Deporting Due Process: A Study of Race and Structural Coercion in "Voluntary" Departure at the U.S.-Mexico Border

By

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Professor Sarah Song
Professor Leti Volpp
Professor Kim Voss
Professor Kitty Calavita

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Abstract

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This dissertation is a study of the structural challenges to due process in summary deportations in the border setting and their consequences. It focuses on a little-understood but consequential U.S. Border Patrol practice called administrative voluntary departure (or colloquially, "voluntary return") whereby, on paper, an undocumented immigrant apprehended by immigration authorities agrees to waive his or her right to a hearing before an immigration judge and voluntarily depart the United States. Voluntary departure is not legally constructed as "deportation" or "removal," but the vast majority of individuals who have been required to depart the U.S. via state action have been subject to voluntary return, and they are overwhelmingly Mexican nationals removed by the U.S. Border Patrol.

Voluntary return has largely been studied as a "border" practice and as part of the social process of border crossing, whereby undocumented immigrants with little to no equities in the U.S. are caught illicitly crossing the border and promptly (within hours, if not minutes) and informally returned to the Mexican side of the border, where they try to effect another entry. It is depicted in the literature and by federal courts as a disposition that undocumented immigrants accept in their own self-interest because they avoid the stigma and consequences of formal removal and would not benefit anyway from lengthy removal proceedings, given their lack of equities in the U.S. In contrast, this law-in-action study shows that the U.S. Border Patrol has also historically used voluntary departure as a racialized tool of *interior* enforcement to summarily deport long-term resident Mexican immigrants from the communities they have lived in for years, if not decades, with long-term deleterious consequences.

Drawing on 29 in-depth, semi-structured interviews with immigration practitioners and border advocates in the border city of San Diego, as well as a range of documentary evidence including Border Patrol organizational materials (such as voluntary return instructor guides and training materials) obtained through a Freedom of Information Act request from the American Immigration Council, this dissertation shows that the U.S. Border Patrol has relied on systematic surveillance of the border region to target and deport en masse Mexican nationals in a process that, contrary to statute and regulations, is unduly coercive. Coercion in voluntary departure is a

result of the weak context of rights and protections for custodial migrants in the civil immigration context (e.g. lax USBP policies governing detention conditions, barriers to legal representation, information-deficient forms, and deficient USBP officer training in voluntary departure procedures)—structures that undermine the conditions of consent. I argue that the legal construction of voluntary return as a consensual process belies the ways in which subtle forms of power such as information control, deception, persuasion, and manipulation operate through these structural factors to induce undocumented immigrants with ties to the U.S. to relinquish important procedural rights and potential opportunities to formalize their status in immigration court. Through the mass processing of Mexican nationals and the lack of procedural due process, I show that voluntary return functions as an engine of mass social inequality, comparable to the U.S. system of mass incarceration, which is similarly a racialized institution, systematic in practice, and quasi-illegal.

Ultimately, my research on voluntary return finds that the law-in-action differs from the law-on-the-books in a way that is symptomatic of an immigration system that lacks a commitment to the due process rights of undocumented immigrants. This gap signifies that the promise of the law-on-the-books for due process cannot, or will not, be kept. The lack of commitment to due process is corroborated by the relatively recent shift in border enforcement to summary removal procedures (e.g. expedited removal and reinstatement of removal), which have constituted the vast majority of removals in recent years. Where the law provides the option of due process in court for those subject to voluntary return, summary removal procedures altogether bar migrants in these proceedings from a hearing. The predominance of expedited removals and reinstatement of removals signal not only a continued neglect of due process rights, but one that is now enshrined in the statute and regulations. What these new policies effectively do is remove the gap between the law-on-the-books and the law-in-action, not by providing *more* due process, but by *removing* the promise of due process altogether. Thus, there is a kind of devolution from the law on the books, which promised due process, to voluntary departure in action which violates that promise on the ground, to formal summary removal policies which remove the gap by removing the promise (i.e. writing the promise of due process out of the law). This movement away from a policy of formally consensual voluntary returns to summary removal procedures exposes the legal fiction of consensual voluntary departure.

This dissertation contributes to the growing field of deportation studies by providing a study of one of the main mechanisms of deportation, one that has largely been understudied and undertheorized. It also illuminates the central role in the U.S. deportation regime of "deformalized" or "fast-track" deportations (those that bypass courts), which have largely been neglected by empirical scholars of deportation. By shifting the focus of deportation studies outside of courts, this dissertation shows that the U.S. deportation regime is more expansive, but also less visible, than what the literature indicates, and that to truly understand the scale of the deportation system and its effects, it must be studied from the perspective of these dispositions.

For Kiel and Cyrus

and

for my parents, Nassrin and Hossein

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and live the lives they set out for themselves. I am grateful to them for their unwavering love and support. I would also like to extend my most heartfelt thanks to my beloved partner, Kiel Martin, for his patience, understanding, and optimism as I pursued this years-long endeavor. He has at once played the roles of sounding board, therapist, IT person, motivational speaker, proofreader, loving husband, and most devoted dad to our son, Cyrus. I could not have finished this dissertation without his unconditional support.

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Chapter 1 Introduction

The United States government has viewed undocumented immigration[1] as a pressing "problem"[2] in need of managing since the late 19th century, when Congress first began legislating immigration restrictions and imposing qualitative (e.g. race/nationality and class) and subsequently, quantitative, limits on who could enter its border (De Genova 2002a). Historically it has adopted a vast array of law and policy mechanisms for controlling undocumented (and unwanted, undesirable) immigration flows, and undocumented immigrants themselves.

Most recently, beginning in the early 2000s, the United States, along with a number of other Western countries, has experienced a "deportation turn" in which the state has become increasingly reliant on the use of deportation as a mechanism of immigration enforcement to manage its noncitizens, including undocumented immigrants, and reinforce its borders. This has prompted a proliferation of multi-disciplinary scholarly research which has subjected various facets of the current regime to critical inquiry in an effort to understand and account for its emergence, the various institutions and actors involved, and its societal impact (Coutin 2015; De Genova and Peutz 2010).

Some of these scholars have examined the current deportation regime as a product of the legal and policy changes resulting from the "War on Terror," the related increasing criminalization of immigration, and the devolution of immigration enforcement from the federal level to the local level (Coleman 2007; Macías-Rojas 2016; Stumpf 2006; Welch 2003). Many have examined deportation as an instrument of sovereignty and a discretionary tool of social control which renders certain populations 'deportable'—i.e. perpetually vulnerable to state repression and the threat of deportation, without regard for their ties and connections to the host society (Coutin 2003a, 2003b; De Genova 2002a, 2005; Heyman, Núñez, and Talavera 2009; Kanstroom 2007; Núñez and Heyman 2007). Several scholars have examined deportation through the lens of other kinds of movement (forced or otherwise), such as displacement, detention, and incarceration (Cunningham and Heyman 2004; De Genova 2007; Dow 2004; Reiter and Coutin 2017; Simon 1998; Walters 2002; Welch 2002). Some scholars have begun to examine the increase in deportations and the resulting proliferation of private detention facilities as part of an "immigration industrial complex" which serves as a "politically motivated and profit-generating enterprise" for corporations and policymakers (Golash-Boza 2009, 2015; Martínez and Slack 2013). Still others have examined the long-term effects and social consequences of deportation (e.g. family separation, re-integration challenges) and its attendant

[1] In the official parlance of U.S. immigration enforcement agencies, migrants who have entered the US in violation of immigration laws are often referred to as "aliens" or "illegal immigrants/immigration." Towards the endeavor of avoiding this largely pejorative, racialized, and dehumanizing language, this dissertation refers to these individuals as "undocumented" or "unauthorized" immigrants (or simply "migrants," "immigrants," or "noncitizens").

[2] The use of quotation marks here denotes that the construction by the US of undocumented immigration as a problem belies the many important ways in which the US itself created the problem of migrant "illegality" through its own self-interested and uninformed immigration policymaking, and the myriad ways in which it contributes to the reproduction of this illegality everyday (De Genova 2002a).

practices (e.g. detention) on deportees, their families, and their sending and receiving societies, challenging the notion that deportation is a discrete event that affects only the deportee (Coutin 2007; Golash-Boza 2014, 2015; Hiemstra 2012; Kanstroom 2012; Martínez, Slack, and Martínez-Schuldt 2018; Núñez and Heyman 2007; Peutz 2010; Reiter and Coutin 2017; Slack et al. 2013). Through these critical examinations of deportation, these scholars have expanded and enriched our understanding of the modern deportation system, and helped to elucidate the scope, effects, and apparatuses of the state's deportation power.

In spite of this growing field, as Martínez et al. (2018) have pointed out, very few studies have examined the actual *mechanisms* of removal and how they are implemented on the ground relative to formal policy (for notable exceptions, see, e.g., Amuedo-Dorantes and Pozo 2014; De León 2013; J. J. Lydgate 2010; Slack, Martínez, et al. 2015). In particular, there has been scant empirical attention paid by these scholars to the use of summary or "deformalized" and "fast-tracked" deportations (Kanstroom 2012), which are implemented by immigration officers and lack the requisite procedural protections that are attendant in removal proceedings before an immigration judge, such as the right to counsel (at one's own expense)[3] and the right to apply for forms of relief from deportation that would enable one to remain in the U.S. with formal status (and which are only available in court). Kanstroom (2012) refers to this as the "major but largely untold story of deportation" (65). In an effort to chronicle part of this story, this dissertation brings together interdisciplinary perspectives to provide a law-in-action study of one such procedure, administrative voluntary departure, or "voluntary return" as it is mostly commonly known and referred to in immigration law enforcement parlance.[4]

1.1 What is Administrative Voluntary Departure and Why is it Important?

Voluntary return is a mechanism of expulsion that has heretofore escaped critical study as a deportation practice, even though it has long constituted a key way for the U.S. Border Patrol (USBP) to expel undocumented Mexican immigrants in the U.S.-Mexico border region without a hearing. Under the voluntary departure statute, an undocumented immigrant in the custody of immigration officers may agree to waive his right to a hearing before a judge and to return to his or her country of origin (8 U.S.C. § 1229c).[5] The undocumented immigrant thereby ostensibly

[3] Under U.S. immigration laws, deportation is not considered punishment/penal/punitive (Kanstroom 2007). Therefore, unlike individuals in criminal proceedings, those in removal proceedings, which is considered a civil process, have no constitutional right to state-appointed counsel.

[4] Hereinafter, "voluntary return," "voluntary departure," and "administrative voluntary departure" will be used interchangeably unless otherwise indicated.

[5] Federal regulations govern the immigration enforcement agencies' administration of voluntary departure: "The authority contained in section 240B(a) of the Act [INA] to permit aliens to depart voluntarily from the United States may be exercised in lieu of being subject to [removal] proceedings under section 240 of the Act" by certain authorized officers within the Department of Homeland Security (8 C.F.R. § 240.25(a)). Moreover, "[v]oluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions" (8 C.F.R. § 240.25(c)).

avoids the stigma and consequences of being formally deported via removal proceedings,[6] including years-long bars to future legal re-entry. Voluntary departure is therefore not legally constructed as "deportation" and is in fact constructed in the law as a desirable alternative to removal.[7]

This characterization has largely been taken for granted by deportation scholars, who have treated it as a "twilight" deportation category[8]—"partially recognized" but not quite considered as "deportation"—all without further examination. It has been variously described as not a "formal deportation" but nonetheless "depend[ent] on the power of deportation" (Hester 2010, 35); as a "deformalized deportation" as opposed to one of the "major methods of deportation" (Kanstroom 2012, 66); and as a "voluntary repatriation" as opposed to a "formal deportation" (Martínez and Slack 2013; Slack, Martínez, et al. 2015). Others explicitly rely on the rather limited definition of voluntary departure provided by the Department of Homeland Security (DHS) in distinguishing it from removal (Martínez, Slack, and Martínez-Schuldt 2018, 175). Some others distinguish voluntary departure from deportation by highlighting that deportation has consequences while voluntary departure does not (Jacqueline Hagan and Phillips 2008).

In contrast, those subject to voluntary departure must concede removability (i.e. admit their entry was illegal), waive the right to a hearing and the right to appeal, and are required to leave the country (Simanski and Sapp 2012, 2).[9] Historically the vast majority of noncitizens required to depart the United States, in both absolute and relative terms, have done so via voluntary

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[6] After the enactment and passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIA) (1996), deportation proceedings and exclusion proceedings (i.e. the formal proceeding in which an alien's admissibility to the US is determined) were combined into one unified proceeding known as "removal." This is the formal proceeding in which a noncitizen's deportability from the US or inadmissibility to the US is determined. In this dissertation, the terms deportation and removal are used interchangeably.

[7] "Voluntary departure is an alternative to removal…that the immigration service may grant in its discretion…For aliens, voluntary departure is desirable because it allows them to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, to avoid the stigma and various penalties associated with forced removals…and it facilitates the possibility of return to the United States, for example, by adjustment of status." (*Lopez-Chavez v. Ashcroft* 2004: 651). "Voluntary departure is granted an alien as a form of clemency…in return for his agreeing to relinquish his illegal presence" (*Mireles-Valdez v. Ashcroft* 2003: 218). Voluntary departure has also been described as "a mechanism for illegal aliens to leave the country without being subject to the stigma or bars to future relief that are part of the sanction of deportation" (*Azarte v. Aschcroft* 2005: 1284).

[8] David Martin (2005) discusses "twilight statuses" in the context of bringing attention to the "significant variety" within the undocumented population. He criticizes the tendency to treat the unauthorized population "as a monolithic whole" and argues for altering statistical practices of the way the unauthorized are counted, among other things. I apply this logic to what I consider to be the broad category of deportation.

[9] The DHS has noted that, "[a]lthough such departures are called 'voluntary departures,' they are required and verified" (Dougherty, Wilson, and Wu 2005, 3). Furthermore, Goodman (2011) points out that "returns" should not be confused with return migration, which is usually voluntary in nature: "official returns require individuals to depart the country by order of the federal immigration bureaucracy."

return. This is illustrated by Figure 1.1. Figure 1.1 is based on "returns" and "removals" data provided by the Department of Homeland Security in their annual "Yearbook of Immigration Statistics" (see Tables A1 and A2 for the raw data). The category of "removals" refers to dispositions that are legally constructed as "deportation." This includes removals through the standard removal process (i.e. removal proceedings before an immigration judge from the Department of Justice's Executive Office for Immigration Review (EOIR)) (INA §240),[10] as well as summary removal procedures, processes created by Congress in 1996 through which a noncitizen can be removed with limited or no review by the immigration courts:[11] expedited removal (8 U.S.C. § 1225 (2014)), reinstatement of removal (8 U.S.C. § 1231(a)(5) (2014)), administrative removal (8 U.S.C. § 1228b (2013)), and stipulated removal (8 U.S.C. § 1229a(d) (2014)) (see chapter 3 for more on summary removal procedures; see also Table A5).

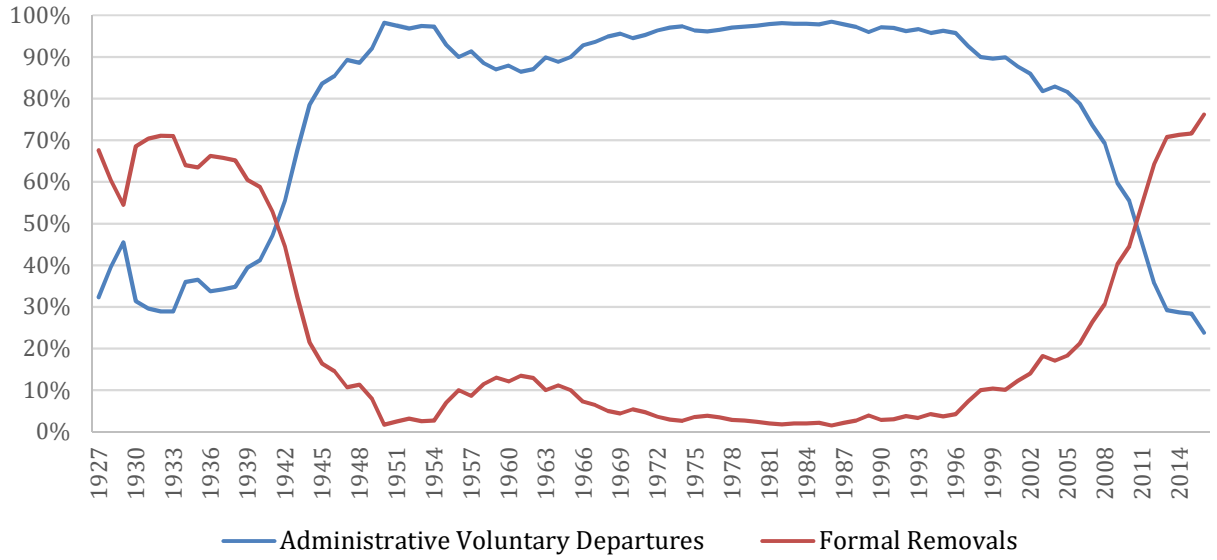

Figure 1.1 Number of Returns vs. Number of Formal Removals as Percentage of All Deportations (Returns + Removals) FY 1927 – 2016 *Source*: U.S. Department of Homeland Security (2017b).

Alternatively, the category of "returns" (also featured in Figure 1.2) refers to two different kinds of dispositions that are considered alternatives to removal because they are ostensibly exempt from the penalties associated with removal and because noncitizens "choose" to take them. One category is constituted by voluntary departures given by Immigration and Customs Enforcement (ICE), the arm of the DHS responsible for enforcing immigration law in the interior of the U.S., and voluntary departures given at the border by the USBP, which is the arm of U.S. Customs and Border Enforcement (CBP) which enforces immigration law between ports of entry. The other category that makes up "returns" data are withdrawals of application for

[10] A noncitizen who fails to appear for a removal hearing can also be removed *in absentia* if the government establishes by clear, unequivocal and convincing evidence that proper written notice was provided and that the person is removable.

[11] See the Antiterrorism and Effective Death Penalty Act (AEDPA) (1996) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (1996).

admission.[12] At the discretion of the government (specifically, the Office of Field Operations (OFO), the arm of CBP[13] which enforces immigration law at ports of entry), an applicant for admission to the United States at a port of entry, otherwise known as an "Arriving Alien," may be permitted to withdraw his or her application and depart immediately from the United States without being subject to the five-year bar on reentry that is attendant with being formally removed from the country (Siskin 2015).[14] This is essentially voluntary departure by another name. Historically, the vast majority of returns have been voluntary departures of Mexican nationals who have been apprehended by the Border Patrol (DHS Office of Immigration Statistics 2012, 102).[15] In fact, administrative voluntary departure ("voluntary return") was conceived in the early 20th century as an administrative means for a fledgling USBP to streamline the removal of undocumented Mexican immigrants and thereby save resources for the costly detention and removal of undocumented Chinese and Europeans (DHS Office of Immigration Statistics 2012, 102). As I will show in chapter 2, its historical practice has played a central role in shaping Mexican nationals into racialized subjects.

The preponderance of voluntary returns strongly suggests the deportation regime is much more expansive, but also less visible, than what the literature indicates, and that to truly understand the scale of the deportation system and its effects, it must be studied from the perspective of voluntary departure. An illustrative context where we see a similar relationship dynamic at play is in the criminal justice system and its dependence on plea bargains, rather than trials, as the main disposition for a case. Plea bargaining, a concept from the criminal law enforcement context, requires the defendant to waive their right to a trial and plead guilty in exchange for a more lenient or lighter sentence from the prosecutor. According to the Sentencing Commission, "over 95 percent of federal defendants convicted of a felony or Class A misdemeanor offense are adjudicated guilty based on a guilty plea rather than on a verdict at a trial" (2015, 5). Like plea bargaining, which was adopted to prevent the collapse of the trial system (Langbein 1978), administrative voluntary departure is a mechanism of governance that, by requiring the undocumented immigrant to forego removal proceedings, has historically diverted millions of noncitizens annually from an already massively backlogged immigration

[12] In addition, some undocumented immigrants within the country accept voluntary departure in removal proceedings from an immigration judge (i.e. judicial voluntary departure)—either as an alternative to having a judge render a decision regarding their removability or at the conclusion of their removal proceeding (Siskin 2015). Judicial voluntary departures are not depicted in the figures and are significantly smaller in number than administrative voluntary departures. See chapter 3 for more on judicial voluntary departure and the differences from administrative voluntary departure.

[13] Hereinafter, when the term "CBP" is used, it references both the OFO and the USBP.

[14] "An alien may be permitted to withdraw the application if it is determined that it is in the best interest of justice that a removal (or expedited removal) order not be issued, and that the alien has both the intent and means to depart immediately from the United States" (Siskin 2015, 11).

[15] The trend of USBP issuing the most voluntary returns on an annual basis has changed in recent years. Since 2011, the proportion of voluntary returns given by the USBP has significantly decreased as formal removals have outpaced voluntary returns (reflecting the USBP's move to summary removal procedures). This has left the OFO to issue the largest proportion of voluntary returns, but note that the absolute number of voluntary returns issued annually by the OFO has remained relatively the same (see Baker 2017).

court system and expedited their removal so that the bureaucratic machinery of immigration enforcement can continue functioning.[16] Therefore voluntary returns have arguably historically supported and made possible the U.S. deportation regime similar to the way plea bargains have supported the criminal justice system.

Plea bargains were at one time not acknowledged by legal and empirical scholars of crime and courts as an important part of the criminal justice system because they didn't happen in courts. Once plea bargains were examined more critically, it became clear that to really understand the criminal justice system and its scope and impacts, it had to be studied from the perspective of plea bargaining; it wasn't enough to know what was happening in courts. Thus, it became apparent through the study of plea bargains that when the system depends on it, it *is* part of the system. Similarly, by focusing on what the immigration enforcement bureaucracy has legally constructed as "deportation" or what looks on its face like "deportation," scholars have missed the shadow under the tip of the iceberg, i.e. deportations masquerading as an informal, benign-looking process called "voluntary return."

Plea bargains and voluntary returns are also both applied in racially disparate ways. In plea bargaining, these racial disparities result in black defendants being more likely than white defendants to be convicted of a felony (Berdejo 2018). Similarly, white defendants initially charged with misdemeanors are more likely than black defendants either to be convicted for crimes carrying no possible incarceration, or not to be convicted at all (Berdejo 2018). As I will show, as a result of racial disparities in the application of voluntary return, Mexican nationals are more likely than other similarly situated nationalities to receive less due process. In plea bargains, the racial disparities are a result of informal factors, namely that in the absence of sufficient case information, race is used by prosecutors as a proxy for latent criminality and likelihood to recidivate (Berdejo 2018). In contrast, my research shows that in voluntary return, the focus on Mexicans is a result of formal policy that explicitly encourages USBP officers to voluntarily return all undocumented Mexicans they apprehend.

As my dissertation will show, comparisons of the immigration enforcement context to the criminal law enforcement context are fruitful for illustrating how the tension between crime control and due process values similarly plays out on the ground in both contexts (see Packer 1964). The analogy to criminal plea bargains is effective for illustrating the scale of voluntary departures, their role in the immigration system, and their racially disparate application. However, as my research will show, there are important differences between the context in which administrative voluntary departure and criminal plea bargains are implemented that limit the comparison. These distinctions have largely to do with the fact that the civil detention context is governed by much fewer and weaker rights protections than the criminal detention context, which arguably renders the practice of voluntary return more egregious than plea bargains.

[16] "It is a virtual certainty that the immigration system in this country would break down if all aliens who were apprehended as deportable were to request the deportation hearing the INA [Immigration and Nationality Act] provides them" (Aleinikoff, Martin, and Motomura 1995, 641). As of the writing of this dissertation, it takes an average of 578 days to complete one case but this widely varies depending on the court and the hearing location (see TRACImmigration 2018). Courts in New York City, for example, take an average of 910 days to complete a case, while those in New Mexico take only 70 days.

1.2 The Shift to Summary Removal Procedures

Beginning in the mid-1990s, voluntary returns started to decline as a proportion of the total number of deportations and in 2011, removals began outpacing returns as a proportion of all deportations for the first time in (see Figures 1.1, 1.3). The vast majority of these removals in recent years have not been issued by an immigration judge, which has traditionally been the case, but rather by immigration officers. This increase in formal removals and the concomitant decline in voluntary returns has largely been attributed to the USBP's shift toward "high consequence" enforcement which began in 2005 and sought to increasingly replace voluntary returns with these formal removals[17] (Rosenblum and Meissner 2014). Before 2005, USBP officers had two enforcement mechanisms at their disposal—voluntary return and removal proceedings. Virtually all Mexican nationals apprehended in the border region were given voluntary return, and all other nationalities were placed in removal proceedings (Argueta 2016, 7). In 2005, officers received more tools in their enforcement arsenal, including the use of summary removal procedures, which authorized officers to formally deport immigrants, a power traditionally exercised solely by immigration judges. As voluntary returns have decreased and formal removals have increased, today a Mexican national is more likely to be formally removed (by an immigration officer) than voluntarily returned (Martínez, Slack, and Martínez-Schuldt 2018).

One might then ask why voluntary returns remain an important and relevant topic of study. It is important to scrutinize the recent increase in formal removals relative to voluntary returns. It is not enough to talk about this trend in terms of a shift to "high consequence" enforcement; we also need to account for the particular role voluntary returns serve in U.S. immigration enforcement—the work they do for the deportation regime. As alluded to by the earlier discussion of plea bargains, voluntary returns have largely been relied upon by the government to help cope with large volumes of undocumented immigration. In the absence of sufficient time and resources and staggering court backlogs, this has been the go-to strategy for immigration authorities to enforce immigration law. Southwest border apprehensions, and more specifically Mexican border apprehensions, have been in decline since 2001, and experienced a precipitous drop following the 2008 recession from which they did not recover (Massey 2018). In 2000, 1.6 million immigrants (98% Mexican) were apprehended along the border compared to 304,000 (42 percent Mexican) in 2017—the lowest number of apprehensions since the 1970s, when the USBP had only 1600 officers; today the southwest border has more than 16,000 (United States Border Patrol 2017b, 2017a). As a result, Mexican border apprehensions, which used to constitute the vast majority of border apprehensions, have reached near-historic lows in recent years (Gonzalez-Barrera 2016). The decrease in voluntary returns largely corresponds to this dramatic long-term decrease in the number of southwest apprehensions of Mexican nationals,[18]

[17] High consequence enforcement involved not only a shift to formal summary removals like expedited removal and reinstatement of removal, but also the expansion of the use of criminal prosecutions for illegal entry and reentry, including the creation of Operation Streamline, and lateral repatriation programs, which deport undocumented immigrants through/to border regions distant from where they were apprehended (Argueta 2016). See chapter 8 for more on this approach.

[18] The long-term decline in Mexican immigration has largely been attributed to Mexico's drop in fertility rates and the attendant transition to an aging society, which has reduced the labor force growth (Massey, Durand, and Pren 2016). Other trends which predict lower levels of migration

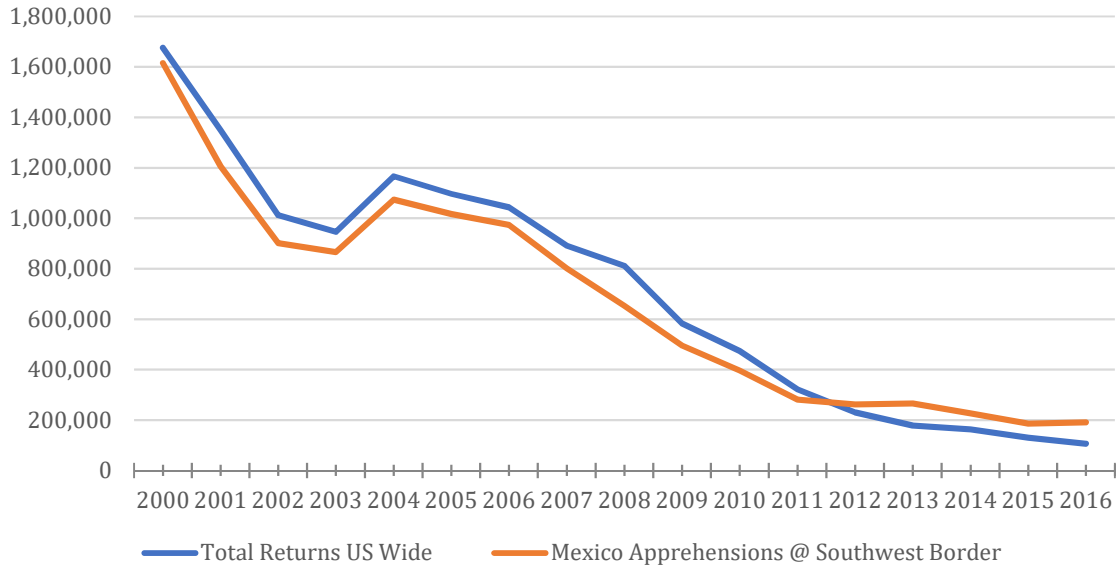

Figure 1.2 Returns and Mexican Border Apprehensions by U.S. Authorities, FY 2000 – 2016 *Source*: Department of Homeland Security (2017b).

which precedes the deployment of "high consequence" enforcement that began in 2005 (see Figure 1.2). In other words, less border apprehensions of Mexican nationals means less migrants to voluntary return. Moreover, as alluded to above, as Mexican apprehensions have declined, the proportion of migrants being apprehended by the USBP are increasingly Other Than Mexicans (OTMs), and more specifically, Central Americans (Massey 2018). These are individuals who cannot be removed via voluntary return by the USBP; as subsequent chapters will show, voluntary return is a USBP mechanism of deportation that is only for Mexican nationals (and nominally for Canadian nationals).

Together these trends show that it is not the case that formal removals have *replaced* voluntary returns; it is more accurate to say that the decline in voluntary returns reflects a *diminished need* for them as the number of Mexican border apprehensions have declined. With less apprehensions and thus less volume to manage, this has enabled officers to apply summary removal procedures, which are more time- and resource-intensive than voluntary returns. This is evidenced by the fact that although high consequence enforcement was instituted in 2005, formal removals didn't start outpacing voluntary returns until 2011, when apprehensions were sufficiently low (see Figure 1.1). Before that point, even as late as 2009, Border Patrol sectors struggled to fully implement high consequence enforcement measures (see, e.g., McCombs 2009). This is supported by the USBP's own admission.[19] Thus the degree to which the decline

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from Mexico to the US in the future include the slowed population growth, a growing economy, rising education levels among the population, the emergence of a sizable middle class, and the fact that people are increasingly living in large metropolitan areas (Massey, Durand, and Pren 2016).

[19] "Substantial investment in personnel, technology, and infrastructure along the Southwest Border with Mexico during the past several years has facilitated reduction of illegal cross-border activity to unprecedented levels. This reduction in traffic is now enabling the Border Patrol to

in voluntary returns can be attributed to the shift to high consequence enforcement is debatable. Furthermore, these trends suggest that if we expect border apprehensions to spike again in the future, we will likely see an uptick in voluntary returns as a coping mechanism.[20]

Another reason to study voluntary returns in spite of their decline is that as described above, the increase in the aforementioned formal removals is a consequence of the increase not in immigration judge-issued removals, but in fast-track removals issued by immigration officers, which are essentially formalized versions of voluntary return. Figure 1.3 shows this trend. In 2015 and 2016, the vast majority of individuals of individuals formally removed from the United States—nearly 85 percent—were removed via summary removal procedures, namely expedited removal and reinstatement of removal.[21] Of the remaining 15 percent (reflected in Figure 1.3 as "other removals"), most are removals pursuant to a standard judicial order and the rest are removals pursuant to a stipulated removal order or an administrative removal order, which both bypass the courtroom (Table A3: Summary Removal Procedures). As the number of summary removal procedures has dramatically risen relative to court-issued removal orders and voluntary returns, legal scholars have taken note, sounding the alarm on how these enforcement mechanisms expand border enforcement into the interior and, by bypassing courts, dramatically curb procedural due process rights, leading to the possibility of erroneous deportations (of, for example, asylum seekers, those with equities, and those with legal status) (see Family 2008; Frost 2015; Holper 2017; Koh 2013, 2016; Shachar 2009; Wadhia 2015). Like the social science literature on deportation, legal scholars have similarly forsaken voluntary departures.[22] Where social scientists have remained focused on immigration judge-issued (i.e. court) removals at the expense of voluntary returns, legal scholars have focused on summary removal procedures which are legally constructed as deportation, thereby neglecting voluntary returns which are not considered "deportation." In the context of growing numbers of formal deportations effected by

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manage, as opposed to simply react to, the volume of illegal traffic along our borders through the application of appropriate consequences to illegal entrants" (U.S. Border Patrol 2012). Although the USBP credits its own enforcement for the decline in border apprehensions, in general the effectiveness of border enforcement is actually quite difficult to measure because there are so many factors at play. Despite significant expenditures by the federal government on border enforcement in recent years, until very recently there has not been a concomitant effort to develop a comprehensive system of performance indicators that measure the effectiveness of its efforts to combat unauthorized immigration. The Consequence Delivery System, which is examined at length in chapter 8, is an attempt at that but a recent study casts doubt on the efficacy of its measures (U.S. Government Accountability Office 2017a).

[20] It is, however, unlikely that they will return to the numbers we saw in the late 1990s and early 2000s (Chiquiar and Salcedo 2013).

[21] These are removals by both ICE and USBP. It is noteworthy that the USBP apprehended the vast majority of those who were removed—72 percent. This is compared to only 40 percent in 2010. The DHS has surmised that one factor contributing to this shift has been the expansion in the USBP's authority to issue deportation orders against the individuals it apprehends (Baker 2017).

[22] Some scholars have examined *judicial* voluntary departure, which are voluntary departures issued by an immigration judge at various stages of removal proceedings, but these differ in significant ways from administrative voluntary departures. See chapter 3 for more on judicial voluntary departure.

immigration officers, voluntary return's liminality as a deportation practice thus lends itself to less scrutiny. Nevertheless, the informal nature of voluntary return is arguably why it deserves critical examination. As one legal scholar and advocate I corresponded with regarding my research aptly put it:

> I find administrative voluntary return to [be] a challenging thing to talk about because it is typically understood as a "benefit" or lesser evil to formal removal. It's hard to get advocates and scholars to pay attention to it because, if anything, it seems that recent administrations have turned much more to formal, though still fast-track removals in lieu of the "softer" voluntary return approach. But I really think that it's the harshness of the formal deportation system that allows ICE and BP officials to get away with voluntarily returning people who otherwise would (should) receive prosecutorial discretion or who would have a chance of obtaining relief from removal if they did not voluntarily depart.[23]

Moreover, I argue that the new cadre of fast-track formal removals are merely a formalization of voluntary return. In other words, the deprivations of due process and rights under these summary removal procedures have long existed under voluntary return. Summary removal procedures are merely a formalization (albeit with consequences) of voluntary return, a longstanding yet largely invisible practice. Thus, I argue, the trend toward summary removal is nothing new, but an ominous move to formalize the due process deprivations already common in voluntary departure.

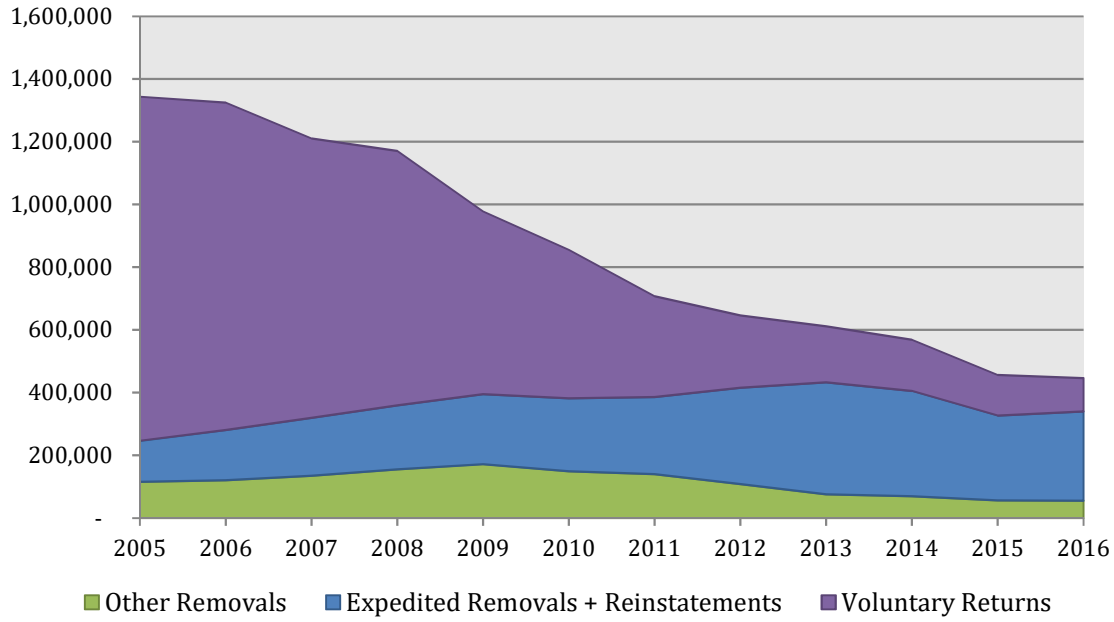

Figure 1.3 Number of Summary Removal Procedures, Voluntary Returns, and Other Removals, FY 2005 – 2016 *Source*: DHS Office of Immigration Statistics 2016, 2009; DHS Yearbook of Immigration Statistics, 2016.

[23] Email correspondence with Annie Lai, June 4, 2015 (on file with the author).

1.3 The Need for a Law-in-Action Study of Voluntary Departure

Despite the deportation regime's historical reliance on the use of administrative voluntary departure, the literature tells us very little about its qualitative nature and how it is implemented on the ground. The widely-held view of voluntary return in the extant literature is that undocumented Mexican immigrants take voluntary return in their self-interest (Heyman 1995; Singer and Massey 1998). This view is based on examinations of voluntary return that focus on it as a phenomenon affecting those with few, if any, stakes in the U.S. As extant accounts describe it, migrants are subject to voluntary return after they are apprehended while illegally crossing the border. They are almost immediately dropped off by law enforcement directly on the other side of the border, where they can attempt again to effectuate reentry until they are successful (Kossoudji 1992). They thereby avoid the time and immigration consequences of removal proceedings. The assumption is that undocumented Mexicans are better off being voluntarily returned and trying to elicit another illegal entry to return to work because they do not have ties in the U.S. and would not benefit from going to immigration court to fight their case.

In contrast, as will be explained in more detail in chapter 3, changes to legal and social conditions in recent decades, wrought by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and increasing border militarization starting in the mid-1980s, have rendered voluntary return more legally punitive and increased the proportion of undocumented Mexican immigrants in the U.S. who are long-term residents rather than temporary/circular migrants and thus have greater stakes for remaining in the U.S. (and would ostensibly benefit from a hearing). This population is also increasingly the target of U.S. immigration enforcement (Slack, Martínez, et al. 2015). This suggests that current examinations of voluntary return are outdated and don't accurately reflect the universe of individuals affected by voluntary return and what is at stake for them.

What we know from the work of scholars and immigrant rights advocates about immigration law enforcement in the border zone, where most voluntary returns are implemented, is similarly concerning and has not been brought to bear on a study of voluntary return. Administrative voluntary departures happen swiftly—within a few hours or days (see Nuñez-Neto, Siskin, and Viña 2005)—and outside the purview of the courts in the murky border region, a geographic area that has been treated by the Border Patrol as a state of exception for the rule of law and is considered by civil liberties advocates a black hole for legal rights (American Civil Liberties Union, n.d.). They are implemented by Border Patrol officers who enjoy significant discretion (Heyman 2009, 2001) that is rarely exercised in favor of migrants (see Vega 2017), and broad policing authority which empowers them to make stops and arrests well within the interior of the United States (American Civil Liberties Union, n.d.). Moreover, Border Patrol officers enjoy very little accountability, the agency is subject to little public oversight, and there is little to no transparency of their operations (Cantor and Ewing 2017; Martínez, Cantor, and Ewing 2014; UC Irvine School of Law International Justice Clinic 2015).

This dissertation examines voluntary return with a law-in-action study that accounts for this context. The "law-in-action" is a central preoccupation of the law and society tradition (Cotterrell 2004; Seron and Silbey 2004; Friedman 1986). It refers to the idea that the law is a social institution whose meaning and impact is shaped by the context it is embedded in. Scholars in the law and society tradition are interested in examining the gaps between the law-on-the-books and the law-in-action and thus the ways in which law is mediated—or "altered, manipulated, elaborated, or ignored by the social actors [and institutions] who give them life"

(Suchman and Edelman 1996, 907). Accordingly, this study asks, how is statutory voluntary departure implemented on the ground by USBP officers? Specifically, how do Border Patrol officers obtain consent from custodial migrants to waive their right to a hearing? How does the USBP exercise informal mechanisms of power against custodial migrants through the process of voluntary return? More broadly, how does the USBP's "managerialization" of due process requirements in immigration law shape rights processes and de-emphasize their legal meaning? What are the effects of border policing via voluntary return on the border community? Finally, what does border enforcement, through the practice of voluntary return and similar fast-track removal procedures, reveal about law's promise of due process in court?

Based on a case study of voluntary departure in San Diego and USBP organizational materials on voluntary departure, including guidelines, directives, rules, policies, procedures, instructions, and training materials concerning voluntary returns, my research shows that contrary to the neutral statutory language of the voluntary departure statute, administrative voluntary departure has been historically implemented in a racially disparate way against undocumented Mexican nationals. This racialized practice of voluntary return is largely a product of the way that the voluntary departure statute is interpreted in USBP training and instructional materials, which instructs officers to give voluntary returns specifically to Mexican nationals in a process that is inordinately speedy and provides for little to no due process. This speedy process is facilitated by San Diego's proximity to the U.S.-Mexico border, which provides USBP officers a perverse incentive to quickly bus Mexican nationals a short distance over the border rather than initiate more time consuming and exhaustive formal removal proceedings. This speed undermines opportunities for legal intervention and is a barrier to due process that is disproportionately faced by Mexican nationals because other nationalities are logistically more time-consuming and require more resources to physically remove from the U.S.

Even with the expansion of expedited removal into the interior of the U.S. in 2005, which authorized immigration officers to summarily remove undocumented "Other than Mexican"[24] nationals, there are legal (regulatory) constraints the practice of expedited removal which limit its use against those with "equities" in the United States. In contrast, there are no such constraints on the practice of voluntary return—in the law or in USBP training and instruction materials. My research shows that through systematic surveillance and policing of the border including raids of public transportation, checkpoints, and traffic stops, USBP have pervasively implemented voluntary return in the border region, deporting hundreds of thousands of long-term resident undocumented Mexican immigrants quickly and without due process. These are individuals with extensive ties to the U.S. and who otherwise had strong claims for relief from an immigration judge, could have avoided deportation through executive action, or were eligible to adjust their status through mechanisms created by Congress, but who, as a result of the immigration consequences of taking voluntary return, disrupted their continuous physical presence for the purposes of obtaining relief or adjusting their status and/or otherwise face bars to admission. Despite a legal settlement in 2015 between the American Civil Liberties Union (ACLU) and immigration enforcement agencies that has, at least on paper, reformed the practice of voluntary return in San Diego,[25] by depriving undocumented Mexican immigrants on a large scale of the ability to pursue potentially realizable rights and come into formal status, my research shows that

[24] "Other Than Mexicans" is broad DHS parlance for all nationalities excluding Mexicans.
[25] Lopez-Venegas v. Johnson, No. CV 13-03972-JAK (PLAx) (C.D. Cal. March 11, 2015).

the practice of voluntary return has functioned as an engine of mass inequality in the border community, akin to the system of mass incarceration which is also applied in a racially disparate way and has mass stratification effects on African Americans.

My research further shows that contrary to the statutory requirement for consent in voluntary departure, custodial migrants were systematically coerced to take voluntary return. It shows specifically that the legal requirement for consent in voluntary departure operates in a setting that provides weak rights and procedural protections for immigrants in USBP custody, thereby rendering voluntary departure coercive. More specifically, coercion in voluntary return is a product of structural factors within the USBP, which creates conditions that systematically undermine the conditions for the obtainment of consent. As I will discuss in greater detail, these structural factors include policies and procedures that are built into the system, such as inhumane detention conditions, a lack of a requirement for officers to provide rights advisals, barriers for custodial migrants to accessing a lawyer and/or family members who could help hire a lawyer, barriers for family members in locating and helping persons in custody, immigration officers with limited training in immigration law and voluntary return procedures, and information-deficient forms and/or forms not written in the native language of the custodial migrant. Thus, coercion in voluntary return is a subtle, even imperceptible, exercise of power by immigration officers that takes the form of information control, deception, manipulation, and persuasion.

Finally, my research shows that even where the USBP's own policy directs officers to initiate removal proceedings against custodial migrants, officers exercise discretion on the basis of normative judgments about the efficiency and effectiveness of removal proceedings to select less rights-protective dispositions, such as expedited removal. Thus, through the exercise of voluntary return and other summary removal procedures, immigration officers not only act as gatekeepers to more formal, rights-protective removal proceedings, but, I argue, they more troublingly effectively appropriate the discretion and decision-making authority of courts. I further argue that that by "managerializing" legal due process provisions in terms of the organizational objectives of efficiency, the USBP's structures encourage this the appropriation of court's adjudicatory power. Accordingly, this is a study not only of coercion by immigration officers in the practice of voluntary return but more broadly of the subtle and invisible (i.e. structural) ways the administrative state wields power over marginalized populations to hinder and effectively block them from access to formal protections under the law.

Ultimately, my research on voluntary return finds that law-in-action differs from law-on-the-books in a way that is symptomatic of an immigration system that lacks a commitment to the due process rights of undocumented immigrants. This gap signifies that the promise of the law-on-the-books for due process cannot, or will not, be kept. This is corroborated by the shift in border enforcement to summary removal procedures, which have eliminated the right to a hearing altogether. The predominance of expedited removals and reinstatement of removals signal not only a continued neglect of due process rights, but one that is now enshrined in the statute and regulations. What these new policies effectively do is remove the gap between the law-on-the-books and the law-in-action, not by providing *more* due process, but by *removing* the promise of due process altogether. Thus, there is a kind of devolution from the law on the books, which promised due process, to voluntary departure in action which violates that promise on the ground, to formal summary removal policies which remove the gap by removing the promise (i.e. writing the promise of due process out of the law). This movement away from a policy of formally consensual voluntary returns to summary removal procedures exposes the legal fiction of consensual voluntary departure.

1.4 Roadmap of the Dissertation

This dissertation proceeds in the following way. The first half is dedicated to background chapters and the second half to empirical chapters. This introductory chapter sets up the puzzle of voluntary return that motivates this dissertation. It shows that voluntary return has largely been neglected as a mechanism of deportation by social science as well as legal scholars, despite the fact that historically the vast majority of individuals removed via state action have been voluntarily returned. It further shows how extant examinations of voluntary return are insufficient in explaining the qualitative nature of voluntary return and argues for a law-in-action examination that centers issues of consent, procedural due process, and rights.

Chapter 2 establishes the historical background for understanding voluntary departure as a deportation practice. It shows how voluntary return has historically served as a central means of border enforcement by the USBP against Mexican nationals by facilitating their en masse summary removal from the U.S. territory often regardless of legal status or their ties to the U.S. and largely in the interests of nativists and southwest growers. It further shows how Mexican immigrants were treated differently from other immigrant groups through the exercise of administrative discretion in voluntary return, and thus how the practice of voluntary return shaped Mexicans into racialized subjects.

Chapter 3 provides important context for the contemporary practice of voluntary return. It describes in detail the changes to social and legal conditions in the last few decades that have made voluntary departure legally punitive and increased the stakes of taking it. In particular, it details how border militarization has changed immigration patterns, interrupting circular migration and creating a caging effect which has resulted in a larger settled population of undocumented immigrants, who have developed strong kinship and community ties to the U.S. but who are increasingly the target of immigration law enforcement. It also describes changes wrought to voluntary return by the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRRIRA). While voluntary departure had no legal consequences before 1996, the passage of IRIIRA imposed significant immigration consequences on those who take it after a triggering period of unlawful presence, including a bar to future legal admission for up to ten years and disqualification from most forms of relief from deportation. Subsequently, this chapter compares the due process procedures in voluntary departure to those in traditional removal proceedings to show the ways in which voluntary return is a procedurally deficient process, despite the significant rights at stake. It also compares voluntary return to the relatively emergent summary removal procedures, including expedited removal and reinstatement of removal. Like voluntary return, they are fast-track procedures, but the avenues for due process for custodial migrants in these proceedings are even fewer and narrower than those in voluntary return, since the right to a hearing has been altogether written out of the law. This three-part comparison between removal proceedings, voluntary return, and summary removal procedures powerfully illustrates the way in which the law's promise of due process in court was diluted and muddied in the provision of voluntary return, and then altogether eliminated in summary removal procedures. This chapter concludes that the changes to legal and social conditions, and the dearth of procedural rights in voluntary return, complicate and cast doubt on characterizations in the extant literature of voluntary departure as simply a border-crossing phenomenon, and on claims that taking voluntary departure is in the self-interest of migrants. Accordingly, it argues that voluntary departure must be studied in this more contemporary punitive context.

Chapter 4 describes the research design and methodology that guide the empirical portion of the dissertation. Taking a law-in-action approach, I examined my questions through a case study of voluntary departure, consisting of 29 semi-structured, in-depth interviews with border advocates and immigration practitioners in the border city of San Diego, California. Broadly, the goal of interview questions for advocates and attorneys was to uncover systemic patterns in the practice of voluntary departure based on their clients' experiences with voluntary return and their own experiences trying to assist those clients. I supplemented this data with an analysis of relevant USBP organizational materials, obtained from the CBP through FOIA litigation by the American Immigration Council, that provide insight into the context of USBP custody and culture, the voluntary return process, and border enforcement more broadly. These include DHS and CBP guidance, guidelines, directives, rules, policies, procedures, instructions, criteria, standards, agreements, correspondence, communications, and training materials concerning voluntary returns. I also analyzed other available documentary evidence regarding USBP detention policies and standards. These materials helped provide context and evidentiary support for the findings from advocate and attorney interviews. Because so little is known empirically about the practice of voluntary return in the contemporary context, I took a grounded theory approach to my data, focusing on generating theory based on patterns and themes in my empirical materials. Data analysis was iterative. After every round of data collection, I conducted a "self-debrief," wherein I wrote an analytical memo about emerging themes and findings within that interview and compared them to data collected in previous rounds, as well as data from documentary evidence. These memos became part of my dataset. Subsequently, using a grounded theory approach (Glaser and Strauss 1967), I coded my interview transcripts as well as the corresponding analytical memos from my debrief session with ATLAS.ti qualitative coding software, developing new themes and keywords that informed subsequent rounds of data collection. As I reached data saturation, I distilled my coding process to build on the recurring themes I found in my data: racially disparate enforcement and effects; structural coercion and subtle institutional power; and the managerialization of due process. I then wrote a series of analytical memos examining these themes, which formed the basis of my dissertation chapters.

Chapter 5 provides a broad empirical picture of the practice of voluntary return in San Diego, California, illustrating the large gap between what the voluntary departure statute and regulations stipulate and USBP enforcement patterns on the ground. The voluntary departure statute is neutral with regard to nationality; requires that the migrant take voluntary departure knowingly and willingly in exchange for waiving their right to a hearing before an immigration judge; and stipulates that immigration officers exercise discretion to provide a period to depart the United States (up to 120 days), allowing time for the migrant to put his or her affairs in order. In contrast, attorney and advocate interviews as well as USBP organizational materials show that because of the way the statute is interpreted in USBP instructional and training materials; the perverse incentives created by USBP's own policies, which pose a formidable barrier to legal representation for detainees; and the geographic proximity of the USBP's policing work to the U.S.-Mexico border, in San Diego administrative voluntary departure is systematically implemented almost exclusively against Mexican nationals in a process that, contrary to what's stipulated in the statute, is coercive, punitive, and racially discriminatory. The accounts of border advocates and immigration practitioners show that USBP systematically surveils the interior of the U.S. using voluntary return to rapidly deport *en masse* Mexican residents of the border region from the communities where they have lived and worked for years, and thus well within the U.S.-Mexico border. The effect of this policing is the loss by Mexican nationals, on a large scale,

of potentially realizable rights (to seek legal representation, to have a hearing before an immigration judge) and opportunities to adjust their status and remain in the U.S. in lawful status (and eventually apply for U.S. citizenship). As a result of the mass processing of Mexican nationals and the lack of procedural due process, my research suggests that voluntary return functions as an engine of mass social inequality, comparable to the U.S. system of mass incarceration, which is similarly a racialized institution, systematic in practice, quasi-illegal, and has mass stratification effects.

Chapters 6 and 7 expand on an insight provided in chapter 5—that contrary to the statutory requirement for consent, the practice of voluntary return in San Diego is coercive. Chapter 6 begins by examining the voluntary departure statute and regulations as well as case law to elucidate what the law requires for a truly "voluntary" departure. It argues that the legal definition of consent in voluntary departure is vague and incomplete, and accordingly formulates a more holistic and robust set of conditions for consent drawing on a 2014 American Civil Liberties Union (ACLU) legal complaint against the immigration enforcement agencies in southern California and a reading of the normative literature on freedom, autonomy, and consent. Both chapters 6 and 7 present findings from my interviews and USBP organizational materials, which show the various ways in which USBP agents (and the USBP as an organization) routinely violate the tenets of consent provided above during the implementation of voluntary return. Chapter 6 focuses on coercive strategies and tactics resulting from the physical custody and detention conditions, and chapter 7 focuses on those resulting from misinformation and the confidence game. Drawing on Steven Lukes' (1974) multi-dimensional theory of institutional power, these chapters together argue that the legal construction of voluntary return as a consensual process belies the ways in which power operates through structural factors in the civil immigration context to render voluntary return subtly coercive. In particular, the weak context of rights for custodial migrants creates an environment where immigration officers exercise subtle forms of power such as information control, deception, manipulation and persuasion, to coerce custodial migrants with strong ties to the U.S. and who would have benefited from access to counsel and/or an immigration judge to waive their right to a hearing. Thus the law in action differs from law on the books not in arbitrary and random ways but in a way that reflects unequal power relations and is symptomatic of an immigration system that lacks a commitment to the due process rights of undocumented immigrants. This lack of care by the law for genuine consent to waiver of due process is corroborated by the recent shift from voluntary returns to summary removal procedures, which are essentially voluntary return without the fiction of consent.

While previous empirical chapters focused on the practice of voluntary return, Chapter 8 zooms out to examine the Consequence Delivery System (CDS), the USBP's decision-making framework for enforcement actions, and the puzzle of the USBP's non-compliance with it. While researchers have examined the effect(iveness) of the consequences that constitute the CDS (Grimes et al. 2013; De León 2013; Lydgate 2010; Slack et al. 2015), little remains known about the CDS as a whole and how it works. Drawing on USBP organizational materials obtained through the AIC FOIA litigation, my research shows how for each sector, the CDS ranks the various enforcement actions (including removal proceedings, expedited removal, reinstatement of removal, and voluntary return) according to their effectiveness and efficiency with regard to reducing the risk that the migrant will cross in the future, and directs officers to apply the "Most Effective and Efficient" consequence. I further show that despite the goal of systematization and standardization of border enforcement, officers have ample opportunity to exercise their discretion, and that this discretion is routinely exercised to depart from their own policy. In

particular, this chapter highlights the findings of a recent Government Accountability Office (GAO) report on the CDS which found that in 2013, across sectors, officers applied the "Most Effective and Efficient" consequence only 28% of the time, and that this rate dropped to 18% in 2015. The report indicates that officers are hesitant to apply the Most Effective and Efficient consequence listed in their CDS guide when it is removal proceedings based on normative judgments about their lack of efficiency. In exercising discretion based on normative judgments, I argue that officers effectively appropriate the discretion and decision-making authority of more rights-protective immigration courts. If officers are not initiating removal proceedings, the implication is that migrants are largely processed through a summary removal procedure or voluntary return. This is troubling given my findings in chapters 6 and 7, which showed how due process in voluntary return (and arguably, in other fast-track removal procedures) is undermined by structures in the USBP custodial context. I further argue that these USBP structures, as well as the CDS itself, encourage officers to appropriate the adjudicatory power of immigration courts by "managerializing" the legal concept of due process—i.e. re-casting it in terms of the organizational objectives of effectiveness and efficiency and thus de-emphasizing its legal aspects (Edelman, Fuller, and Mara-Drita 2001). Finally, I argue that the "loose coupling" between the actions of officers and the stated policies of the CDS suggests that the USBP is a "symbolic structure" created by the USBP to bolster its own legitimacy in the face of political pressure to more stringently enforce immigration law, rather than a rational response to an actual problem of undocumented immigration (Edelman 1992). Despite its goal to maximize consequences, it is noteworthy that the CDS was created in 2011, was at near-historic lows and had been in decline since 2001. Moreover, most apprehensions in recent years have been of noncriminal, non-repeat border-crossers. Together this suggests the CDS is trying to solve a problem that barely exists, and that it in fact may be a ploy for legitimacy. Thus, although the CDS signals a systematically "effective and efficient" approach to border enforcement, it belies the messy reality of discretionary decision-making by officers that persists—decision-making that subverts rights processes.

Chapter 9 concludes this dissertation by considering the normative implications of my study's findings for what is required for meaningful consent in the civil immigration custody and detention context, and whether genuine consent is even possible in the context of a persistently unequal institutional power imbalance. In so doing, it proposes some systemic reforms to the practice of voluntary return that would meet the four conditions of consent articulated in chapter 6. It also argues, however, that unless steps are taken to also change the underlying USBP culture of unaccountability and lack of transparency, these reforms might not matter. I then turn to considering the implications of my research for understanding recent border enforcement practices by ICE and the USBP, which force asylum-seeking parents in immigration custody who have been separated from their children to "choose" between being reunited with their children and being subsequently "repatriated" with them, or "requesting" voluntary return to their country of origin without their child(ren), who would remain in the U.S. to pursue their asylum case by themselves. Both "choices" require the signatory to abandon their own asylum case. I ultimately argue that my findings about how structural coercion undermines due process in voluntary return is not unique to the context I studied and has broad-ranging implications.

Chapter 2 Voluntary Departure in Historical Context

The "deformalization of deportation" (Kanstroom 2012) has been characterized by legal scholars as a recent phenomenon. Their analysis focuses largely on summary removal procedures that were created by Congress in 1996 and that are legally constructed as deportation ("removal") (see, e.g., Wadhia 2015; Koh 2016, 2013). In contrast, this chapter shows that the reliance by the U.S. immigration enforcement regime on deportations that bypass the courtroom is not a recent trend and actually began around the time of the inception of the U.S. Border Patrol in the early 20th century. It argues, in part, that although voluntary departure has never been legally constructed as deportation, it has historically served as a key mechanism of en masse, summary deportation by the U.S. immigration enforcement regime, particularly against Mexican nationals, and often regardless of their legal status. As the last chapter showed, the vast majority of noncitizens who have been required to depart the United States due to state action have done so via the exercise of voluntary departure by the U.S. Border Patrol, and most of the individuals subject to voluntary departure have been persons of Mexican nationality. Through a secondary historical analysis of U.S. immigration enforcement against undocumented Mexican immigration, this chapter provides an important socio-legal and political context for these quantitative insights.

Statistics produced by the immigration enforcement agencies demonstrate that the control and management of undocumented Mexican immigration is central to the work of the U.S. immigration law enforcement regime. There is also a considerable literature that has demonstrated the key role of immigration laws in constructing the illegality of Mexican (and more broadly, Latino) immigrants,[26] including the role of administrative discretion in the disparate application of those laws and policies to serve the interests of employers and quell the racial hysteria of nativists (see, e.g., Calavita 1992; Ngai 2004). This chapter contributes to these literatures by showing the extent to which the story of immigration enforcement against undocumented Mexicans, and the racialization of undocumented Mexicans as the prototypical illegal immigrant, is connected to the use of summary deportations in the form of voluntary departure. The origins and early practice of voluntary departure have been documented in piecemeal fashion in various historical accounts of U.S. immigration law enforcement from three defining periods of state formation for the U.S. between 1924 and 1965. These periods saw the emergence of an immigration law regime that shored up territorial bounds and constructed racial categories and ideas about citizenship that continue to influence perceptions about the belonging of Mexicans to the U.S. territory (Molina 2014). In particular, during these periods, immigration law and its enforcement in the context of the political economy of the Southwest constructed Mexicans as transient, as temporary labor commodities, and ultimately unsuitable for membership in the U.S. polity.

This chapter highlights the particular role of voluntary departure in producing and reinforcing those racial constructions. It synthesizes these scholarly accounts and foregrounds them in the broader context of U.S. immigration law, mostly legislative and administrative decisions regulating admission and deportation of Mexican immigrants that has historically

[26] See De Genova (2002b) for an overview.

constructed Mexicans as outside the bounds of membership in the U.S. polity.[27] It then highlights and examines patterns in the practice of voluntary return across these periods to create a new analytical lens for understanding a history that is commonly told, and thereby provides a more nuanced perspective of contemporary voluntary departure, and the U.S. deportation regime, than has been offered heretofore. Ultimately, I argue that the history of voluntary departure as a deportation practice is central to the narrative of how U.S. immigration law and its discretionary enforcement has shaped Mexicans into racialized subjects.

This chapter proceeds in the following way. Part 2.1 details the emergence of U.S. immigration law and the beginning of an era of selective enforcement against Mexican nationals in the interest of U.S. labor demands. Together, these events constructed the phenomenon of "illegal" Mexican immigration, leading the fledgling Border Patrol to conceive voluntary departure as a means to manage and control it in a more efficient and cost-effective manner—at the expense of due process protections (while other nationalities received a hearing). Subsequently, Part 2.2 describes the use of voluntary departure during the era of the Great Depression to remove en masse long-term resident undocumented Mexican immigrants who were perceived to be a burden on the depressed economy, and conversely, its disparate use by the Immigration Service to legalize the status of undocumented Europeans and Canadians and thereby spare them the hardships of deportation, which were similarly experienced by their Mexican counterparts. In Part 2.3, this chapter describes the enactment of the Bracero Program and the subsequent recruitment of mass temporary Mexican labor, the unintended consequence of the mass proliferation of illegal immigration, and the use of voluntary departure to quickly and in large numbers clear the land of surplus Mexican labor in the interest of growers. The chapter concludes with a consideration of the implications of this history for the study and understanding of the contemporary practice of voluntary departure. This secondary historical analysis complicates extant characterizations of voluntary departure and suggests this practice should be examined more critically as a racialized deportation practice.

2.1 The Emergence of "Illegal" Immigration and the Origins of Voluntary Departure

The history of U.S. immigration enforcement against Mexican immigration necessarily begins long before the creation of any systematic legal framework of immigration regulation and control. Instead, it takes as its point of departure the signing of the Treaty of Guadalupe Hidalgo, which signaled Mexico's defeat in the Mexican-American War[28] and provided for the annexation by the U.S. of fifty percent of Mexico's northern territory—an area that today encompasses Texas, California, New Mexico, Arizona, Nevada, Utah, and parts of Wyoming and

[27] The history of immigration law properly includes a consideration of legislation, judicial cases, and administrative decisions, as well as access to employment, housing, and education, and eligibility for various social welfare benefits (De Genova 2004).

[28] The Mexican-American War occurred as a result of the United States' encroachment on Mexican territory in the name of "Manifest Destiny" and the prerogative of westward expansion. In 1836, US settlers/landowners proclaimed Texas' independence from the Republic of Mexico, a status which Mexico did not recognize. Then, following years of brewing hostilities between the two countries over the Texas-Mexico boundary, the US annexed Texas in 1945. The Mexican-American War followed in its wake.

Colorado. Subsequently, Mexican citizen residents of this annexed land who did not either announce their intention to remain Mexican citizens or depart within a year were automatically made U.S. citizens, a "collective naturalization" (Gómez 2008, 138) that underscored "Mexicans' new status as a conquered population" [29] (Ngai 2004, 50–51). Despite these changes to land boundaries and Mexican immigration status, the new border between the U.S. and Mexico remained largely "an artificial one" in the years immediately following ratification of the Treaty, "unmarked and wholly unreal" to most of the inhabitants (Hing 2004, 118). With no federal border enforcement, these two regions—the U.S. Southwest and northern Mexico—remained deeply unified, with its Mexican-American inhabitants enjoying economic and cultural ties on both sides of the border (Hing 2004, 118; Samora 1971, 17–18, 31–36).

Even as the late 19th and early 20th century saw the dawn of Congressional legislation of immigration and a new mantle of laws governing entry and exit, including the Chinese Exclusion Act,[30] the first U.S. immigration law to exclude immigrants based on their nationality,[31] Mexican migration to and from the U.S. retained an "informal, unregulated character" (Hing 2004, 120). The nascent Immigration Service largely considered/treated Mexican immigration as something "regulated by labor market demands in the [southwestern] border states" and therefore outside the scope of its duties (Ngai 2004, 64). Thus in this period, the Immigration Service "played a role of *de jure* control and *de facto* passivity" with regard to enforcement against Mexican immigration (Hing 2004, 120), patrolling the border against illegal entry by Chinese immigrants and ignoring Mexican immigrants who came to the southwest to work[32] (Ngai 2004, 64). While border enforcement continued to be lax through the beginning of the 20th century, the size, source, and reason for the flows from Mexico to the U.S. began to change. Whereas before the 1880s, Mexican migration remained largely limited to economically integrated border regions, in response to labor demand created by the vacuum left by Chinese workers in industries such as railroads, mining, and agriculture in particular, after the 1880s Mexican migration expanded beyond the border region and throughout the southwest (Hing 2004, 120).

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[29] A few years later, a similar provision was included as part of the terms of the 1853 Gadsden Purchase, by which the US acquired more of the Southwest (Cruz and Carpenter 2011, 53).

[30] During the era of Chinese exclusion, racism was established as the "central protagonist in immigration law making" (Calavita 2007). It marked the transformation of the US into a "gate-keeping nation," which stands in stark opposition to the image of the US as a "nation of immigrants" that exists in the popular imagination today (Lee 2003). As a result of these laws, the Chinese became the "yardsticks" by which the whiteness and (relatedly) the desirability of other immigrants was measured (Lee 2003).

[31] The distinction between nationality and race here is a subtle one. While "Chinese" denotes nationality, it was also a highly racialized category, in the same way that "Mexican" came to be. The difference between race and nationality in the law did not become all that clear until the passage of the National Origins Quotas in 1921. During the era of national origins quotas in the 1920s, the gate-keeping function of the state assumed a more explicitly racial valence, as US immigration law for the first time quantitatively restricted the number of immigrants to the US (although qualitative bases for exclusion remained).

[32] Moreover, because the "overwhelming majority of immigrants entering the United States landed at Ellis Island and other seaports," immigrant flows into the US were "focused at fixed points that rendered land borders invisible" to the Immigration Service (Ngai 2004, 64).

At the turn of the twentieth century, Mexican migration began to reflect for the first time "the attributes of a mass movement," much of it facilitated by an "elaborate system of recruitment and support" by U.S. employers (Hing 2004, 120). Although labor recruitment efforts by employers long pre-dated these larger flows,[33] the nature of these earlier recruitment efforts was less systematic and small in scale, focused on fulfilling the individual demands of employers (Cardenas 1975, 73). With the growth of the agricultural industry and the gradual expansion of the bar against Chinese immigrants to virtually all Asian immigrants,[34] the increasing demand for cheap labor from Mexico was met by "middlemen"—the labor contractor and the private recruiting agent—whose "role and function was a direct outgrowth of employer labor recruitment efforts" (Cardenas 1975, 73). These entities quickly became the "predominant mode of labor market organization," acting as the intermediary between the pull factors facilitating immigration to the U.S. from Mexico (namely a growing need for cheap immigrant

[33] Hing (2004) writes: "While immigration was, in part, a product of general economic conditions in Mexico, a complex and successful strategy of recruitment had existed long before 1900" (120).

[34] The 1917 Asiatic Barred Zone, as it came to be called, effectively barred all inhabitants of an area that "ran from Afghanistan to the Pacific" (Ngai 2004, 18). It came in the wake of years of reliance on the labor of immigrants from these regions to develop the country and its industries. Between 1891 and 1900, 27,000 Japanese nationals were recruited by US employers to fill the gap resulting from Chinese Exclusion. Japanese immigrants were highly organized and empowered to demand higher wages, and often made "inroads into the business of farming as small landowners and tenants," in direct competition with white landowners (Hernández 2010, 23). As a result, racial animosity towards this group emerged as it had against the Chinese only decades earlier (Hernández 2010, 23). Although the economic and geopolitical power of imperialist Japan in the early 20th century posed an obstacle to the efforts of anti-Japanese groups in the US to treat Japanese immigration in the same exclusionary manner it had Chinese immigration (Ngai 2004), exclusion was nevertheless achieved through the so-called Gentleman's Agreement, whereby Japan agreed in 1907 to withhold immigration of its citizens to the United States. A decade later, the exclusionary reach of the "gatekeeper state" (Lee 2003) was extended through the 1917 Asiatic Barred Zone. The only exceptions to the bar were Japan (because of the Gentleman's Agreement) and the Philippines, which the US acquired, along with Puerto Rico and Guam, after its victory in the Spanish-American War in 1898. Filipinos were thus colonial subjects and considered to be US nationals. Subsequently, with the passage of the Tydings-McDuffie Act in 1934 though, the US granted the Philippines independence and their entry became severely restricted to a quota of 50 (Ngai 2004, 119). With the advent of WWII and the reliance of the US on China as an ally, between 1943 and 1952, racial restrictions on citizenship were done away. All the Asian exclusion laws were repealed, beginning with Chinese exclusion.[34] In 1952, the McCarren Walter Act replaced the barred zone with a strict quota of 2,000 immigrants year from that the "Asia-Pacific triangle," including a limit of 100 ethnic Chinese regardless of actual country of origin (Calavita 2007). In this way, the racialization of Asians continued, as did the system of national origins quotas, which was not abolished until the passage of the Hart-Cellar Act of 1965, along with the Asia-Pacific triangle restriction.

labor by U.S. industries), and push factors within Mexico causing emigration from Mexico[35] (Cardenas 1975, 73).

The interests and efforts of employers to recruit temporary Mexican labor migrants were supported by the government, even if indirectly. A Congressional bipartisan special committee convened in 1907 to study the origins and consequences of recent immigration to the U.S. recommended the continued importation of Mexican workers because their large numbers were needed "to settle the land, exploit its resources, and to provide a supply of labor for the maintenance and expansion of [US] industries" (Cardenas 1975, 71). However, the report made it clear that despite the recommendation for the continuing use of Mexican labor, they were considered unsuitable as citizens: "it was evident that in the case of the Mexican he was less desirable as a citizen than as a laborer" (see Calavita 1992, 180). In an effort to dispel concerns about the racial threat or threat to domestic labor their presence posed, the final report, issued in 1911, described Mexican migrants as having an innately migratory nature and a lack of a competitive ability to suggest they would not compete for native jobs and would eventually return to Mexico (Cardenas 1975, 71).

It is not surprising then that when Congress passed the Immigration Act of 1917, U.S. agri-businessmen and industrialists were able to successfully lobby for an exception to the law for Mexican immigrants in the form of a waiver program. For the first time, the Act prohibited entry into the U.S. at any point other than an official point of entry and erected significant barriers to lawful entry, including the passage of a literacy test. Per the recommendation of the 1911 Dillingham Commission, [36] the literacy test was intended specifically to limit the immigration of (largely unskilled) workers from eastern and southern Europe whose labor heretofore had helped expand American industrialization (Ngai 2004, 18). Although mass European immigration had faced few legal barriers in the late nineteenth and early twentieth century, [37] it had also experienced increasing restrictionist demands from native-born white Americans who considered the new immigrants "unassimilable backward peasants from the 'degraded races' of Europe" (Ngai 2004, 19)—sentiments that were reflected in the final report of the Dillingham Commission a few years earlier and which motivated the passage of the Immigration Act of 1917.

Nevertheless, the provisions of the Act also applied to undocumented Mexicans who were often unable to comply with the requirements for legal entry. [38] The 1918 waiver program exempted Mexican laborers from the literacy requirement and the payment of fees and permitted them to enter as legal temporary workers. The waiver created an early precedent for the "self-serving manipulation of immigration law by the government" for the purposes of admitting (temporary) legal workers (Hing 2004, 122). It was one of a series of measures (allowing

[35] Among the push factors within Mexico that facilitated emigration from Mexico to the US were dramatic changes to urban infrastructure which rendered Mexicans more mobile, including a railroad constructed with US money; the resultant urban poverty; increased social unrest leading up to the country's 1910 revolution; and the revolution itself (Hernández 2010, 25).

[36] U.S. Congress. Senate Immigration Commission, 1911, p. 48

[37] "Despite the growing list of excludable categories, the Immigration Service excluded only 1 percent of the 25 million immigrants from Europe who arrived in the United States from 1880 to World War I" (Ngai 2004, 18).

[38] For example, at the time, the Mexican state of Michoacán, which was the largest source of Mexican immigrants to the US, had an 85% illiteracy rate (Cruz and Carpenter 2011, 54).

Mexicans to circumvent immigration law) taken by the U.S. government in the decade after World War I that suggested the U.S. had become economically dependent on Mexican migrant labor (Hing 2004, 122). Nevertheless, as Balderrama and Rodriguez (2006) have noted, despite the increasingly vital role of Mexican labor in the southwest economy, the Anglo community continued to view and treat Mexican immigrants as temporary residents, "an exploitable labor force imported to perform seasonal tasks"[39] (23).

In 1921, the same year that the exemption for Mexican immigrants was lifted, an emergency measure was passed by Congress in response to the inability of the literacy test to restrict immigration from southern and eastern Europe.[40] The Emergency Quota Law of 1921, which sought to limit the number of immigrants from those regions who were considered racially undesirable, created a global immigration cap of 355,000 a year (excepting the Asiatic Barred Zone) and limited the number of noncitizens of any nationality entering the U.S. to three percent of the foreign-born persons of that nationality who lived in the U.S. in 1910. For the first time, the law imposed quantitative limits on immigration, in addition to the many qualitative bases of exclusion that remained. Nationals of countries in the Western Hemisphere, including Mexico, were exempted from the quota but the lifting of the 1918 waiver in 1921 meant that tens of thousands of Mexican laborers who could not meet the demands of the law (head tax, literacy test, etc.) circumvented border inspection by entering outside unofficial points of entry[41] and became illegal immigrants. The effect of this series of self-serving pieces of legislation was to produce large numbers of Mexican immigrants with illegal status who had otherwise for years been considered "legal." While migration patterns and labor demands had not changed, the legal and social construction of Mexican migrants as "illegal" did.

Although the 1921 quota was initially conceived as a temporary measure, it was extended for two years—but after failing to sufficiently reduce immigration from southern and eastern Europe over this period, Congress subsequently enacted the Immigration Act of 1924 which was "heralded as a permanent solution to U.S. immigration problems" (Aleinikoff, Martin, and Motomura 1995, 53). It created National Origins Quotas which sought explicitly to reduce the number of southern and eastern European immigrants to the U.S. and thus to alter the ethnic composition of immigration flows.[42] The 1924 Act also excluded from entry anyone racially

[39] Balderamma and Rodríguez (2006) note that this view of Mexicans as temporary rather than permanent residents was prevalent in the Mexican community as well, as many planned to eventually return to Mexico.

[40] "The literacy rate in Europe had increased since the 1890s, and the test, which involved recognizing few words in one's native language on flash cards, proved a feeble barrier to immigration. By the end of 1920 immigration neared prewar levels, and Ellis Island was again teeming with immigrants" (Ngai 2004, 19–20).

[41] Starting in 1919, Mexicans entering the US were required to apply for admission at lawfully designated ports of entry (Ngai 2004, 64).

[42] The law initially based the annual quota for each country on two percent of the foreign-born persons of such nationality resident in the US in 1890. These were temporary quotas until the national origins of the entire US population were subsequently determined in 1927. In that year, the cap on worldwide immigration to the US was reduced to 155,000 with allocations by country based on national origins of inhabitants according to the census of 1920—a provision that did not go into effect until 1929 (Ngai 2004).

ineligible for citizenship[43] and exempted Western Hemisphere immigration once again in the interest of trade, diplomacy (i.e. "pan-Americanism"), and to meet the needs of the expanding agriculture industry. Although nativists concerned with burgeoning Mexican immigration campaigned to have Mexicans included in the 1924 quotas, they yielded to growers' objections.[44] Subsequent bids in 1926 and 1928 to add Mexico's migrant workers to the quota system were ultimately unsuccessful as well out of a fear of "international repercussions" (Balderrama and Rodríguez 2006, 21).

However the battle between nativists and growers over the fate of these bills revealed the extent to which Mexicans were increasingly considered "part of an emergent 'race problem'" in U.S. society (Ngai 2004, 7). On one hand, "the proposed immigration-quota bills reflected the fears of many politicians, community leaders, and civic organizations about Mexican nationals as 'the most undesirable people to come under the flag'" (Balderrama and Rodríguez 2006, 21). These entities expressed fears about how Mexicans' perceived unassimilability would affect the American social fabric in the long term. On the other, growers largely appealed to racist sensibilities about Mexican immigrants to convince nativists that Mexican migrants were "nothing more than a source of cheap and disposable labor whose impact upon America would only be measured in dollars and sweat" (Hernández 2010, 31). Specifically, they relied on racialized ideas about the physical constitution of Mexican immigrant bodies, their work ethic, and their culture to make their case, insisting in part that Mexican migrants would work for low wages (when they obviously had no other choice) and promptly return to Mexico at the end of the agricultural season.

Although Mexican labor immigration was not subject to the quotas, by the 1920s the enforcement provisions of restriction nevertheless "hardened the US-Mexico border against informal border crossings" (Hernández 2010, 84) and concretized the distinction between legal and illegal Mexican immigration. The Immigration Act of 1924, besides imposing numerical quotas on the Eastern hemisphere, apportioned funds for the creation of an enforcement body, a land Border Patrol, in the Immigration Bureau of the U.S. Department of Labor, providing it

[43] At this time, only free white persons (1790) and persons of African nativity or black descent (1870) could naturalize to US citizenship. The Chinese experienced an explicit (statutory) bar to racial naturalization through a provision of the 1882 Chinese Exclusion Act. The legal ambiguity over the eligibility for citizenship of Japanese, Indians, and other Asians was resolved by the Supreme Court by the early 1920s via "the racial prerequisite cases," which together revealed the legally and socially contingent nature of race (Haney-Lopez 2006). Importantly, Mexicans were considered "white enough" for the purposes of federal citizenship because, as Gómez (2008) argues, they were ascribed citizenship via the precedent of "collective naturalization" following the terms of Mexican conquest in the 1848 Treaty of Guadalupe Hidalgo—i.e. at a time when citizenship was restricted to white persons only (139). Often, however, federal citizenship (i.e. legal whiteness) did not translate to the enjoyment of rights (i.e. the benefits of social whiteness) at the local level due to the application in the southwest of Jim Crow segregation laws to Mexicans (Ngai 2004, 7).

[44] Not all growers opposed the quotas. The growers who opposed restriction were large growers of fruit and cotton who largely relied on cheap Mexican labor; "white small farmers squeezed by agribusiness" joined the "urban middle class concerned about the emerging 'Mexican problem'" (i.e. nativists) in supporting quotas for Mexican immigration (Ngai 2004, 54). See generally Tichenor (2002) for more on the "strange bedfellows" of US immigration policy.

"broad powers of arrest without warrant in the pursuit of immigration law enforcement and defined a massive jurisdiction for Border Patrol work" that extended well beyond the US-Mexico boundary (Hernández 2010, 35). The Act also largely outsourced the system of immigration control by requiring prospective immigrants seeking to enter the U.S. as permanent legal residents to apply for a visa at a U.S. consulate abroad. In a telling example of the way in which the institution of citizenship discriminated against persons of Mexican nationality, Mexican legal immigrants who passed the consulate screening abroad faced a second inspection upon arriving at the border. Those arriving by train, who were often not riding in the first-class trains (that were exempt from this inspection), were subjected to humiliating inspection procedures that including forced baths, naked inspections and fumigations of their belongings (Cruz and Carpenter 2011, 60).

In 1929, the State Department began requiring U.S. consuls in Mexico to stringently enforce existing provisions of immigration law ("inspection procedures, the Border Patrol, criminal prosecution,[45] and irregular categories of immigration") to deny visas to prospective immigrants. The impact of privileging formal status in a geographical region historically characterized by informal crossings was stark. Whereas between 1920 and 1929, over 400,000 Mexicans became permanent residents, between 1930 and 1939, just over 30,000 Mexicans became permanent residents (Cruz and Carpenter 2011, 61). Administrative exclusion resulted in a 76.7 percent decrease in legal Mexican immigration generally, but generated dramatically more illegal immigration as Mexicans continued to enter the U.S. by crossing the border at unofficial points of entry and avoiding immigration inspection (Ngai 2004, 255). Thus it effectively stymied the ability of Mexican nationals to legally immigrate to the U.S. on a permanent basis while providing the federal government unfettered flexibility over the admission of temporary labor migrants (Hing 2004, 125). This approach to Mexican immigration both reflected and reified racialized ideas that they are temporary and unworthy of being members of the polity.

With the rise in illegal immigration resulting directly from administrative exclusion,[46] "the extensive use of the power to expel" began in 1925 and deportation assumed a central place in immigration enforcement efforts of the Immigration Service (Ngai 2003, 76). However, because the Immigration Service had never been generously funded by Congress, it struggled to keep up with the demands of immigration control following the enactment of the Immigration Act of 1924:

> Records from the U.S. Border Patrol office in El Paso indicate the organization's financial troubles. Grover C. Wilmoth, the district director [of the Immigration Service] in El Paso, Texas, explained in March of 1927 that fiscal limitations required that all Border Patrol officers judiciously and economically pursue immigration law enforcement (Hernández 2010, 76).

[45] In 1929, Congress criminalized unlawful entry, defining unsanctioned border crossings as a misdemeanor for first-time offenses and a felony punishable by 2-5 years in prison and a fine of ten thousand dollars for second offenses. As a result of the criminalization of illegal entry, "the undocumented alien's status was transformed from that of a migratory worker whose presence was seldom questioned to that of a fugitive constantly in fear of apprehension" (Salinas and Torres 1976, 873).

[46] Importantly, legal Mexican migration also increased until 1930 (Cruz and Carpenter 2011, 61).

In an effort to ease the financial burden imposed by immigration hearings, detention, and deportation, starting in 1927 the Immigration Service began offering undocumented Canadians and Mexicans without criminal records a process called "voluntary return," whereby they could forgo an immigration hearing and possible detention and leave the country voluntarily with the possibility of returning legally in the future, whereas a deportation on their record would have barred them from future legal re-entry (Hernández 2010). For the Immigration Service, it saved untold time and expenses that would have otherwise been spent on formal deportation proceedings and enabled them to use the savings to subsidize the costly deportation of unauthorized Asians and Europeans. In practical terms, for Mexican immigrants who took it, voluntary return essentially served as a liminal deportation category that accomplished the same outcome as formal deportation but without all the requisite procedures and rights protections and without immigration consequences.

Months after instituting voluntary return as a means of expeditiously removing undocumented Mexican and Canadian immigrants, the U.S. Immigration Service moved to further mitigate its financial crisis by broadening the authority of Border Patrol officers to issue their own voluntary return orders to ensure that, according to Wilmoth, "no money should be spent for the maintenance or detention of any Mexican alien, or of any Canadian alien, or any able-bodied alien seamen of whatever nationality, if such can possibly be avoided" (Hernández 2010, 76). Whereas Border Patrol officers had previously taken undocumented Mexican and Canadian immigrants to the nearest U.S. Immigration station to be processed for deportation *or* voluntary return, the Immigration Service authorized Border Patrol officers to determine, at their own discretion, whether the noncitizen encountered should be subject to voluntary return or to deportation proceedings (Hernández 2010, 76). It essentially put the power to deport Mexicans without an administrative hearing into the hands of Border Patrol officers. More broadly, voluntary return gave individual officers more flexibility and discretionary power over the governance of Mexican immigration by nullifying rights protections Mexican nationals were otherwise entitled to by virtue of their territorial presence, namely the chance to demonstrate equities before a judge that might entitle them to stay.

Moreover, because Border Patrol officers had broad powers of immigration enforcement that extended into the U.S. borderlands, well beyond the thin line of the actual border, they often picked up persons who had important ties and attachments to the US:

> When taken straight to the border for voluntary departure, Mexico's labor emigrants reported that they had to leave behind basic goods that they had either brought with them from Mexico or purchased in the United States. 'A large number of deportees,' reported Inspector Jose Bravo Betancourt of the Mexican Department of Migration, 'are persons with resources,' but U.S. officials did not provide them with 'time to communicate with family [or] gather their things and money.' Animals, clothing, furniture, and even cars were all forfeited by Mexico's labor emigrants when they were forcibly removed from the United State (Hernández 2010, 90).

It's important to note here that despite the directive to use voluntary return for both undocumented Mexicans and Canadians, "the service's [minimal] work on the Canadian border contrasted to what the commissioner general described as the 'high pitch' of its work along the US-Mexico border" (Ngai 2004, 67). In the late 1920s, "by some estimates, Mexican nationals

accounted for half of all deportees and over 80% of all voluntary departures" (see Cruz and Carpenter 2011, 61). By the early 1930s and the onset of the Great Depression, Mexican nationals who departed via voluntary departure outnumbered Canadian nationals about four to one (Hoffman 1973). Such treatment reflects how much Mexican immigrants had become associated with temporary labor that was fungible and disposable. The high percentage of voluntary departures of Mexican immigrants, compared to the much smaller proportion of Canadians, reflected growing racist sentiments that viewed Mexicans as unsuitable for American citizenship.

To conclude, while early in the 20th century, Mexican labor migrants were recruited en masse by employers in the U.S. and were largely unregulated by the law (only by the market), subsequently there was stringent legal regulation of these flows, rendering previous legal flows illegal. Although labor migration patterns had not changed dramatically, the effect of immigration law enforcement was to socially construct Mexicans as illegal and thus an economic and racial threat. As a result of the spike in unauthorized immigration, deportations took a central place in immigration law enforcement efforts. This included the conception of a summary deportation practice called voluntary departure, which gave Border Patrol officers the discretion to summarily deport Mexican nationals under the guise that these individuals were choosing to depart.

2.2 Mass Deportation and the Disparate Application of Voluntary Departure During the Great Depression

This racial hostility against Mexican immigrants which had taken shape during the 1920s as a result of their "actual and imagined" association with illegal immigration" (Ngai 2004, 7) only intensified during the era of the Great Depression as these individuals became the scapegoats for the economic troubles of the time.[47] The perception that Mexicans were taking the jobs of "real Americans" and draining welfare bureaus of resources reserved for "deserving" Americans resulted in growing calls from natives to deport them, despite the fact that Mexicans comprised less than ten percent of relief recipients across the country (Balderrama and Rodríguez 2006, 99):

> Regardless of the actual facts, allegations kept the anti-Mexican sentiment inflamed throughout the nation during the decade. Local, state, and national officials were incessantly bombarded with letters and petitions. Individuals and organizations demanded that immediate action be taken to curtail the employment of Mexicans. They also wanted them removed from the relief rolls and shipped back to Mexico, where they believed all Mexicans belonged" (Balderrama and Rodríguez 2006, 100).

[47] For more on the treatment of Mexicans and Mexican Americans and their racial status during this era, see generally Fox (2012).

As a consequence, in the 1930s, Mexicans became the only immigrant origin group targeted by a concerted campaign of mass removal, involving federal deportations and voluntary departures,[48] which did not distinguish between legal immigrants, illegal immigrants, and American citizens (Ngai 2004, 71). This shift in enforcement priorities was a dramatic departure from the past. As described in detail above, in previous decades, Mexican immigrants were at first actively recruited by labor interests and immigration flows were largely legally unregulated. Subsequently, as the immigration law regime developed in response to nativist concerns, exceptions were made in the law to allow for their unrestricted en masse entry in the interest of growers. In contrast, between 1930 and 1939, Mexicans constituted 46.3 percent of deportations, even though they constituted only one percent of the total U.S. population (Balderrama and Rodríguez 2006, 67). The broad campaign was characterized by well-publicized raids carried out by Border Patrol in cooperation with local police.[49] Deportations were racially motivated rather than motivated by undocumented status. As many as half a million persons of Mexican nationality—nearly half of whom were U.S. citizens—were removed. The vast majority, in fact, spoke English and many had been in the U.S. for upwards of ten years (Ngai 2004, 72).

Voluntary return was central to the campaign. In general, if apprehended, Mexican immigrants could request a hearing, but most of the time, Mexicans in the U.S. were persuaded to take voluntary departure over staying to contest their deportation. The campaign served to create such a "reign of terror" that in anticipation of being swept up in a raid, many fled their homes to the border and requested to "voluntarily" return (Cardenas 1975, 74). "It was the policy of the immigration service to permit and even encourage these voluntary departures" (see Cardenas 1975, 74). This practice was so common that "many consuls felt obligated to condemn the process," which they perceived was resulting in the "arbitrary deportation of Mexican nationals" (Balderrama and Rodríguez 2006, 64). Here again we see the discretion of immigration officers as central to the practice of voluntary return as a tool of summary deportation and racial construction.

During the Great Depression, the reliance on voluntary departures to manage Mexican immigration was further buoyed, as it was in the decade earlier, by the Border Patrol's limited resources in dealing with a "surge" of unauthorized Chinese immigration from Mexico in the western borderlands (Hernández 2010, 79). Like the US, Mexico similarly had an anti-Chinese immigration policy and the influx of Chinese immigrants into the U.S. was a result of Mexico forcing them north of the border into the U.S., where the entry of Chinese laborers was similarly barred by the Chinese Exclusion laws passed in the previous century. Because by the end of

[48] These federal deportation drives sometimes coincided with efforts in the early 1930s by local authorities (city, county, and state) and civic or private charitable agencies to organize "repatriation" drives, whereby persons of Mexican descent were rounded up and taken across the border. Although the federal government was not directly involved with these repatriation drives, a number of scholars have shown evidence of cooperation (see, e.g., Hoffman 1973; Fox 2012). Mexico helped facilitate these returns, "welcome[ing] repatriation as a return of its citizens home and made efforts to resettle the returnees" (Ngai 2004, 72).

[49] See Balderrama and Rodríguez (2006, 63–87) and Hoffman (1973) for detailed descriptions on the nature of these raids.

fiscal year 1933,[50] the Immigration Service's fiscal resources remained strained and thus insufficient to cope with the unsanctioned Chinese immigration, Grover C. Wilmoth, district director of the Immigration Service in El Paso, once again instructed his officers that:

> "*commencing immediately* there must be a sharp reduction in maintenance expenses, our principal item of expenditure. This will be accomplished by extending the voluntary departure privilege to a larger number of Mexican aliens…In general, Mexican aliens apprehended in the act of crossing the International Line illegally, or thereafter while in travel status, will be accorded the voluntary departure privilege unless criminal proceedings are to be instituted'" (quoted in Hernández 2010, 80; emphasis in original).

The implication of this directive was that in the interest of saving scarce organizational resources, Border Patrol officers were expected to induce even more Mexican immigrants to forgo a hearing they were otherwise entitled to, and to leave the U.S. without the benefit of due process and the chance to demonstrate equities. In other words, by virtue of their nationality and without regard for their individual background or ties to the US, all Mexican nationals were targeted for summary removal.

During this same period, the deportations of unauthorized European immigrants were also increasing (although at a lower rate) as a result of more restrictive immigration legislation (i.e. the Immigration Act of 1924). In contrast to Mexican deportations though, European deportations did not enjoy the same level of support from the public, legal reformers, and social welfare advocates who perceived European immigrants' removal from the territory, and the resulting hardship they endured, as unjust (Ngai 2004). Like their Mexican counterparts, a large proportion of European immigrants acquired the social trappings of citizenship like jobs, property, and families and thereby established formidable roots in the U.S. (Ngai 2004, 82). Unlike Mexican immigrants, however, European immigrants were perceived as belonging to the polity—their roots and ties mattered in a way that Mexicans' did not (and arguably could not).

As a result, in contrast to the implementation of a broad deportation movement against Mexicans that relied heavily on the presumption of their "alien citizenship"[51] to justify their indiscriminate removal, the late 1920s and 1930s saw the emergence of a variety of legal and administrative mechanisms by which thousands of European and Canadian immigrants were able to legalize their status and gain legal permanent residence in the US—processes that Mexicans were largely precluded from. During this era, these "reforms operated in ways that fueled racial disparity in deportation practices" (Ngai 2004, 82). One instance of this was the creation in 1935 of "pre-examination," an "ad-hoc" administrative process whereby certain groups of undocumented immigrants were permitted to obtain a legal visa (Ngai 2004, 85). In response to slow Congressional action on deportation reform to address the perceived unjust deportation of

[50] Around this time, the Department of Labor reorganized the Immigration Service and Naturalization Service by forming the joint Immigration and Naturalization Service (INS), which was tasked with enforcing US immigration laws (Hernández 2010, 64).

[51] "For Mexicans, the concept of alien citizenship captured the condition of being a foreigner in one's former native land…But alien citizenship was not only a racial metaphor. While not strictly a legal term, the concept underwrote both formal and informal structures of racial discrimination and was at the core of major, official race policies" (Ngai 2004, 8).

Europeans, President Roosevelt's secretary of labor, Frances Perkins, and the new head of the INS, Daniel W. MacCormack, conceived of pre-examination, whereby an undocumented immigrant would obtain a waiver from deportation from the secretary, leave the U.S. via a voluntary departure, proceed to the nearest American consul in Canada to obtain a visa for permanent residence, and re-enter the U.S. as a legal admission (Ngai 2004, 84–85).

As Ngai (2004) has shown, although Mexicans were not initially explicitly barred from the "privilege" of pre-examination, they were effectively excluded through the exercise of administrative discretion. INS El Paso district director Wilmoth's effort to process Mexican hardship cases were hampered by the American consul in Juarez, William Blocker, on the basis that Mexican applicants "were of the laboring class" and that their being on relief "unquestionably" precluded them from eligibility for a visa (Ngai 2004, 89). Blocker slowed the processing of Mexican visas to a trickle in an effort to hinder Wilmoth's efforts to grant relief to Mexican cases. In contrast the INS Board of Special Inquiry had ruled in Canadian pre-examination cases that receipt of relief during the Depression did not make someone liable to become a public charge (a bar to admission), since there was no work available. According to Ngai (2004), there was no evidence that Wilmoth's superiors in the INS argued with the State Department for a fair application of pre-examination policy and procedure. Instead the INS seemingly altogether scrapped pre-examination for Mexicans and moved to clarify that the "general pre-examination procedure is limited to certain aliens—relatives of U.S. citizens—desiring to proceed to Canada," thus effectively excluding Mexican nationals (Ngai 2004, 87). Even more tellingly, later documents referred to the program as the "Canadian pre-examination procedure," signaling an explicit shift away from Mexican relief cases altogether (Ngai 2004, 87).

Starting in 1945, the INS instituted what appeared on its face to be a race-neutral version of pre-examination, which restricted the practice to "other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States"—i.e. it appeared to preclude relief for migrants from countries with contiguous borders to the U.S (Ngai 2004, 87). However, the policy was intended to "categorically deny relief to Mexican and Caribbean migrants" (Ngai 2004, 87). "Because pre-examination involved permission for temporary entry into Canada to acquire the U.S. visa, it was irrelevant to Canadians, who did not need special permission to enter Canada" (Ngai 2004, 87). Thus during the same period that voluntary departure was used to expeditiously (without due process) rid the territory of Mexicans and Mexican Americans, it was also part and parcel of a policy that enabled thousands of undocumented Europeans and Canadians to legalize their status and become permanent members of the polity, while largely precluding Mexican immigrants from the benefit. On the one hand, for undocumented Europeans and Canadians, voluntary departure was coupled with pre-examination and enabled them to acquire legal permanent residency and remain in the United States. On the other hand, for Mexican immigrants, voluntary departure, despite its re-labeling in the law as "relief" from deportation, accomplished the same thing as deportation, without the attendant procedural due process protections.

Similarly, in 1940, Congress codified into law a provision called suspension of deportation, which gave discretion to the Attorney General to provide relief from deportation in cases involving aliens of good moral character if deportation would result in "serious economic detriment to the alien's immediate family" (Ngai 2004, 87). The result of providing this administrative discretion was that the vast majority (73 percent) of grants of suspension of deportation were provided to unauthorized European immigrants, while only 8 percent of the

cases involved Mexicans (Ngai 2004, 88). That same year, voluntary departure, which up to this point had only been an administrative process, was also codified into statute as a form of discretionary relief from deportation.[52] Unlike all the other kinds of relief that were available at that time—through the Registry Act,[53] pre-examination, and now suspension of deportation[54]—undocumented Mexicans were eligible for this "relief." Nevertheless, it is noteworthy that unlike these other kinds of relief, which enabled those (Europeans) with illegal status to legalize and then *remain* in the U.S. as permanent residents, voluntary departure did not provide for either of those things. Instead, like deportation, which voluntary departure was ostensibly supposed to provide relief from, it required the undocumented immigrant to leave the territory. In other words, what the government considered "relief" from deportation meant something vastly different for Mexican immigrants than it did for European or Canadian immigrants. "Relief" for Mexican immigrants reflected ideas about them as temporary (despite any roots they might have had) and ultimately undesirable as permanent residents and citizens. On the other hand, relief for Canadians and Europeans reflected the idea that they were part of the polity. Moreover, voluntary departure's legal construction as "relief" altogether rendered invisible the reality that through discretion it was applied in punitive ways to Mexicans and in benevolent ways to Europeans.

2.3 The Bracero Program and the Use of Voluntary Return to "Dry Out the Wetbacks"

While the Depression era of the 1930s saw demands by the government and the public alike for the mass expulsion of Mexican immigrants from the U.S. territory, the early 1940s conversely brought renewed demands by U.S. growers, particularly in the southwest, for the importation of Mexican workers to fill a labor shortage in the wake of World War II. This labor shortage was a result of two corresponding events: poor white farmers, who had largely filled the labor needs of agriculture during the Great Depression (i.e. the jobs of Mexican laborers before they were kicked out en mass), moved on to better-paying industrial jobs once the Great Depression had ended (Hing 2004, 126); and the Congressional call for the expansion in

[52] An alien 'deportable under any law of the United States and who has proved good moral character for the preceding five years' may be permitted by the Attorney General to 'depart the United States to any country of his choice at his own expense, in lieu of deportation.' Alien Registration Act of 1940, § 20, 54 Stat. 671-72 (see Ngai 2004, 64).

[53] In 1929, Congress passed the first Registration of Aliens Act, which permitted undocumented persons with good moral character and who could demonstrate they had entered and resided continuously in the U.S. prior to 1921 to obtain lawful permanent status by paying a fee of $20 (Ngai 2004, 82). Although the law did not on its face exclude Mexican immigrants and many Mexicans qualified for an adjustment of status under the Registry Act, few were aware of it, understood its terms, or could afford the fee (see Ngai 2004, 82). As a result, of the 115,000 immigrants who registered their prior entries into the country between 1930 and 1940, 80 percent were European or Canadian (Ngai 2004, 82).

[54] "…[A] rough estimation suggests that between 1925 and 1965, some 200,000 illegal European immigrants who were constructed as deserving successfully legalized their status under the Registry Act, through pre-examination, or by suspension of deportation" (Ngai 2004, 89).

agriculture to support the war effort (Hernández 2010, 109). Accordingly, farmers from southwestern districts lobbied Congress for a contract labor program that would enable employers to recruit Mexican farm workers "on a large but temporary basis"[55] (Cardenas 1975, 75). Reminiscent of the ways in which immigration law was selectively enforced against undocumented Mexican immigration in the early 20th century to meet the needs of growers, the U.S. struck up an emergency wartime agreement[56] with Mexico in 1942, once again facilitating the temporary migration of Mexican farm workers into the U.S. by exempting them from the requirements for admission, including the head tax, the literacy test, and contract labor laws (Cardenas 1975, 77). Unlike measures in the past, this program was intended to resolve what Calavita (2010) has characterized as the USBP's structural dilemma "between the economic demand for cheap labor and the political demands for border control" (102). By providing farmers/growers with easy access to legal migrant laborers, the hope was that this would reduce the incentive for the recruitment by farmers of illegal immigrants for these jobs and ultimately eliminate illegal immigration.

Conversely, the effect of the Bracero Program was to generate a massive increase in illegal immigration. Despite the economic advantage provided to employers by the Bracero Program, it didn't provide the same flexibility that recruiting undocumented immigrants did (Hing 2004, 128). The incentive remained for employers to recruit undocumented labor over bracero labor, and "Mexican workers were eager to comply" (Gratton and Merchant 2013, 966). This had the effect of generating large amounts of illegal immigration, as immigrants learned they didn't have to have a bracero contract to work in the US:

> Some swamped recruitment centers in central Mexico while others simply traveled north, crowding into border towns and crossing the line without papers. Braceros began to overstay or break their contracts, or, having become familiar with the U.S. and with job sites, crossed the border without official permission (Gratton and Merchant 2013, 966).

As a result, the Bracero Program, which was originally intended to eliminate illegal immigration, resulted in a massive proliferation in the population of undocumented Mexican immigrants in the United States—from a reported 26,689 in 1944 to a high of 1,075,168 in 1954 (Cardenas 1975, 80).

A reliance on the practice of voluntary departure enabled the Immigration Service to control these illegal flows to benefit the needs of growers while still maintaining the legitimacy of the Bracero Program as a *legal* labor contract program. In a practice known as "drying out the wetbacks," the Service used voluntary return to "clear the market" of unemployed illegal workers and legalization to resupply it (Calavita 1992; Gratton and Merchant 2013; Ngai 2004).

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[55] "The American public [remained] hostile to any renewal of immigration and settlement, particularly of Mexicans, and officials faced opposition from unions and the working class, who feared Mexican competition with native-born American workers" (Gratton and Merchant 2013, 965).

[56] Although the Bracero Program was initially conceived as an emergency wartime measure, it lasted through 1964, well after the war had ended. For a more detailed explanation of the various legal and administrative incarnations it took during its tenure, see Ngai (2004) and Calavita (1992).

Undocumented Mexican immigrants in the U.S. were voluntarily returned to Mexico temporarily, if not momentarily, and subsequently recruited under contract to employers in the United States. As Cardenas (1975) put it, "the official policy during this period gave *priority* to illegal immigrants found in the US" (80). This practice of voluntary returning and immediately legalizing undocumented immigrants became the dominant feature of the Bracero program. By 1950, the number of Mexicans "legalized" and "paroled" to growers as braceros was five times higher than the number actually recruited from Mexico (Calavita 1992, 2). Accordingly, the number of voluntary departures rose from 93,330 in the period from 1931 to 1940 (pre-Bracero program) to 1,470,925 between 1941 and 1950, nearly all of these occurring after 1944 and nearly all Mexicans (Gratton and Merchant 2013, 966). It is noteworthy too that 1942, the year the Bracero Program started, marked the first year that voluntary departures began to outpace formal deportations. Thus although before 1955, the U.S. imported, on average, 200,000 braceros a year (Ngai 2004, 139), these legal flows were complemented by the "creation, utilization, and regulation of illegal Mexican aliens" (Cardenas 1975, 79). The INS heavily relied on the use of mass voluntary departures to exploit undocumented Mexican labor and thereby create an endless supply of flexible, temporary and cheap labor for farmers while helping maintain the fiction of a successful legal bracero program.

As undocumented immigration continued to rise in the early 1950s, and given the context of the recession following the end of the Korean War and the paranoia generated by the McCarthy era, there were renewed calls from the nativist citizenry to control the rampant illegal immigration—even as growers continued to demand more workers. Facing contradictory pressures from two powerful and highly mobilized factions, the INS implemented a well-publicized summary deportation campaign known as "Operation Wetback" beginning in June 1954[57] (Samora 1971). During the course of the campaign, over a million migrants were apprehended by Border Patrol officers and deported via voluntary departure (Annual Report of the INS 1953-1954, 31, 41). In cooperation with state and local authorities, and growers themselves, massive numbers of undocumented immigrants were rounded up:

> The local Border Patrol, reinforced by units from around the country, set up road blocks, boarded trains, and cordoned off neighborhoods for inspection. Police in the area were instructed to detain suspected illegal aliens on vagrancy charges and then turn them over to Border Patrol agents. The Service launched a bus lift, returning apprehended aliens to the interior of Mexico, in order to make reentry more difficult and to encourage aliens to depart on their own to avoid being deported to the interior (Calavita 1992, 57).

Moreover, Border Patrol officers conducted massive sweeps of agricultural areas in California and Arizona, deporting as many as a thousand migrants a day (Calavita 1992, 58). However, the campaign was not limited to the southwest, as sweeps extended well into the interior, deporting undocumented immigrants working in industrial jobs. There were also reports of mistreatment of legal residents and U.S. citizens—not only beatings and harassment but some were also swept up in the enforcement initiative and deported (Calavita 1992, 58). At the same time, the INS more than doubled the number of Bracero visas; between 1955 and 1960, annual

[57] But see Hernández (2006) on the collaborative role of the Mexican government in the success of the campaign.

bracero migration fluctuated between 400,000 and 450,000 workers. This "two-pronged strategy" of mass deportation of undocumented immigrants and the expansion of the Bracero Program satisfied both nativists and growers (Massey, Durand, and Malone 2002, 37).

The Bracero Program is part of the broader history of selective enforcement of immigration law against Mexican nationals in the interests of U.S. employers that has rendered them the prototypical illegal immigrant, and reduced their racial identity to a temporary and, ultimately, disposable and fungible labor commodity (see De Genova 2002a). Selective enforcement through this program allowed for the mass importation of Mexican labor migrants, and, concurrently, justified their mass deportation. Voluntary return played a central role in both processes, enabling the fast return of "illegal" Mexicans to the other side of the border so as to facilitate their immediate importation to the U.S. as "legal" workers, whilst serving as a means to remove them rapidly and en masse to the interior of Mexico in the service of political theater.

2.4 Conclusion

This secondary historical analysis of voluntary departure is consistent with what immigration scholars have taught us about the historical treatment of Mexican immigrants by the law. It highlights that they were treated differently from other immigrant groups, not just by the law but also in terms of the exercise of discretion by those who implemented the law. It also shows how much flexibility the state had over the governance of Mexican immigrant flows—both legal and illegal—through the discretion state actors exercised in voluntary departure. Moreover, it shows how this discretion was driven by the racialized stereotype of Mexicans as temporary labor that was constructed by immigration law throughout the early and mid-20th century. In other words, the practice of voluntary departure is part of the larger historical pattern of treating Mexicans, regardless of legal status, as though they have no rootedness or stakes in the US, expected by the government to come and go like nomads based on seasonal labor demands in the U.S. As a result, U.S. immigration law and policy governs them in a way that does not acknowledge their territorial status (which entitles them to rights including a hearing). This analysis thereby provides important context for understanding the contemporary practice of voluntary return as a racialized deportation practice.

It also shows that historically voluntary departure has been used as a means to summarily remove en masse persons of Mexican nationality from well within the interior of the United States. Voluntary departure is not simply a border phenomenon, whereby Border Patrol officers summarily deport recent arrivals apprehended at the US-Mexico border. It has been used historically and on a massive scale to police and expel without due process and without regard for their equities Mexican nationals who are firmly in the United States and who have lived there for years. This complicates extant characterizations of voluntary departure, which elide voluntary departure's function as "deportation" as we understand it from the literature (see chapter 1) and therefore allowed it to escape more in-depth and critical inquiry. This chapter shows that voluntary departure has historically not been a consensual process and that its informality—the lack of due process—provides its utility to the Border Patrol and makes it a powerful and easy tool of expulsion. Given this context, I argue conceptualizing voluntary return as a racialized deportation practice would afford a broader analytic framework in which to more meaningfully problematize and critique it. Chapter 3 turns to describing changes to legal and social conditions in the ensuing decades of the Bracero Program and examining their implications for understanding the contemporary practice of voluntary return—including the imposition of stark limits to legal immigration, the militarization of the US-Mexico border, the enactment of

immigration consequences for taking voluntary departure, and the increase in the settled undocumented immigrant population in the U.S.

Chapter 3 The Contemporary Practice of Voluntary Departure

In the years following the termination of the Bracero Program in 1964, administrative voluntary departure, or "voluntary return" as it is known colloquially by the immigration enforcement bureaucracy, served as a "bureaucratic coping strategy" for the U.S. Border Patrol (USBP) as undocumented immigration from Mexico increased in unprecedented (Massey, Durand, and Malone 2002, 46).[58] The extant literature portrays the practice of voluntary departure during this era as serving not only the interests of the government and USBP agents, but also undocumented Mexican immigrants. For the government and the USBP, voluntary return's streamlined nature enabled a large number of apprehensions and arrests which provided the illusion that the border was being controlled[59] (Heyman 1995). It also saved scarce resources that would otherwise be spent on providing a hearing for every unauthorized immigrant who was entitled to one.[60] For the USBP officer, it served their "career interests" by enabling them to arrest and quickly process large numbers of undocumented immigrants (Massey, Durand, and Malone 2002, 46–47). And for the Mexican migrant, he[61] avoided lengthy and exhaustive removal (i.e. deportation) proceedings, freeing him up to attempt re-crossing the next day, or even a few hours later (Heyman 1995; Kossoudji 1992).

The narrative that migrants take voluntary departure in their own self-interest is based on studies of voluntary departure as solely a border phenomenon and, I argue, is largely limited to the experience of migrants during the era of circular (temporary) migration, which ended in the 1980s. During the era of circular migration, undocumented immigrants were largely seasonal workers who traveled back and forth between the U.S. and Mexico for the purposes of work, sending remittances to family in Mexico while working and returning once the season ended (Massey, Durand, and Malone 2002). Arguably they had few equities in the U.S. and their main motivation for migrating to and remaining in the U.S. was to work.[62] Although they had a right to a hearing, they had a better chance of departing immediately and successfully re-crossing than fighting their case (to stay in the US) in court.[63] Finally, during this era, there were no

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[58] Aleinikoff et al. (1995) similarly note that the decision to choose voluntary departure as an alternative to deportation proceedings may be influenced by the inability (or unwillingness) of the US government to stop the surreptitious entry of aliens across the border (641).

[59] It's an "illusion" because once migrants are released into Mexico at the US border, many repeat their attempts to re-enter until they are successful (Heyman 1995).

[60] "The willingness of hundreds of thousand of aliens to waive a deportation hearing and leave the United States before a date certainly saves the government untold resources" and "it is a virtual certainty that the immigration system in this country would break down if all aliens who were apprehended as deportable were to request the deportation hearing the INA [Immigration and Nationality Act] provides them" (Aleinikoff, Martin, and Motomura 1995, 641).

[61] Roughly two-thirds of Mexican migrants during this period were male (Massey, Durand, and Malone 2002, 66).

[62] "The high rates of remitting reported by Mexican migrants in the undocumented era suggest that most of them saw migration as a temporary strategy and that they anticipated returning to Mexico….[T]he likelihood of returning to Mexico within two years of departure was indeed quite high among undocumented males" (Massey, Durand, and Malone 2002, 62).

[63] "The vast majority of aliens granted voluntary departure are arrested for entering [the US] without inspection and most have no colorable claim of lawful residence..[Therefore] "[m]any of

immigration consequences for departing the U.S. via voluntary departure. Therefore, it did not affect their ability to immigrate legally later.

In contrast, this chapter explains how changes to legal and social conditions in recent decades have changed the immigration context and thereby raised the stakes and consequences of taking voluntary return for undocumented immigrants. Therefore, extant studies of voluntary departure do not capture the reality of voluntary departure on the ground today. The chapter begins by explaining how changes to immigration patterns brought on by border militarization starting in the mid-1980s have created a "caging effect" (Rosenblum et al. 2012), increasing the proportion of undocumented immigrants in the U.S. who are long-term residents rather than temporary/circular migrants. Where undocumented migrants used to make regular trips to visit families that remain in Mexico, the increased costs and risks of border-crossing resulting from border militarization has prompted them to stay longer in the U.S. and raise families here. As a result, the undocumented immigration population in the U.S. is increasingly made up of long-term residents with kinship and social ties to the U.S.

The chapter also describes the vast policing reach of the U.S. Border Patrol into border communities (i.e. the interior of the US), where millions of individuals (immigrants and U.S. citizens alike) live and work. Subsequently it shows how the changes wrought by IIRAIRA have given the provision of voluntary return more teeth since 1997, and how this affects undocumented immigrants who are long-term residents of the United States. It then compares the rights and opportunities that noncitizens receive in removal proceedings to those one is entitled to in the voluntary return process, showing how procedurally deficient voluntary return is. The chapter also provides a comparison of voluntary return to the relatively emergent category of summary removal procedures, which constitute the vast majority of removals in recent years, and are arguably formalized versions of voluntary return. These comparisons powerfully illustrate the way in which the law's promise of due process in court was diluted in the provision of voluntary return, and then altogether written out of the law in summary removal procedures.

This chapter concludes by arguing that the social and legal changes and the dearth of procedural rights in voluntary return together complicate claims in the extant literature that taking voluntary return is in the self-interest of the migrant. It raises some new questions surfaced by these insights about how statutory voluntary departure is implemented on the ground by USBP officers in this contemporary punitive context, and what the effects of voluntary departure are on the border community.

3.1 How Voluntary Return Got its Teeth

3.1.1 The End of Circular Migration and the Settlement of the Undocumented Population

Historically, migration from Mexico to the U.S. has been circular in nature, as migrants traveled back and forth across the border, working temporarily in the United States and making

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these aliens would rather accept the government's offer of a free ride over the border than stay and fight deportation" because "their chances of effecting another surreptitious entry are far greater than successfully contesting deportability in a hearing." Thus, they reason that "[t]he availability of voluntary departure, coupled with the realities of law enforcement and the rational decisions of aliens, creates a sequence at the border that is repeated over and over again: unlawful entry, apprehension, detention, return and another unlawful entry" (Aleinikoff, Martin, and Motomura 1995, 642).

regular visits home to visit family. Between 1942 and 1964, circular migration occurred under the mantle of the Bracero Program, a program under which the U.S. government contracted with Mexico to import legal temporary workers from Mexico for short-term, mostly agricultural work, in the U.S. (see chapter two). Although the program was an attempt by the U.S. to legalize the flow of migrant workers from Mexico to the US, it ended up generating more illegal immigration as there was more incentive for American employers to recruit undocumented immigrants rather than legal ones officially sponsored by the Bracero Program. "By the late 1950s a massive circular flow of Mexican migrants had become deeply embedded in employer practices and migrant expectations and had come to be sustained by well-developed and widely accessible migrant networks" (see Massey and Pren 2012a, 3). In 1964, in response to Mexican opposition to continue it, the Bracero Program was terminated and in the following year, the Immigration and Nationality Act (also known as the Hart-Celler Act) passed which for the first time imposed numerical limits on legal immigration from the Western hemisphere, including Mexico. These two events dramatically diminished the channels for legal entry for Mexican migrants after 1965. [64] However "the migratory flow did not disappear but simply continued without authorization or documents" (Massey and Pren 2012a). In other words, while migration patterns between the late 1950s and the late 1970s did not change, "in symbolic terms" the situation changed markedly because the same long-established migration flows became illegal, thereby creating a sudden "surge" in undocumented immigration (Massey, Durand, and Pren 2016). Ngai (2004) has similarly made the argument that the narrowing of avenues for legal immigration had the effect of creating even more Mexican nationals who were considered "illegal aliens."

The government did not have the resources to detain everyone and give them a hearing. The number of deportable immigrants apprehended far exceeded the number of spaces available in federal and local detention facilities (Goodman 2011, 65). Writing in the 1968 Annual Report, INS commissioner Raymond F. Farrell, states:

> in order to reduce costs, policy and procedural changes were made to utilize informal deportations [returns] in lieu of formal deportations [removals] in the rising number of Mexican cases (see Goodman 2011, 65).

To manage these flows, in the early 1960s voluntary return became part of the Border Patrol's strategy of "frontline deterrence" (Massey, Durand, and Malone 2002). Undocumented immigrants were arrested, promptly voluntarily returned just over the border, and then attempted re-crossing again, a ritualized interaction which became eventually institutionalized as the "voluntary departure complex" (Heyman 1995).[65] Thus between 1965 and the mid-1980s, the US-Mexico border functioned like a "revolving door" (see Andreas 2001, 37). During this era, it was in the "mutual self-interest" of both the Border Patrol agent and the undocumented migrant that the undocumented immigrant take voluntary return and be "deported as soon as possible" (Singer and Massey 1998, 564).

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[64] In subsequent amendments to the Hart-Celler Act, numerical limits to legal immigration were increasingly restricted until by the late 1970s, Mexicans legal entries were limited to 20,000 permanent resident visas and no temporary work visas. In contrast, in the 1950s, they were entitled to 50,000 permanent resident visas and 450,000 temporary work visas (Massey, Durand, and Malone 2002).

[65] It has similarly been characterized as a "game of cat and mouse" (Kossoudji 1992).

The long-standing pattern of circular migration began to change in 1986 when Congress enacted the Immigration Reform and Control Act (IRCA), launching the first of a series of legislative events (the latest in 2010) ramping up border enforcement intended to stop the flow of illegal immigrants into the United States (Inda 2008). Table 3.1 illustrates this acceleration. Although undocumented inflows had stabilized by the late 1970s, a "Latino threat" narrative, created earlier in the decade by politicians, pundits, and bureaucrats (Chavez 2001, 2008; see also Massey and Pren 2012b), took hold through the 1990s, producing a perceived need to dedicate increasingly more resources to border enforcement (Massey 2016). The high pace of voluntary returns (the "voluntary departure complex") continued during this time (through the early 2000s) but under vastly different social and legal conditions. Although border militarization had virtually no effect on the flow of undocumented immigrants *into* the US, it had the unintended effect of dramatically reducing their returns to Mexico (see Massey and Pren 2012a). By making the border more challenging, expensive, and risky for migrants to cross, the U.S. government's militarization of the border has prompted migrants to remain in the United States longer and raise families here instead of making regular trips to visit family that remained in Mexico, thereby creating a permanently settled population of undocumented immigrants in the U.S. (Cornelius 2005; Massey, Durand, and Malone 2002).

Table 3.1 Border Militarization Measures (1986 – 2010)

Name of Legislation & Year	Provisions for the USBP
Immigration Reform and Control Act of 1986 (IRCA, Pub. L. 99–603)	Authorized a 50% increase in the Immigration and Naturalization Service budget; the hiring of 5,000 new USBP agents over the next five years; and funded a 14-mile triple fence along the U.S. border from San Diego eastward, as well as equipment such as aircraft, helicopters, night vision goggles, and four-wheel drive vehicles.
Immigration Act of 1990 (Pub. L.101-649)	Authorized the hiring of 1,000 more Border Patrol agents.
Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA, Pub. L. 104-208, Div. C)	Provided funding to purchase military equipment and hire 1,000 officers per year until the Border Patrol reached 10,000 total officers.
USA-PATRIOT ACT of 2001 (Pub. L. No. 107-56)	Created the Department of Homeland Security and increased the Border Patrol's budget by another $300 million. Authorized the tripling of the number of Border Patrol agents at the northern border.
National Intelligence Reform and Terrorism Protection Act of 2000 (Pub. L. 108-458)	Provided more funds to the Border Patrol for equipment, aircraft, agents (an increase of 10,000 agents between FY2006 and FY2010), immigration investigators, and detention centers.
Secure Fence Act of 2006 (Pub. L. 109-367)	Authorized the Border Patrol to erect new fences, vehicle barriers, checkpoints and lighting and to purchase new cameras, satellites, and unmanned drones for use in border enforcement.
Border Security Act of 2010 (Pub. L. 111-230)	Funded the hiring of 3,000 more Border Patrol agents and increased the Border Patrol's budget by $244 million.

Source: Massey, Durand, and Pren (2016)

As a result, those with long residence in the US, and thus with greater stakes for remaining[66] (see Massey 1986), represent an increasingly larger share of the undocumented immigrant population in the United States.[67] They are also more and more of the share of Mexican nationals who find themselves caught in the immigration enforcement dragnet. According to the Pew Hispanic Center, a growing share of unauthorized Mexican immigrants deported by U.S. authorities had been in the U.S. for a year or more—27% in 2010, up from 6% in 2005 (2012, 9-10). Findings from the Migrant Border Crossing Study (MBCS), a random sample survey of 1,100 recently deported (i.e. formally removed or voluntarily returned) migrants in six cities in Mexico conducted between 2009 and 2012, showed that one-half of deportees had at least one U.S. citizen family member, and about one in five had at least one child under the age of 18 with U.S. citizenship. Moreover, nearly half expressed their intention to settle permanently in the U.S. during their last crossing, and 30 percent stated that their current home was in the United States (Slack, Martínez, et al. 2015, 112). This is a stark contrast to the recipients of voluntary return from the Border Patrol than that suggested by existing/extant narratives of voluntary return—that they are mostly temporary migrants with no family or social ties in the U.S.

3.1.2 USBP Enforcement in the 100-mile "Border" Region

Moreover, the enforcement dragnet in the border region is vast. The authority of USBP officers to police the border is not limited to individuals attempting to illicitly cross, or the thin line of the border itself. Under federal statute and regulations, the U.S. border is expansively defined as extending 100 miles into the United States from any land and coastal boundary.[68]

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[66] When unauthorized immigrants in the US are deported, more often than not they leave behind family in the US (Jacqueline Hagan, Rodriguez, and Castro 2011). As a consequence of long-term settlement, one in five undocumented immigrant adults has a US citizen or lawful permanent resident spouse, and nearly half of the undocumented population has minor children, many of them born in the U.S. As of 2017, there are 16.7 million people living in the US in mixed-status families, where at least one family member is an unauthorized immigrant (Mathema 2017, 2). A substantial portion of these individuals—nearly 8.2 million—are U.S. citizens (Mathema 2017, 2). Of these US citizens, 72 percent (5.9 million) of them are children (Mathema 2017, 2).

[67] A rising share of unauthorized immigrants have lived in the US for at least a decade. About two-thirds (66%) of unauthorized adults in 2016 had been in the US at least that long, compared with 41% in 2007. This means the majority of unauthorized immigrants are long-term residents of the U.S. As of 2016, 80% of unauthorized Mexican immigrant adults had lived in the U.S. for more than 10 years. A declining share of unauthorized immigrants have lived in the US for less than five years—18% of adults in 2016 compared with 30% in 2007. In 2016, only 8% of undocumented Mexican immigrants had lived in the U.S. for less than 5 years. In 2014, unauthorized immigrant adults lived in the US for a median of 13.6 years, meaning that half had been in the country at least that long. See Krogstad et al. (2018); Gonzalez-Barrera and Krogstad (2018).

[68] The statute provides that USBP officers have the authority to stop and conduct searches on vessels, trains, aircraft, or other vehicles anywhere within "a reasonable distance from any external boundary of the United States" (8 U.S.C. § 1357(a)(3)). In the absence of further

What this means in practical terms is that the USBP does its policing work, including voluntary returns, far removed from the actual border and in an area that encompasses where approximately 200 million people, or two-thirds of the U.S. population, live and work.[69] As Ayelet Schachar (2009) has characterized it, the U.S. relies on the "legal fiction of removing unwanted migrants 'at the border' when they are already firmly within its perimeter" (174).[70] The extensive policing reach of the USBP into the interior of the U.S. is nothing new. As chapter 2 showed, the Border Patrol was created in 1924 with broad powers to police the interior. What is different now is that as migration patterns have changed, there are more settled undocumented immigrants who call the border zone home and are vulnerable to those policing powers.

USBP presence is not limited to border states and covers all 50 states, but most USBP enforcement is disproportionately concentrated[71] in the nearly 2000-mile southwest border zone with Mexico (see Figure 3.1, Table 3.2). This region, which spans four states—California, Arizona, New Mexico, and Texas—is divided geographically into nine Border Patrol sectors, each of which hosts a headquarters with management personnel.[72] These sectors are further divided into varying numbers of stations, with agents assigned to police defined geographic areas (see Figure 3.1).

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statutory guidance, in 1953 federal regulations defined "reasonable distance" as 100 air miles from any external boundary of the US, including coastal boundaries, unless an agency official sets a shorter distance (8 C.F.R. § 287.1(b)). As the American Civil Liberties Union (n.d.) has noted, the 100-mile rule has never been debated or scrutinized by Congress, which suggests this is an arbitrary designation.

[69] Compounding the militarization of the border region, the USBP shares jurisdiction with another federal law enforcement agency, Immigration and Customs Enforcement (ICE), the branch of Department of Homeland Security (DHS) responsible for the enforcement of immigration laws in the interior of the U.S. Following the dissolution of the Immigration and Naturalization Service (INS) in 2003 in the wake of the 9/11 terrorist attacks, its law enforcement functions were transferred to ICE and Customs and Border Protection (CBP), of which the USBP is a branch. A third DHS agency, US Citizenship and Immigration Services (USCIS), is a non-law enforcement agency which, among other things, processes visa and naturalization petitions as well as asylum applications.

[70] Here Shachar (2009) refers specifically to the enlargement of immigration officers' powers into the interior through the expansion of expedited removal, which authorizes officers to deport undocumented immigrants within the 100-mile border zone. See also Coleman (2012) (referring to borders as a "territorially unanchored 'society of control,'" and similarly that "borders have become attached to immigrant bodies who are everywhere and always understood by the state as 'crossing'" (431)); and Coutin (2010) (explaining how undocumented migrants' illegal status maps onto their physical location so that they are never free from the ubiquitous threat of "border" enforcement, even if they are physically well within borders).

[71] "[I]t is disproportionate in comparison to national origins, settlement areas, and modes of entry to United States territory" (Núñez and Heyman 2007, 355). For more on this, see Nevins (2002) and Andreas (2001).

[72] These sectors are San Diego and El Centro in California; Yuma which spans parts of California and Arizona; Tucson in Arizona; El Paso which covers New Mexico and part of Texas; and Big Bend, Del Rio, Laredo, and Rio Grande Valley which cover the remainder of Texas. There is also a central USBP headquarters, which is located in Washington D.C.

The USBP takes a self-described "layered approach" to policing (U.S. Customs and Border Protection 2018), surveilling the border itself but also policing extensively into the interior through so-called "roving patrols," by conducting traffic checkpoints (see Figure 3.2),[73] and through both ad-hoc and formal cooperation/partnerships with local law enforcement/police, which together have greatly expanded the scope of border policing into the interior (Chacón 2010; Núñez and Heyman 2007). As social conditions have changed the immigration context, existing examinations of voluntary departure, which focus on migrant apprehensions at the border proper, are therefore inadequate in explaining the scope of enforcement via the practice of voluntary return, and its effects.

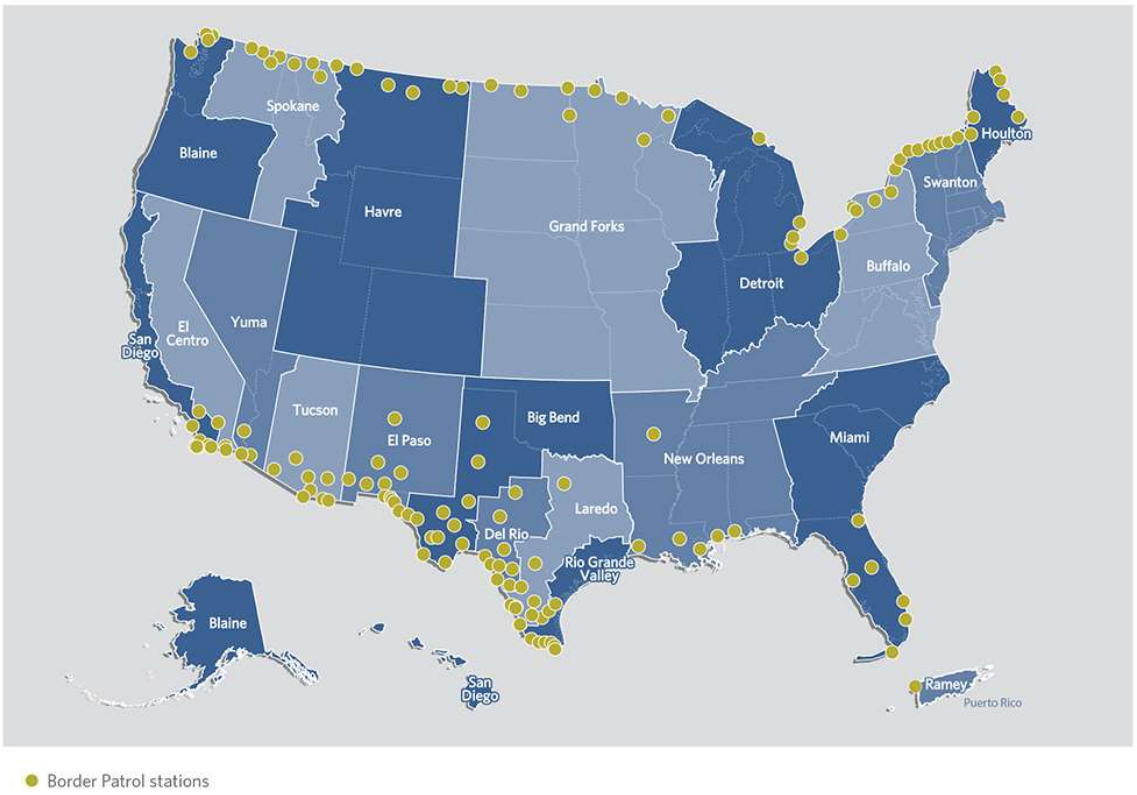

Figure 3.1 U.S. Border Patrol Stations By Sector *Source*: The Pew Charitable Trusts (2015)

3.1.3

IIRIRA and the Imposition of Legal Consequences for Voluntary Departure

Legal conditions have similarly changed, creating immigration consequences for taking voluntary return where none had existed before. In 1996, Congress passed the IIRIRA, which vastly changed U.S. immigration law in ways that rendered more noncitizens (both with and without status) removable, narrowed channels through which undocumented persons could

[73] In addition to the 35 permanent checkpoints along both the northern and southern borders, which are intended to be operational most of the time, Border Patrol has the ability to open 182 tactical, or temporary checkpoints, which are set up for short-term or intermittent use (Denvir 2015).

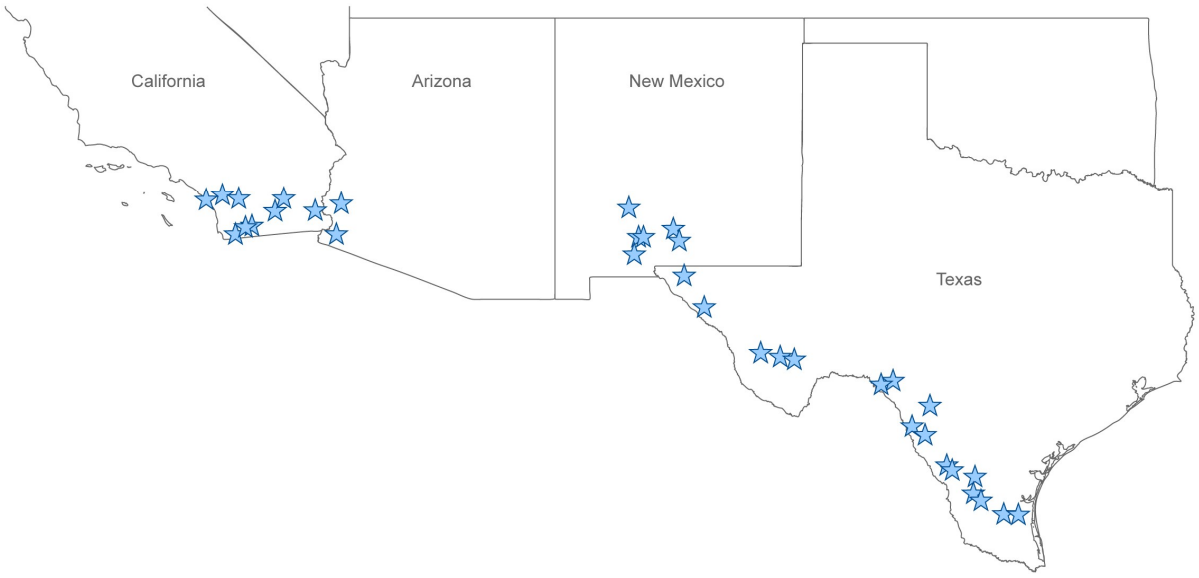

Figure 3.2 Permanent U.S. Border Patrol Checkpoints in the Southwest Border[74] Region *Source*: U.S. Government Accountability Office (2017b)

legalize their status, and effectively punishes those in the U.S. with certain thresholds of unauthorized presence (Lundstrom 2013; Johnson 2001). As a result of some of these changes, IIRAIRA "gut the incentive of receiving voluntary return," as one lawyer interviewed for this study put it, by imposing stark penalties on those who accrue "unlawful presence" in the United States, leave the country (including via voluntary return), and want to reenter lawfully. An immigrant who enters the United States without being "admitted" (i.e. enters the U.S. illegally, for example by crossing the border illicitly) or who overstays a period of authorized admission (i.e. who came to the U.S. legally, for example on a visa, and overstayed it), will be deemed to have accrued unlawful presence, and will be subject to a bar to future legal reentry.[74] The majority of

Table 3.2 Number of U.S. Border Patrol Agents and Permanent Checkpoints by Region

Border Region	Agents*	Permanent Checkpoints**
Southwest	16,605	34
Northern	2048	1
Coastal	212	0

**Source:* U.S. Customs and Border Protection (2017a)
***Source*: The Pew Charitable Trusts (2015)

[74] "Unlawful presence" is a term of art and is not defined in the statute and regulations. The US Citizen and Immigration Services (USCIS) Adjudicator's Field Manual provides guidance on determining when a noncitizen accrues unlawful presence (American Immigration Council 2016).

long-term residents in the U.S. easily have accrued a triggering number of years of unlawful presence. After all, the bar for a triggering number of years is not high—only six months; if they depart the country, through voluntary return, for example, they will trigger that bar. Such a bar renders the noncitizen inadmissible to the United States for three or ten years, depending on the period of unlawful presence.[75] What this means in practical terms is that taking voluntary departure after a triggering period of unlawful presence makes the person ineligible for an immigrant visa for lawful permanent resident status (i.e. via family or employment sponsorship) or any other type of lawful entry into the United States, including a visitor (i.e. nonimmigrant) visa, for a period of three or ten years.[76] Those who already have an active immigrant visa petition when they depart the country after a triggering period of unlawful presence can no longer pursue that petition because they are subject to a bar to admission.

Moreover, as a consequence of IIRAIRA, a person who reenters the United States before the time bar has run will be subject to a "permanent" bar of inadmissibility and will be disqualified from most forms of relief from deportation, which provide formal status or otherwise enable the individual to remain legally in the United States.[77] Before being eligible again to apply to lawfully enter, the person subject to the bar must first wait outside the United States for at least ten years and then after waiting those ten years, must request permission from the United States to apply. One lawyer aptly referred to this bar as the "kiss of death" and a "lifetime ban" because it creates so many hurdles for applying for a visa that it effectively does away with one's ability to immigrate legally to the United States. It is possible for some individuals to obtain a waiver of this inadmissibility bar, but such waivers are entirely discretionary and available only to individuals who can demonstrate "extreme hardship"[78] to a

[75] 8 U.S.C. § 1182(a)(9)(B)(i) provides that (i) a person who has been unlawfully present in the United States for one year or more and takes voluntary departure is thereafter inadmissible for a period of ten years; and (ii) a person unlawfully present for over 180 days but less than one year is inadmissible for a period of three years if he or she takes voluntary departure.

[76] *See* 8 U.S.C. § 1182(a) (describing an alien who is inadmissible to be "ineligible to receive visas and ineligible to be admitted to the United States"). With regard to the visitor visa specifically, the petitioner faces challenges because of skepticism by the consular officer issuing the visa that the person will adhere to its terms (INA § 221(g)) or because the officer will suspect an "immigrant intent," i.e. that the person wants to live in the US and will therefore not depart before the visa expires (INA § 214(b)).

[77] "Any alien who (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible" (8 U.S.C. § 1182(a)(9)(C)(i)/INA § 212(a)(9)(C)(i)). The bar is for ten years but the State Department refers to it as a "permanent bar" because there is no general waiver of inadmissibility like there is for the 3- and 10-year bars. See also *Garfias-Rodriguez v. Holder* (2012) (finding that an undocumented immigrant who was inadmissible due to his unlawful entry into the US after accruing more than a year of unlawful presence was not eligible to adjust to lawful permanent resident status based on marriage to U.S. citizen).

[78] "Extreme hardship" is another term of art that is not defined in the immigration statute or regulations. As a result, over the years, the government has failed to apply the standard consistently. New guidance effective December 5, 2016 clarifies that, among other things, to be

U.S. citizen or lawful permanent resident spouse or parent, a standard that's very challenging to meet, if not impossible (for those who don't have a qualifying U.S. citizen or lawful permanent resident spouse or parent).[79] If the waiver is denied, there is no way to appeal or have that denial reviewed (8 U.S.C. § 1182(a)(9)(B)(v)). In sum, taking a voluntary return can create irreparable harm to the migrant who takes it, in a way that the existing literature does not account for.

3.2 Procedural Rights and Safeguards for Various Dispositions: A Comparison

Despite the fact that IIRIRA rendered administrative voluntary departure punitive, there was no corresponding imposition of additional procedural protections. As such, voluntary departure has remained a rights-deficient process, compared to removal proceedings (the alternative to taking voluntary departure). The following discussion compares the procedural rights one has in voluntary return, as well as in the emergent summary removal procedures, to those one has in removal proceedings, showing how the original promise of due process in court has been diluted in voluntary return and then completely eliminated in dispositions like expedited removal and reinstatement of removal. It also provides a comparison to judicial voluntary departures, which are more rights-protective than administrative voluntary departure by virtue of the fact that they are granted to those individuals who are already in removal proceedings. The intention of these comparisons is not to idealize standard removal proceedings in court, because they certainly have their limitations.[80] Moreover, it may be easy to overstate the importance of procedural due process rights. The idea of due process as something that is always beneficial and inherently good, without a critical perspective on it, is often reified when in reality, there can be hidden costs that cut against it, such as detention (cite). However, as I will show in this and subsequent chapters, due process in these fast-track procedures is vital given the extreme information deficit for undocumented immigrants in the custodial context. They often don't have access to a lawyer, and they themselves are not aware of the fact that they are entitled to a bundle of important rights, however small, including avenues for relief from deportation and/or channels through which to challenge the determinations of removability by immigration officers. As a result of this information deficit, individuals subject to voluntary return or summary removal procedures who have claims for relief, or who otherwise want to challenge a determination of removability, may be unable advance to more formal and rights-protective systems where they may pursue their cases.

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considered "extreme," the hardship must exceed that which is usual or expected and must go beyond what is typically associated with deportation (American Immigration Council 2016).

[79] In other words, hardship to the immigrant is not a factor; neither is hardship to the immigrant's children, even if the children are US citizens.

[80] In general, noncitizens in removal proceedings have fewer and less robust rights than criminal defendants, who are entitled to a range of criminal procedural protections guaranteed by the Constitution, because they are considered to be in a civil proceeding, not a criminal one (Kanstroom 2007). Moreover, having a lawyer is integral to success in removal proceedings, although there is no constitutional right to one; in other words, the chances of successfully navigating removal proceedings and obtaining relief are dramatically lower without the assistance of counsel (Ingrid V. Eagly and Shafer 2015). See Koh (2017) for a discussion of common critiques of immigration courts.

3.2.1 Removal Proceedings

The initiation of removal proceeding[81] and the proceedings themselves entitle the migrant to various rights, procedural safeguards, and opportunities to formalize his or her status (or otherwise defer removal) that he is altogether precluded from by accepting voluntary return. With the service of a Notice to Appear (NTA), the charging document for the initiation of immigration court proceedings (8 C.F.R. § 239.1(a), officers are required to provide the migrant their *Miranda*-type rights (8 C.F.R. § 287.3(c) (2011)). Because noncitizens in DHS custody are considered to be in civil detention, they don't enjoy the robust set of constitutional protections that individuals in criminal custody are entitled to, such as the right to remain silent, the right to counsel at the government's expense, and the right to a trial,[82] but they *are* entitled to a weaker set of regulatory advisals: the right to representation by counsel not at the government's expense;[83] the right to examine, present, and challenge evidence, including through cross-examination of the government's witnesses; and the right not to be ordered removed from the United States unless the government proves that she is removable by clear and convincing evidence[84]. Once he is transferred from USBP custody to long-term detention facilities (governed by Immigration and Customs Enforcement (ICE)),[85] he may be released on his own recognizance by immigration officers pending removal proceedings[86] or released on bond set by ICE. If the bond amount set by ICE is too high to pay,[87] or if the person otherwise remains in

[81] IIRIRA combined deportation proceedings and exclusion proceedings (i.e. the formal proceeding in which an alien's admissibility to the US is determined) into one unified proceeding known as "removal." This is the formal proceeding in which an alien's deportability from the US or inadmissibility to the US is determined. In this dissertation, the terms deportation and removal are used interchangeably.

[82] But note that Leo (1996b) has shown that in the criminal interrogation context, police officers rely on psychological tactics to induce custodial suspects to waive these rights and thereby elicit (often false) confessions.

[83] Because immigration court is considered a civil proceeding, the right to counsel in removal proceedings means the right to choose one's own counsel at one's own expense. Thus, the right is not as robust as the right to counsel that criminal defendants enjoy—i.e. the constitutional right to court-appointed counsel at the government's expense.

[84] *See* 8 U.S.C. § 1229a. It is noteworthy that although this is the burden of proof for deportable noncitizens per INA 237, inadmissible aliens (including undocumented immigrants who entered without inspection) bear the burden of proof in removal proceedings (INA 212(a)). The grounds of admissibility apply to a person seeking admission to the U.S., while the grounds of deportability apply to a person already legally living within the United States.

[85] ICE provides long-term detention facilities for individuals that USBP apprehends (either their own or they contract with a correctional facility or jail). As chapter 6 will explain, USBP only has short-term detention facilities, where apprehended migrants are held pending a decision about whether/which federal agency to transfer them to.

[86] *See* 8 C.F.R. § 1236.1(c)(8) (2015) (permitting immigration officers to release detainees if the noncitizen does not pose a threat to property or persons and is likely to appear at a court proceeding).

[87] But as Eagly and Shafer (2015) point out, even if they are statutorily eligible for release in general, many immigrants cannot afford the high bonds set by immigration judges.

detention, he may request a custody hearing from an immigration judge[88] (either while in detention or at his first court hearing), provided he is not subject to mandatory detention.[89] Candidates for voluntary return generally don't fit the criteria for mandatory detention.[90] In the custody hearing, the immigration judge will weigh a number of factors to determine whether the immigrant is eligible for release on a monetary bond or other conditions. [91]

If he is released from detention, the migrant has a dramatically improved chance of securing representation from a lawyer than when he was detained. Those migrants who are released (or never detained at all) while awaiting a removal hearing are almost five times more likely to obtain counsel than detained respondents.[92] They are also more likely to be granted more time from the judge to find counsel than their detained counterparts (29% of never detained/released respondents vs. 14% of detained respondents) and more likely to find counsel when given time to do so (65% of released respondents vs. 36% of detained respondents) (Ingrid V. Eagly and Shafer 2015, 32–34). Obtaining this representation is vital to the success of a case—immigrants with representation and those litigated outside detention are far more likely to seek and obtain relief in court (Ingrid V. Eagly and Shafer 2015, 50).[93]

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[88] See *Matter of P-C-M-* (1991) ("The regulations …only provide authority for the immigration judge to redetermine custody status upon application by the respondent or his representative.")

[89] There are certain categories of migrants, mostly having to do with commission or conviction of certain crimes, that are subject to mandatory detention while awaiting proceedings. Individuals in these categories do not have a statutory right to release and they must remain in detention while removal proceedings are pending against them. The provision of "mandatory detention" was added by the IIRAIRA. See 8 U.S.C. § 1226(c) (2012) (describing the procedure for detention of "criminal aliens"); 8 C.F.R. § 1003.19(h)(2)(i)(B) (2015) (limiting the ability of immigration judges to "redetermine conditions of custody"). However, as Eagly and Shafer (2015) point out, courts have begun to recognize due process limitations on mandatory detention.

[90] Candidates for voluntary departure must not have been convicted of an aggravated felony or have engaged in terrorist activities (8 U.S.C. § 1229c(1)(C)).

[91] See, e.g., *In re* Guerra (2006) (providing that immigration judges must weigh whether the immigrant is "a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk"). Detainees with lawyers are far more likely to get bond in the first place. Those with a lawyer are 3.5 times more likely to be granted bond than those without one (Ryo 2016).

[92] Although in general only 37 percent nationally of all immigrants secure legal representation in their removal cases, immigrants in detention are the least likely to obtain representation (Ingrid V. Eagly and Shafer 2015). In their study, Eagly and Shafer (2015) found that only 14 percent of detained immigrants acquired legal counsel, compared with two-thirds of non-detained immigrants.

[93] Those who secured representation were 15 times more likely to seek relief from deportation and 5.5 times more likely to obtain it than someone who did not have representation. Never-detained immigrants (i.e. those who remained free of detention for the duration of their cases) with counsel obtained a successful outcome in 60% of cases, three-and-a-half times greater than the 17% for their unrepresented counterparts (Ingrid V. Eagly and Shafer 2015). Even for detained individuals, though, having an attorney early in the process is key for case success (Ingrid V. Eagly and Shafer 2015). Detained immigrants with counsel obtained a successful

In addition to the rights listed above, once in court, if the immigration judge finds the migrant removable, he must inform the migrant of his or her right to apply for forms of discretionary relief from deportation under the immigration laws and the programs of the Department of Homeland Security (i.e. for ways to remain in the United States in a formal status or otherwise) and provide the person an opportunity to apply for the relief during the hearing (8 C.F.R § 1240.11(a)(2) (2015); see Table A3). If the person applies for a form of relief from the judge and that form of relief is denied by the immigration judge, the migrant has the right to appeal that decision to the Board of Immigration Appeals (BIA), the immigration "court of appeals."[94] Similarly, if the person is otherwise ordered removed, that decision may also be appealed to the BIA. Due process challenges in removal proceedings may be raised directly through a petition for review by a federal appellate court.[95]

In removal proceedings, one also has the opportunity to petition the immigration judge to administratively close their case.[96] Administrative closure is a "docket management tool" that allows a pending case to be removed from the active docket of the court or the BIA (Reichlin-Melnick 2017). It does not terminate the migrant's case but it does pause the proceeding and provides a reprieve from immediate removal. Although it is not considered a form of relief and it does not provide immigration status (the individuals will still be considered to be in removal proceedings), the case will remain closed indefinitely until a successful motion (by DHS or the noncitizen) to re-calendar the case. This allots valuable time to build a possible case for relief. It may also be useful to someone who has an application pending for a visa or other form of status (*Matter of W-Y-U-* 2017).

3.2.2 Administrative Voluntary Departure

In contrast, all of the options described above are foreclosed by taking voluntary return, which requires the person to waive their right to the hearing that would otherwise trigger this cascade of rights and opportunities. In other words, despite the increase in the consequences and stakes of voluntary return in recent years (as described in the section above), there are very few procedural protections for a person who waives their right to a hearing and takes voluntary return. Notably, officers are not required to read *Miranda*-type rights before the initiation of

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outcome (i.e. case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their counterparts with no representation.

[94] The BIA is an administrative appellate body in the Department of Justice's EOIR (i.e. the executive branch).

[95] In general, the grounds for judicial review of immigration decisions are very limited (see American Immigration Council 2013).

[96] The administrative closure of cases was a commonly used form of prosecutorial discretion during the latter years of the Obama administration. If a person in DHS custody was not considered a priority for removal (such as parents of U.S. citizen children with a long period of U.S. presence and no criminal record), there was a good chance during that era that they would have their case administratively closed by an immigration judge. Under the Trump presidency, however, they have become far less common; in fact, courts are actually actively re-calendaring formerly administratively closed cases (Semansky 2018).

removal proceedings, which voluntary return entirely bypasses.[97] What this means in practical terms is that those arrested on suspicion of immigration violations are precluded from a host of procedural rights and protections until after the service of an NTA. This is equivalent to a criminal defendant getting read their *Miranda* rights at their arraignment hearing as opposed to at the time of arrest and prior to questioning. Thus, in theory, until an officer initiates removal proceedings, he can hold (detain) and question an individual indefinitely without informing him or her of their rights and options under the law.[98]

Instead the migrant is ostensibly protected by some weak and minimal safeguards. These procedures are administered by frontline immigration officers who wield considerable discretion (Heyman 2009) and operate with very little accountability (Cantor and Ewing 2017). He or she is provided the opportunity by USBP to contact his or her consulate "without delay"[99] (Vienna Convention on Consular Relations 1963). Under the Vienna Convention on Consular Relations, to which the U.S. has been a signatory since 1969, foreign nationals who have been arrested or detained on criminal or immigration charges must be advised of their right to notify their consulate. The voluntary departure statute stipulates that officers may not grant voluntary departure unless migrants request it and "agree to its terms and conditions."[100] However it is not clear from the statute and regulations what those terms and conditions are and how the undocumented immigrant is made aware of the terms and conditions, other than through the specified form, which is sparse in information (see Appendix B for Form I-210). It does not provide the person's other potential options (e.g. a hearing) or the immigration consequences of voluntary return, as described above. Moreover, because the form is boilerplate, it does not provide any information that may be pertinent to the migrant's specific case and is thus information that only a lawyer can convey. The migrant's signature on this form signifies that he/she has consented to take voluntary departure in lieu of being put into removal proceedings. This decision cannot be appealed.

In terms of the benefits of accepting VR, the USBP may provide the migrant a period of up to 120 days to voluntarily depart the U.S[101] so that the person has time to arrange his or her

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[97] See *Matter of ERMF & ASM* (2011) ("Until an alien who is arrested without a warrant is placed in formal proceedings by the filing of a Notice to Appear (Form I-862), the regulation at 8 C.F.R. § 287.3(c) (2011) does not require immigration officers to advise the alien that he or she has a right to counsel and that any statements made during interrogation can subsequently be used against the alien").

[98] This is the case based on statute and regulations; nevertheless, there may be constitutional arguments per the Fourth Amendment or Due Process Clause that this would be improper.

[99] The Department of State Manual on Consular Notification and Access (August 2016) similarly states: "Whenever you arrest or detain a foreign national in the United States, you must inform the foreign national, without delay, that he or she may communicate with his or her consular offices."

[100] "[A]ny decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action—Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions" (8 C.F.R. § 240.25(c)).

[101] An "authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days" (8 C.F.R. § 240.25(c)). Before the

affairs before departing the country—"for example, to make childcare and housing arrangements for family members who stay behind, spend time with family, close bank accounts, or prepare a place to live in the country to which they are being deported" (Mehta 2014, 23). He or she also ostensibly avoids the immigration consequences of removal, which is a bar from reentering the U.S. for up to ten years.[102] On the other hand, by taking voluntary return, he/she may be barred from potential opportunities to formalize or otherwise acquire status, which are only available to individuals who have been placed in removal proceedings before an immigration judge (which voluntary departure bypasses), and/or they require a certain threshold of continuous physical presence in the U.S. (which VR breaks) to be eligible [103] (for examples, see Table A3), and/or they otherwise disqualify themselves from the form of relief because departing the country via voluntary return triggers the unlawful presence bar so they are unable to apply to enter lawfully for many years. Without a hearing before an immigration judge or the assistance of counsel, the options for relief and how one's eligibility for them is affected by taking voluntary return is not apparent. By taking voluntary return, the migrant is essentially shuttled down one narrow track with no off-ramp and little to no recourse. While voluntary return might benefit some individuals, for others who are eligible for relief, have the possibility of adjusting their status, or otherwise have means available to them to formalize their status, it is not a rights protective process.

3.2.3 Judicial Voluntary Departure

Although it is outside the scope of my research, it is noteworthy that voluntary departure may also be issued to an undocumented immigrant by an immigration judge as a form of

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enactment of IIRAIRA, there was no cap on the period of departure so it could be given for lengthy or indefinite periods, thus affording a quasi-form of immigration status to those individuals who otherwise have no status/legal remedy/pathway to remain in the United States (Heeren 2015). The cap to voluntary departure created by IIRAIRA was in response to criticism by immigration officials who had expressed frustration that individuals granted voluntary departure were "permitted to continue their illegal presence in the United States for months, and even years" (see *Dada v. Mukasey* 2008).

[102] The period of inadmissibility is determined by the reason and type of removal. For example, for arriving noncitizens (i.e. those being removed for the first time), the period is five years. In the case of a subsequent removal (i.e. if the noncitizen is removed once and returns but is removed again), the bar is 20 years. A noncitizen convicted of an aggravated felony is not permitted to return at any time and is therefore indefinitely inadmissible (i.e. "permanent" bar). In most cases, the period is 10 years. See INA 212(a)(9). In all these cases, the noncitizen can request a waiver of the bar, but this waiver is discretionary. In the case of a person facing the "permanent bar," the waiver is available after ten years.

[103] See *Vasquez-Lopez v. Ashcroft* (2003) (finding that a noncitizen who departs the United States pursuant to administrative voluntary departure interrupts his physical presence in the United States so that, should he/she return, he/she must begin anew the process of accumulating physical presence for immigration purposes). But see *Matter of Garcia-Ramirez* (2015) and *Matter of Castrejon-Colino* (2015) (creating a rebuttable presumption that voluntary departure breaks continuous physical presence in the absence of evidence that the alien was informed of and waived the right to a hearing).

discretionary relief from deportation. However, by virtue of the fact that it is issued to the migrant by an immigration judge at the beginning of or at the conclusion of removal proceedings (rather than before removal proceedings have been initiated, as is the case with administrative voluntary departure), it differs procedurally in important ways from administrative voluntary departure that make it a more rights-protective process. Judicial voluntary departures also make up a significantly smaller portion of all voluntary departures than administrative voluntary departures.[104]

An individual may take voluntary departure from an immigration judge at two stages. With regard to the first stage, he or she may request voluntary departure before the completion of removal proceedings (8 C.F.R. § 1240.26(b)). In practical terms, this means the migrant can request voluntary departure before or at their Master Calendar Hearing—i.e. after removal proceedings have begun but before the individual is scheduled for an "individual merits hearing" with the judge where the individual presents their defense and makes their case for relief from removal. It may be the case that the person anticipates that the immigration judge will find him or her removable and that he or she will not be eligible for other forms of relief. Thus he/she asks the judge for voluntary departure. At this stage, the individual must waive or withdraw all other requests for relief, concede removability, waive their right to appeal all issues, and show clear and convincing evidence that they intend and have financial ability to depart. Moreover, he/she must prove that he/she has not been convicted of an aggravated felony and is not deportable for national security or other public safety reasons. If he/she meets these requirements, the judge has the discretion to allow the person a period of up to 120 days to depart the United States on their own recognizance.

Alternatively, the individual may request voluntary departure after the conclusion of their removal proceedings (8 C.F.R. § 1240.26(c)). At this point, the person has been found removable and any applications for other forms of relief they had were denied, and they are requesting voluntary departure as a last resort. The requirements for voluntary departure at this stage are different and more stringent than those at the first stage. The individual must show evidence of physical presence for at least one year prior to the date the NTA was issued; show clear and convincing evidence that he/she intends and has the financial ability to depart; pays a bond (of at least $500) if the immigration judge requires it; shows good moral character for five years prior to the application; is not an aggravated felon or terrorist; and presents to the DHS a valid passport or other travel document sufficient to show lawful entry into her country. If those requirements are fulfilled, the immigration judge may grant the individual a period of 60 days to depart.

At both stages, the individual is requesting voluntary departure from the judge, and making that request in open court. This, in theory, guards against the possibility of coercion. Moreover, as described earlier, immigration judges are required to inform individuals in removal proceedings of their eligibility for various forms of relief. As a result, in the context of removal proceedings, individuals have the opportunity to consider and/or apply for other forms of relief before they make the decision to take voluntary departure. While it may be the case that a person

[104] In recent years, the number of judicial voluntary departures has fluctuated but remained well below the number of administrative voluntary departures. For example, in FY 2016, there were 9,596 judicial voluntary departures, compared to 106,167 administrative voluntary departures. In contrast, in FY2011 there were 30,333 judicial voluntary departures and 322,073 administrative voluntary departures (TRACImmigration 2018; Department of Homeland Security 2017b).

who takes voluntary departure from a judge still faces bars to admission based on their period of unlawful presence in the United States, the judge must inform them of the consequences beforehand. Moreover, this context affords migrants the chance to assess their other options and thereby make an informed choice about voluntary departure.

3.2.4 Summary Removal Procedures

As described in chapter 1, in recent years, the vast majority of individuals deported from the United States have been removed via "summary removal procedures," including expedited removal, stipulated removal, administrative removal, and reinstatement of removal (Wadhia 2015). These procedures were created or otherwise modified by Congress in 1996 to streamline deportations by giving more authority to immigration officers to issue formal deportation orders. Thus, like voluntary return, these dispositions bypass the courtroom. Accordingly, legal scholars have variously characterized them as "speed deportations" (Wadhia 2015), "shadow deportations" (Holper 2017), "removals in the shadow of the immigration court" (Koh 2016), and "diversions from the system" (Family 2008). In contrast to voluntary return, which under the statute and regulations the noncitizen can *choose* to take in lieu of removal proceedings (i.e. the individual otherwise has the right to a hearing), those subject to summary removal procedures have no statutory right to court proceedings before an immigration judge.[105]

Expedited removal allows immigration officers to issue removal orders which have the same legal effect as one issued by an immigration judge—a ban on future admission that ranges from five years to life (Koh 2016). Although once limited to migrants apprehended at ports of entry, expedited removals were expanded in 2005 to provide immigration officers with the authority to apply them to migrants apprehended between ports of entry and within 100 miles of the U.S. border who cannot furnish evidence they have been physically present in the U.S. for a period longer than 14 days immediately before the arrest (Shachar 2009). Regulations stipulate that as a matter of prosecutorial discretion, immigration officers are only supposed to apply expedited removal to Mexican nationals apprehended between ports of entry with histories of criminal or immigration violation,[106] but it is notable that the vast majority of expedited removals are of Mexican nationals.[107]

Reinstatement of removal permits immigration officers to reissue a prior order of removal without reopening or reviewing the prior order of removal; there is presumably no statute of limitations, which means a person can be subject to reinstatement at any time after their reentry (Koh 2016). It carries a bar on admission for up to 20 years; if the person has been convicted of an aggravated felony, they face a lifetime bar. Administrative removal allows immigration

[105] The only exception is stipulated removal, which, similar to voluntary return, requires the noncitizen to waive their right to a hearing. One distinction between voluntary return and stipulated removal, though, is that a person in stipulated removal proceedings is ordered removed by an immigration judge after a paper review of the stipulated order to ensure the waiver is "knowing, voluntary, and intelligent" (see Table A5). There is no such review for waivers in voluntary return.

[106] 69 Fed. Reg. 48878 (August 11, 2004).

[107] 75 percent of all expedited removals in 2013 were from Mexico; 77 percent in 2012; 83 percent in 2011; and 77 percent in 2010 (see Cassidy and Lynch 2016, 14).

officers to deport non-citizens who are not lawful permanent residents (LPRs),[108] and who have been convicted of certain criminal offenses, including "aggravated felonies" which are not necessarily felonies under criminal laws (Wadhia 2015). Individuals in administrative removal proceedings have an opportunity to rebut the charges against them but have a very small window of time to do so. Moreover, they are often serving a jail sentence or are in immigration detention, which poses challenges to collecting the necessary evidence for the rebuttal of allegations. Finally, in stipulated removal, noncitizens "agree" to accept a removal order and waive their right to an immigration court hearing (Koh 2013). Like voluntary return, immigration officers issuing stipulated removal orders are tasked with obtaining the signature on the stipulated order and thus securing the noncitizen's waiver of their right to see a judge. In contrast to voluntary return, a judge must verify that the waiver was "voluntary, knowing, and intelligent" in cases where the noncitizen is unrepresented (by legal counsel or another representative, including a "near relative, legal guardian, or friend"), before issuing the removal order. However regulations permit the judge to conduct a paper review and do not require the migrant to actually appear in court (Koh 2013).

Although immigration officers have the discretion to terminate summary removal proceedings and place the noncitizen in full removal proceedings before an immigration judge, for the most part, the statutes and implementing regulations do not provide guidance on how to exercise this decision in the statute and regulations nor does it appear that immigration officers are exercising this discretion (Mehta 2014). If they exist at all, the channels for challenging the charges underpinning the removal order or an immigration officer's decision regarding removability are often limited and very difficult to pursue while migrants are in detention, which is often the case. The pursuit of these avenues is also largely dependent on immigration officers—to inform custodial migrants of their right to these challenge procedures and/or to administer the procedures themselves if they are internal. Noncitizens in the summary removal proceedings are also barred in many cases from applying for most forms of relief they could apply for in removal proceedings. The avenues for relief they do have, if any, are very narrow and challenging to obtain (see Table A4 for more on these procedures).

An emerging strand in the legal scholarship argues that factors such as the lack of government-appointed counsel, information deficits inherent to the process, the coercive effect of detention, the speed with which these removals can occur (especially for Mexican nationals apprehended in the US-Mexico border region), the administration of complex and ambiguous immigration laws quickly by low-level officers with little training or oversight (and in the context of bureaucratic rigidity) may all pose impediments to and ultimately suppress the mobilization of any rights and protections custodial migrants have in these procedures. As a result, they face impediments to advancing in the system and pursuing the very limited options for recourse they have, including internal agency opportunities to contest officers' removal determinations, for judicial review of officers' decisions, and to pursue limited avenues for relief, such as claims for asylum (Family 2008; Frost 2015; Koh 2016, 2013; Wadhia 2015). They can thus lead to erroneous deportations of those with equities who would otherwise be eligible for

[108] The category of non-LPRs may still encompass those with stakes in the U.S. Non-LPRs may include individuals with conditional lawful permanent residence (1) due to having acquired status through less than two years of marriage; (2) valid temporary visa holders (e.g. students or high-skilled workers); and (3) individuals with limited immigration relief including DACA or withholding of removal (Koh 2016).

forms of relief in court or otherwise adjust their status, those seeking asylum, and those with legal status.

3.3 Conclusion

The foregoing sections described changes in social and legal conditions which have created a settled population of undocumented Mexican immigrants in the United States vulnerable to the policing reach of the USBP and rendered voluntary return punitive for long-term residents who take it (without a concomitant increase in procedural rights). Given this contemporary context, and the historical backdrop of racialized voluntary returns described in chapter 2, there is reason to be concerned about what the practice of voluntary return looks like on the ground today. How do USBP officers implement voluntary return procedures? Specifically, how do Border Patrol officers obtain consent from migrants on the ground? In this new context, where there is more at stake for the immigrant but still the same few protections, meaningful consent to voluntary departure is vital. But, as suggested above and described in more detail in chapter 6, the statute and regulations provide very meager guidance on the issue of consent, as do the courts. Aside from suggesting that voluntary departure is not a consensual process, [109] the literature tells us virtually nothing about the procedures that make a voluntary departure purportedly "voluntary" and how they are implemented by immigration officers. Moreover, given the vast reach of USBP policing authority, what are the effects of the practice of voluntary return on the border community? Before the second half of this dissertation examines these questions, the next chapter describes the research design and methods for the empirical portion of the dissertation.

[109] For example, in his study, Heyman (1995) describes voluntary departure as "an alternative to formal deportation, employed especially at the Mexican border, whereby arrested aliens are permitted (indeed, encouraged) to waive their rights to a deportation hearing and return to Mexico…" (266).

Chapter 4 Research Design and Methodology

This dissertation takes a "law-in-action" approach (Macaulay, Friedman, and Mertz 2007) to contribute an original empirical study of voluntary return, one that brings nuance to our understanding of the practice of voluntary return. The study of the law-in-action, or law in its social context, is a central preoccupation of law and society, or socio-legal, research (Cotterrell 2004; Seron and Silbey 2004; Friedman 1986). Scholars in the law and society tradition study formal law (law-on-the-books), such as statutes, regulations, and judicial decisions, in relation to social systems that shape how the law-on-the books is interpreted and enforced on the ground. Thus the focus is on "what law does rather than what it ought to do" (Silbey 2002, 860). This gap, which commonly exists between the law-on-the-books and the law-in-action, is of "canonical concern" for law and society researchers (Calavita 2010, 9). By studying it, law and society scholars reveal much not only about "real law" but the social institutions that are tasked with upholding law's promise but are unable or unwilling to deliver on it (Calavita 2010, 9).

Based this approach, my dissertation examines the following central research questions. First, how do USBP officers implement statutory voluntary departure on the ground? One strand of law and society scholarship, which focuses on the relationship between law and organizations, has long shown how organizational context (such as formal and unwritten rules and policies and internal structures, practices, routines, and culture) shapes law/rights and legal processes (see, e.g., Edelman 1990; Erlanger, Edelman, and Lande 1993). Accordingly, my question is interested in how the law of voluntary departure is interpreted in formal USBP policies and procedures and how USBP officers in turn apply those on the ground. It focuses in part on the issue of "voluntariness" that is the defining feature of voluntary departure and central to keeping its promise of due process in court. In so doing, this dissertation seeks to explain how officers obtain consent from custodial migrants to waive their right to removal proceedings and how factors within the institutional setting shape that process. My second central research question asks, what are the effects of border policing via voluntary return on the border community? Chapter 3 described the vast reach of the USBP into towns and cities well within the boundaries of the United States and showed the widespread and invasive nature of enforcement in the border region. It also described the how immigration consequences of taking voluntary return. In this social and legal context, it examines whether voluntary return in practice lives up to its characterization as a benefit over formal removal.

Law and society is an interdisciplinary, social-scientific tradition that draws on a vast range of methodological tools to study law and social processes. Scholars in this tradition who study how organizations shape law have sometimes embedded themselves within the institutions of interest in order to collect data through, for example, extensive interviews with institutional actors and/or ethnography. However, studying "real law" (Calavita 2010) in the border enforcement context poses uniquely formidable challenges, especially with regard to access . The U.S. Border Patrol is an opaque agency that is notorious for its lack of transparency (UC Irvine School of Law International Justice Clinic 2015). Despite the significant Congressional funding of its activities and its broad statutory and regulatory policing authority which affects hundreds of millions of people, including U.S. citizens (see chapter 3), it does not make data about its policies, procedures, and operations available to the public. Much of what we do know about the USBP is the result of hard-won lawsuits by legal advocacy organizations through the Freedom of Information Act (FOIA). Moreover, as a USBP practice, voluntary return is an inherently informal, fast, and thus largely invisible process. Finally, as I will discuss in further detail below,

given constraints on my data collection protocol imposed by the U.C. Berkeley Institutional Review Board (IRB) and the unusually oppressive political climate for immigrants in recent years, the people who have been subject to this process were similarly challenging to obtain access to.

In light of these challenges, I examine my questions through a case study of voluntary departure, consisting of semi-structured, in-depth interviews with border advocates and immigration practitioners in the border city of San Diego, California. I supplemented this data with an analysis of relevant USBP organizational materials obtained through FOIA litigation by the American Immigration Council (AIC), as well other available documentary evidence, including standards and formal policies governing CBP detention and custodial standards. Broadly, the goal of interview questions for advocate and attorneys was to uncover systemic patterns in the practice of voluntary departure based on their clients' experiences with voluntary return and their own experiences trying to assist those clients. Because there is so little known empirically about the contemporary practice of voluntary return, the objective of data collection through the case study was to collect nuanced, in-depth data in one setting as an explanatory theory-generating exercise (Glaser and Strauss 1967). By providing an understanding of the "conceptual parameters" (Luker 2009, 207) of voluntary return, this case study serves as a starting point for comparisons with the practice of voluntary return (or other fast-track deportation procedures) in USBP sectors in other parts of the border.

In addition to interviews, I examined a range of relevant organizational materials, obtained from the CBP through FOIA litigation by the American Immigration Council, that provide insight into the context of USBP custody and culture, the voluntary return process, and border enforcement more broadly. These include DHS and CBP guidance, guidelines, directives, rules, policies, procedures, instructions, criteria, standards, agreements, correspondence, communications, and training materials. I also analyzed other documentary evidence regarding USBP detention policies and standards. Although these documents do not account for discretionary decisions USBP officers may make, they are nevertheless helpful because they provide a baseline for how law enforcers are trained and instructed to think about their legal obligations. Finally, this dissertation relies on statutory texts, case law, and legal scholarship in an effort to bring legal and socio-legal scholars into conversation with one another on the subject of summary deportations.

In the sections that follow, I describe my research design in detail, including my choice of San Diego as the site of my case study, my data sources, methods of data collection, and sampling method. I subsequently describe how I analyzed my data and mitigated the risk of bias. I conclude with an explanation of the scope and limitations of my project.

4.1 Data Collection

4.1.1 Qualitative Interviews

Between February 2015 and March 2017, I conducted semi-structured, in-depth interviews with 21 immigration practitioners and 8 immigrant advocates based in San Diego. These served as bottom-up informant interviews (Johnson and Weller 2002), interviews with knowledgeable insiders of the border enforcement regime in San Diego who could provide insight into the poorly understood practice of voluntary return. The semi-structured format allowed for both an investigation of a predetermined set of questions asked of each respondent, and the exploration of unanticipated issues and perspectives that emerged during the interview.

Qualitative interviews have an iterative, continuous quality to them through which the researcher "repeat[s] the basic process of gathering information, analyzing it, winnowing it, and testing it," and each iteration brings the researcher "closer to a clear and convincing model of the phenomenon you are studying" (Rubin and Rubin 1995, 46–47).

Interviews were digitally recorded with the consent of the respondent and transcribed for the purposes of analysis. Digital recording was important because I was interested in working from verbatim transcripts. In particular, I quote interviewees in my project. Moreover, I was interested in capturing the nuances and complexities of respondents' speech to allow me to understand *how* a respondent saw a particular event or reacted to it (not just what the event was). These small but important details and distinctions might otherwise have been missed through note-taking. Thus, I value the fidelity of the transcripts of digitally recorded material.

I selected San Diego as my case study site because it is located in the southwest border region, where the USBP (the immigration enforcement agency that has historically implemented the most voluntary returns) concentrates most of its enforcement (see chapter 3). Moreover, the San Diego sector is part of the Southern District of California, which is the only southwest border district that has chosen not to adopt Operation Streamline. In 2008, all southwest border sectors (with the exception of California), and their overlapping Border Patrol sectors, adopted Operation Streamline, which mandates the criminal prosecution of virtually all undocumented border-crossers (J. J. Lydgate 2010).[110] In those sectors, undocumented immigrants who used to overwhelmingly be voluntarily returned are now, to the extent possible, processed through Operation Streamline before they are formally removed.[111] Conversely, San Diego sector has retained discretion over who it prosecutes, and has opted not to participate in Streamline, in part because of the lack of political support for it.[112] Thus, it has historically relied more on the use of voluntary return than other sectors and makes it an ideal place to study the practice of voluntary return.

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[110] Operation Streamline was initially conceived because agents in Del Rio sector (Texas) did not have sufficient detention space for OTMs they placed in expedited removal proceedings, who must be mandatorily detained. Their initial idea was to have the US Attorney's Office prosecute 100 percent of OTMs so that they could be processed for expedited removal while in criminal detention, thus solving the problem of insufficient DHS detention space. However, the USAO flatly rejected the plan on Equal Protection grounds. In response, the Border Patrol conceived of Operation Streamline, which prosecutes *all migrants*, Mexicans and non-Mexicans (Lydgate 2010, 493).

[111] In reality, "[n]o Operation Streamline jurisdiction actually prosecutes *exactly 100%* of border apprehensions. The Border Patrol, as a matter of policy, does not refer for prosecution juveniles, parents traveling with minor children, certain persons with health conditions, and others who require prompt [voluntary] return to their country of origin for humanitarian reasons" (J. Lydgate 2010a, 3). The resource-intensive nature of Operation Streamline and resource constraints on the part of the USAOs also dictate that there are a limited number of people who can be processed through Streamline any given day (see Capps, Hipsman, and Meissner 2017). When the volume of undocumented immigration is higher than Streamline personnel and resources permit, the USBP may be forced to revert to the traditional practice of voluntary returns (see U.S. Government Accountability Office 2017a).

[112] According to U.S. Attorney Karen Hewitt, the district's prosecution plan is "consistent with what the public [in the Southern District of California] would like to see" (J. Lydgate 2010b, 2).

I recruited participants directly through email. Their participation was voluntary and confidential. The vast majority of interviews were conducted over the telephone and lasted between 30 minutes and 70 minutes, with most lasting about one hour. Follow-up interviews were conducted with those respondents whose interviews required clarification and/or generated more questions. I used a snowball sampling process to build the sample, by which referrals from initial subjects were used to identify additional potential subject (Weiss 1995). Snowball sampling is a purposeful sampling strategy that is useful for conducting exploratory qualitative research. It is a particularly helpful process for "locating information-rich key informants," and "it begins by asking well-situated people: 'Who knows a lot about ___?'" (Patton 2001, 237). To mitigate the risk that I was consulting only one network of advocates and one network of practitioners in San Diego, I began with two nodes of entry ("seeds") for my practitioner interviews and two nodes of entry for my advocate interviews, on the basis of referrals by four immigration scholars in three different departments/schools (sociology, political science, and law) at two institutions in Southern California who had knowledge of the advocacy landscape and/or knew practitioners in San Diego and could provide me entrée. As is customary in purposive sampling (Tashakkori and Teddlie 2010), I added subjects to the study until respondents converged on a common set of responses, or until interviews reached a "saturation" point, suggesting further interviews were unlikely to yield new information (Teddlie and Tashakkori 2008).

All of my interviews were digitally recorded and submitted for transcription to a transcription service almost immediately following the interview, with the exception of two interviews.[113] Analysis was an iterative process and began immediately after my first interview. During interviews that were digitally recorded, I also took notes in the event of a recording failure or the loss of the recording before I had the chance to transcribe the interview[114] and as a way to remain actively engaged with emergent data and themes. Moreover, following each interview, I engaged in an instant "self-debriefing" process in which I reflected on and wrote down emerging themes and findings within that interview in an analytical memo and compared them to data collected in previous rounds, as well as data from documentary evidence (Wengraf 2001; see also Luker 2009). Debriefs were helpful in identifying gaps in my data that required, for example, refining a line of inquiry (Wengraf 2001). Furthermore, they enabled the recording of "non-linguistic" data that the tape-recorder cannot capture (Wengraf 2001, 144). Accordingly, they greatly informed my data collection and my analysis, especially the coding portion.

I relied on a debriefing template to provide guiding questions that largely tracked the questions and themes in my interview protocol, as well as some broad questions including what is it a case of, what kinds of theories might explain what I am hearing in my interviews, and what kinds of variables (categories) might be emerging from my interviews (Luker 2009). However, in general I wrote my notes in "free-flow" form. As part of each debrief, I assessed my impressions of the interview (e.g. what went well and what didn't and what I might do differently next time), summarized the main themes, described patterns I discerned both within the interview and in relation to past interviews, formulated follow-up questions about parts of the interview that were unclear, and recorded any additional notes and observations about the

[113] In these cases, the interviewee requested not to be recorded so I took detailed hand-written notes, which were typed up immediately after the interview.

[114] This occurred one time in the case of a follow-up interview with an attorney because the servers belonging to the transcription service I use crashed.

interview and interviewee. I either hand-wrote or typed most of my debriefs, but in some instances, I debriefed by speaking into a digital recorder and subsequently transcribed the recording.

Upon receipt of each interview transcript from the transcription service (usually within 24 hours), I read it while simultaneously listening to the interview audio to ensure accuracy of transcription. During this process, I took additional notes and modified my interview protocol in light of new insights or questions emerging from the data. I also scrubbed the transcript of information that would identify the interview participant and identified the transcript via an interview number. The key to identifying the interview transcripts was stored in an electronic database which was encrypted.

In advance of every interview, I emailed the participant the consent form[115] (Appendix F), which provides information about the study and asked for the individual's consent to participate via email. At the beginning of each interview, I asked the participant if they had reviewed the consent form, answered any questions they had, and asked them to confirm orally their consent to participate. Subsequently, interviews followed a guide (Appendix G) with open-ended questions about individuals' background as an immigrant lawyer or advocate and the experience of advocates' and attorney's clients with voluntary return. Specifically, I asked practitioners about their practice area, the size of their practice, and length of practice in San Diego. I asked border advocates what their advocacy organization does, their particular role within the organization and what a typical day looks like, and the length of time they had been engaged in border advocacy in San Diego. I then asked them if they had clients who had been affected by voluntary return and if so, how. Subsequently, I asked them to provide me a "grand tour" of their clients' experiences with voluntary return in order to elicit rich details about how voluntary return is practiced on the ground (Spradley 1979). In the course of this "tour," I asked probing questions about how they came to meet and consult with or be hired by their clients, the circumstances under which their clients were apprehended and detained by the Border Patrol; what the process of being offered and "accepting" voluntary departure looked like (e.g. the questioning they were subject to, the information they received—or did not receive, as the case often was); and the impact taking voluntary return has had on their clients. Moreover, I asked advocates and practitioners to make broad judgments about what proportion of their clientele (past and present) and/or potential clientele (i.e. cases where practitioners consulted with an individual but did not take their case) has been affected by voluntary return, the impacts on the border community, and their perception of how widespread this practice is within San Diego and outside. I also asked about how the practice of voluntary return in San Diego had changed over time, including the effects of *Lopez-Venegas v. Johnson* (2013) lawsuit and settlement. I requested that participants ground their responses in specific examples and incidents (without breaching attorney-client privilege where relevant) as a means of eliciting concrete experiences (Weiss 1995). I also asked interviewees for their assessment of broad patterns in the practice of voluntary return in San Diego as a check on the themes I was identifying in my data.

With the exception of two practitioners, who was are staff attorneys for a national civil liberties organization, immigration attorney respondents were either solo practitioners or part of a small private firm of no more than four or five other practitioners. At the time of the interviews, they had practiced in the San Diego area for two to 25 years, with most practicing in

[115] My IRB protocol did not require practitioner and advocate participants to sign the consent form. Oral consent was considered sufficient.

San Diego for between 10 and 15 years and providing a range of services.[116] Immigrant advocate respondents were all part of long-present border advocacy and civil rights organizations in San Diego, focused on, among other things, documenting abuses by the USBP, providing legal advocacy services, and advocating for more progressive border enforcement policies, including more accountability for and transparency of border official actions. Most had been involved in border advocacy in one form or another for upwards of 20 years and had experience advocating for the rights and welfare of the immigrant community on both sides of the border. The length of advocates' and attorneys' experience in San Diego suggests they are well-positioned to provide a perspective of the practice of voluntary return in the region over time and not merely a brief snapshot of it.

Practitioners and border advocates largely described these clients (and potential clients they consulted with, in the case of practitioners) as Mexican nationals and long-term residents of the United States—and of the border region specifically—ranging from a period of five to upwards of twenty or more years. They commonly had family ties in the form of a U.S. citizen spouse and/or children. Practitioners estimated that anywhere between a third and three-quarters of their Mexican clientele had a voluntary return in their past, sometimes more than one and reported that their clients took voluntary return(s) between the late 1990s and 2000s.

Interviews focused on uncovering systemic patterns in the practice of voluntary departure based on their clients' experiences and their own experiences trying to assist those clients. Some lawyers provided accounts of voluntary return based on the experience of helping clients in USBP custody as these clients were being actively pressured to take voluntary return. In other words, in these accounts, the lawyer became involved while the migrant was still in USBP custody (i.e. before the migrant was voluntarily returned). However, it became increasingly clear from listening to the accounts of lawyers that in most cases, attorneys were not involved with administrative (i.e. pre-hearing) voluntary departures while their clients were in USBP custody. Typically, the issue of voluntary return surfaced for the attorney when their client consulted them on another matter—for example a petition for a family-sponsored Green Card or because their client hired them to defend them in removal proceedings (resulting from a separate apprehension). (The implication is that these individuals, despite being voluntarily returned, ended up returning to the US). At the time then when the attorney was reviewing the client's immigration history/screening the person (i.e. asking them about their entries and exits), the details of that experience with voluntary return came to light, thus coloring their case. As a result, the insights of attorneys here are (largely—but not exclusively) based on the experience of clients who didn't consult them for reasons related to the voluntary return per se but who found out about the voluntary return indirectly, as they were helping their client with another issue, which the voluntary return complicated.

This is noteworthy because it suggests that even if undocumented immigrants do perceive their rights were violated, there are barriers to legal claims-making that deter them from seeking the help of a lawyer.[117] Alternatively, this finding may more troublingly signal that immigrants

[116] Their services included but were not limited to removal defense, asylum cases, family-based adjustments of status, consular processing for immigrant visas, naturalization, U-visas (for victims of crime), T-visas (for victims of trafficking), S-visas, Violence Against Women Act (VAWA) petitions, and hardship waivers.

[117] For more generally on the barriers to legal mobilization and claimsmaking, see Felstiner et al. (1980).

don't perceive what happens to them during the voluntary return process as legally problematic or as don't recognize it as rising to the level of a legal grievance and thus don't mobilize their the law to obtain a remedy. Regardless of the reason, the dearth of legal claims-making in this context is evidence of an invisible form of rights suppression and ultimately a subtle but impactful exercise of power by the USBP (see chapter 7).

The fact that lawyers learned of these voluntary return experiences only indirectly was an advantage for my study rather than a drawback, as I was able to tease apart this insight and ask attorneys and advocates about, among other things, their experience providing legal help to clients in the border region, as a way of revealing the challenges that individuals in the custody of USBP face in getting access to their rights. The utility of these interviews thus goes beyond that of an "informant interview." They provide insight into a system of racialized immigration law enforcement against Mexican nationals via the practice of voluntary return that stretches well beyond the thin line of the border into the interior of the U.S. and which has effects on the border community that are comparable to the stratifying effects of mass incarceration (see chapter 5). They also reveal the structures that render voluntary return a subtly coercive practice and the structural problems with border enforcement more broadly which undermine due process (see chapters 6 and 7). Conversely, they shed light on the import of immigration courts, despite their limitations, for meaningful access to rights and justice (see chapter 7).

Moreover, from a sampling standpoint, interviewing advocates and attorneys was useful because their responses were based on the experiences of a large pool of individuals—their clients who had taken voluntary return. In order to solicit a wide range of experiences of undocumented immigrants with voluntary return by interviewing individual undocumented immigrants, it would have been incredibly difficult and time consuming, if not impossible, given the challenges of getting access to and recruiting these respondents. Undocumented immigrants are a hidden population for whom there is no sampling frame/boundary, thus making a random/representative sample nearly impossible.[118] Moreover, the repressive legal and political climate, as well as restrictions placed by the Office for the Protection of Human Subjects on my data collection in light of increasingly stringent surveillance and enforcement measures under President Trump, posed additional challenges. In spite of several attempts through multiple channels at recruiting undocumented immigrants to speak with me (*Lopez-Venegas* plaintiffs, through an immigrant rights organization, and through lawyers and advocates themselves), these yielded only a handful of interviews. Conversely, by interviewing even one attorney or advocate, I received access to the experiences of the many undocumented immigrants who were their clients and were subject to voluntary return. I achieved a breadth in data that would have been very challenging to obtain from interviews with undocumented immigrants.

4.1.2 Documentary Evidence

USBP Organizational Materials from the American Immigration Council FOIA Litigation

The interviews are supplemented with a wide range of USBP organizational materials which provide context to and evidentiary support for the findings from advocate and attorney interviews—namely that the practice of voluntary return occurs in a context where there are very

[118] For more on the methodological and ethical challenges of sampling hidden and at-risk populations, see Jacobsen and Landau (2003).

little if any procedural due process protections for custodial migrants subject to voluntary return. These materials were obtained through Freedom of Information Act (FOIA) litigation by the American Immigration Council (AIC) against the U.S. Customs and Border Protection (CBP).[119] The AIC is a non-profit legal and policy advocacy organization which relies on research and policy analysis and litigation to, among other things, advocate for fair immigration policies, defend the rights of immigrants, and educate the public on immigration-related issues. It requested disclosure of these records in order to advance "public understanding" of DHS and CBP's enforcement practices in general, and the agency's use of voluntary return in particular, about which there is no information in the public domain.[120] The AIC cited that as part of CBP's broad policing power over U.S. borders, CBP officers "frequently manage the 'voluntary return' of noncitizens" and they do so in ways that are not consistent with the law/due process.[121] The complaint cites that according to immigration advocates, officers don't always explain to noncitizens the consequences of accepting voluntary return and in some cases coerce custodial migrants to accept voluntary return, and that these practices have "profound adverse consequences" for noncitizens who take it (2). Thus, the AIC argues that an understanding of these practices would be helpful to noncitizens who are subject to the policing power of the CBP, immigration attorneys who represent these noncitizens, immigrant advocacy organizations interested in human/civil rights, and other members of the public who are concerned with CBP's policies and operations and how they affect the community.[122]

Accordingly, the AIC made a detailed request for a broad range of materials. It requested from the CBP the "disclosure of any and all records that were prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security (DHS) and/or U.S. Customs and Border Protection (CBP) that describe, refer or relate to CBP's enforcement operations and activities within 100 miles of the US-Mexico border aimed at and/or resulting in voluntary returns of individuals to their countries of origin from January 2009 to the present.[123]" More specifically, it asked for DHS and CBP guidance, guidelines, directives, rules, policies, procedures, instructions, criteria, standards, agreements, correspondence, communications, and training materials concerning voluntary returns.[124] It also requested documents related to

[119] On June 15, 2011, the AIC sent a letter to CBP's FOIA office requesting disclosure of voluntary return materials. CBP's request was essentially non-responsive, furnishing only two documents consisting of four pages. On June 7, 2012, after continued resistance from the CBP, the AIC filed a lawsuit against the DHS for failure to disclose the requested records.

[120] Letter re FOIA request from the AIC to CBP FOIA office, June 15, 2011, page 4. On file with the author.

[121] American Immigration Council vs. United States Department of Homeland Security and U.S. Customs Protection, filed June 7, 2012, United States District Court for the District of Columbia, page 2.

[122] Letter re FOIA request from the AIC to CBP FOIA office, June 15, 2011, page 4. On file with the author.

[123] Letter re FOIA request from the AIC to CBP FOIA office, June 15, 2011, page 1. On file with the author.

[124] American Immigration Council vs. United States Department of Homeland Security and U.S. Customs Protection, filed June 7, 2012, United States District Court for the District of Columbia, page 5.

complaints and investigations regarding potential misconduct, coercive tactics and mistreatment of apprehended individuals by DHS or CBP agents within 100 mile of the US-Mexico border.[125]

In response to the complaint, the CBP requested searches for records from several offices within CBP in which responsive records could likely be found: the Office of the Border Patrol (OBP), the Office of Field Operations (OFO), the Office of Internal Affairs (IA), the Office of Training and Development (OTD), the Office of Public Affairs (OPA), and the Office of Chief Counsel (OCC). Ultimately this yielded hundreds of pages of records, including voluntary return procedures, training materials (e.g. instructor guides, excerpts from the Border Patrol Handbook, glossaries), a detailed list of complaints of physical abuse filed against CBP personnel from 2009 to 2012, documents regarding the circumstances under which CBP officers should consider prosecutorial discretion, numerous incident reports, email correspondence, internal memos, internal newsletters ("CBP Today") public affairs guidance on various topics such as Operation Streamline and unaccompanied minors, and documents related to the implementation of the Consequence Delivery System for each sector. Together, these documents help us understand USBP's rules and policies, how the USBP operationalizes them, and the organizational culture behind them.

As is the case with any data source, these data are imperfect and suffer from a number of limitations which make them incomplete, namely selective deposit/selective retention issues common to archival research. For example, many of these records are excerpted from larger documents, like Instructor Guides and Field Training Programs. As a result, I often only have part of the original document. Moreover, under the FOIA, certain information contained in the responsive records is exempt from disclosure in order to protect personal privacy and if the disclosure could reasonably be expected to circumvent the law.[126] As a result, some of the records disclosed by the CBP are redacted in part or in full.

It is important to put these data in context. Part of the underlying motivation for this dissertation research is that the Border Patrol is a black box. Little is known about its inner workings and its operations on the ground in large part because it is so challenging to get access to the information that would provide a better understanding. In the case of these data, the AIC had to rely on the CBP to produce them. Short of the CBP letting the AIC read through and make copies of their records, this is what they were able to legally obtain. Thus, in spite of its limitations, this is still valuable data that we didn't have access to before and which provides important evidence of USBP's policies, organizational culture, and context for its practices.

In addition, in spite of the wide range of documents and multiple time periods they come from, they all reflect similar themes. I was thus able to corroborate my interview findings by triangulating different kinds of evidence from these documents in support of my argument. Triangulation is a qualitative research strategy to test validity through the convergence of

[125] American Immigration Council vs. United States Department of Homeland Security and U.S. Customs Protection, filed June 7, 2012, United States District Court for the District of Columbia, page 5.

[126] 5 U.S.C. § 552(b)(6) (protects from disclosure "personnel and medical files and similar files" the release of which could constitute an unwarranted invasion of personal privacy); § (b)(7)(C) (protects from disclosure information compiled in a law enforcement context if its closure could constitute an unwarranted invasion of personal privacy); and § (b)(7)(E) (protects from disclosure information compiled for law enforcement purposes, "if such disclosure could reasonably be expected to risk circumvention of the law[.]")

information from different sources (Morrill and Fine 1997). The fact that the same themes are consistently found in different kinds of documents is evidence that what is reflected in these documents has to do with the culture of the organization.

Moreover, I actively searched for countervailing/counter-hypothesis evidence in the records disclosed by the CBP but found very little of it. Notwithstanding the fact that a FOIA request by law requires a complete response, the CBP had every incentive to produce documents in response to the FOIA request in order to demonstrate they were in compliance with administrative voluntary departure procedures. If they had those records, they arguably would have produced them because it would have been in their interest to do so—but they did not. As a result, one could argue that the records they disclosed are in fact the best evidence they could marshal to show compliance with due process. A dearth of data about how voluntary return operated in certain time periods, particularly in the early years (reflected by the lack of documents produced by the CBP in response to the FOIA request) may be evidence that there just wasn't a lot of process. In terms of the fact that the USBP materials seem to become more developed over time in terms of rules and procedures for the administration of voluntary return may reflect the fact that the USBP has increasingly been under scrutiny and the improvement in training procedures, as reflected in these materials, reflects more awareness of and a response to this scrutiny.

Other Documentary Evidence

In addition to the FOIA materials, I consulted materials about CBP and USBP detention policies and standards that were publicly available on the internet. They are relevant to the extent that they provide information about the custody and detention context where voluntary returns are often "accepted." Together these documents provide information about how the facilities are designed and should be used, as well as the rules, policies and standards governing, among other things, the conditions of detention, how detainees are supposed to be treated, time limits on detention, and detainees' access to rights.

The U.S. Border Patrol Policy on "Hold Rooms and Short Term Custody" (hereinafter "USBP Detention Policy") (2008) is one such document. It is a "directive [from David V. Aguilar, the Chief of the U.S. Border Patrol at the time] that establishes national policy for the short-term custody of persons arrested or detained by Border Patrol Agents and detained in hold rooms at Border Patrol stations, checkpoints, processing facilities, and other facilities that are under the control of U.S. Customs and Border Protection (CBP)." This is the policy that currently remains in effect. It provides rules regarding the duration of detention and provisions such as meals, restrooms, drinking water, and bedding, and access to a telephone. At the end of the document, it reads that "this document is an internal policy statement of U.S. Customs and Border Protection and does not create or confer any rights, privileges, or benefits on any person or party" (USBP Detention Policy 2008, 14). In other words, the content of this document does not create any rights that are legally enforceable by any person or entity. It is relevant here that neither are there any statutory or regulatory standards for CBP detention.

The U.S. Customs and Border Protection National Standards on Transport, Escort, Detention, and Search (hereinafter "CBP TEDS") are new standards released in 2015, which apply to all CBP components, but do not replace the 2008 memorandum from Aguilar, which applies solely to Border Patrol facilities. CBP TEDS (2015) is an "agency-wide policy that sets for the first nationwide standards which

govern CBP's interaction with detained individuals" (3). It "incorporates best practices developed in the field, and it reflects key legal and regulatory requirements" (CBP TEDS 2015, 3). The policy document begins by stating some general rules with regard to, among other things, accommodations for those with special needs, language access, and duration of detention. Then it describes various policies related to a few topics. Of relevance to this study are the policies regarding secure detention standards, including hold room standards, consular contact, access to legal service providers, telephones, bedding, food and beverage, and drinking water. These are publicly available, non-binding agency-wide minimum standards that the agency in theory holds itself.

In contrast, the U.S. Customs and Border Protection Security Policy and Procedures Handbook (hereinafter "CBP Security Handbook") (2009) is an internal document. The Handbook (2009) provides "mandatory minimum requirements for CBP managers to implement and improve the security posture for their designated CBP area of responsibilities" and is intended for CBP managers. Of relevance to this study are the parts relating to "Hold Rooms," where custodial migrants are housed pending a decision from the agency about what to do with them. It defines what a hold room is, which CBP facilities have hold rooms, and describes space-related requirements including toilet facilities, among other things. It also provides maps with the layouts of the facilities and each kind of room—hold room vs. search room vs. interview room vs. processing area—and is therefore helpful in providing a glimpse into what the inside of these facilities looks like.

4.2 Data Analysis

As mentioned above, data analysis was an iterative process which involved note-taking during interviews as well as self-debriefs in the form of analytical memos immediately following interviews. These notes and memos became part of my data set, along with my interview transcripts and my documentary evidence, which I read together for emergent codes and themes with the ATLAS.ti qualitative coding software using a grounded theory approach. Grounded theory is an analytical approach which builds theory up from empirical data by relying on an iterative process of coding, writing analytical memos, and concept mapping (Glaser and Strauss 1967; Corbin and Strauss 2014; Charmaz 2006). The themes and codes I developed during each interview informed subsequent rounds of data collection. As data collection progressed and I began seeing signs of data saturation, I distilled my coding process to build on the recurring themes I found in my data: racially disparate enforcement and effects; structural coercion and subtle institutional power; and the managerialization of due process (Glaser and Strauss 1967). I then wrote a series of analytical memos wherein I examined how each of these themes played out and how they functioned in relation to each other. These memos formed the basis of my dissertation chapters.

I relied on triangulation to mitigate the risk of bias. Triangulation is a common strategy in exploratory qualitative social science whereby the researcher assesses the validity of his or her data and findings by checking it against other evidentiary sources, such as "organizational documentation, secondary published material, and outsider perspectives" (Morrill and Fine 1997, 440). I triangulated my informant interviews with a wide variety of other data sources, including but not limited to USBP organizational materials such as voluntary departure training and instruction guides and internal standards and policies governing custody and detention; DHS and Congressional reports about the USBP and border enforcement; reports of immigrant advocacy

organizations about CBP and USBP practices and their effects on immigrants and immigrant communities; and other empirical studies of border enforcement.

4.3 Scope and Limitations

Notwithstanding the advantages to the research design described above, as with any empirical study my data have some limitations. Some of these limitations flow from the methodological choice to focus (in part) on the perspective of attorneys and advocates, rather than that of the affected immigrants. As part of their professional training, lawyers are taught to zealously defend their clients, and therefore they may have a bias towards their clients' account of what happened. On the other hand, lawyers are trained to identify potential flaws in their clients' cases and do not naively believe everything their clients tell them. Another limitation of relying on lawyers' accounts is that because they are providing a second-hand account of their clients' experiences with voluntary return, they may omit facts in their accounts to me that they did not see as important. On the flip side, clients may not provide them with all the relevant information for purposes of this study. Finally, lawyers may focus on the legal aspects of voluntary return rather than non-legal aspects such as the cultural and social meaning and impact of voluntary return. However, many of the lawyers I interviewed were active in and engaged with the border community with regard to immigration enforcement issues, teaching courses and providing "know your rights" seminars and other legal advocacy to the public. As a result, they are well-positioned to provide both a perspective on the individual experiences of their clients and on the collective effects of border enforcement on the community. Moreover, the perspective of border advocates arguably made up for any shortcomings in the data from lawyers with regard to the social, community-wide impact of voluntary return, given their experience documenting border enforcement abuses and supporting individuals and their families affected by these practices.

Together, interviews with lawyers and advocates are a reasonable proxy for data from undocumented immigrants about how the practice of voluntary return works on the ground. As mentioned before, by interviewing lawyers and advocates, I obtained access to a pool of individuals subject to voluntary return. The same data I obtained from lawyers would take me years to get from interviewing undocumented immigrants. Thus, this is a reasonable tradeoff. Moreover, lawyers and advocates all independently reported the same common patterns among their clients. I in turn also observed consistent patterns across the accounts of lawyers and advocates so even though these are second-hand accounts, there was enough consistency among them to be confident about their validity. It's unlikely that so many of their clients would experience the same things and that these clients' experiences would be so similar across all the attorneys and advocates I interviewed, unless there was an actual underlying pattern in the practice of voluntary return.

Moreover, the findings from this study are consistent with the findings of an empirical study of the behavioral patterns of U.S. immigration authorities [CBP and ICE] during the apprehension, custody and removal of Mexican migrants from the United States (Campos and Cantor 2017).[127] Campos and Cantor (2017) found that immigration officials "failed to deliver basic rights under U.S. laws and policies:"

[127] The study is based on an analysis of survey and interview data collected by the Binational Defense and Advocacy Program (*Program de Defensa e Incidencia Binacional*, or PDIB) from

- 43.5 percent of the respondents surveyed were not advised of their right to contact their consulate;
- More than half of the respondents surveyed (55.7 percent) were not asked if they feared returning home;
- Almost a quarter of the respondents (23.5 percent) reported being victims of some type of abuse or aggression by immigration authorities during their apprehension;
- Half of the respondents (50.7 percent) who signed repatriation documents reported that they were not allowed to read the documents before they signed them;
- 57.6 percent of the respondents did not receive their repatriation documents

The authors concluded that "when U.S. officials prevent migrants from accessing critical information and processes, they further deprive individuals of their possible legal opportunities to present immigration claims" (Campos and Cantor 2017, 2). My findings are also consistent with findings from a recent study of ICE's practice of stipulated removal. Stipulated removal is a summary removal procedure which, like voluntary return, provides custodial migrants the "option" of waiving a right to a hearing in exchange for speedy removal (Koh 2013). Although regulations provide that an immigration judge is required to determine that the individual's waiver of rights in stipulated removal proceedings was "voluntary, knowing, and intelligent" before signing off on the removal order, Koh's (2013) study found that the role of the judge is largely symbolic and that in practice, immigration judges "rubber-stamped" their approval of stipulated removal requests without an in-person hearing for the immigrant. Moreover, she found that stipulated removals were used disproportionately against those of Latino descent who were in immigration detention and did not have a lawyer. The procedures, which, were largely carried out by ICE officers, were plagued by misinformation and misrepresentations about immigration law, language barriers, information deficits, and the coercive effects of immigration detention—which all induced custodial migrants to "accept" stipulated removal. Thus, custodial migrant experienced many of the same barriers to due process in stipulated removal that I found migrants faced in my study of voluntary return.

Another limitation of this study is that by virtue of focusing on the perspectives of lawyers and advocates to elicit the experiences of undocumented immigrants with voluntary return, the sample of experiences is limited to those who were able and willing to consult an attorney or who received assistance from an advocate. They are thus a self-selecting group. The sample omits those who did not consult or hire an attorney (i.e. those who had no reason to seek an advocate or attorney because they took it knowingly and willingly; who may have wanted to get legal help but were unable to, e.g. they lacked the resources or the access; and/or who did not realize there was a reason to get help (i.e. because they did not realize they had suffered a harm) (see Felstiner, Abel, and Sarat, Austin 1980). Thus, the issue for the purposes of this study is whether those subject to voluntary return who did *not* consult a lawyer had different voluntary return experiences. I argue there is reason to believe that selection bias will not significantly affect my findings. As described above, often the facts regarding the experience of voluntary return emerged when the client sought a lawyer about another grievance or issue. They did not realize they had even suffered harm as a result of taking voluntary return or sometimes were

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600 migrants deported from the US to five repatriation points in Mexico between August 2016 and April 2017.

even unaware that they had taken one and were consulting a lawyer for an unrelated reason. In other words, the facts about the experience of voluntary return were usually ancillary to the case that the lawyer was helping with, and lawyers often had to dig for this information, indicating that clients were not motivated to tell lawyers about this experience. Thus, the experiences of those who went to a lawyer and those who didn't might not significantly differ, since the idea to make a legal claim about a coercive voluntary return did not surface for either group. Moreover, these interviews elicit the experiences with voluntary return of the most mobilized individuals—the ones who turn to attorneys, which arguably makes the accounts of coercion even more compelling. In other words, these migrants the most agentic individuals—those with resources, connections and enough social and economic capital to consult a lawyer (albeit about non-voluntary return related issues)—and thus the best situated to resist attempts at coercion in voluntary return. Consequently, this is a hard test of the nature of coercion in the practice of voluntary return.

4.3.1 The Effect of the *Lopez-Venegas* Settlement

I began my interviews shortly after the immigration enforcement agencies in southern California settled a lawsuit with the ACLU regarding their (alleged) abusive and coercive practice of voluntary return, and thus during a period of time when systemic reforms to the practice of voluntary return in that region went into effect. My interview questions focused largely on the practice of voluntary return before the terms of the settlement took effect. As a result, it may be the case that my data mostly reflect a practice of voluntary return that no longer exists in San Diego, or at least that the legal settlement has changed the practice in certain ways since I conducted my research. While I did ask advocates and attorneys about how *Lopez-Venegas v. Johnson (2013*) has affected the practice of voluntary return, as I will explain, the effects were challenging for my respondents to accurately assess in the short-term. Moreover, it is noteworthy that because these settlement terms are limited to the immigration enforcement agencies in southern California, the abusive practice of voluntary reflected in my data may continue to be prevalent in other parts of the border region (even if voluntary return itself is no longer prevalent).

In 2013, the American Civil Liberties Union (ACLU) of San Diego and Imperial Counties filed a class action lawsuit against the Department of Homeland Security (DHS), Customs and Border Protection (CBP), and ICE, alleging in the complaint that these immigration enforcement agencies in Southern California "regularly pressure, deceive, and threaten Mexican nationals who are eligible to reside in the United States lawfully-and have built lives in the United States over decades" into signing for voluntary departure (*Lopez-Venegas v. Johnson* 2013). The parties reached a settlement in 2014 that had two parts.[128] One part provided for identification and the return of class plaintiffs to the U.S. and for restoration to their original status before they were voluntarily returned to Mexico.[129] These individuals have been afforded

[128]See Lopez-Venegas v. Johnson, No. CV 13-03972-JAK (PLAx) (C.D. Cal. March 11, 2015).

[129] The class was very narrow given how far back the coercive practice of VR in San Diego goes and how broad-sweeping it has been (see chapter 5). Among other things, to qualify for the class, individuals must have been voluntarily returned between 2009 and 2014 and they must have remained in Mexico after their voluntary return. In other words, unauthorized return to the US would disqualify you from the class. Lawyers for the case indicated there were many, many

the opportunity to try their case in immigration court and seek relief from removal.[130] In addition, the immigration enforcement agencies "agreed to supplement their existing procedures" in southern California with additional due process protections (see Marosi 2014). Accordingly, the settlement stipulated terms for the reform of agency practices regarding voluntary return and a period of compliance monitoring of settlement terms by ACLU attorneys. Reforms focused on improving the conditions for obtaining meaningful consent to voluntary return by increasing access to information about the practice for custodial immigrants and weakening barriers to legal representation. Among the reforms, immigration officers were required to provide detailed information, in writing, orally, and through a 1-800 hotline, regarding the consequences of taking voluntary return, cease pre-checking the box selecting "voluntary return" on the forms agencies provide to custodial immigrants; permit them to use a working phone, provide them with a list of legal service providers, and allow them two hours to reach someone before deciding whether to accept voluntary return; and provide lawyers meaningful access to clients in detention. It remains to be seen whether members of the class will be able to remain with some formalized status, and more broadly (and as it pertains to my research), whether and how the settlement has changed the voluntary return practices of the USBP in San Diego in the long-term.

In the short-term, lawyers and advocates indicate a decline in reports of voluntary return abuse in the wake of the lawsuit. However, they also indicated it is difficult to assess the impact of the lawsuit on the practice of voluntary return in San Diego in the short-term. First, the terms of the settlement only took effect as I was beginning some of my interviews. Secondly, the general nature in which reports of these abuse surface, usually long after they actually happen as my data shows, means it is rare for attorneys and advocates to become involved during the voluntary return process:

> It's a weird catch-22 because I could say that [immigration officers] haven't been doing it [the abusive practice of VR], but if someone has signed it then I'm not going to know because they're not here to tell me [right now].

In this sense, time will tell what the exact impact of the lawsuit and settlement has been. If it is any indication, another similar lawsuit against the USBP in the 1980s for abusive voluntary departure practices against Salvadoran asylum seekers resulted similarly in a settlement that called for the systemic reform of voluntary departure practices (specifically for the narrow class of Salvadorans), but as recently as 2007, the court found that Border Patrol still failed to show that voluntary departure is properly administered (cite to *Orantes* litigation). Relatedly, as part of the terms of the *Lopez-Venegas* settlement, the USBP (and ICE) was required to allow the ACLU to monitor their compliance with the settlement for three years—which means monitoring expired last year. Some attorneys and advocates expressed concern that without oversight, the USBP might revert to old practices.

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people who called into the ACLU from all over the country who did not qualify, which suggests the number of people who had issues with voluntary return pales in comparison to the number of people the suit provided a remedy to.

[130] The ACLU conducted outreach throughout Mexico about the settlement in an effort to locate plaintiffs but it is probable that there are many individuals who qualified for the class who were not located in time.

Despite the *Lopez-Venegas* settlement and the reforms it enacted, my interviews with attorneys and advocates indicated that the practice of voluntary return in San Diego has had long lasting, deleterious effects on the border community. The next chapter turns to articulating these impacts, as well as providing a broad empirical picture of the practice of voluntary departure.

Chapter 5 The Racialized and Systematic Practice of Voluntary Return Against Mexican Nationals in San Diego

My understanding [is] voluntary departure is exclusive to Mexican nationals, so they are Mexican by and large…Overwhelmingly, [they are] Mexican nationals. In essence if you've never had an immigration record in the United States and you're a Mexican national, you are probably going to fit into that category of being offered voluntary departure. Anyone else is likely to face a much more complicated deportation process…They will have a full-blown deportation order and if they're lucky, they'll be able to try their case in court.

--Border advocate for 15 years

The officers pass [voluntary return] out like candy and give it out to people without even advising them of their rights.

--Immigration practitioner for 20 years

Ultimately voluntary departures are a sugar-coated trap. If you don't know what they are, it's easy for individuals to take them and ultimately wind up either having a ten-year penalty [i.e. bar to admission] or they might even lose the ability to pursue certain types of remedies in immigration court if they are talked into taking a voluntary departure, for example by a border patrol agent.

--Immigration practitioner for 34 years

As described in previous chapters, the law largely sees administrative voluntary departure as a desirable alternative to being formally removed. It has been characterized by courts as a permissive practice, a "privilege" or form of "clemency" which affords an undocumented immigrant the choice to leave the United States, after a period of time to put their affairs in order, in lieu of being subject to the "stigma" and consequences of being forcibly and formally deported (see chapters 1 and 3). Accordingly, the voluntary departure statute requires that the migrant take voluntary departure knowingly and willingly in exchange for waiving their right to a hearing before an immigration judge, and stipulates that immigration officers exercise discretion to provide a period to depart the United States (up to 120 days). The statute is also neutral with regard to nationality and does not specify any immigrant group for whom it is intended.

In contrast, this chapter shows that in San Diego, administrative voluntary departure has been systematically implemented almost exclusively against Mexican nationals in a process that, contrary to what's stipulated in the statute, has historically been coercive, punitive, and ultimately racially discriminatory. My research shows that this is a product of the way the statute is interpreted in USBP instructional and training materials; the perverse incentives created by USBP's own policies, which pose a formidable barrier to legal representation for detainees; and the geographic proximity of the USBP's policing work to the US-Mexico border. The accounts

of border advocates and immigration practitioners in San Diego show that the USBP has systematically policed the interior of the U.S. using voluntary return to routinely and rapidly deport *en masse* residents of the border region from the communities where they have lived and worked for years, and thus well within the interior of the United States. On the other hand, they indicate that nationals of other non-contiguous countries, referred to in DHS parlance as Other Than Mexicans (OTMs), apprehended in the border region logistically cannot be returned as quickly by the USBP and are therefore afforded more time and opportunities to challenge their removal. The implication is that if you are a Mexican national, you are much less likely to have access to formal rights and processes than a person of a different nationality who is similarly situated

In spite of a legal settlement finalized in March 2015 between the immigration authorities in Southern California and the American Civil Liberties Union (ACLU), which created systemic reforms to remedy the issue of coercion and more generally the abusive practice of voluntary return by immigration officers (see chapter 4), the large-scale summary removal of undocumented long-term resident Mexican nationals has had long-lasting, deleterious effects on the community in San Diego. As a result of their coerced voluntary return, scores of long-term resident undocumented Mexican nationals have lost their ability to adjust their status or seek relief from deportation in court and thus formalize their status and remain legally in the US.[131] The implication is that those with the strongest and longest ties to the U.S. are removed due to the disproportionate focus on Mexican nationals.

In the following sections, this chapter analyzes USBP instructional training materials obtained through the AIC's FOIA litigation to show that USBP officers are directed to give voluntary return specifically to all Mexican nationals they encounter and that they are not instructed to exercise their discretion to give a period to depart; rather, officers are encouraged, after minimal processing, to take the migrant, regardless of their immigration history which might indicate compelling reasons that would merit a hearing before a judge, immediately to the US-Mexico border to "return" them. In fact, the materials strike an explicit distinction between statutory voluntary departure, which is for all nationalities, and voluntary return, which is just for Mexican nationals and is a much swifter, less rights-protective process. Even with the expansion of expedited removal starting in 2005, which enables USBP officers to summarily remove OTMs in the border region like voluntary return for Mexicans, this chapter will show how the practice of expedited removal is legally and pragmatically constrained in ways intended to protect those migrants with "equities" and who may be eligible for immigration relief. Voluntary return has no such constraints on it, in the statute and regulations or in the USBP materials, allowing the USBP to deport Mexican nationals indiscriminately and sweepingly without regard for their ties to the U.S. or claims to formalize their status.

The subsequent section provides a broad empirical picture of the practice of voluntary return in San Diego and its effects on the border community. It draws on interviews with immigration practitioners and border advocates in the region to show how the themes described in USBP training materials are borne out in enforcement patterns on the ground. In particular it shows the pervasive practice of custodial Mexican migrants being coerced to sign for voluntary

[131] The ACLU alleged that there are "hundreds of thousands of Mexican nationals who have been expelled from the United States pursuant to unlawful 'voluntary returns'" by the USBP in San Diego and by ICE officers from the San Diego and Los Angeles field offices (American Civil Liberties Union 2014)

return and swiftly deported, without being informed of their rights or afforded the chance to mobilize them. The speed of voluntary return, and the contributing role of San Diego's proximity to the US-Mexico border in that speediness, were particularly prominent themes in interviews. Border proximity was commonly cited as a barrier to due process for custodial migrants, as the short distance to the border means officers can deport Mexican migrants so rapidly that there isn't sufficient time for custodial migrants to mobilize rights and for lawyers and advocates to intervene with necessary information for the custodial migrant to make a decision about signing before the USBP promptly voluntary returns them. It is thus a barrier to due process that is uniquely experienced by Mexican immigrant. In general, speed is a coercive strategy most effectively yielded against Mexican migrants. Moreover, the ubiquity of voluntary return among Mexican nationals described by advocates and practitioners is evidence of systematic surveillance and policing which they described happening through raids of public transportation, traffic stops, and checkpoints in the border region.

Despite a 2014 legal settlement regarding the coercive and abusive practice of voluntary return between the ACLU and the immigration enforcement agencies in Southern California, which yielded systemic reforms of the policy and practice of voluntary return in that region, border advocates and immigration practitioners reported that the practice of voluntary return in recent decades by the USBP has already had indelible, long-term effects on the community. As chapter three described, one of the immigration consequences of voluntary return is that once a migrant has accrued a certain (even small) period of unlawful presence in the US, if he or she departs the U.S. (e.g. via voluntary return) and then returns to the US, he or she precludes themselves from opportunities to formalize their status through adjustment of status or through relief from an immigration judge. Because of the direct actions of USBP officers to block access to formal rights (i.e. hearing before an immigration judge, access to a lawyer), this has been the outcome for tens of thousands, if not more, long-term resident undocumented Mexican nationals in San Diego who have been coerced in one way or another to take voluntary return. Through the mass processing of Mexican nationals and the lack of procedural due process, voluntary return functions as an engine of mass social inequality, comparable to the U.S. system of mass incarceration, which is similarly a racialized institution, systematic in practice, and quasi-illegal. This chapter concludes by making the case that the practice of voluntary return shown in this study is not unrelated to the historical treatment and perception of Mexican nationals in the U.S. as the prototypical illegal immigrants, and that as long as the nature and effects of these practices remain hidden, they will continue to reproduce and reify those perceptions.

5.1 Interpretation of Voluntary Departure Statute in USBP Materials

The voluntary departure statute provides that with some exceptions,[132] an undocumented immigrant (i.e. "an alien") may choose[133] to depart the country without a removal order in exchange for waiving their right to a hearing (i.e. "in lieu of being subject to proceedings") (INA

[132] Those who have committed an aggravated felony; are inadmissible under the terrorism exclusion; or those who were previously removed but then returned while still inadmissible are ineligible for voluntary departure (INA § 240(B)(a)(1), INA §240(c)).

[133] "Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions" (8 C.F.R. § 240.25(c)).

§ 240.25(a)). [134] Thus, the statute makes clear that taking voluntary departure is a choice for the immigrant, and that he or she must consent to take it over having a hearing before an immigration judge. Moreover, it does not specify any specific nationality for whom voluntary departure is intended and is thus neutral with regard to race. Statutory and regulatory requirements further provide that immigration officials exercise discretion to designate a date by which time the immigrant, regardless of their nationality, must voluntarily depart the United States—up to 120 days.[135] The purpose of this period to depart is so that the undocumented immigrant can get his/her affairs in order etc. and is therefore an important part of what makes voluntary departure a so-called benefit. This is an especially important benefit if the individual has resided in the U.S. for a substantial period of time and has family responsibilities to hand off, bank accounts to close, and otherwise needs to get their affairs in order. Accordingly, the form required by statute to effectuate a voluntary departure, Form I-210 (Voluntary Departure and Verification of Departure), provides a field for the officer to specify a future departure date from the US[136] (Appendix B). However, the regulations also stipulate that immigration authorities may attach any conditions necessary to ensure the migrant's "timely departure" from the US, including requiring the migrant to post a bond (which will ostensibly be repaid once the migrant has departed and only if he/she departs on time), detention of the migrant pending departure, and the immediate removal of the individual by immigration authorities without a period to depart (referred to as "removal under safeguards") (8 C.F.R. § 240.25(b)).

In contrast, the statute is interpreted in USBP organizational materials, obtained by the American Immigration Council through FOIA litigation, such that it defines "voluntary return" as a process specifically intended to streamline the deportation of Mexican nationals and distinguishes it from statutory "voluntary departure" which is for all nationalities. In explaining the disposition of voluntary departure, a USBP immigration law instructor guide[137] states that there are two types of voluntary departure—"voluntary departure prior to [a] removal hearing," which it refers to as "voluntary return (V/R)" and "voluntary departure in lieu of removal" which it refers to as "voluntary departure (V/D)" Voluntary departure in lieu of removal is described as voluntary departure provided by an immigration judge after removal proceedings have been initiated and "generally means the judge releases the alien and allows them time to leave the U.S. (within a certain time period) with no official escort or associated travel cost to the US." What the materials describe here is judicial voluntary departure, a disposition that the migrant accepts from an immigration judge as a form of discretionary relief from deportation either during removal proceedings or at the conclusion of removal proceedings. As described in chapter 3, at

[134] As noted in chapter 3, there are two types of voluntary departure—administrative and judicial. Administrative voluntary departure is those granted by immigration officers—both ICE and CBP—before the initiation of removal proceedings. Judicial voluntary departure is granted by an immigration judge either before or at the conclusion of removal proceedings, although the criteria differs at each stage (8 C.F.R. § 1240.26).

[135] "The authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days" (8 C.F.R. § 240.25(c)).

[136] "Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action—Voluntary Departure" (8 C.F.R. § 240.25(c)).

[137] Instructor Guide: Immigration Law, "Removal/Deportabilities," dated November 2012, page 10 (on file with the author).

these two stages, the person has the benefit of going before a judge, someone who is professionally trained in the law and is obligated to inform the person of their rights and opportunities as well as the terms and conditions of taking voluntary departure. In this context, the person also has the opportunity to consider and apply for forms of relief to remain in the U.S. in formal status (apart from voluntary departure), and can accept voluntary departure as a last resort if the judge does not grant them another form of relief. By taking voluntary departure, the migrant is afforded a period to depart and he or she does so on their own recognizance and at their own expense. Consistent with the statute and regulations, the USBP materials make no reference to a specific national group for whom "voluntary departure in lieu of removal" is intended and refers generally to "aliens."

Conversely, voluntary return (V/R), which the instructor guide describes as "voluntary departure prior to a removal hearing" is a process that altogether precludes a hearing before a judge. It is thus an inferior process—and it is specifically intended for Mexican nationals. The Guide carves out a section to explicitly stipulate that V/R is a mechanism for managing the large volume of undocumented *Mexican* immigrants:

> To cope with the large number of illegal entries across the Mexican border, the Department of Homeland Security for many years has used a form of Voluntary Departure prior to a removal hearing; this is known as Voluntary Return (V/R). A large number of removable aliens are permitted to leave voluntarily, and return to their country of residence without the institution of removal proceedings… Voluntary Return (VR) is a Border Patrol specific term that is used to describe an alien that has been granted a Voluntary Departure (VD) prior to a ***formal*** removal hearing….Obviously, it is advantageous to the United States and to the alien that Voluntary Departure is permitted in such cases (emphasis in original).[138]

This language in no way resembles the statute or regulations, even though it seems to associate itself with them. It casually usurps the concept of "return" articulated in the law (as a form of relief from removal) and appropriates it for its own organizational purposes towards border enforcement against Mexican nationals. The lack of nuance in the language is troubling because it treats Mexican nationals as a monolithic group—recent arrivals with no ties to the U.S. who would surely benefit from voluntary departure over removal proceedings. It therefore encourages officers to give them to all Mexicans. The only "restrictions to voluntary departure" listed in the Instructor Guide for immigration law that would indicate an officer should take pause and refer the migrant for formal proceedings is if the officer "decides that the alien would be subject to persecution due to race, religion, or political opinion."[139] (2012, 4). Otherwise there is little nuance here to indicate that some Mexican nationals would benefit from a hearing before a judge by virtue of their length of continuous physical presence in the United States and family ties and nothing to indicate that the migrant actually has a right to a hearing—that voluntary return is a choice for the migrant and the alternative is removal proceedings.

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[138] Instructor Guide: Immigration Law, "Removal/Deportabilities," dated November 2012, page 10 (on file with the author).

[139] Instructor Guide: Immigration Law, "Removal/Deportabilities," dated November 2012, page 4 (on file with the author).

Moreover, although the instructor guide indicates that officers should exercise discretion to provide a period to depart up to 120 days consistent with federal regulations, this document contains no mention of Form I-210, the form required by federal regulations to effect a voluntary departure.[140] Instead, the guide states that "Voluntary Return (V/R) is granted by issuance of a Form I-826 (Notice of Rights and Request for Disposition)," a form which does not contain a field to specify a future departure date[141] (Appendix C). Form I-826 requires the person taking voluntary departure to check a box indicating among other things, "I wish to return to my country *as soon as arrangements can be made* to effect my departure" (emphasis added). Similarly, another voluntary return training document instructs officers: "you may use Form I-826, Notice of Rights and Request for Disposition, to *voluntary return* an alien in Service custody who is *departing immediately* and who is not in proceedings (prior to the filing of the Notice to Appear)" (15; emphasis added).[142] This document distinguishes between voluntary departure, which requires Form I-210 and a designation of a period to depart (and is ostensibly for all nationalities), and voluntary return, which involves immediate return and is intended for Mexican nationals. This document also has a section discussing "voluntary departure with safeguards" that reflects the language in federal regulations:

> The Service may choose to allow the alien to leave under voluntary departure without safeguards, voluntary departure with safeguards, or it may place the alien in removal proceedings. The distinctions between the first two options can be significant. An alien granted voluntary departure with safeguards must depart immediately, under the direct observation of the officer. In general, an alien granted voluntary departure without safeguards is released from Service custody, remaining at liberty until the required departure date (14).

Thus, in theory, the officer has the option to exercise discretion to let a person subject to voluntary departure depart on their own recognizance at a later date, but read with the other materials, it is reasonable to assume that Mexicans are more often than not given voluntary departure with safeguards and are taken immediately to the border for return.[143]

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[140] Instructor Guide: Immigration Law, "Removal/Deportabilities," dated November 2012, page 12 (on file with the author).

[141] Instructor Guide: Immigration Law, "Removal/Deportabilities," dated November 2012, page 11 (on file with the author).

[142] Voluntary Departure, "Authority for Voluntary Departure," undated, page 9 (on file with author). The document outlines the legal authority for voluntary departure, who is authorized to grant it, and when it may be granted and under what conditions. This document is not dated but based on the fact that it mentions the effect of IIRAIRA which was passed in 1996 and the fact that it refers to the "Service" (i.e. the former INS) which became defunct in 2003 following the creation of the DHS, it is safe to say it was created sometime between these years.

[143] This is also consistent with testimony of the Chief Border Patrol Agent from 2005: "Along the Southwest border, processing Mexicans who can be voluntarily returned takes only 10-15 minutes. After they are processed, the aliens are briefly held at the USBP station while they await the buses or vans that are used to return them to a nearby Mexican port of entry" (see Nuñez-Neto, Siskin, and Viña 2005, 3).

As further evidence from USBP materials, an immigration law glossary from 2011 distinguishes between "voluntary departure," which it defines consistently with the statute (i.e. no reference to national origin and provides that officers have discretion to provide a period to depart) and cites to it; and voluntary return, which it simply defines as the "process whereby a border patrol agent or INS investigator returns an alien to Mexico or Canada without a hearing."[144] Thus although there is mention of the statutory period to depart in the Instructor Guide, the combination of the absence of any mention of Form I-210 and the emphasis on using Form I-826 with its language about immediate departure implies that officers trained in voluntary return procedures are not expected to exercise their discretion to provide undocumented Mexican nationals a period to depart. Instead they are trained to return individuals in their custody as soon as possible.

The field training instructions together provide yet further evidence of a national origin emphasis in voluntary returns and that officers actually take custodial migrants straight to the border, rather than giving them a period of time to depart and releasing them. Instructor guides for processing a voluntary return in the USBP's E3 computer system stipulate a list of required paperwork for voluntary return that does not include Form I-210.[145] Tellingly, one of these documents indicates that in the computer system, a voluntary return is referred to as a "Quick VR."[146] Moreover, a document titled "Processing a Voluntary Return Through a Port of Entry" provides guidance on how to physically voluntary return a Mexican national, but there are no instructions on how to process other nationalities for a voluntary departure.[147] The instructor is told to "demonstrate/discuss procedure to ensure aliens' safe passage through the port *into Mexico*" (emphasis added). The "procedure to grant an alien a VR to Mexico" includes transporting aliens to the nearest designated port of entry, transporting them to a "VR Gate" or gate substitute at the port, and witnessing the migrants' departure through the gate. Hundreds of emails (heavily redacted in parts) containing brief narratives from officers of both the OFO and the CBP about migrants encountered by USBP and granted voluntary return similarly reflect the practice of VR against Mexican nationals (largely with no history of criminal and immigration violations) and an abbreviated process whereby immigration officers "escorted" migrants "to

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[144] The USBP's own data shows that the practice of administrative voluntary departure against Canadian nationals is nominal. Statistics from Fiscal Year 2009-2011 furnished by the USBP as part of the FOIA lawsuit show that during those years, there were 662,485 voluntary returns of Mexican nationals, and only 891 of Canadian nationals. It is noteworthy, too, that there is no mention of Canadian nationals in the Instructor Guide on Immigration Law—only Mexicans.

[145] "Some subjects processed in this path will be granted Voluntary Return and no further processing will be needed. The Quick VR [redacted] generates all necessary paperwork: I-213 Record of Inadmissible/Deportable Alien, and I-826 Notice of Rights and Request for Disposition or I-770 Notice of Rights and Request for Disposition (Juvenile)." Instructor Guide, Operations 2: E3 Processing, dated May 2010, page 31 (on file with the author). See also Instructor Guide, Field Training Program: Processing a Voluntary Return, dated September 2007, page 8 (on file with author) ("Print required VR paperwork to include I-213, I-826, and I-216").

[146] Instructor Guide, Operations 2, "E3 Processing," dated May 2010, page 31 (on file with the author).

[147] See, e.g., Instructor Guide, Field Training Program: Processing a Voluntary Return through a Port of Entry, dated September 2007, page 13 (on file with author).

Mexico" or "to a Port of Entry".[148] Almost all were narratives of VR granted for "humanitarian reasons" and in coordination with the Mexican consulate to ill or injured Mexican nationals. There is often a common script of "the alien requested and received voluntary return;" otherwise, the alien was "processed" for or "granted a voluntary return to Mexico" and returned through a Port of Entry. There is no elaboration on what if any procedures.

These materials show that the USBP has taken a statutory provision that is neutral with regard to national origin and applied a procedurally-diluted version/the most restrictive version of it only to Mexicans, in the aim of achieving organizational goals. This is not only troubling because of the national origin emphasis but also because the materials suggest strongly that voluntary return is all Mexican immigrants should be given, regardless of their immigration history, ties to the US, and potential claims they might have to formalize their status; there is little indication that officers are required to consider other enforcement actions/alternatives that would provide Mexican nationals more procedural due process and thus the opportunity to pursue their claims. The materials preclude the notion that Mexican nationals may have claims to remain, that they have a potential case that could be pursued before a judge. It suggests an *en masse* processing without any consideration for the specifics of the immigrant's case—a blanket directive about how all undocumented Mexican nationals should be treated. Thus the requirement to give all Mexican nationals voluntary return means they are treated as a monolithic group. This approach to enforcement against undocumented Mexican nationals is similarly evident in the distinction between procedures for the processing of unaccompanied Mexican minors in their asylum cases (usually through voluntary return) versus unaccompanied minors of other nationalities, who, as a matter of law and policy, cannot be voluntarily returned and therefore can advance to more formal systems of rights in the United States (see Appendix D). It also tracks much of the historical treatment of Mexicans through voluntary return described in chapter two, which reflects a view of them as transient, temporary, and fungible, regardless of their ties to and length of residence in the U.S. In contrast, similarly-situated undocumented Europeans were considered part of the polity and given entrée to formal membership through administrative means.

5.1.1 Expedited Removal and "OTMs"

Since 2005, a summary removal procedure known as expedited removal has allowed officers to streamline the deportation of *non-Mexicans* (i.e. OTMs) apprehended in the border region, but federal regulations limit the scope of its application in a way that voluntary return has not been. Before the option of expedited removal as an enforcement action existed, USBP officers essentially had two choices with regard to enforcement actions to take against undocumented immigrants they apprehended for the first time (i.e. who had no immigration or criminal record)—initiate removal proceedings against them or promptly voluntary return them to their country of origin/nationality. As shown in previous chapters, the vast majority of undocumented Mexican immigrant apprehensions were voluntarily returned in the interest of administrative efficiency. In contrast, officers were directed by ICE Enforcement and Removal Operations (ERO) to initiate removal proceedings against "Other Than Mexicans" (OTMs), or third country national apprehensions, and, due to insufficient detention space, release them

[148] Email Records of Snapshots/Weekly Reports from the USBP (officer narratives about migrants encountered and voluntarily returned), dated 2007-2012 (on file with author).

pending their proceedings, a process known pejoratively as "catch and release." The USBP considers "catch and release" a pressing problem, as indicated in an internal CBP newsletter, which states that there is:

> a policy quirk that allows Mexican detainees to be returned to Mexico immediately while those from other countries are detained. This becomes an issue when there is insufficient holding space for detainees and they are released [pending a removal hearing] and asked to report for a future court date. This "catch and release" pattern undermines law enforcement efforts and sends a message that encourages illegal crossing attempts.[149]

Similarly, the notice in the Federal Registrar for expanding expedited removal states that something like voluntary return is needed for OTMs:

> DHS has a pressing need to improve the security and safety of the nation's land borders, and expanding expedited removal between ports of entry will provide DHS officers with a valuable tool to meet that objective. Presently DHS officers cannot apply expedited removal procedures to the nearly 1 million aliens who are apprehended each year in close proximity to the borders after illegal entry. It is not logistically possible for DHS to initiate formal removal proceedings against all such aliens. This is primarily a problem along the southern border, and thus the majority of such aliens are Mexican nationals, who are "voluntarily" returned to Mexico without any formal removal order. On the southern land border with Mexico, those aliens who are apprehended who are not Mexican nationals cannot be returned to Mexico. Currently, non-Mexican nationals who are inadmissible may be voluntarily returned to their country of citizenship or nationality via aircraft, or placed in formal removal proceedings under section 240 of the [Immigration and Nationality] Act. Because DHS lacks the resources to detain all third-country nationals (aliens who are neither nationals of Mexico or Canada) who have been apprehended after illegally crossing into the U.S. from both the northern and southern land borders, many of these aliens are released in the U.S. each year with a notice to appear for removal proceedings. Many of these aliens subsequently fail to appear for their removal proceedings, and then disappear into the US.[150]

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[149] "U.S. Customs and Border Protection Today" (internal newsletter), dated March 2006 (on file with the author).

[150] U.S. Citizenship and Immigration Services, "Designating Aliens for Expedited Removal," (August 11, 2004), available at https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-94157/0-0-0-94177/0-0-0-94493.html. Although the notice is dated 2004, implementation did not occur until 2005 (Department of Homeland Security 2005). While it may be the case that some migrants released from detention abscond from their court dates, a recent study of detained families over a 15 year period (between 2001 and 2016) found that 86 percent of those family members released had attended all their court hearings (Ingid V. Eagly, Shafer, and Whalley 2018). Another recent study by legal advocates of asylum seekers who had missed their court date found that although in absolute terms, the number who abscond is sizeable, contrary to the

To remedy the perceived problem of "catch and release" of OTMs, the provision of expedited removal, which was created in 1996 and initially limited to migrants apprehended at ports of entry (i.e. migrants who had technically not yet set foot within the US), was expanded in 2005 to OTMs apprehended *between* ports of entry within 100 miles of the southern (and northern) border, i.e. to those who are firmly within the borders of the U.S. Expedited removal allows an immigration officer to summarily remove an OTM apprehended in the border region without a hearing before an immigration judge—but it carries the same legal weight as a removal order from a judge.[151] Thus is in many ways it is a formalized version of voluntary return. As stated in the internal newsletter:

> Expedited removal omits the judicial process, cutting processing time by half or two-thirds. This policy allows an officer or agent to send an illegal migrant back immediately if they can establish that the migrant is in this country illegally.

Unlike a person subject to voluntary return, a person placed in expedited removal proceedings has no right to a hearing. As a result, expedited removal has received much attention from legal scholars who have raised due process concerns about its expansion to undocumented immigrants apprehended in the interior of the U.S. (see, e.g., Wadhia 2015; Koh 2016). Notwithstanding these concerns, the practice of expedited removal is legally constrained in ways that voluntary return is not, even though they similarly carry immigration consequences of years-long bars to re-entry and undermine opportunities for relief from an immigration judge.[152] Namely, expedited removal is limited to those OTM individuals apprehended within the 100-mile border zone and who cannot demonstrate they have been physically present in the U.S. for the 14-day period immediately before apprehension.[153] The Federal Register notice expanding expedited removal

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narrative of purposeful court absconders, individuals face social and structural barriers to attending their hearing, including lack of notice, incorrect government information, language barriers and severe trauma or disabilities, in addition to serious medical problems (The Catholic Legal Immigration Network, Inc. and Asylum Seeker Advocacy Project at the Urban Justice Center 2018).

[151] Agents are expected to exercise prosecutorial discretion and only apply expedited removal to those Mexican and Canadian nationals with histories of criminal or immigration violations, such as smugglers or aliens who have made numerous illegal entries." See U.S. Citizenship and Immigration Services, "Designating Aliens for Expedited Removal," (August 11, 2004), available at https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-94157/0-0-0-94177/0-0-0-94493.html.

[152] This is not to diminish the real harm of expedited removal, especially for asylum seekers at ports of entry (see Cassidy and Lynch 2016; Mehta 2014). It is only to say that voluntary return is similarly problematic, and that expedited removal is arguably a formalized version of it.

[153] In 2017, President Donald Trump issued an executive order directing the Secretary of Homeland Security to expand expedited removal, but it remains unclear if and when the expansion will be implemented, and what the scope of the expansion will be. Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017). available at https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-andimmigration-enforcement-improvements. Under the full extent

acknowledges the stakes of being deported if you are a long-term resident, and that expedited removal is intended only for people with "spatial and temporal" proximity to the border:

> It is anticipated under this designation that expedited removal will be employed against those aliens who are apprehended immediately proximate to the land border and have negligible ties or equities in the U.S.

Moreover, the Notice indicates that prosecutorial discretion, including the initiation of removal proceedings, should be exercised for those who demonstrate equities that weigh against the use of expedited removal proceedings:

> …including unaccompanied minors, members of the Class Action Settlement in American Baptist Churches v. Thornburgh…(which settled the claims of a class of Salvadorans and Guatemalans regarding handling of asylum claims), and aliens who may be eligible for cancellation of removal under section 240A of the [Immigration and Nationality] Act, for example, may possess equities that weigh against the use of expedited removal proceedings.

Ironically voluntary return is also listed as one of the examples of "prosecutorial discretion" for someone with equities, which does not account for the fact that under IIRAIRA, departing after a certain period of unlawful presence (180 days) creates years-long bars to re-entry akin to those one would experience under expedited removal. The legal constraint on expedited removal is similarly reflected in USBP training materials:

> Expedited Removal (ER)…grants the Border Patrol Agent in the field the authority to formally remove certain aliens from the U.S. without a further hearing or review. (1) An expedited removal order carries the same legal weight as a removal order issued by a judge. (2) As a result, this use of this authority is limited to some extent by both the law and policy.[154]

Unfortunately the instructions that follow are redacted but given what these initial instructions state (i.e. that USBP's authority is limited by the law), it is reasonable to believe they reflect the restrictions that the Federal Register notice describes above (i.e. third country national who entered the U.S. within the last 14 days and Mexican and Canadian nationals only if they have a history of immigration or criminal violations). These redactions are followed by the following step:

> 1) Will we seek a formal removal of the individual in question [based on the rules above]? 2) If yes: proceed to Step 2. (a) If no: VR per existing local procedure.

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provided by the statute, immigration officers would be authorized to use it against any noncitizen apprehended anywhere in the US who is inadmissible under either 8 U.S.C. § 1182(a)(6)(C) or § 1182(a)(7) and who entered without inspection less than two years prior to the date of the expedited removal proceedings (Macleod-Ball et al. 2017).

[154] Instructor Guide: Immigration Law, "Removal/Deportabilities," dated November 2012, page 4 (on file with the author).

In other words, immigration officers are instructed to voluntary return those individuals who don't meet the criteria for expedited removal (i.e. Mexican and nominally Canadian nationals). There is no reference to removal proceedings or other rights-protective processes for those with equities in the U.S. It's a blanket directive about how all Mexican nationals should be treated. There don't appear to be many parameters at all on the practice of voluntary return in any USBP materials. The implication is that voluntary return is an informal process that can be given to virtually any Mexican national, regardless of their equities or length of stay in the U.S.

In addition to legal constraints, there are pragmatic and logistical constraints on the practice of expedited removal by the USBP. Expedited removal cannot be carried out as quickly as voluntary return. Because it is a formal removal, it takes significantly longer to process a person for expedited removal, and then subsequently to physically return them. For expedited removal it takes an average of 90 minutes (Capps, Hipsman, and Meissner 2017) to process the person after which he/she has to be put on an aircraft to be removed. One report cites that on average it takes 32 days for a person in expedited removal proceedings to be removed (Nuñez-Neto, Siskin, and Viña 2005, 8). Conversely, as previously described, a person subject to voluntary return can take as little at 10-15 minutes to process. Then it is simply a matter of a van or bus taking the person to the border a short distance away to the border, which can be accomplished in a matter of hours if not sooner. Moreover, although expedited removal requires the individual to be mandatorily detained pending their removal, it is often the case that these individuals "do not have criminal records, multiple re-entries, or other characteristics which would make them subject to mandatory detention absent a determination of expedited removal. If ICE has no bed space available (which is often the case), undocumented migrants encountered by the USBP who are subject to expedited removal, and who do not have another reason to be mandatorily detained, may be released on their own recognizance [with an NTA to appear before a judge at a later date] despite the legal requirement that they be detained"[155] (Nuñez-Neto, Siskin, and Viña 2005, 9). In other words, the practice of "catch and release" continues (Ainsley 2017; Sacchetti 2018; Jarvie 2017) in spite of a recent proclamation by the Secretary of Homeland Security that the DHS has "ended dangerous 'catch and release' enforcement policies."[156] Conversely, with Mexican nationals, processing them for VR is easy and fast—the USBP does not have to rely on other agencies or their resources. The implication is that because of the DHS's resource limitations, if you are a Mexican national, you are much less likely to have access to formal rights and processes than a person of a different nationality who is similarly situated. Even in the case of a Mexican national who is placed into expedited removal proceedings from a USBP agent, they face many of the same obstacles to rights as a Mexican national subject to VR by virtue of their close proximity to the border.

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[155] This is the initial reason Operation Streamline was conceived—it provided a solution to the problem of insufficient DHS detention space for those in expedited removal proceedings (see chapter 4). A person prosecuted under Operation Streamline can simultaneously be processed for expedited removal proceedings while they are in *criminal* (i.e. US Marshals Service) detention, thus saving limited DHS detention capacity (see Lydgate 2010). There is no Operation Streamline in California.

[156] Press Release, Department of Homeland Security, "Remarks By Secretary Kelly in El Paso," dated April 20, 2017, available at https://www.dhs.gov/news/2017/04/20/remarks-secretary-kelly-el-paso.

5.2 The Practice of Voluntary Return on the Ground: The Case of San Diego

Reflective of the racialized and streamlined way that voluntary return is defined and expected to be applied by officers in USBP materials, my in-depth, semi-structured interviews with 29 border advocates and immigration practitioners show that in San Diego, undocumented Mexican nationals without a criminal or immigration history encountered by the USBP are routinely directed to take voluntary return and subsequently returned across the border within hours. More broadly, they show that voluntary return has been part of systematic border surveillance by the USBP that has enabled the mass processing and rapid deportation without due process (sometimes repeatedly) of not only undocumented recent arrivals/border crossers from Mexico, but more troublingly, long-term undocumented residents of Mexican nationality within U.S. borders. Often these individuals had potential claims for discretionary relief that they could have pursued before an immigration judge (see Table A3) or they could have adjusted their status. These opportunities to formalize their status were foreclosed by the process of voluntary return as implemented by USBP agents in San Diego, not based on the formal statute but because of their status as (1) Mexican nationals (2) living in a border community.

5.2.1 Speediness of Voluntary Return and Implications for Legal Representation

Account after account described the rushed experience for Mexican migrants of being picked up in the normal course of their day, and subsequently pressured, misled, or otherwise induced to sign a form indicating their "consent" to voluntary return, and "returned" to the Mexican side of the border via bus within hours of apprehension, all without being informed of 1) their right to obtain a lawyer—or provided the opportunity to contact one, 2) the option to see a judge for a hearing (unless the "choice" to see a judge was accompanied with undue pressure to choose voluntary return instead) and thus to pursue potential means to stay in the U.S. in a formal status, or 3) the immigration consequences of taking voluntary return (see chapter seven for more on lack of information as coercive strategy in voluntary return). The speediness of voluntary return thus not only undermines a key benefit of voluntary departure—the period to depart—but by undercutting opportunities for due process and legal representation, it also serves as a very important coercive strategy to induce individuals to take voluntary return—one that is most effectively implemented primarily against Mexican nationals (see chapters 6 and 7 for more on the USBP's coercive strategies in voluntary return).

As one lawyer, who has practiced immigration law in San Diego for 23 years and is active in the border community (e.g. teaching classes giving talks about immigration to universities, churches and other organizations), described the long-standing pattern of the typically brief, frenzied and ultimately rights-deficient (involuntary) experience of voluntary return for his clients:

> [Of] course before 1997 [pre-IIRAIRA], we were under a different regime of laws. It was different back then, but from the very beginning, I met people who had been voluntarily returned on repeated occasions without ever being notified of their rights. The general story is, without me saying a word, they say the same thing which is, "They picked me up. They treated me like a piece of paper. Pushed me here, pushed me there. Sign here. Snap a photo. Come out of the cell,

> go back in the cell. Come out of the cell, go back in the cell. Then, they just boarded us all on a bus and, within two hours, we were in Mexico."

Lawyers and advocates reported their Mexican clients were often returned to Mexico within 24 hours of being apprehended, if not sooner, despite the fact that the statute stipulates that officers exercise discretion to provide a period of time for the undocumented immigrant to depart. [157] In the words of one advocate, it was common for individuals she worked with to be "detained at 8 a.m., signing at 10 a.m. and…in Tijuana around noon." One lawyer alternatively explained it as "an officer is throwing you in a van, and then you open your eyes and, poof, you're in Mexico." Lawyers and advocates variously described the experience of voluntary return for their clients as "whirlwind" and "chaotic." As described by lawyers and advocates, the speed with which officers implement voluntary return poses an obstacle to opportunities for migrants to obtain information about their rights and options under the circumstances, and ultimately obstructs avenues for legal challenge and representation. Specifically, it affords very little opportunity for meaningful intervention—for example, for undocumented immigrants to contact their consular representative upon arrest and "without delay,"[158] to inform family and/or friends they are in USBP custody; and/or to get access to an immigration lawyer/obstructs and precludes opportunities for process and rights:

> Because we are so close to the border there's not really a pause or an opportunity for them to call an attorney. They're not detained for a long period of time. They're literally put in the back of a van and driven across the border, so there's not going to be a moment where they could access counsel during the admin voluntary return. Unlike folks who are subjected to voluntary returns maybe in other parts of the country or further into the interior, here it can happen within an hour—where somebody is apprehended and an hour later or two hours later, they're in Mexico, so there's no moment or opportunity for an attorney to intervene.

This speed cuts two ways: it not only hampers efforts by the custodial migrant to get help, but it effectively blocks those on the outside from providing vital help and resources:

> With our proximity to the border, there's always a challenge to time and available resources when it comes to a person being detained and family members reaching out to us and trying to find a way to provide the central information that someone may need, such as not signing any documents, such as not making any statements, and requesting their right to try the case or [requesting more] time so that they can consult with an attorney.

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[157] This is consistent with *Lopez-Venegas v. Johnson* (2013), which alleged Mexican migrants subject to administrative voluntary departure were returned "as rapidly as logistically possible."

[158] "Whenever you arrest of detain a foreign national in the United States, you must inform the foreign national, without delay, that he or she may communicate with his or her consular offices." The Department of State Manual on Consular Notification and Access, Fourth Edition, August 2016.

This proximity to the border was cited over and over again by attorneys and advocates as one of the key reasons for the speediness of voluntary return and suggests that the speediness against Mexican migrants bears a direct relation with their nationality. Given the closeness of the border, and as reflected in the training materials described above, upon the migrant signing the form, implementing the voluntary return of a Mexican migrant is a matter of an officer driving the individual to the border, opening the so-called "VR gate" or "repatriation gate"[159] at a port of entry, and watching the migrant cross.[160] As one advocate put it:

> We know voluntary returns are very common along the border and they're also very common to be given to Mexican nationals because of the proximity and you know it's so easy for them to be deported. It's not like people from Central America who have to wait for a plane.

Similarly, in the words of one lawyer, describing the recipients of voluntary return in his experience: "they're always Mexican because those are the people that can just be voluntarily returned." The speedy practice of voluntary return is an obstacle to due process that is experienced disproportionately by Mexican nationals. These accounts also suggest that border proximity provides a perverse incentive for officers to rapidly process and deport the migrant they can through voluntary return instead of going through the lengthy and formal process of initiating removal proceedings or placing a person in expedited removal proceedings, especially in the face of perpetual resource constraints and limited detention space:

> Near San Diego, near the border, CBP has some places where they temporarily stick people when they catch them before they process them and hand them over to ICE. Those places get really filled up and they get backlogged. It's apparently really overcrowded. There's limits to how many people they can catch and process. I just think as a matter of just making due with the resources they have, that there's people that just return rather than go through processing them just because the ... Barrack Five [CBP holding facility] is what they call it, was all backed up and they couldn't stick more people in there if they wanted to…When they're riding around in their vans and they catch people, then they bring them to this Barrack Five to process them. If they get too many people then they just don't have any room to stick them, so they'll just get them to sign voluntary returns and go.

Another attorney told me:

> If they're seeking to do reinstatement of removal or expedited removal, things like that, that carry more consequences, that might be sort of their goal, but I think practically, they still utilize that voluntary return pretty frequently because individual officers are still going to have to do paperwork for a removal order, to

[159] This is the term used in the USBP organizational materials. See, e.g., Instructor Guide, Field Training Program, "Processing a Voluntary Return Through a Port of Entry," dated September 2007 pages 13 and 15 (on file with the author).

[160] Instructor Guide: Field Training Program, "Processing a Voluntary Return through Port of Entry," dated September 2007 (on file with author).

> put someone in removal proceedings, all of that takes a lot more paperwork on their part then to just process voluntary returns. Especially in San Diego where they can put someone on a bus and take them a couple miles over the border. I think just for the convenience for the San Diego officers to do the voluntary returns, even just for their personal work day it might just lead to that being pretty frequent.

Arguably, CBP's own detention policy, coupled with the speedy nature of the voluntary return process for Mexicans as articulated in USBP materials described above, may additionally serve as a perverse incentive to rapidly deport Mexican migrants. CBP guidance does not require USBP officers to provide custodial migrants telephone access to a lawyer or other legal representative until they have been detained for more than 24 hours (USBP Detention Policy 2008, 9). The implication is that it is in the interest of officers and the USBP more broadly to deport the individual as quickly as possible, before formal rights are triggered by the passage of time. Thus, Mexican nationals face compounding barriers to accessing and mobilizing their due process rights in the process of voluntary return.

5.2.2 Systematic Surveillance of the San Diego Border Community: Raids, Traffic Stops, and Checkpoints

In San Diego, the USBP's practice of voluntary return against Mexican nationals with no criminal or immigration history has not only been routine, but also pervasive and widespread. Many lawyers noted that a significant proportion of their Mexican clientele had taken at least one voluntary return from an immigration officer in the past:

> Probably, in general, about half of the people [clients or those consulting to be clients] have had prior voluntary returns…that reflect in their files. You'll say, "Well, you've been here for ten years or twelve years. Have you ever been returned to Mexico? Half the time there's some return in the past. Maybe that's a little extreme. A third of the time. It's very common.

In the words of another attorney, "it's never a surprise." They indicated it was not uncommon for clients who have lived in the United States long-term to have multiple voluntary returns, spanning a number of years:

> For folks who've lived here for a long time in undocumented status, for folks who entered in the '90s, for example, I would say 60% to 70% have had some sort of administrative voluntary return at some point in their history…Let's say they'll come in [to my office], they've been undocumented since 1998 or 1999 when they first entered and they have old voluntary returns from let's say, one in 2002, on in 2006, one in 2008, one in 2010. It's usually more than one. Folks will usually have a string of them.

This ubiquity of voluntary return among Mexican nationals—the fact that such a large proportion of Mexican nationals in the San Diego community have been apprehended and voluntarily returned—some multiple times—is evidence of systematized surveillance and

enforcement in the border region by the USBP that makes the practice of voluntary return widespread, rapid deportation easier, and affects the community at large. As described in chapter 3, the USBP's policing authority is not limited to the border proper but actually extends 100 miles from any land or coastal boundary into the United States (8 C.F.R. § 287.1(b)), permitting the agency to cast a wide enforcement net that encompasses 65.3 percent (almost two-thirds) of the U.S. population and 75 percent (three-fourths) of the U.S. Hispanic population lives (see City Lab article). Because the 100 mile "border" region is also technically the interior of the US, the USBP shares dual jurisdiction with ICE, the branch of the DHS which policies the interior of the US, since its inception in 2003. Adding local law enforcement to that equation, San Diego is heavily policed by multiple law enforcement agencies:

> Both ICE and Border Patrol have jurisdiction in the border region to administrate administrative voluntary returns and to do immigration enforcement, whereas when you're in the interior Border Patrol doesn't have any jurisdiction. There are two immigration law enforcement agencies here in San Diego, for example, that are both active doing removals, doing administrative voluntary returns, apprehending people, looking for fugitives, things like that…We've got double the fun…Especially with th[ese] administrative orders coming out today that they're going triple the number of ICE agents and put all these additional Border Patrol—we're already inundated. You can't drive through an immigrant neighborhood here without seeing an ICE or a Border Patrol car already. They're just going to oversaturate the border area with all these law enforcement agents. That's why you hear people saying this is like a militarized zone practically because we've got SDPD, we've got the Sheriffs, we've got Border Patrol, we have ICE. How many police do you need in one city?

Notwithstanding the policing and surveillance of other agencies, within the border region, Congress has provided CBP officials with substantial authority—to stop and conduct searches on vessels, trains, aircraft, or other vehicles (8 U.S.C. § 1357(a)(3)). They are also statutorily permitted to access private lands (except "dwellings") within 25 miles of the border (8 U.S.C. § 1357(a)(3)). As documented by numerous border advocacy organizations, the USBP exercises this power through a number of invasive enforcement mechanisms, including raids on public transportation, checkpoints,[161] traffic stops (including through formal and informal agreements with local law enforcement who call Border Patrol after a stop), and roving patrols (see, e.g. Lyall 2016; Lyall et al. 2015; Amnesty International 2012; Cato Institute n.d.; NYU School of Law Immigrant Rights Clinic, New York Civil Liberties Union, and Families for Freedom 2011). Moreover, the Supreme Court has held that agents may rely on race and/or ethnicity as factors to determine reasonable suspicion, as long as it is not the only factor (see *United States v. Brignoni-Ponce* 1975).[162] More recent DOJ and CBP guidance similarly allow USBP agents to use race

[161] CBP's own data shows internal checkpoints are not effective for screening for people with immigration violations, and end up ensnaring significantly more people with legal status than those without (Denvir 2015).

[162] "The court made suggestions of what would serve as reasonable suspicion during a roving patrol: a driver's erratic driving or obvious attempts to evade officers; characteristics of the vehicle, such as certain station wagons or vehicles that are heavily loaded with passengers, or

and ethnicity under certain conditions, language which appears to provide wide latitude for racial profiling (U.S. Department of Justice 2014; U.S. Customs and Border Protection 2017b).

This is consistent with the enforcement patterns of the USBP described by border advocates and immigration practitioners in San Diego. Although they are not as common in San Diego as they once used to be, interviews described the historical use of raids aboard public transportation and of transportation hubs in traditionally Latin neighborhoods and the reliance on racial profiling to indiscriminately and swiftly round up and voluntary return large numbers of undocumented individuals:

> [W]e have faced the issues of voluntary departure, not only here in the California border but throughout the southwest border. A lot of the cases we've had have been with Border Patrol operations. Some of the raids that the Border Patrol used to conduct aboard public transportation and [in] residential areas [involved] a very, very quick process to have folks be apprehended during these operations…[A] lot of the folks that were rounded up in these operations ended up on the Mexican side of the border through the voluntary departure initiative or programs…With Border Patrol, the operations were much more public and very disruptive [than ICE operations]. Border Patrol would traditionally sweep public transportation, for instance, and in essence, racially profiled the folks who were on the public transportation hubs or systems and in that process, a lot of folks were also detained and deported….A lot of the folks that came forward after many of these operations were conducted have stated to us that in some cases, [they] were forced to sign those [voluntary departure] documents. In other instances, folks were signing the blank document or in some cases, folks [told] us that they didn't sign anything at all and they were still being taken outside the country. We realized very quickly that many of these supposed "voluntary" departures were not as voluntary as the government would have us believe.

In one particularly egregious example, a border advocate described the experience of three high school students, two of whom were minors, who were not given an opportunity to contact their parents, a lawyer, or the Mexican consulate, before they were coerced to sign voluntary return papers and deported to Mexico within hours after being caught up in a USBP raid of a trolley they were riding:[163]

> These were high school students on their way to school. Border Patrol swept a trolley station here and picked up several high-schoolers in that operation. [Their] [p]arents were at work and they began to get calls from the school system that their kid had not showed up, that they were truant…There were very concerned and then we began to receive photographs from their classmates…who witnessed Border Patrol sweeping the trolley station. By then, the middle of that school day, it was very clear that several students had been picked up by Border Patrol. In the

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vehicles where persons appear to be trying to hide; and 'the characteristic appearance of people who live in Mexico, relying on such factors as the mode of dress or haircut' (see Holper 2017, 21).

[163] This was the incident that lead ACLU attorneys to file suit in *Lopez-Venegas*.

> case of minors, [by law] the Mexican consulate has to be contacted [but it was not]….[B]ecause we knew the pressure that they [USBP] puts on these folks [in custody], it was already too late. Three kids were already on the Mexican side of the border. They had no knowledge [of what they signed]. After we tracked them down, we were able to get humanitarian parole for the three of them and they were reunited with their family about 10 days after the terrible ordeal.

While advocates indicated these USBP raids seemed to taper off during the Obama administration, in more recent years, the USBP has relied on less visible tactics, such as the use of checkpoints and traffic stops, including those by local police, to apprehend and voluntary return individuals:

> The typical situation that I hear about is that the individual would be stopped. Let's say stopped for a traffic violation, and then the sheriff department or the local police department would call in Border Patrol, or Border Patrol themselves would stop a car for a traffic violation or often times for a reason that the person was not able to identify. They didn't think they were doing anything wrong, so we would suspect that would be a racial profiling situation. Once the car was stopped the individuals would be taken to the closest border patrol station, so often times that may be San Onofre or Temecula, which are areas in North County of San Diego. They would be asked questions about their immigration status. They would not be informed that they had the right to remain silent. Typically, the individuals would comply and answer all the questions, and then they would sign and they would be put in the back of a van and driven from San Diego County into Mexico and just basically let out of the van right on the other side of the border. Sometimes they would have their fingerprints taken and their photo taken. If you're looking back into the older time period, sometimes that didn't even happen. Maybe there were no fingerprints or no photos, but in more recent history, like late '90s through the present, you'll see in the FOIA [Freedom of Information Act] records that they had a mugshot taken and their prints taken.

Many accounts mentioned their suspicion of the use of racial profiling to target individuals:

> Oh, this is another practice I saw a lot of, is when I pulled people's records and I would get the Border Patrol Agent's narrative on why they pulled someone over, right? They have to document, how did this person come into their custody? Every voluntary return has to get an I-213 written up, and I saw this pattern a lot—Border Patrol Agents putting into their narratives that the reason that they had pulled over the suspect was because they—and it was almost template because I saw it many many, many times—they were in the area that is a known alien smuggling area, and they saw this car, and that the people ... There were 3 people in the car and that the minute they saw them, they slowed down or changed lanes, and they pulled up next to them, drove up next to them and the people avoided making eye contact with the Border Patrol Officer, and so he pulled them over. That is almost like a template. I've seen it like 10 times, and I'm like, "You've got to be kidding me with this, right?" The ones I've seen it's

> because the people come to me, because they actually have the ... They've said, "Oh, I'm going to fight my case."

These accounts of the racialized, systematic and coercive practice of voluntary return in San Diego against Mexican nationals show that they have routinely been precluded from important procedural rights and protections and ultimately the ability to challenge their deportation.

5.3 The Effects of Voluntary Return on the Border Community

In 2013, the ACLU filed a class action lawsuit against the immigration enforcement agencies in San Diego, including CBP, for regularly coercing Mexican nationals "who have built lives in the United States over decades, into signing their own expulsion orders through misuse of" voluntary departure," thereby "rob[bing] victims of their right to seek relief from removal" (*Lopez-Venegas v. Johnson* 2013, 2). Despite the lawsuit and the ensuing systemic reforms to the policy and practice of voluntary return in San Diego, which have dampened the practice of voluntary return in the region, border advocates and lawyers concede that the long-term and systematic practice of voluntary has taken a significant toll on the border community. In the words of one advocate:

> [I]n San Diego sector, because of the terms of the settlement and continuous engagement between ACLU and CBP on voluntary returns, I think that has eased a bit of the problems that we have seen here but the fact is that [the] practice [of voluntary return] has been so commonly used that it has left a mark here in the San Diego-Tijuana border region.

The "mark" he refers to is the impact it has had on those in the border community who were long-term residents with kinship ties to the U.S. and who, because of the direct actions of immigration authorities to block access to formal rights (including the right to a lawyer and to a hearing), signed voluntary return papers and thereby lost the opportunity to pursue avenues for formalizing their status. Because of the widespread and systematic nature of this practice, this has affected the community at large:

> I'd say in terms of the impact on the community legally, I would say there have to be thousands, maybe tens of thousands of people in San Diego County alone who would have been eligible to fix their status in some way but for their voluntary return. I would say it has destroyed thousands of families' abilities to bring the person who's undocumented into a documented status.

As described in chapter 3, a person who has accrued a certain period of unlawful presence in the U.S. and departs via voluntary return often faces deleterious immigration consequences that impose nearly insurmountable barriers to obtaining legal status in the future. Individuals who take voluntary return effectively relinquish their right to apply for forms of relief that are unavailable outside the United States, and they face years-longs bars to readmission to the U.S. Lawyers described how a significant portion of their clients and those who consulted to be clients were eligible for relief or to adjust their status in some way but they lost potentially realizable rights by taking voluntary return instead of seeing a judge for hearing:

> I would say most people that I have that are affected by [voluntary return] would be people coming to my office for a consultation who unfortunately don't have many options because of a prior voluntary return…People who have been in the United States for a long time, who have been picked up by immigration or stopped by immigration, instead of remaining in the U.S. and going forward with an opportunity before an immigration court, they leave with voluntary return and/or they are pressured to do so, thinking that there's not going to be any consequence for coming right back over and when they come back over then they trigger that permanent bar and then if they have options down the line to get a Green Card through a U.S. citizen child or spouse, they're ineligible. There's no waiver available for that permanent bar.…They have a family member that wants to start the petition process and then they cannot go forward. Then also people who are affected by it who are in removal proceedings but had a prior voluntary return that might interrupt their otherwise continuous presence in the U.S.

The compromising of Green Card eligibility by the imposition of bars to admission was one of the issues that was most commonly brought up by lawyers to describe the impact of voluntary return, and it was the issue that they indicated affected scores of their clients and potential clients. When a person departs the U.S. via voluntary return after a triggering period of unlawful presence (more than 180 days but less than one year), he or she is inadmissible to the U.S. for 3 years (8 U.S.C. § 1182(a)(9)(B)(i)(I)). If the period of unlawful presence is more than one year, the bar is ten years (8 U.S.C. § 1182(a)(9)(B)(i)(II)). In order to be eligible to apply for a Green Card, he or she must wait that period in Mexico and then apply for an unlawful presence waiver of inadmissibility:

> If the person never would have accepted that voluntary return, they would never have triggered 212(a)(9)(B). And there's literally, there's not a day that goes by where I don't have that issue. Where someone just calls me on the phone and says listen, I qualified [to apply for a Green Card] through my wife or my husband or my adult son but in 2006 I took an administrative voluntary return and triggered 212(a)(9)(b) and can't fix it now. So yeah, that's had a big impact there.

If that person returns to the U.S. before that bar is up, they face the so-called "permanent" bar to admission, which is triggered when a person re-enters or attempts to re-enter the U.S. without inspection after having departed the U.S. with one year or more of unlawful presence. This completely disqualifies a person from getting a visa altogether because there is no general waiver of inadmissibility. In the words of one lawyer, "they're stuck." This permanent bar was something that many of their clients faced:[164]

> I have tons of clients that have taken voluntary return. Let me put it this way. I have a huge amount of potential clients that have come to me in consultations, in

[164] As chapter 7 will show, the decision to return to the U.S. may in part reflect the (baseless) assurances of officers to custodial migrants that returning to the U.S. will not affect their immigration status—part of the enticement—and ultimately a coercive strategy—to induce them to take voluntary return.

> which I have discovered that but for their taking voluntary return, they would have been eligible for provisional waivers in order to be able to immigrate through their spouses or through their children or through their parents. But, because they had the voluntary return in the past and re-entered illegally afterwards, it completely disqualifies them based upon a 212(a)(9)(c) bar. I have tons of those. I mean, just lists of people.

As alluded to above, and starkly illustrated by the lawyer below, individuals who take voluntary return often have no idea what they are giving up—the rights and opportunities they abandon—and the hurdles it imposes to obtaining legal status.[165] That is in part what makes the practice of voluntary return so egregious. One lawyer I sat down to interview told me that right before we met, she took a phone call from a man who she had to inform was no longer eligible for the Green Card he applied for twenty years ago because of a voluntary return he was coerced to take ten years ago—a fact that completely shocked him:

> This guy tells me he's been waiting in the pipeline for him to get a green card through his father, who's a U.S. citizen. Are you still single? Yes. When did your father file a petition? Sometime in 1995. Well now I see that it's going to be current in May. Next question. Have you ever left the country? Or has anybody taken you out of the country?...In this case, I believe he was stopped for a traffic infraction. The Border Patrol was called. And he signed a voluntary departure. Good-bye visa. Good-bye. And that was ten years ago [that he took the voluntary return]. And then he said to me, I asked [Border Patrol], I wanted to go before the judge. But they didn't give me a choice. He was going through a checkpoint in Temecula. Why was he going through a checkpoint knowing that immigration would be there? I don't know. But he did and he got caught. And now he has no case…He waited for 20 years to become eligible for his visa through his father because of the backlog in the Mexico preferences and now, after 20 years of wait, the lawyer says, you're not eligible for the visa.[166] So I think even though

[165] Chapter 7 will show that the lack of knowledge and understanding of voluntary return and its consequences on the part of custodial migrants is often a reflection of an information-deficient voluntary return procedure and constitutes a coercive strategy to induce migrants to take it.

[166] Historically Mexico faces one of the largest backlogs for family-sponsored visas. This is because there are significantly more individuals who want to immigrate to the US through family than there are spots available. This mismatch is a result of the US's formally equal immigration selection system, in which there are the same number of available spots available for every country, thus disregarding enormous differences in the population size of countries. As a result, the family-sponsored categories are very oversubscribed, resulting in backlogs for certain countries including Mexico. Motomura (2006) has argued that facially neutral laws may "mask inequality" when applied to countries that differ based on history, demographics and geography (183). Thus, our current immigration laws, he says, which limit annual immigration from any single country to the same number, may seem neutral, but they disproportionately impact countries like Mexico, "where the demand for immigrant admission to the United States is huge, rooted in long historical entanglement and a shared nineteen-hundred mile border with the

> [voluntary return] doesn't carry the punishment or the stigma of deportation, nowadays, I think it doesn't matter—it's the same. Then he asks me, "My son just turned 21—what about him?" No! It doesn't matter who petitions for you. You're inadmissible through 212(a)(9)(c) which is the kiss of death. He's in shock. So, I think that the voluntary departure in many cases completely does away with your right to get a Green Card. Nowadays even a voluntary departure can have terrible consequences.

Alternatively those who decide to remain in Mexico in lieu of returning to the U.S. face indefinite separation from their family and community in the U.S., which imposes social, economic, and psychological pressures on both factions, akin to the effects of deportation (see, e.g., Jacqueline Hagan, Castro, and Rodriguez 2009; Jacqueline Hagan, Rodriguez, and Castro 2011):

> [Voluntary return has] created [an] economic nightmare for a lot of these families. Many, we're talking about [are] the primary sources of income. The breadwinners are the folks who end up deported, so [it] creates a very serious economic pressure on a lot of the family units. We do have, unfortunately, a lot of those increasingly, folks who end up being divided by immigration policies, families being divided and it's distinctly a very psychological impact or a financial burden on all these families.

The *Lopez-Venegas* plaintiffs, for example, remained in Mexico for years before the settlement allowed for them to be paroled back to the U.S. (in their original status) for a hearing. Based on conversations with attorneys for the case (both working directly on the case and conducting intake to identify class members), many, many others who entered the U.S. after a voluntary return were not eligible members of the class. These are thus very stark choices. A border advocate describes the case of a mother and a father who were caught up in a raid by the USBP and one parent was voluntarily returned while the other, who had been previously deported, was formally removed, leaving the eldest child, a college student to care for her two siblings and to (unsuccessfully) pay the mortgage on their home/to take on the burden of financially supporting the family:

> The[ir] kids were at school at that moment, so they didn't know that this was happening…By the time the kids got home, they couldn't find mom or dad. A few days later, they were contacted by their parents and they were both in Tijuana. This happened 6 or 7 years ago so we had an 18- or 19-year-old taking care of her two siblings [while] she was going to college. They had bought a home and for a long time, she made it work. She had drop out of college. She had to look for jobs and she was still paying the mortgage. After a while, she really couldn't afford to do that and was able to really keep her family together. They ended up renting a small room where they lived for several years. Just late last year, after many legal ordeals, they were able to unify the family... The family actually qualified for immigration relief because they had U.S.-born children and one of them who needed help with a special medication attention and couldn't receive that attention

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greatest per capita income differential of any national border in the world" (Motomura 2006, 184; see also Ngai 2004).

> in Mexico. There could have been a way for these folks to adjust their status through a hearing but unfortunately because of the pressure that a lot of these folks are subjected to, the family is separated for many years. [For example] kids will go to Tijuana and live with their parents and will come back to the U.S. and go to school.

Although more research is necessary to understand the effects of voluntary, together the lack of due process and the mass processing of Mexican nationals suggests that the practice of voluntary return in San Diego has functioned as an "engine of [mass] social inequality" against Mexican nationals in the US, akin to the way the system of mass incarceration operates against African Americans (Western 2006). To be clear, I don't intend for this comparison to misappropriate the problems afflicting one race to another race, or to suggest that the processes of inequality in voluntary return and mass incarceration are the exact same. There are key differences between undocumented Mexican nationals and African Americans and between the systems of voluntary return and mass incarceration, which suggest the categorical inequality processes may also be distinct. Unlike Black Americans, undocumented immigrants in the U.S., by virtue of being noncitizens, are subject to immigration law and, specifically, to the political branches' plenary power to deport. Deportation practices, including voluntary return, are considered civil (law) processes rather than criminal ones, and thus individuals in these proceedings are not entitled to the robust set of constitutionally-protected procedural due process rights that those subject to criminal proceedings are. When they are arrested and prior to questioning, those subject to the criminal process must be advised of their *Miranda* rights, including their right to remain silent and thereby avoid self-incrimination and their right to legal counsel. Apart from these rights advisals, criminal defendants have the right to a lawyer at government expense and to an impartial jury trial that is speedy and public. The standard of proof is high—the defendant must prove the defendant is guilty "beyond a reasonable doubt" (*In re Winship* 1970). Criminal defendants have the right to appeal the jury's decision to a higher court to have a criminal conviction overturned or their sentence reduced.

In contrast, as described in chapter three, noncitizens in the civil custodial context have a weaker set of regulatory rights: the right to representation by counsel *not* at the government's expense; the right to examine, present, and challenge evidence, including through cross-examination of the government's witnesses; and the right not to be ordered removed from the United States unless the government proves that she is removable by clear and convincing evidence (a lower standard than "beyond a reasonable doubt"). However, the law does not require noncitizens in the civil custodial context to be advised of these rights until after the initiation of removal proceedings, which voluntary return entirely precludes. Thus, while an immigrant subject to voluntary return may have a right to a hearing, this right can be easily undermined if, as my research suggests is often the case, the custodial migrant is not informed of it by officers and/or lacks legal representation that can provide this information.

Moreover, voluntary departure procedures are administered by administrative officers who operate with ample discretion, little accountability, and little legal training. Due to a "discretionary decision bar," the decisions of immigration officers are generally not subject to judicial review by federal courts (American Immigration Council 2013). Thus, under the law, undocumented immigrants subject to voluntary return have far fewer and weaker rights and protections to begin with than African Americans subject to mass incarceration, and fewer options for recourse. Importantly, the rights differential between these two groups may reflect

the fact that nominally, deportation is not considered punishment while incarceration is, even though, as my research shows, the experience of deportation in the form of voluntary return feels punitive.[167]

This is not to paint a rosy picture of the criminal process and the experience of criminal defendants, as there is a substantial literature that has documented the ways in which due process is undermined in the criminal justice system (see, e.g., Leo 2009; Skolnick 1966). It is instead to highlight that both the differences in legal status between Black Americans and undocumented Mexican nationals and the wide gulf in rights dictated by the civil and criminal contexts together suggest that undocumented Mexican immigrants in the voluntary return process are more vulnerable to the caprices of state power and are subject to an insidious form of repression that Black Americans in the system of mass incarceration are not.

Notwithstanding these differences, I argue both Black Americans and undocumented Mexican immigrants are regularly subject to oppressive state social control through legal systems that function to racialize, punish, and justify (as the case may be, extra-) "legal violence" against them (see Menjívar and Abrego 2012), and ultimately to produce and reinforce their social inequality. In addition to highlighting their differences, it is therefore productive to also examine how these systems similarly act on these different groups and the ways their inequalities may be similarly structured.

Like the practice of voluntary return, mass incarceration is systematic, applied racially, and quasi-illegal (Bobo and Thompson 2006; Garland 2001; Wacquant 2001, 2000; Mauer 2006). Through these systems, Black Americans and Mexican nationals in the U.S. are disproportionately subject to intense and punitive surveillance by law enforcement officers in neighborhoods and regions where their populations are concentrated. Black communities are targeted through tactics such as stop-and-frisk and pretextual stops (Butler 2014; Baumgartner et al. 2017) which funnel them into prisons at astronomical rates that far surpass their proportion in the U.S. population and the rates at which whites are imprisoned.[168] Similarly, as shown in chapter 1, the vast majority of individuals subject to voluntary return have been undocumented Mexican immigrants removed from within the 100-mile southwest border zone, where most of the U.S. Hispanic population lives and where most USBP presence is concentrated. This region is heavily policed by the USBP using police stops, checkpoints, roving patrols, and historically, raids of public transportation, tactics which have enabled the mass processing of Mexican nationals through voluntary return, based on their nationality and their location within the border region rather than on their legal status.

Moreover, my research suggests that similar to mass incarceration, voluntary return is a mass "stratifying institution" that leads to the large-scale loss of rights and diminished citizenship

[167] See also Coutin and Reiter (2017) for the parallels between the punitive experiences of deportation and incarceration.

[168] Roberts (2003) argues that prison policy at the turn of the twenty-first century is most accurately characterized as the mass incarceration of African Americans" (1273). In 2016, blacks represented 12% of the U.S. adult population but 33% of the sentenced prison population. In contrast, whites accounted for 64% of adults but 30% of prisoners (Gramlich 2018). Black Americans are incarcerated at more than five times the rate of whites (Gramlich 2018). As a result, 15 percent of the African American male population has served time in prison, and 33 percent of the African American population in the US has a felony conviction (Shannon et al. 2017).

(broadly speaking) for those segments of the population that are disproportionately ensnared by the system. As a result of laws in almost every state that disenfranchise people with felony convictions, Black Americans experience the loss of their voting rights on a massive scale.[169] Thus, Black Americans subject to mass incarceration are disproportionately deprived of their full rights of citizenship. Although undocumented Mexican immigrants in lawyer and advocate accounts are not U.S. citizens, they are arguably members of the communities they reside in. By virtue of their kinship ties and long residence in the U.S., they enjoy a normative social or community membership that is comparable to certain dimensions of formal citizenship (Carens and Chasman 2010; Bosniak 2008). Those who have been voluntarily returned and triggered the unlawful presence bars lose an important bundle of due process rights, including the right to a hearing before a judge and the right to apply for discretionary relief from removal and possibly remain in the U.S. in formal status as a legal permanent resident (LPR). By losing these rights, these individuals are unable to access and enjoy/pursue the fuller set of rights, protections and benefits afforded by formal membership as an LPR.[170] Moreover, because LPR status is a necessary steppingstone to naturalization to U.S. citizenship, voluntary return potentially deprives the ability of tens of thousands of individuals in San Diego to become U.S. citizens and thus to enjoy the civil, political, and social rights of full membership in the polity (see Bosniak 2008). The barriers to U.S. citizenship created by the practice of voluntary return are not inconsequential and may serve to deepen existing social and racial disparities experienced by undocumented immigrants (see Aptekar 2015).

The mass stratification effects of these systems are not limited to the confined/returned individual. Both the systematic practice of voluntary return and mass incarceration hide "collateral consequences," whereby the effects of imprisonment and voluntary return extend into and shape the lives of family members and the communities of the confined/returned person (Chesney-Lind and Mauer 2003). As a result of the immigration consequences of voluntary return, which impose bars to admission and thereby compromise visa eligibility, voluntary return affects the U.S. citizen or permanent legal resident family members who are unable to sponsor their family members for a Green Card and bring them into formal status. More broadly, as indicated in the accounts of lawyers and advocates above, the spillover effects include family separation, the loss of employment, and the financial and mental pressures these events exert on family members. Similarly, mass incarceration creates "fractured families," permanently shifting familial relationships and structures; disrupts employment and thereby exacts financial pressures on the family unit; and imposes a host of long-term social and economic consequences on family members including on their health and educational attainment (Wakefield and Uggen 2010; Pattillo, Western, and Weiman 2006; Chesney-Lind and Mauer 2003; Western and Wildeman 2009).

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[169] One in 13 black people of voting age does not have the right to vote, versus 1 in 56 non-black voters (Chung 2018).

[170] Although it differs in important ways from U.S. citizenship (namely that as a citizen, you cannot be deported), LPR status is a formal status that comes with a host of rights that one is not entitled to as an undocumented immigrant (Bosniak 2008). Importantly, although it does not completely insulate the migrant from deportation (Kanstroom 2007), LPR status makes the person less vulnerable to removal in the future.

The social effects of both voluntary return and mass imprisonment are largely concentrated in the regions and neighborhoods where the confined/returned reside, which means these systems contribute to the long-term destabilization of entire communities. Scholars have shown how mass incarceration undermines the structure and social organization of communities, creating economic and social disadvantage for the populations that live there (see, e.g., Morenoff and Harding 2014). This has implications for prisoner reentry too, as formerly incarcerated individuals who return to their communities lack the social and economic support necessary to successfully reintegrate (Morenoff and Harding 2014). Voluntary return also arguably creates collective harms on the border community of San Diego. My research shows that the recipients of voluntary return are not only temporary labor migrants, as the stereotype of Mexican immigrants and the literature on voluntary return suggests, but also long-term residents and members of their communities with deep roots to the territory, including in the form of U.S. citizen family members. The effect of large-scale deprivation of rights through voluntary return has ostensibly been to disrupt and destabilize this community. Given the vital role of local communities in the successful integration of immigrants, the practice of voluntary return may have implications for the ability of migrants to become fully incorporated.

5.4 Conclusion

This chapter provided a broad empirical picture of the practice of voluntary return against Mexican nationals in San Diego. It showed that contrary to the language of the statute, voluntary return is a racialized, coercive (due process-deficient) practice that the USBP relies on to control undocumented immigrants within the U.S., and that its effect has been to deprive those individuals without status who are already very much a part of their communities in the U.S. the chance to come into status and become members of the polity in some formal and ultimately legal sense, and thus to enjoy the attendant rights and protections. Instead, these individuals remain out of status and vulnerable to the deportation power of the state (if they decide to return), or they are otherwise separated from their family and community in the U.S. The stigma related to being a Mexican national—the historically entrenched perception, largely created by the history of selective enforcement of immigration law in the interest of U.S. employers, that they are perpetually "illegal" regardless of citizenship status (see chapter 2)—is not unconnected to these practices, which reinforce and reify this stigma. It is popular belief that voluntary return, and border enforcement more broadly, is given to "economic" or "labor" migrants with have no ties to the U.S. and no significant period of residence to speak of, i.e. those caught illicitly crossing the border or recent arrivals. Conversely, this study showed how "border" enforcement extends well into the border community of San Diego and affects people who are very much rooted in and a part of the community. When the nature of these practices and their effects remain hidden or otherwise invisible, they go toward supporting and reifying the narrative of all Mexicans as temporary labor commodities. The lack of contestation also gives more hegemonic power to the law of voluntary departure by making it appear as if these practices and their resulting subordination and inequalities are "part of the natural order of things" (Calavita 2010, 38).

Towards the end of revealing more about voluntary return practices, the following two chapters expand on the finding of coercion articulated in this chapter by empirically showing the various, mostly subtle coercive strategies that USBP officers deploy to induce voluntary departure, and analyzes them in terms of the exercise of invisible institutional power.

Chapter 6 Coerced Consent: Detention Conditions and Physical Custody

The whole point of voluntary return is they get rid of the person before they get into the system where they can get access to legal advice and everything. Nobody gets brought downtown [where ICE offices are located] and fingerprinted and given the Notice to Appear and then gets offered voluntary return. They might fingerprint them and then toss them over, but that's all preliminary to giving them any real notices of warning or anything. They do have to sign some paper that says they're foregoing the right to see an immigration judge, but certainly no paper that explains all the different things that could happen in immigration court.

--Immigration practitioner for 23 years

6.1 What is Legal "Consent" in Voluntary Departure?

The voluntary departure statute stipulates that "voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions" (8 C.F.R. §240.25(c)). Federal courts have similarly affirmed this requirement for consent from the migrant in voluntary return in a series of cases which address the presence-breaking character of voluntary departure.[171] As described in chapter 3, a break in continuous physical presence for the purpose of obtaining deportation relief is one of the immigration consequences of voluntary departure. In spite of this line of cases, the legal definition of consent in voluntary departure remains unclear and incomplete. In *Ibarra-Flores v. Gonzalez* (2006), the Ninth Circuit held the following:

> Given the consequences of an agreement to accept voluntary departure, such an agreement, like a plea agreement, should be enforced against an alien only when the alien has been informed of, and has knowingly and voluntarily consented to, the terms of the agreement.[172]

[171] See, e.g., *Ibarra-Flores v. Gonzales* (2006) (the taking of voluntary return must be both voluntary and knowing); *U.S. v. Gomez* (2014) (waiver of a removal hearing must be "voluntary, knowing, and intelligent").

[172] The issue in the case was not specifically about whether the petitioner consented to voluntary departure but the issue of consent was important enough to the central issue (whether the petitioner's voluntary departure constituted a break in continuous physical presence for the purposes of receiving relief from removal) to be addressed by the court: "Although the issue of whether petitioner knowingly and voluntarily accepted administrative voluntary departure is not 'specifically and distinctly' raised in the opening brief, we find good cause for addressing this argument." Accordingly, the Court notes that the petitioner's testimony before the immigration judge suggests that "due to the misrepresentations of immigration officers, petitioner did not knowingly and voluntarily accept administrative voluntary departure in lieu of being placed in deportation proceedings" (*Ibarra-Flores v. Gonzales* 2006: 620). See also *Orantes-Hernandez v. Smith* (1982).

The consequences the Court cites are the both interruption to continuous presence in the United States which undermines potential pathways to formal status, as well as the relinquishment of the right to apply for relief that would otherwise allow the individual to remain legally in the United States.[173]

The Court formulated this "knowing and voluntary" standard based on case law that "the record must contain some evidence that the undocumented immigrant was informed of and accepted the terms of voluntary departure," and more specifically, that he or she takes voluntary departure with the knowledge that he or she is doing so in lieu of being placed in removal proceedings before an immigration judge (and should therefore not have an expectation that he may reenter and resume continuous presence).[174] In other words, the standard requires there to be evidence that the undocumented immigrant was made aware of the possibility of appearing at a hearing before an immigration judge and affirmatively agreed to depart instead of being placed in removal proceedings. The message here is that one element of a knowing and truly voluntary (i.e. consensual) voluntary departure is that the undocumented immigrant has information about his other choices/alternatives before he accepts the option of voluntary departure.

More recently, federal courts and the Board of Immigration Appeals (BIA) (i.e. the immigration "court of appeals") have also considered whether the evidence shows a process that is sufficiently formal and documented that the undocumented immigrant was made aware of the choice between returning voluntarily or being subjected to more formal procedures to expel him or her from the United States.[175] Formality here serves as a proxy for procedural due process, but what process is sufficient is not clear. The BIA has suggested several examples of evidence of a formal process, but has not addressed the question of which pieces are sufficient (individually or together) to constitute a "formal and documented process" for the purpose of a consenting

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[173] "[A]n agreement to accept voluntary departure is akin to a plea bargain in which the alien gives up any expectation that the alien can 'illegally enter and resume a period of continuous physical presence.' Moreover, if voluntary departure is accepted in lieu of being placed in deportation or removal proceedings, the alien agrees to relinquish the right to present a claim for relief that might otherwise allow the alien to stay in the United States" (*Ibarra-Flores v. Gonzalez* 2006).

[174] See *Reyes-Vasquez v. Ashcroft* (2005)(a finding of no continuous physical presence for cancellation of removal purposes was not discretionary and therefore subject to judicial review); *Tapia v. Gonzalez* (2005: 430) (stating that the type of agreement to depart that terminates an alien's continuous physical presence is a formal one "whereby the terms and conditions of [the undocumented immigrant's] departure were clearly specified"); *Morales-Morales v. Ashcroft* (2004) (stating that a voluntary return following an arrest for reentry without inspection will not break continuous physical presence where the record lacks evidence of any threat that the alternative was a hearing in removal proceedings). See also *Matter of Avilez* (2005); *Matter of Romalez* (2002).

[175] See *Rosario-Mijangos v. Holder* (2013) (finding that the undocumented immigrant's continuous presence was terminated where he was informed of his right to appear before an Immigration Judge and chose to return to Mexico voluntarily in lieu of being placed in proceedings); *Reyes-Sanchez v. Holder* (2011) (finding a break in the undocumented immigrant's continuous physical presence where she received a form notifying her of her right to request a hearing before an Immigration Judge).

voluntary departure (and therefore breaking continuous physical presence).[176] Instead it has stated that "the evidence required to show a process of sufficient formality to break continuous physical presence will depend on the circumstances of each case"—i.e. a case-by-case evaluation/assessment is required. Most circuits that have addressed this question have looked to whether there is evidence that the undocumented immigrant was advised of and waived the right to have a hearing before an immigration judge (see, e.g., *Rosario-Mijangos v. Holder* 2013; *Reyes-Sanchez v. Holder* 2011). Based on this jurisprudence, the BIA most recently stated that evidence of the formality of the process used includes how the threat of proceedings was communicated to the undocumented immigrant, what advisals were given, and whether the undocumented immigrant had knowledge that the agreement to depart was in lieu of being placed in proceedings (*Matter of Castrejon-Colino* 2015).

Although helpful, at best these decisions provide a piecemeal legal concept of consent in voluntary departure. Different courts articulate different rules to help decipher whether consent was given after the fact (for the purposes of determining whether the voluntary departure broke continuous physical presence) but none provides a complete set of criteria for consent and affirmative steps that immigration officers should take to ensure consent.[177] It is not entirely clear from these cases what consent actually requires in voluntary departure.[178] In this ambiguous legal context—where the definition of consent is unclear and custodial migrants are liminal legal subjects with limited rights in civil custody (see chapter three)—what does the practice of voluntary return look like on the ground? More specifically, how do immigration officers obtain consent from custodial migrants? The obtainment of consent is central to voluntary departure having any process at all—it's the only semblance of a process for custodial migrants, given its streamlined nature compared to traditional removal proceedings.

The law and society literature on criminal and quasi-criminal practices has shown that law enforcement institutions are often structured in ways that incentivize administrative expedience and efficiency at the cost of due process ideals. As a result, they operate in ways that oppose the interests of the subjects they are intended to serve. In his model of the criminal process, Herbert Packer (1964) illustrates this tension between due process and crime control values that motivate the various players in the criminal justice system. He argues that the crime control approach is an inherent (i.e. built-in) feature of enforcement agencies which necessarily prioritize efficiency in the name of maintaining social order. Under this approach, law enforcement agencies rely on, among other things, informal decisions and processes, uniformity of processing, and finality of decisions over adherence to formal rights and procedures,

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[176] *Matter of Avilez* (2005: 805-806) (stating that possible evidence includes, among other things, fingerprints and photographs, a Notice of Action—Voluntary Departure (Form I-210), statements of testimony from the undocumented immigrant or immigrant officials, and other appropriate immigration forms or official records).

[177] To reiterate, consent was an ancillary issue in this line of cases; none of the courts examined the issue of consent directly. The central question these courts examined was what kind of evidence the court should look for in the record to decide whether a voluntary departure breaks continuous physical presence.

[178] It is also noteworthy that the court compares voluntary return to a plea agreement for criminal defendants (in the far more rights-protective criminal context) to justify the requirement for informed consent, in spite of the well-documented myth of consent in the criminal plea bargaining context (see, e.g. Alschuler 1979; Blumberg 1967; Dash 1951).

individualized justice, and accuracy and reliability of decisions, which are characteristic of the due process approach. This is borne out by empirical studies of the police setting. In his empirical study of police culture and practice, Jerome Skolnick (1966) examined how police address the conflict between these two value systems as they try to enforce the law on the ground. He found that officers tended to rely on their own perceived expert ability to make judgments to determine who they arrest is guilty and who is innocent, and that they considered criminal procedures and due process protections as obstacles to police work, constraining their ability to carry out their job effectively. As such, his study shows that police tend to emphasize crime control and social order and deemphasize the values underlying the due process approach. Richard Leo's extensive body of scholarship on police interrogations also shows this bias (see, e.g., 1992, 1996b, 1996a, 2009). He found that in the interest of efficient processing (i.e. screening suspects and determining guilt), police departments train their officers in subtle (i.e. non-physical) coercion tactics which effectively induce criminal defendants to waive their *Miranda* rights and make incriminating admissions and confessions against their own self-interest. Police departments thereby undercut the formal *Miranda* rights that criminal defendants are constitutionally entitled to, which protect their free choice not to make a confession, and more broadly, reflect the goal of avoiding errors and increasing accuracy.

What we know about the practices of law enforcement officers in the immigration context similarly suggests that due process values are de-emphasized by immigration enforcement officers. The advocacy literature shows that immigration officers routinely fail to inform custodial migrants of requisite rights and information and to provide requisite screening processes which are supposed to help determine whether the individual is entitled to access to more formal processes (and thus more protection from the state). A 2017 study of the behavioral patterns of U.S. immigration authorities (CBP and ICE) during the apprehension, custody and removal of Mexican migrants from the United States found, among other things, that 43.5 percent of the respondents surveyed were not advised of their right to contact their consulate; more than half of the respondents surveyed (55.7 percent) were not asked if they feared returning home; and half of the respondents (50.7 percent) who signed repatriation documents reported that they were not allowed to read the documents before they signed them (Campos and Cantor 2017). Another recent study found that CBP agents at ports of entry rely on a number of informal tactics, including misrepresentations about U.S. asylum law and the U.S. asylum process, interference with and attempts to obstruct the right to counsel, threats and intimidation, verbal and physical abuse, and coercion, to block asylum seekers from access to formal processes like asylum protection screenings and immigration proceedings, as they are required to do under U.S. law and treaty commitments (Drake, Acer, and Byrne 2017).

This chapter shows that the practice of voluntary return is consistent with both the law and society literature on criminal process and the findings of the immigrant advocacy literature. Although, as described in chapter three, some limited procedural safeguards are supposed to govern the process of voluntary return, including the statutory requirement for informed consent, this chapter shows that even the minimal protections that apply under the law are not routinely observed by agents. Thus consent in voluntary return is illusory and coerced. After articulating in Part 6.2 four baseline conditions for consent in voluntary departure based on a reading of the normative literature on freedom and autonomy and on violations of legal consent in voluntary departure cited in a recent American Civil Liberties (ACLU) complaint, Part 6.3 and 6.4 presents findings from interviews with 29 immigration attorneys and border advocates in San Diego and USBP organizational materials obtained through the AIC FOIA litigation, as well as other

documentary evidence about the standards and policies governing the USBP detention and custodial context, which show that coercion in voluntary return is a product of structural factors within the USBP (i.e. policies and procedures that are built into the system) that undermine those four conditions of consent. While some lawyers reported instances of physical intimidation and verbal harassment suffered by their clients to induce them to sign voluntary return, most of these data show that coercion in the practice of voluntary return was structural, and thus largely subtle. Although they are examined separately, these structural factors exist throughout all stages of the voluntary departure process. Thus, custodial migrants were typically subject to multiple forms of coercion that often worked in concert with one another to induce the "acceptance" of voluntary return. For organizational purposes, they have been distilled into two broad categories: physical custody and detention conditions, the subject of this chapter, and (mis)information and the confidence game, which is examined in chapter 7.

In general, voluntary departure is implemented in the context of civil detention where there are already significantly fewer and less robust legal protections than in the criminal context. For example, in the civil detention context, officers are not required to provide rights advisals until after the initiation of removal proceedings, which voluntary departure precludes. However, USBP detention policies further complicate and/or obstruct access to the rights afforded by the law, namely the right to counsel and the right to a hearing. As shown in chapter five, USBP policies encourage the speedy practice of voluntary return (which is by definition an expedited process) and thereby preclude detainees from access to information, advice, and ultimately legal representation and challenge. Because of proximity to the US-Mexico border, this coercive strategy disproportionately affects Mexican nationals. Chapter 6 will show that USBP policies also serve to isolate detainees (in inhumane physical conditions for unknown periods of time) from communication with family members and/or attorneys, making it challenging to obtain legal representation. USBP detention policy does not require officers to provide detainees a phone call to a lawyer or other legal representative until 24 hours has passed and it does not provide provisions for in-person access to counsel. The facilities where detainees are kept are not set up to make it easy for those on the outside to contact or locate detainees. Moreover, even if contact is made, local (sector and station) guidance often dictate that officers don't have to provide those on the outside, including attorneys, access to information about detainees, including where they are located, or to the detainees themselves. This makes the USBP very murky, shadowy, and inchoate, obstructing transparency. Chapter 7 shows that as part of this culture of no information/no representation, requisite information about voluntary return and one's rights is not effectively communicated (if at all) to detainees. Without representation, detainees have no choice but to rely on the information provided by officers. However, the training and instruction that officers receive is deficient with regard to immigration law and the implementation of even basic procedural safeguards, such as ensuring that forms are in a language the person understands. Consequently, USBP officers who implement voluntary return are inadequately versed in, among other things, immigration law and how to correctly and lawfully implement voluntary departure procedures. This makes it more likely they will provide detainees insufficient or erroneous information, or resort to informal explanations that reflect the interests of the USBP, and therefore administer voluntary return in a manner that undermines due process requirements (and consent). The forms officers administer, which in theory are a key way for officers to convey important information about voluntary return, are similarly deficient. For example, they do not provide the potential legal consequences of taking voluntary return.

Together, these structural problems show that the legal requirement for consent in voluntary departure operates in a setting that provides weak protections for immigrants in USBP custody, thereby rendering voluntary departure coercive. In other words, because of the dearth of strong rights and procedural safeguards for undocumented immigrants in USBP custody, the law creates a context for the subtly coercive implementation of voluntary return and thus for the unfair and exploitive treatment of undocumented immigrants. As a result, the practice of voluntary departure raises serious concerns about the protection of the due process and substantive rights of undocumented immigrants in USBP custody, especially those of Mexican nationality, who are the main recipients of administrative voluntary departure.

Because coercion is a result of structural problems, it can be seen as exercising a subtle form of power. This chapter concludes in Part 6.5 by drawing on British sociologist Steven Lukes' (1974) multi-dimensional theory of institutional power to help examine and explain how power in the practice of voluntary return operates in forms such as information control, deception, persuasion, and manipulation to render it subtly coercive. While Lukes (1974) treats the three forms of power in his framework separately, my analysis shows that they are not divisible in practice. The practice of voluntary departure reveals how these forms of power operate together and through each other and can be indistinguishable. This chapter focuses largely on the first of the three dimensions of power—decision-making power, and specifically, power dependence. The remaining two dimensions, non-decision making (agenda-setting) power, and hegemonic (preference-setting) power will be examined in chapter 7, which examines how structural factors and officers' practice of a confidence game undermine the conditions for informed consent.

6.2 A New Articulation of Consent: Four Conditions

Given the vague guidance from the law on the definition of consent, it may not be altogether surprising that there is a long history of lawsuits alleging the coercive practice of voluntary departure by immigration enforcement agencies, especially in Southern California.[179] In the absence of further, more explicit guidance from the statute and regulations and federal courts on the practical requirements for/definition of consent in voluntary return, these complaints/lawsuits may provide further insight to help formulate a more complete and robust set of criteria for consent by articulating the specific ways the practice of voluntary return undermines the legal requirement for consent. Most recently, in 2013, the American Civil Liberties Union (ACLU) of San Diego and Imperial Counties filed a class action lawsuit against the Department of Homeland Security (DHS), Customs and Border Protection (CBP), and ICE, alleging in the complaint that these immigration enforcement agencies in Southern California "regularly pressure, deceive, and threaten Mexican nationals who are eligible to reside in the United States lawfully-and have built lives in the United States over decades" into signing for voluntary departure (*Lopez-Venegas v. Johnson* 2013, 1).

The obstructions/violations of legal consent they cite are map onto a reading of the theoretical literature on consent on freedom/autonomy. Early (pre-modern and modern) political theorists saw as central to the concept of coercion the use of physical force and violence (or threats thereof) by some parties to implement and enforce decisions about the activities of others (Aquinas 1920 [1273]; Hobbes 2018 [1651]; Kant 2017 [1797]; Locke 1823 [1689]). They examined the nature of coercion in relation to the power and function of the state, particularly its

[179] See *Lopez-Venegas v. Johnson* (2013, 47-52) for a good overview of this history of abuse.

ability to enforce the law either through direct force or punishment of lawbreakers. Contemporary theorists largely departed from the traditional approach of early theorists by shifting the analysis of coercion to focus on how the subject of coercion was affected by/perceived the coercion rather than on the acts of the coercer (see e.g. Gorr 1986; Nozick 2017 [1974]; Rhodes 2000; Wertheimer 1987; Zimmerman 1981).[180] Thus they were interested in the ways the coercee's acts altered the coercee's intentions, preferences, and choice of actions and by affecting her reasons for acting but akin to the traditional approach, much of these works focus on the coercee's will and associate coercion with threats. For example, some of these writers have considered the effect of coercive threats on freedom (i.e. of choice) and autonomy (Anderson 2010; Carr 1988; Pettit 1996). Other works dispute that only threats can be coercive and show how conditional offers can also be used coercively (see e.g. Feinberg 1989; Frankfurt 1988; Held 1972; Zimmerman 1981). For example, McGregor (1988) points to how differentials in bargaining power between parties (e.g. due to a dependence by the weaker party on the stronger party which enables the stronger party to make threats against and promises to the weaker party within the exchange relationship) can create the conditions such that a conditional offer cannot be reasonably refused, thus rendering it coercive (see also O'Neill 1991). Accordingly, theorists including McGregor criticize the approach of focusing on the impact on the coercee because it complicates the distinction between coercive and non-coercive acts, insisting instead on a (return to a?) "coercer-focused" account that considers the powers, intentions and activities of coercers (Berman 2002; Lamond 1996, 2000; McGregor 1988).

From this literature we can distill the following four conditions that any concept of informed consent must plausibly meet. First, there must be an absence of direct coercion, such as threats or pressure to make a particular decision. The *Lopez-Venegas* (2013) complaint cited the use of threats of lengthy incarceration by officers if undocumented immigrants didn't sign voluntary return papers. Second, consent requires that one must have access to an adequate range of options. If you are provided only one option, you don't genuinely have a choice, so you can't be regarded as having given your consent to the one and only option. In *Lopez-Venegas* (2013), officers allegedly regularly pre-checked "voluntary departure" on a form of migrants' options that they told migrants to sign. Voluntary return was thereby portrayed as their only option. Third, one must have access to information about what one's options are. Not only must you actually have access to an adequate range of options; you must also know what options you have. This is the element of consent that both federal courts and the BIA focused on. In *Lopez-Venegas*, consent was undermined in this way when officers failed to convey information regarding voluntary return in migrants' native language. It was also undermined by officers' suppression of migrant's rights through the failure to provide or interference with an opportunity to contact and speak to an attorney who could provide migrants information that would enable them to make a meaningful decision about voluntary return. Finally, informed consent requires that the person must have certain cognitive and psychological abilities in order to truly consent. The *Lopez-Venegas* (2013) complaint details the case of a woman with cognitive disabilities who was subject to voluntary return, as were minors.[181] This last condition is less relevant to the findings of this study but nevertheless remains an important condition of meaningful consent.

[180] But see Bayles (1972); Gunderson (1979); and Lamond (1996, 2000) (equally accept direct force as a means of coercion).

[181] Although not explicitly reflected in the voluntary departure statute, it is legally permissible to voluntary return Mexican minors (see, e.g., William Wilberforce Trafficking Victims Protection

Together, the court and BIA opinions, as well as the *Lopez-Venegas* (2013) complaint and the normative literature on freedom and autonomy, help provide a more complete and more concrete definition of consent to voluntary departure and what conditions it *should* require to be truly voluntary. But how does the reality on the ground measure up? The next section turns to examining this question.

6.3 The Nature of the Holding (Detention) Situation

This section examines the various aspects of civil detention that rendered it a coercive space and ultimately pressured voluntary return. Attorney and advocates reported that the physical conditions of detention, the isolation for unknown periods of time, and the pressures that flow from the prospect of indefinite detention acted as powerful coercive forces that pressured custodial migrants to concede to signing and being deported via voluntary return. They often talked about these coercive forces together. This suggests not only that these coercive forces worked hand in hand but that there were simultaneously several coercive forces acting on the detained individual, pressuring them to sign for voluntary return. In a telling example, one attorney describes the overwhelmingly powerful coercive effect of detention and the various forces at play:

> I had recently a client who was detained, who had a U.S. citizen wife and a U.S. citizen son, and he was a good example of someone who felt very pressured to sign a voluntary return even though he had never had any prior encounters with immigration. He had no immigration record in the United States, so he would be eligible to pursue cancellation of removal [discretionary relief from deportation via an immigration judge] and while he was detained he felt pressured to sign and I think that watching his wife try to contact him, and tell him, look the attorney is saying you have options, just be patient, not to sign anything [is the reason why he hasn't signed yet]. He felt from his perspective that it would just be easier to sign something and return to Mexico and so I think that a lot of that came down to the circumstances of the detention and the conditions he was in, the isolation he was in, what he was told by the officers that he was kind of just so demoralized and willing to give up an opportunity…Just the effort it took from myself and his spouse to convince him to have the patience to wait and continue to pursue those opportunities.

In the following sections, this chapter untangles these forces—uninhabitable detention conditions, isolation, and barriers to legal representation—in order to comprehensively examine the features of each and how they work to render voluntary return coercive.

Act 2008). Federal regulations require immigration officers to implement certain procedural safeguards for unaccompanied minors presented with the choice of voluntary departure (see 8 C.F.R. § 263.3(g)), which *Lopez-Venegas* (2013) alleged the USBP in San Diego has not abided by. See Appendix D for more on the voluntary return of Mexican minors.

6.2.1 Uninhabitable Detention Conditions

One way attorneys and advocates commonly described migrants felt pressured to sign for voluntary return was the prospect of detention for indefinite or unknown periods of time in uncomfortable, unpleasant, and ultimately inhumane physical conditions of the CBP holding facilities, which stood in stark (and much less appealing) contrast with the "offer" to sign the voluntary return form and be released from detention imminently, if not immediately:

> He [the Border Patrol officer]…tells you, "If you request a hearing before an immigration judge, [you're] going to end up spending three, four weeks behind bars waiting for that hearing or [they'll say] you don't even qualify for that, why don't you make it easy for yourself?" Mind you, the conditions at the short-term holding facility are heinous: overcrowded cells, no privacy whatsoever, very little nourishment is provided to folks there, and some Border Patrol employees are intimidating folks, who in turn are under [duress]…A lot of folks want to get out of that situation [as] quickly as possible and they'll take that bait.

When migrants are apprehended at the southern border by the USBP, if they are not immediately taken to the border and voluntarily returned, they are usually taken back to a CBP facility[182] and placed in what is known as a "hold room," [183] which is intended to temporarily house individuals while officers are initially processing them and a decision is being made about what to do with their case—to release the individual, repatriate them to their home countries via formal removal or informal return, or transfer them to the custody of another federal agency, including ICE (which runs/contracts long-term detention facilities) for civil removal proceedings.[184] These hold rooms can be located in any number of CBP facilities, including Border Patrol Stations and Border Patrol Check Points (CBP Handbook 2009, 492). In San Diego, the first stop for individuals apprehended by the USBP (and usually the only stop if they are removed via voluntary return) is usually the temporary holding facilities at one of the eight Border Patrol stations dispersed throughout the sector[185] or alternatively, a location known as the Barracks 5

[182] This can include, among other things, Border Patrol Stations, Border Patrol Sector Headquarters, Border Patrol Check Points, and Staging and Alien Detention Removal Facilities (CBP Security Handbook 2009, 492).

[183] In a different organizational document, the CBP broadly defines a hold room as "a secure facility for the detention of aliens encountered and processed by operational components of CBP" (CBP Security Handbook 2009, 492).

[184] The individual may also be transferred to the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) if the detainee is an unaccompanied child (8 U.S.C. section 1232(b)(3)(2013)) or to the United States Marshals Service (USMS) for possible federal criminal proceedings, such as prosecution for illegal re-entry under Operation Streamline (USBP Detention Policy 2008, 3).

[185] These stations are the Imperial Beach Station, Brown Field Station, Campo Station, San Clemente Station, El Cajon Station, Theodore L. Newton Jr. and George F. Azrak Station, Chula Vista Station, and Boulevard Station.

(or just simply the "barracks"), a transit staging area" in San Ysidro.[186] Although there are no statutory or regulatory standards for CBP detention, internal agency guidance on USBP detention standards (2008) requires that detainees in these facilities "be held under humane conditions of confinement that provide for their wellbeing and general good health" (13), including regular snacks and meals; access to potable drinking water, bathrooms and toilet items, and necessary medical attention; and detention cells that are regularly cleaned and sanitized[187] (8-9). More recent standards which apply to all CBP components similarly state these things, but also add that "food and water should never be used as a reward, or withheld as punishment. Food provided must be in edible condition (not frozen, expired, or spoiled)" (CBP TEDS Policy 2015, 18).

In contrast, lawyers and advocates described clients routinely deprived of basic amenities, including food and water, while detained in a cold and otherwise unsanitary and uncomfortable setting, as a means to pressure custodial migrants to sign. One lawyer detailed the typical conditions of confinement that her clients in these facilities experience, and how these conditions create a coercive physical space which induces them to "accept" voluntary return so that they may get out as quickly as possible:

> They may sit there for quite some time with little or no food and water, no blankets. They may be placed on a hard cement floor for hours, away from communicating with family, friends, or attorneys. There are no phones that are given to them, they're not allowed to make a phone call. People think you get one phone call. That's nonsense. In that scenario, people have a lot of time to become fearful. The CBP [Customs and Border Protection] guy shows up and he appears to be this wonderful giant grandfather that's going to do them this big favor and they round up all these people and say "hey, we've got a good deal for you. If you want to just sign here you get to go home and you won't have to worry about sitting in this cell." What would you do?

Other times, officers would provide the voluntary departure form to detainees and then leave them in the holding room, waiting for them to succumb to hunger, thirst and the uncertainty of when they would next receive some sustenance:

> In many instances, I saw a systematic way that [officers] would wait a very long time [for migrants in detention to sign]. [In the meantime] [s]ometimes they wouldn't feed them properly [in detention], sometimes they wouldn't get water properly. That's what [migrants] were telling me. I mean, I hear it a few times, that's one thing, but I heard it many times.

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[186] Otherwise, individuals in these facilities are moved to long-term detention facilities run or contracted by ICE or to another agency.

[187] See also "Defendants' Response in Opposition to Plaintiffs' Motion to Enforce Settlement of Class Action, Flores v. Holder," No. 85-cv-4544, Dkt#121 (Feb. 27, 2015) (stating that "CBP sets and enforces clear standards for safe and sanitary conditions at the Border Patrol stations through facilities design guides and written policy guidance," and cites to the 2008 USBP Detention Standards), at pp. 20-22.

These accounts are supported by reports that these CBP short-term detention facilities are sparse—"small concrete rooms with concrete benches" that lack amenities like beds or sleeping accommodations. Per the CBP Security Handbook (2009), in fact, it is a requirement that there be "no beds" because "a hold room is not designed for sleeping"[188] (494). They are also "extremely cold, frequently overcrowded, and routinely lack adequate food, water, and medical care"[189] (Cantor 2016, 1). Moreover, the CBP expansively defines a "hold room," providing that officers have discretion to detain the person in any number of rooms in the facility, even if it is not designated as a "hold room,"[190] which has its own design and space requirements (e.g. a toilet) based on its purpose[191] (Figure 6.1). Internal agency guidance indicates that detainees should not be held for more than 12 hours,[192] but in reality, it is not uncommon for it to be longer.[193]

Furthermore, individuals held in these facilities were regularly subject to freezing cold temperatures as part of their confinement. In the words of one attorney, "it's very common that they turn the air conditioner up, so [migrants are] kept in very, very cold conditions to the point that it's so uncomfortable that they just want to get out of there [so they sign]." Although there is nothing prohibiting officers from this practice in internal guidance, more recent standards proscribe that "officers/agents should maintain hold room temperature within a reasonable and comfortable range" and that "under no circumstances will officers/agents use temperature controls in a punitive manner" (CBP TEDS Policy 2015, 16). Lawyers and advocates cited instances of Border Patrol officers in San Diego essentially converting rooms and cells at holding facilities into iceboxes, or *hieleras,* as they are notoriously referred to in Spanish, and locking up individuals in there for indefinite periods of time without access to basic amenities to pressure them to sign:

> While they're [Border Patrol] letting them think over the voluntary departure, they'll lock them in a really cold room with no access to bathrooms and no access to food and water. That adds to the coercive feeling of the whole experience. I've especially heard that [from] people who are apprehended in their cars and then taken to…I can't

[188] But see the CBP TEDS policy (2015), which states regarding their "bedding" policy: "When available, clean blankets must be provided to adult detainees upon request" (18). For juveniles, on the other hand, "clean bedding must be provided" (18). The document describes "bedding" as "a (or any combination of) a blanket, mat, or cot" (28).

[190] The CBP broadly defines a "hold room" as "an area such as a detention cell, a search room, or an interview room in which detained persons are temporarily held pending processing or transfer" (USBP Detention Policy 2008, 2), and similarly provides that "dual designation of a particular room is authorized" (USBP Detention Policy 2008, 3).

[191] See the CBP Security Handbook (2009, 492-497).

[192] "Whenever possible, a detainee should not be held for more than 12 hours" (USBP Detention Policy 2008, 3).

[193] A recent study of immigrants detained in the CBP Border Patrol's facilities between 2014 and 2015 revealed that detainees are routinely subject to lengthy (overnight) detention, sometimes longer than three days (Cantor 2016). 67 percent of detainees were held for 24 hours or more, 29 percent for 48 hours or more, and 14 percent for 72 hours or more (Cantor 2016).

remember if it's Temecula or San Onofre [USBP checkpoints], but I feel like I want to say it's San Onofre, where then they're just locked in a cold office. No water. No nothing. 'Okay, sign here.' 'Oh, I don't want to sign.' 'Well, why don't you sit here and think about it for a while?' and they're locked into a super freezing cold office space with no restrooms.

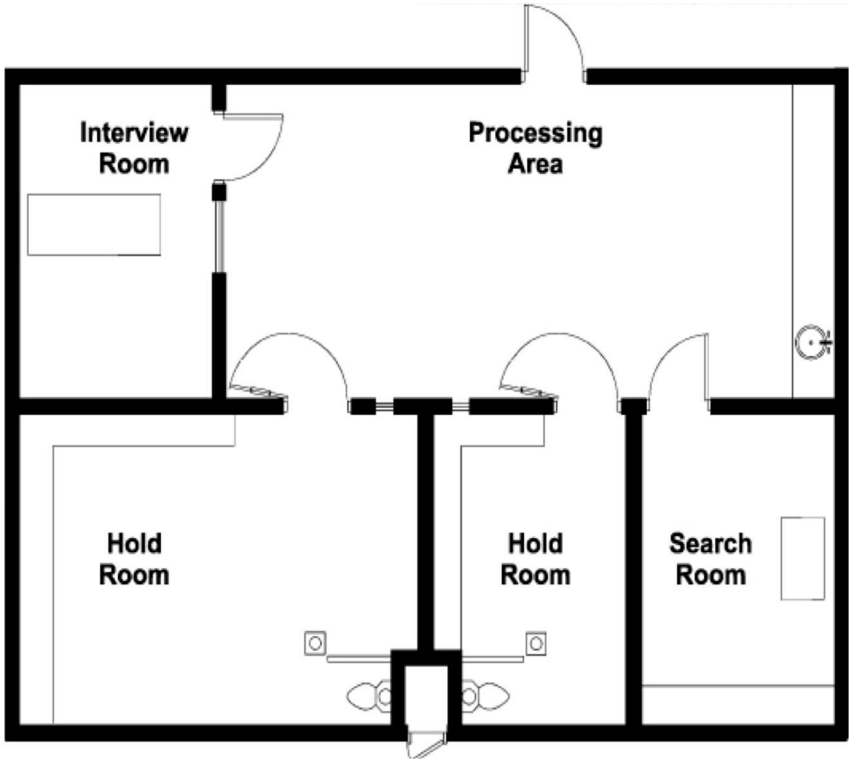

Figure 6.1 Layout of U.S. Customs and Border Protection Facility *Source*: CBP Security Policy and Procedures Handbook (2009).

Lawyer and advocate accounts are supported by numerous reports which document the systemic and widespread CBP practice of keeping detention facilities at inhumanely cold temperatures. For example, one report found that in an analysis of data from 391 detained in Border Patrol facilities in three southwest Border Patrol sectors between June and November 2015, more than three out of four detainees reported that they had been exposed to extremely low temperatures (Cantor 2015). A 2015 class action lawsuit against the Border Patrol in the Tucson Sector details disturbing allegations of detainees in *hieleras* who are subject to:

> painfully low temperatures without proper clothing or blankets. Indeed, CBP officials force detainees to remove extra layers of clothing before entering the frigid cells. CBP officials regularly ignore detainees' complaints about the cold cells, and it has been reported that official threaten to make the cells even colder as punishment for complaining about the temperature (*Doe v. Nielsen* 2015, 2-3).

6.2.2 Isolation

Another factor that renders detention a coercive space is the isolation faced by detainees. Isolation is not just a product of migrants' physical confinement which is an inherent/intrinsic part of the detention experience (i.e. physical bodily separation from their community and loved ones) but also specific structures and policies governing the detention setting that pose obstacles to telephone and in-person contact and communication with family and/or a lawyer. The isolation created by these barriers acts as a significant coercive force on the practice of voluntary return by creating fear and uncertainty about their situation and what course of action to take:

> I have many clients tell me…that some of the worst experiences of their life have been detained and during this detention and processing time period with immigration [i.e. immigration officers]…the frustration [of] not knowing what's happening—being held, not being able to contact family, not being able to contact an attorney, I think those initial 48 hours are really difficult for people. Family members cannot locate them, attorneys often times cannot locate them…That isolation…drives people to sign voluntary return kind of out of desperation because they [can't] talk to someone, to understand the process, to understand their options.

These obstacles to contact and communication which create the conditions of isolation take various forms. USBP guidance regarding standards in short-term detention facilities does not include any provision regarding in-person access to counsel or other visitors including family members (USBP Detention Policy 2008). In San Diego, lawyers reported it was rare for them to meet their clients at these facilities. One lawyer described visiting one facility, "the Barracks," for the first time in her thirty-year career as a practitioner in San Diego, where it became very clear to her that they were not equipped to accommodate visitors:

> I was unaware that we could actually visit it and I visited it last week. It was such an interesting visit because there was like a little cement ledge, it was all dusty and that's where they told me I was to interview my clients, sitting on that ledge.

In lieu of in-person access to counsel, the guidance requires officers to give individuals access to a telephone to call an attorney "or other party." Form I-826 (which, as described in chapter 5, is the practice for officers to provide voluntary candidates) similarly provides, in a section captioned "Notice of Rights," that the detainee has the right to contact an attorney or other legal representative and/or their consular officer, including the right to a telephone call to said attorney, legal representative, or consular officer "*at any time before your departure*" (emphasis added; see Form I-826 in Appendix C). However, this right as stated on Form I-826 is severely limited by USBP detention policy, which states that "persons detained *more than 24 hours* will be given access to a telephone for the purposes of contacting an attorney or other party as stated on the I-826 Notice of Rights and Request for Disposition," and at a minimum, once a day thereafter until the individual is no longer in custody (USBP Detention Policy 2008, 9; emphasis added). In other words, the officer does not have to provide a phone call to an attorney, family member or consular officer until 24 hours has passed. The irony is that CBP's own stated policy proscribes that custodial migrants be "promptly processed" and that the limit

on holding a person is 12 hours. The implication is that officers are instructed to move custodial migrants out as soon as possible, before the passage of time triggers formal rights. As indicated above, officers may grant telephone access at any time at their discretion (see USBP Detention Policy 2008, 9; CBP TEDS Policy 2015, 16) but based on lawyer and advocate accounts, officers rarely exercise favorable discretion. Lawyers and advocates indicated that most of their clients were not given the chance by officers to make a phone call while in these facilities, even for humanitarian reasons. An attorney describes how after asking for a phone call to contact his wife, her client was told by officers that he could make that call once he was in Tijuana:

> [The agent told him] "[y]ou can't make a phone call here. You can call your wife when you get to Tijuana"…Border Patrol does not allow any phone calls. The only time I get someone telling me they were allowed a phone call is if somehow, they explained to the officer that…For instance, if a child is with that person, then they can call usually to have the other parent come pick up the kid. Or, there's a medical issue and they tell them, "I have a medical issue that I need to get this," or "I need to tell my wife," or "someone's in the hospital," or whatever. There's some sort of urgent, sort of medical, humanitarian issue going on that they discover, or if the person is in ICE detention. Not CBP, but ICE detention. CBP never lets people make phone calls.

Even in rare cases where custodial migrants were granted a phone call, sometimes officers obstructed that right in ways that completely undermined it. For example, one individual was told by officers he could make a phone call but was informed he only had 20 seconds to make it. This may be a reflection of deficient policies and training. Neither the USBP guidance on short-term detention nor the training on voluntary return addresses the amount of time detainees have to make their phone call or what steps to take in the event the detainee cannot get a hold of the person they want to speak with. These materials also neglect to emphasize that the phone call is an important element of due process and is therefore a condition of consent in voluntary return. Without a phone call, the custodial migrant has no way to contact a lawyer who can provide advice based on their specific case, and without this information, he/she cannot properly consent to voluntary return. As a result, the gaps in guidance are left to the discretion of the officer.

In addition to the challenges detained migrants experienced contacting anyone on the outside, those on the outside faced obstacles to locating or getting in contact with detainees. Detainees in these facilities are in a black hole of sorts where no one can see in and no one can see out. As explained above, when noncitizens are first apprehended by the USBP, they are housed at any one of a number of temporary holding facilities in the sector. By virtue of their temporary nature, these facilities not only lack the infrastructure to accommodate meetings with visitors as described above, but they are also not equipped to facilitate the ability of family or lawyers/advocates to locate which facility the individual is being held at.[194] These barriers to communication are intentional. In their efforts to locate clients, lawyers described:

[194] In contrast, ICE provides both an "Online Detainee Locator System" to help locate a detainee in ICE custody and determine what facility they are being held at, as well as phone numbers for local ICE field offices.

> phone numbers to nowhere that nobody answers or [if someone answers, the officer will] tell you, "We can't give you any information. We just can't provide you with any information." Or they say, "We don't know. We don't know who's been here." They don't keep a record of who goes in and out of the facility, the checkpoint, or the port. They don't keep a record of that…[so] the officer maybe might not really know if the detainee was at that facility at that one time, or where they might have been transferred to.

This may reflect the fact that there is no protocol stated in the existing USBP Detention Policy (2008) on how to handle the calls and inquiries of family members. Instead it is the case that Border Patrol sectors and stations set their own policy with regard to what information they share with individuals who call in trying to locate and get in touch with detainees (AIC 2014). There isn't a lot of information available about these policies, especially for USBP sectors (as opposed to CBP field offices which enforce immigration law at ports of entry). The few data points we have indicate local guidance varies from sector to sector and sometimes even station to station, indicating a lack of uniformity that is troubling in and of itself (AIC 2014). For example, in the Tucson Sector, guidance from 2004 states that "Border Patrol Stations have no obligation to permit attorneys to meet with individuals awaiting transfer to a long-term detention facility or removal…[and] [o]fficers have no obligation to provide information about a detained individual in response to incoming calls, even from an attorney" (AIC 2014, 7). Tucson sector guidance from 2010 similarly states that "agents are permitted, but not required, to release information about detained individuals to their family members and attorneys, including that the individual has been arrested for an immigration violation, the individual's location, and whether the individual has been removed" (AIC 2014, 7). Thus it leaves it to the discretion of officers to decide whether or not to share information with family members or lawyers who call in and/or facilitate communication between them and custodial migrants. Conversely, in the San Diego sector, which is the focus of my research, in response to complaints about lack of access to counsel at that facility, in 2009 CBP developed a procedure for attorneys to meet with clients detained at the Barracks 5 transit staging area in San Ysidiro, with advance notice. However, it is not clear from the AIC report what this procedure is and what its effect has been—i.e. whether the policy at San Ysidiro has resulted in increased access to counsel for detainees. Despite the policy, as alluded to above, the attorney who recently visited the Barracks indicated that the facilities are not hospitable to visitors. It is also unclear what the policy at other stations in the San Diego sector are, although if the accounts of attorneys are any indication, the policies do not differ much from those of the Tucson sector.

6.2.3 Barriers to Legal Representation

By isolating detainees in this manner, USBP and CBP policies and structures arising from the detention setting function most troublingly to undermine and block access to legal representation and thus formal challenge. Access to legal counsel is crucial where officers are not trained or otherwise required by the law or organizational policy to provide key information regarding voluntary return, such as about its immigration consequences, or otherwise provide misinformation (see chapter 7), and where there is no opportunity to have a hearing in court before the migrant signs away some potentially very important rights and opportunities. As one lawyer put it:

> Unless these people have actually gone to a competent immigration lawyer, and learned about their situation, and been properly advised as to their ability to remain or immigrate to the United States, it's not really a voluntary return because you're asking someone to basically give up all their rights [and] leave the U.S. without proper advice. That really then takes away, I think, the term voluntary. It's to me, more of an involuntary return.

Beyond the information they provide, access to an attorney can also mean having a powerful advocate in the detention context:

> If family is able to contact an attorney, an attorney can try to communicate with the post where the detainee is being held. They [the officers] make it very, very difficult for the attorney to even confirm that the person is being held at that facility, but there have been instances where a family member will call, and I've been able to reach someone and send over a G-28 [requisite form for attorney representation], or just inform the officers that the person doesn't want to accept voluntary departure and wants to be placed in removal proceedings.

Yet the USBP is structured to preclude access to information, advice, and ultimately legal representation at every step of the way.[195] Attorney and advocates spoke commonly of clients who signed for voluntary return without ever talking to a lawyer. As described in chapter three, officers are not required to notify detainees of their right to counsel (at their own expense) until after the initiation of formal proceedings. This is reflected in excerpts from an (undated) Border Patrol Handbook which "emphasize the difference in warnings required for individuals facing administrative versus criminal proceedings [which are more robust and protected by the U.S.

[195] Notwithstanding the unique challenges cited by attorneys to reaching and communicating with clients held in short-term facilities, ICE similarly relies on tactics to interfere with and obstruct access to legal representation for immigrants housed in their long-term facilities. Most notably, they house noncitizens in detention centers in rural, difficult-to-access areas and transfer detainees from detention center to detention center without notice in an effort to isolate them and hamper efforts at legal representation (e.g. Human Rights Watch 2011; Markowitz et al. 2011). In a recent high-profile example, a Deferred Action for Childhood Arrivals (DACA) recipient from Los Angeles, California apprehended and initially detained by the USBP was moved three times to three different detention centers in the span of two weeks—from USBP short-term detention in San Diego, to a long-term facility in Arizona, and then to Georgia (see Castillo 2017). In addition to these barriers, Eagly and Shafer (2015) have noted the challenges generally to accessing legal representation when detained in ICE facilities: "they are confined and cannot visit their attorneys and thus must rely on phone calls rather than office visits, detainees are unable to work and thus face challenges funding private counsel…the facility rules themselves pose challenge (e.g. restrictions on electronics such as laptops), long-wait times for a meeting room at the detention center, and unwillingness of some attorneys to take detained clients because of the complications related to having to visit them at the detention center." Moreover, like USBP holding cells, ICE detention conditions are similarly inhumane and untenable (Patel and Jawetz, n.d.).

Constitution], and note that administrative warnings need not be provided until after an officer has determined that an NTA will be issued" (see American Immigration Council 2014). The CBP TEDS (2015) policy similarly provides that "detainees *referred for removal proceedings* shall be provided with a list of legal service providers and their contact information" (16; emphasis added). This means anyone given voluntary return is precluded from receiving this list. One attorney describes the implications of this in the context of voluntary return:

> So, if you take this in context with voluntary departures, well, voluntary departures are not removal proceedings. They can keep you, they can detain you, they can question you, they don't have to give you any rights of access to counsel, your right to call your consula[r] officer, your right to retain an attorney. Nothing….[Thus] what you have is, you have situations where people are detained, they're unfairly being questioned, they are forced to say incriminating statements [to] immigration [officers]. And then they're at the position where [officers] say, okay, you need to leave [via voluntary return]. You know, so at that point, the person has absolutely no information as to whether or not I can hire an attorney or I can go to court, or I can remain silent.

Even if a person in custody requests a lawyer, as explained above, USBP short-term detention policy dictates that officers don't have to provide access to a telephone to contact one until after 24 hours have passed. If the detainee departs the country within 24 hours, which is common practice with individuals who are voluntarily returned, it's very reasonable to assume that he/she may not get the opportunity to speak with an attorney, family member or consular officer. In general, the maximum duration of detention stipulated by USBP short term detention policy is 12 hours. So, the right to an attorney is actually quite limited in practice by these policies and practices. In the absence of legal advice, migrants in the custody of the USBP face a significant information deficit/exist in an information vacuum about their rights and options and the immigration consequences of VR. Thus the effect of blocking detainees from knowledge of and communication with an attorney is informational isolation which limits the choices the individual in custody has (to voluntary return).[196] As one lawyer put it, migrants in detention "don't have an attorney who is going to visit them like someone in criminal custody would, and then they're isolated on top of that so they're really, really at a loss for knowing what to do and that's why so many people do sign voluntary return."

Even in cases where attorneys do successfully locate their client before they sign, attorneys face obstacles to getting in touch with and/or meeting with their client to fill out the requisite paperwork to represent them. Lawyers are required by the DHS to complete a document, known as Form G-28 Instructions for Notice of Entry of Appearance as Attorney or Accredited Representative, or simply a "G-28," to establish their eligibility to represent their clients (and in more practical terms, to enable them to discuss the case of their client in detention with officers).[197] The barriers to communication act as a formidable barrier to getting this form

[196] This is representative more broadly of a culture at the CBP that is averse to providing custodial migrants information about their rights, particularly with regard to access to counsel (American Immigration Council 2014).

[197] There are exceptions to this rule. According to a 2009 letter from then-Chief Patrol Agent Mike J. Fisher to David Blair-Loy, Legal Director of the ACLU of San Diego and Imperial

completed, as a G-28 form requires the signature by the person in detention to indicate consent to representation, which often depends on not only knowing where their client is being held but also on the cooperation of officers to facilitate:

> A lot of times when people are first detained, they're in sort of temporary holding locations which are more difficult for attorneys to get to, to meet them at. When they're at the formal [long-term] detention facility [run by ICE], it's easier to schedule an attorney visit. Attorneys can go, there's a procedure to go visit and meet with individuals at that location. [Conversely, at the temporary holding facilities] [i]n those first 24-48 hours, sometimes it's hard to locate an individual, sometimes it's hard to meet with them to get that G-28 signed. It can come down to the individual officers, some of the officers allow you to fax the G-28 over and they actually will assist you in getting…that client to sign the G-28 so they can talk to you. Others obviously make that process very difficult.

It thus poses a catch-22 of sorts; the form is needed to facilitate communication with and about their client to officers, but it requires communication with and about their clients to officers in order to garner the signature—communication that is very elusive. The combination of challenges for attorneys to locating, meeting and ultimately representing a detainee before they sign for voluntary return is compounded by the speed with which voluntary return is implemented (see chapter 5), which can make locating a client to represent them a race against time:

> They [have to] contact you quick enough that you can do something to try and help stop it, which is a very huge challenge here in San Diego given our proximity to the border. [CBP] like[s] to process these things fast and quick. CBP does not share any of their names [of noncitizens in detention] with any of the local immigration organizations, like ICE does. They want to keep their information as quiet as possible. They [also] don't share their contact information, so it's literally like hunting down, trying to find where this person is…

As a result, some lawyers indicated that it is very rare for them to become involved with individuals detained by the USBP before their client takes voluntary return:

> Most attorneys don't even try because they know that it's almost fruitless to try, and they go, "well, they'll probably be deported or he's probably going to be gone. If he took voluntary return, he's gone and then you'll have to give us a call back. Then we'll see what we can do." But usually there's nothing we can do. It's too late.

County, at the Barracks 5 transit staging area in San Ysidro a G-28 is (in theory) not required. In response to complaints about lack of access to counsel at that facility, CBP developed a procedure for attorneys to meet with clients detained there, with advance notice (American Immigration Council 2014). Meetings of this nature, however, still appear to be rare, as suggested by the experience of the attorney cited earlier, who recently visited Barracks 5 for the first time in her 30-year career.

6.4 Threats of Long-Term or Indefinite Detention

The coercive aspects of detention reported by advocates and attorneys were not limited to isolation and the physical conditions of the holding space. Undocumented immigrants in USBP custody also experienced psychological coercion to sign for voluntary return based on explicit threats of long-term or indefinite lengths of detention from immigration officers. Threats of long-term detention were commonly presented to undocumented immigrants as one of two stark choices—sign voluntary return and be released from detention now or wait in detention for weeks, months or years to see a judge, who will deny your case anyway. In other words, officers deployed threats of long-term detention specifically to dissuade individuals in their custody from waiting to obtain a hearing with an immigration judge, and thereby undermined their ability to pursue potential legal remedies from deportation. Faced with the prospect of prolonged or unknown lengths of time in isolation in inhumane detention conditions, many migrants succumbed to these threats and signed for voluntary return:

> I'm not there but a very common scenario is my clients will tell me that [officers] will try to scare them with, "You're going to be in jail for years [if you don't sign]. You're going to get stuck behind bars. You're not going to see your family for years." The general fear that is placed on the individual is that they're going to be locked away. Away from their families, away from their jobs, away from society. Essentially the idea of "we're going to put you in jail and throw away the key" and that's frightening to anybody. The very typical individual will of course capitulate and sign a voluntary return.

These threats were made in spite of the fact that the USBP, per its own policy, does not detain individuals long-term, and that even if the person is transferred to long-term detention facilities, they may have the opportunity to be released on bond pending removal proceedings, as only certain categories of non-citizens are subject to mandatory detention:

> The most common that I've heard…I've got tons of notes. I don't even know how to pull out all my notes, but the most common ones [ways that immigration officers convinced custodial migrants to sign voluntary return forms] were, 'You won't be able to see a judge for months and you'll stay in jail during that time.' That's a big one, the threat of very long detention. No ability to get a bond, which is false. Only certain categories of people are subject to mandatory detention, and these are comments to people that didn't fall within those categories.

This is key information that is not provided by officers or in the forms given to custodial migrants and would otherwise be conveyed by a lawyer, to which individuals in USBP custody have limited, if any, access. Thus, without knowledge of a time limit for a hearing or release (and thus no prospect for waiting it out/no end point to look forward to) and no knowledge of their other options or the immigration consequences of voluntary return, the prospect of voluntary return was more appealing:

> I think [one] thing that stands out [is] the threat of detention, so "it's faster if you voluntary return" which for a lot of people is bad advice because those individuals

> [who] were told that oftentimes have twenty years living in the United States working and supporting children, have no criminal record, so really they have a great opportunity to request a bond, a release on bond for their case and they won't be detained for months. So, they're being threatened [with] this long-term detention when really, they're not even subject to mandatory detention. They have a great case to be released on bond.

6.3.1 Threats to Family Ties and Responsibilities

An oft-mentioned dimension to the coercive effect of threats of long-term detention was the pressure to sign for voluntary return generated for custodial migrants by the prospect of outside responsibilities being put in jeopardy by being held in custody. The inability to see, care, and provide financially for family members in the United States, as well as the potential for loss of employment generally, were common reasons lawyers and advocates cited for why their clients, faced with the threat of being detained for lengthy or otherwise unknown periods of time, accepted voluntary return rather than wait to have a hearing:

> We had one case where the man was the financial provider for his family, and his wife was pregnant and going to give birth soon. He was told [by officers] that he was going to be detained for six months….[H]e just panicked and thought, 'I can't do that, because I have all these obligations,' and so that's why he took voluntary return.

Similarly, one lawyer described the decision to take voluntary return of one of her clients, a mother to two U.S. citizen children, one of whom has a severe disability that required around-the-clock care:

> [H]er daughter has multiple sclerosis [and] is in a wheel chair and on a breathing tube, has a tube for feeding, etc. This woman has [lived] here for fifteen years. Out of the blue she gets picked up and she is met by some Border Patrol guy [who] barks at her and tells her she's going to be in jail forever. The first thing the client thinks is "Oh my god who's going to take care of my daughter? My husband works construction and I'm a full-time mother and I have to be home to take care of my daughter. She's disabled and I'm the only one that gets her back and forth on the bus to school and all these special ed[ucation] programs." So, all she can think of is "Okay I can't go to jail." So, she signed her voluntary return.

While in the instances cited above, the use of family ties and responsibilities didn't directly factor as part of officers' strategy of coercion, lawyers also cited examples where officers relied on the undocumented immigrant's family ties in the United States as a way to leverage the threat of long-term detention, preying on and exploiting the person's inability to be with their children and/or provide financially for their family while in detention as a way to pressure them to sign for voluntary return. In other words, USBP officers were not passive in their coercion; they actively and explicitly emphasized these family and financial responsibilities and how the detainee would not be able to see or care for children, their family unless they

signed. In the most egregious of these such cases, officers even threatened that long-term detention would lead to permanent separation from their U.S. citizen children:

> One thing I've heard several times [from clients] is that a family is stopped [by immigration enforcement officers], and let's say it's a mixed status family with undocumented parents and U.S. citizen kids. The officers will basically say to the people, "if you don't agree to this, if you don't sign, you're going to be detained, and because your children can't be detained with you, they're going to be placed in foster care, and they may even be adopted out by other families. I've heard that more than once. That's basically a threat.

The irony here of USBP using kinship ties to induce someone to sign for voluntary return is that these long-term ties ostensibly improve the undocumented immigrant's case for not being deported—i.e. their equities, in the form of for example U.S. citizen children, make the individual's case stronger for being released on bond and for certain types of deportation relief, which allow them to remain in the country. By contrast, USBP is using the long-term ties of individuals as a means of coercion to pressure them to sign their own "voluntary" return. Thus, what would have been a factual advantage to the undocumented immigrant in a bond hearing or in an application for relief in removal proceedings becomes a tool of coercion to sign voluntary return. Moreover, comparable to the spillover effects of mass incarceration, which reverberate into the lives and communities of the individual incarcerated (see, e.g., Chesney-Lind and Mauer 2003; John Hagan and Foster 2012; Rios 2007), the interests of other people aside from the detainee are affected by these coercive tactics.[198]

6.5 Subtle Coercion as Decision-Making Power (Power Dependence)

Because coercion in voluntary departure practices is largely a result of structural factors, it is often not overt and can thus be understood as the exercise by immigration officers of a subtle form of power. In the literature, the exercise of power in the immigration policing and enforcement/custody context is largely depicted as direct and obvious—in the form of physical, sexual and verbal abuse/violence.[199] In contrast, this chapter shows how coercion also operates in less visible ways that can sometimes be more insidious in their operation than overt forms of power that are more perceptible. British sociologist Steven Lukes' (1974) multi-dimensional theory of institutional power helps explain how power operates in forms such as information control, deception, persuasion, and manipulation to render the practice of voluntary subtly coercive. Similar systemic forms of power and coercion operate in the police interrogation context (Leo 1996b). Whereas the exercise of power in the police context has been shown to be

[198] See chapter 5 for more on the parallels between the practice of voluntary return and the system of mass incarceration.

[199] The systematic use of physical abuse and verbal mistreatment by immigration authorities to induce compliance from migrants has been well-documented by both the empirical social science and immigrant advocacy literatures (see, e.g., Cantor and Ewing 2017; Martínez, Slack, and Heyman 2013; No More Deaths 2011; Phillips, Rodriguez, and Hagan 2002; Phillips, Hagan, and Rodriguez 2006; University of Chicago Law School International Human Rights Clinic and American Civil Liberties Union Border Litigation Project 2018).

mostly agentic and conscious/strategic (i.e. officers receive institutional training in how to instrumentally deploy tactics of coercion to garner a waiver of consent), this study shows how power in the immigration enforcement context can be amorphous, diffuse, intangible, and/or invisible, a latent part of the structure/system (coercion to waive rights and take voluntary return is the effect of things like inadequate officer training in voluntary departure procedures, barriers to representation for undocumented immigrants in the custodial context, etc.).

Lukes (1974) conceptualizes power in terms of three facets or "faces" to denote various ways to understand and examine power relations in society or the political context. Although his framework treats these as separate forms of power, the practice of voluntary departure reveals how all three of these forms of power operate with and through each other and can be indistinguishable. In the first face ("decision-making power"), power is operationalized as the incidence of direct/overt conflict; it is power in its most basic, recognizable form. The defining characteristic is the use of force by the more powerful party to induce the weaker party into submission ("power inequality"). As alluded to earlier, the U.S. immigration enforcement agents/agencies are conventionally understood to exercise this kind of power—in the form of physical and verbal abuse—over their custodial subjects in order to garner their compliance, but it was not really part of attorneys and advocate accounts of the practice of voluntary return.

Notably force is not always necessary to constitute first order power—it can also be seen in the form of dependence by one party on another in the context of a relationship in which the more powerful party can reward the less powerful one for complying with his/her choice or punish them for not ("power dependence"). In the context of voluntary departure, the nature of the custody and detention space played an important role in creating this power dependence relationship between USBP officers and custodial migrants. As explained in detail above, attorneys and advocates indicated that as part of their custody and detention experience with the USBP, custodial migrants were subject to physically uncomfortable and isolating conditions; psychological duress wrought by the prospect of long-term, indefinite or otherwise unknown lengths of detention in these conditions (which included explicit threats from officers); and the fear of the potential peril this detention created for the welfare of the detainee's family and finances (again, sometimes a result of explicit threats of family separation, etc. from officers). Officers wielded considerable power over custodial migrants because they had the ability to "reward" individuals who signed with freedom from these conditions and with the ability to reunite with their family and ostensibly resume their livelihoods, or the power to punish them if they didn't sign by continuing to lock them up. Under these conditions, custodial migrants often felt intimidated, pressured, or otherwise forced to sign for voluntary departure, rather than wait to pursue other options, such as seek legal representation or see a judge, if those were presented as options at all.

Migrants may have also experienced threats of long-term detention and threats to family ties and responsibilities as third dimensional power, an even more subtle form of power by which the more powerful party manipulates or persuades the person to willingly take a course of action even if it is not in their interest (see chapter 7 for more on the third dimension of power). In the absence of information about the specifics of the custodial migrant's case, such as factors in their case that would make them eligible for release on bond, USBP officers provided custodial migrants unfounded or altogether false information about the length for which they would be detained if they opted for removal proceedings. Thus, USBP officers coerced voluntary return by depicting voluntary return as the favorable option, which would allow them to be released immediately to return to their families and responsibilities, but without mentioning the

drawbacks of not waiting to see a judge. In other words, officers engaged in preference-setting power by framing voluntary return as a quick way out of detention, without informing them of the consequences of not waiting for a hearing.

As this analysis shows, these forms of power are not distinct and often operate together. Advocate and attorney accounts suggest that structural factors related to physical custody and detention (power in the form of power dependence and manipulation/persuasion) often worked in concert with other structural factors that undermine informed consent, such as lack of information about rights (agenda-setting, or second dimensional power) and erroneous legal advice (preference-setting, or third dimensional power) to induce the custodial migrant to take voluntary return. Chapter 7 turns to examining the structural factors in the USBP which undermine the conditions for informed consent and analyzes them in terms of the second and third dimensions of power.

Chapter 7 Coerced Consent: (Mis)information and the Confidence Game

They get people and they say, "Why don't you just get the hell out of here? Sign this and we'll let you out of here. Otherwise, we're going to yell and scream at you here for five more hours and then we're going to throw you in a detention center in rural Arizona for six months. If that's what you think is better, that's what we'll do, but if I was you, I'd just sign this and go." They sign and go. While, if an officer said, "You understand that if you return after we send you back then you're going to be barred from ever getting a Green Card until you return for ten years, and you understand that you're also cutting yourself off for eligibility for cancellation of removal that you may be eligible for, and actually you could ask a judge for a bond and you might only be detained for two or three weeks", then they would probably make a different decision. That's not the warning that they get…Then, "You have the availability [of] free lawyers. Not all lawyers are going to rip you off. It's not always terribly expensive." None of that is said to them.

--Immigration practitioner, 22 years

I find it very frustrating the information that the Border Patrol officers and the ICE officers [tell] people because for most of my clients and the people I do intakes with, they will tell me, well the immigration officer told me this, or they told me this won't impact me, or they told me I don't qualify for this or I do qualify for this and 90% of the time the information is incorrect. The people take it very seriously because it's coming from an officer of the Department of Homeland Security.

--Immigration practitioner, 6 years

Chapter 6 examined the myriad ways that USBP detention and physical custody rendered voluntary return coercive. This chapter continues the examination of coercion in voluntary return by describing the factors that undermined the conditions for informed consent. Lawyers and advocates reported obstacles to adequate and accurate information, including problematic USBP structures and officers' practice of a confidence game, which limited the range of options that custodial migrants had and thereby made the voluntary return process coercive. The combination of a lack of an informative voluntary return process, including the deficient administration of VR forms (and the deficiency of the voluntary return form itself), and the ubiquity of misinformation from officers meant that undocumented immigrants who signed voluntary return were not aware they were abandoning important procedural due process rights, potential opportunities to formalize their status (both in court and outside court with the help of a lawyer), and subjecting themselves to irreparable immigration consequences. As a result, individuals in USBP custody were rarely able to make an informed decision regarding whether or not to accept voluntary return:

> [Voluntary return is] incredibly coercive. What is supposed to happen is that in an ideal world…somebody would actually understand the consequences of foregoing a court hearing before an immigration judge, and…they would knowingly and willingly decide, 'I don't want to go before the judge. I don't want to fight my case. I prefer to just return to my country informally.' Two times out of 100

> maybe you hear somebody who's gone through admin[istrative] voluntary return saying that that's what they knew, and understood, and wanted.

In Part 7.1, I detail the various information deficient forms and procedures that constitute the voluntary return process, and how these provide inadequate information to custodial migrants to make a truly consensual decision about voluntary departure. In contrast to the *lack* of information in these structures, Part 7.2 describes the kinds of *mis*information officers provide custodial migrants, often in the form of erroneous legal advice officers, and how, in the absence of advice from a lawyer, they rely on this incorrect or misleading information to "choose" voluntary return, against their own interests. Similarly, Part 7.3 details how officers dispense misinformation in the form of friendly advice, thereby practicing a confidence game that manipulates custodial migrants to take voluntary return. In Part 7.4, this chapter continues the power analysis from chapter 6. It analyzes these forms of coercion in terms of the exercise of Steven Lukes (1974) second dimensional (non-decision making or agenda-setting) power and third dimensional (hegemonic or preference-setting) power, showing how these forms of coercion function as subtle but insidious exercises of power. Together, my findings from chapters 6 and chapter 7 show how the legal requirement for consent in voluntary return masks the way in which systems of power subtly shape the character of consent, rendering voluntary return coercive. This chapter concludes with a discussion of whose interests the legal requirement for consent in voluntary return serves, and what the implications of that are.

7.1 Information-Deficient Voluntary Return Forms and Procedures

When a person in USBP custody is offered voluntary return, statute and regulations require officers to present them with a Form I-210 (Appendix B).[200] This form, in theory, formalizes and standardizes the process of voluntary departure by requiring the signature of the individual as a condition of voluntary returning them. Thus, for the USBP, this form signifies legal and institutional consent. The FOIA materials provide two illustrative examples of the agency's reliance on the forms as consent. First, a 2006 internal memo from former Chief USBP Agent David Aguilar to all Sector Chief Patrol Agents instructs them to retain all Form I-826's with original signatures for a period of at least ten years from their dates of signature because they are useful as evidence of consent in future litigation that challenges whether migrants accepted voluntary departure:

> In the past, the Seventh, Eight, and Ninth Judicial Circuits have issued adverse decisions in the cancellation of removal cases, finding that there was insufficient evidence that an alien had been granted and accepted voluntary departure under threat of deportation. A key piece of evidence that would be of use in future litigation is the I-826, Notice of Rights and Request for Disposition, *because the I-826 definitely demonstrates that the alien accepted voluntary departure*[201] (emphasis added).

[200] "[A]ny decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action—Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions" (8 C.F.R. § 240.25(c)).

[201] Memorandum re "Retention of I-826, Notice of Rights and Request for Disposition," Office of Border Patrol, dated May 8, 2006 (on file with author).

In another telling example, in response to an incident where a U.S. citizen in Texas was voluntarily returned by the USBP, CBP Public Affairs formulated a series of "talking points" for media inquiries, including an "official statement" that "when an individual requests and is granted voluntary return, they sign a notice of rights [Form I-826] where they are admitting to being in the U.S. illegally and give up their right to a hearing in Immigration Court." [202] In both of these examples, the agency treats the form as definitive proof that the person, by signing, consented to taking voluntary. Thus, they take for granted, especially in the second example, that this form has all information he or she needs to make his or her decision and that he or she understood the information on the form.

In contrast to this ideal of the form as evidence of consent, the interviews with lawyers and advocates and USBP organizational materials show that the form is (part of) an empty ritual that belies important deficiencies in voluntary return procedures and officers' training in those procedures. The consequence of these deficiencies is that undocumented immigrants who take voluntary return do not receive the information they need to make an informed decision about whether or not to take voluntary return. Thus, although the form carries legal weight, it does very little, if anything, to create the conditions for a consenting voluntary return and ultimately, to protect the (very few) due process rights that apply to immigrants taking voluntary return. It is thus extremely problematic to rely on it as the sole indicator of consent in voluntary return. One lawyer explained his clients' experience with these "consent" forms:

> It's amazing, but I've only found one who ever said that he voluntarily gave up his right to a hearing. I've seen dozens and dozens of people who say they didn't give up that right, and we go to court and the government produces the forms with their signature. Usually in English and not translated into their language, where they did sign away their right to see a judge, and the client looks at that and says, "I have no idea what that is. Yes, it's my signature but I don't know what it is."

Although immigration officers are required to use a form I-210 to effectuate a voluntary departure, as explained in chapter 6, training materials show they are instructed to use a Form I-

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[202] Public Affairs Guidance (log of media appearances), "Talking Points" for "CNN Interview with Luis Delgado's Attorney," Office of Public Affairs, dated September 17, 2010, pages 32-33 (on file with author). In contrast, details that subsequently emerged about the incident show the individual signed under duress; because he didn't speak English well, USBP officers didn't believe he was a U.S. citizen, and used, among other tactics, deception, to induce him to sign away his rights. News reports indicate that 19-year-old Luis Delgado was carrying all his documents (including an American birth certificate) but spoke remedial English because he lived most of his life with his mother in Mexico. He was pulled over by police in a routine traffic stop. The sheriff's deputy did not believe Delgado's documents were authentic and transferred him to USBP custody. The USBP questioned him for 8 hours (from 4 pm until midnight) until he agreed to sign the waiver because officers led him to believe he would be able to return to the border city of Brownsville to solve the misunderstanding. They then drove him to Matamoros, Mexico where they left him. According to his lawyer, "They kept saying 'These are not your documents. You're lying to us. You're going to go to prison for 20 years.' They basically wore him down. He's a 19 year old kid" (Huus 2010).

826, in violation of statutory and regulatory requirements. This form contains a section captioned "Notice of Rights," which explains, among other things, why the person has been arrested, that he/she has the right to a hearing before the Immigration Court, and that he/she has the right to contact an attorney or other legal representative and/or their consular officer, [203] including the right to a telephone call to said attorney, legal representative, or consular officer "at any time before your departure" (see Form I-826 in Appendix C). Under the "Notice of Rights" box, there's another box titled "Request for Disposition" (presumably a request made by the migrant) which is followed by three options (which are summarized here): a hearing before an immigration judge, an asylum claim, and voluntary return. At the very bottom of Form I-826, there is a box for the processing officer to check to confirm that the form has been read *by* the migrant and that the form has been read *to* the migrant by the officer. Thus, the form suggests that officers are expected to ensure the individuals in their custody understand the information on the form regarding their rights and options before they sign. In contrast, attorneys and advocates reported that it was common that undocumented immigrants in custody did not have the form read to them by officers or explained to them, which implies they were not made aware of these rights and options. According to one attorney:

> We go over what happened [while in custody] and I ask, 'Did they explain to you that you had the right to challenge the removal before an immigration judge? Did they explain to you that you could fight your case?' That kind of just trying to get a sense as to what was said [to them by the Border Patrol officer(s)]. [The undocumented immigrant] says 'No, absolutely not. Nobody explained to me that I could challenge this decision. Nobody explained to me that I had the right to a trial.'

Even if the form was explained by officers, attorneys and advocates reported that the explanation was often not provided in the undocumented immigrant's native language. This is the case in spite of the fact Border Patrol interns who are "not fluent in Spanish" receive 8 weeks of "task-based" Spanish language training as part of the curriculum at the Border Patrol Academy,[204] and in spite of the fact that there's a field on Form I-826 for the officer to specify in what language the form was read to the person and a field for the name of the language

[203] The CBP TEDS policy (2015) similarly states that "as appropriate, detainees must be advised of their right to consular access in a language or manner the detainee comprehends." However, this right is limited by the statement that follows: "If requested by a detainee, consular contact will be afforded as soon as operationally feasible" (CBP TEDS Policy 2015, 16). This policy does not provide requirements for exactly *when* consular contact must be provided after it is requested, and it certainly doesn't require they *must* provide that contact. The only thing officers "must" do is inform custodial migrant of this right. This reflects a focus on administrative convenience rather than due process.

[204] The language training at the Border Patrol Academy is "very specialized…focused on critical Border Patrol-specific tasks…Students must be able to understand and employ law enforcement-specific language unique to the Border Patrol Agent's work environment as well as be able to solicit information and use colloquial phrases and idiomatic expressions" (US Customs and Border Protection 2015). As such, this training may not be sufficient for the range of circumstances that may arise.

interpreter. Moreover, it was often the case that the forms themselves were not written in the individual's native language, so they themselves could not read it. As a result, individuals did not know what they signed, nor did they understand the profound implications of signing, including the rights they gave up:

> [Immigration officers] are supposed to read the form to the person that's signing it before they sign it. They're supposed to read, basically the whole form to them, so that they understand what they're signing. I would say 90 percent of [clients who have received a voluntary return] tell me that the form was never read to them, never explained to them, and never read to them in their native language.

Notwithstanding the fact that the information on the form is not effectively communicated by officers to custodial migrants, lawyers said that the form itself is information deficient.[205] Among other things, it does not provide vital, pertinent information about the loss of procedural rights one would be entitled to in removal proceedings before an immigration judge, the relinquishment of the right to pursue forms of relief that are only available within the U.S.; and the imposition of bars to admission to the U.S. for anyone who has accrued a triggering period of unlawful presence in the US.[206] This signals to the custodial migrant reading it and/or hearing it read that there are no consequences to taking voluntary return. Thus, as one lawyer put it:

> The form itself does not really identify things that could be told to someone to try and help them really understand what they're waiving. I think that the form is very deficient in itself, and then it's not being properly explained to the person, so I don't think that it's really, truly a voluntary return.

Attorneys and advocates also reported that voluntarily returned individuals were rarely provided a copy of the form for their own records, even though the DHS provides an "A-file copy" (i.e. short for "Alien Registration File")[207], which is the copy that belongs to DHS, *and* an "alien copy" for the migrant (Appendix C). As one lawyer put it succinctly, "I don't think I've ever had anyone tell me they've gotten a copy, ever." Where the form might provide a means for the migrant and attorneys or advocates to piece together and make sense of their confusing and chaotic experience in custody, the fact that they didn't receive a copy served as yet another impediment to information/is further evidence of an information deficient process:

> When I was at Casa [del Migrante]… [one] challenge was that I would say around 70% of them don't have any document with them. Immigration [enforcement], whether it's Border Patrol or ICE, they rarely gave out any copies to them [custodial

[205] The *Lopez-Venegas* (2013) complaint describes the form as "legally deficient" (11).
[206] Even if the form contained all the information to cure its various legal deficiencies, such a form may not be sufficient for due process. See *Walters v. Reno* (1998) (describing complex forms bearing drastic immigration consequences and deciding that they do not fulfill notice requirements of due process).
[207] The A-file contains all the documents that the DHS maintains for foreign nationals who have arrived in the U.S. as immigrants or nonimmigrants.

migrants] so they would know what kind of document they signed and so we could at least interpret the documents to them.

These attorney and advocate accounts are supported by USBP organizational training materials which show that the voluntary departure procedures "interns" are trained in are inadequate for the purposes of due process. [208] For example, the Instructor Guide (2006) from the Field Training Program for "How to Process a Voluntary Return" indicates that instructors are supposed to teach their interns a number of "interview techniques" listed in the guide, which are essentially a series of broadly-stated rules and instructions with no detailed guidance on how to implement them or a rationale for their implementation (i.e. something to signal to trainees the procedure is a required element important of due process). [209] The list of techniques begins with "inform[ing] the detainee of his/her rights" and "treat[ing] the detainee with respect. The instructor guide neither explains what these rights are (e.g. the right to a hearing before an immigration judge, the right to an attorney), when those rights should be provided (i.e. before any questioning or processing), nor how to articulate/word rights advisals. It does not even suggest reading the rights from the Form I-826. Tellingly, the guide also does not indicate how to operationalize those rights. For example, the training does not state that if the detainee invokes their right to an attorney, the officer should accordingly provide the opportunity for a phone call to that attorney or a family member who can help them get access to one. There is basically no off-ramp from voluntary departure. The implication is that informing a detainee of their rights is just a symbolic practice.

The Instructor Guide also does not define what it means in practical terms to treat a detainee with respect (for example, by offering examples of behavior that would and would not be in compliance with this rule, such as the use of certain discriminatory/racist words and phrases or the use of intimidation tactics). A chapter from the Border Patrol Handbook titled "Interview Techniques" that is provided as a supplementary reference in the guide, which is redacted in spots, does not provide any further direction about rights advisals or the mandate of respectful treatment of detainees. [210] It thus leaves these items up to broad interpretation by both the instructor and the intern.

Among other "interview techniques" listed in the Instructor Guide (2007) on "Processing a Voluntary Return," the intern is also supposed to "consider the person's age, education level, and

[208] Lawyer and advocate accounts are also supported by the Migrant Border Crossing Study (MBCS), a random sample survey of 1,100 recently deported (i.e. formally removed or voluntarily returned) migrants in six cities in Mexico (five cities along the US-Mexico border and Mexico City) conducted between 2009 and 2012. According to the MBCS, individuals in U.S. custody endure systemic due process abuse, largely while in USBP custody (see Slack, Martínez, et al. 2015). 28% of survey respondents who signed official documents reported no one had explained the form to them; 27% reported that no one explained the documents they signed; 27 percent responded "No" or "Don't know" when asked if they knew what they had signed; and 33% reported they felt forced or pressured to sign (see Slack, Martínez, et al. 2015, 121).

[209] Instructor Guide: Field Training Program, "Processing a Voluntary Return," dated September 2007, page 10 (on file with author).

[210] Border Patrol Handbook: Chapter 21.8, "Interview Techniques," undated, pages 115-118, (on file with author).

knowledge of the English language."[211] However again the Guide doesn't elaborate on any of these items or explain their purpose (i.e. indicate that these have important implications for genuine consent). With regard to the issue of the person's age, it does not indicate that for a minor, and especially unaccompanied minors, there are different procedures with regard to both detention[212] and voluntary departure,[213] and that by law the minor is protected by more stringent safeguards. With regard to education level, the Guide does not explain that consideration of education level is important because the person must have a certain cognitive capacity to understand the information regarding voluntary return and to truly consent to it. In terms of the issue of language, the Guide does not, for example, suggest that if the detainee does not have English proficiency (verbal or otherwise), that all correspondence with the individual, both written and verbal, should be done in a language they understand. The only reference to language in the chapter supplement states that "allowances should be made for language difficulties"—but the guide does not elaborate on what "language difficulties" means or looks like or what an "allowance" entails (e.g. providing language translation). The guide also indicates instructors are supposed to instruct interns to "ensure" the requisite forms "have been correctly filled out." However it does not provide any of the following, which are all key conditions for genuine consent: the purpose of the forms; when in the process the forms should be provided to the migrant; that the migrant should be provided sufficient time to read and understand the forms; that the forms must be read and explained to migrants and that they must understand what the forms say before they sign; and relatedly, that all verbal and written communication should be in a language the individual understands. Moreover, there is also nothing in the Instructor Guide to indicate that officers are trained to provide a copy of the form to the migrant for their own records.

These procedures are (in theory) included in the training materials to ensure that custodial migrants have all the information about voluntary return and that they have the ability to understand/comprehend that information so that they may make a meaningful decision about whether or not to take it. Their existence in the training materials signals that the USBP wants their new agents to abide by them, but the fact that the procedures as written are vague suggests that these rules and procedures themselves are symbolic rather than required policy agents are expected to implement. The implication is that genuine consent is not the goal; efficient processing is. In fact, the guide says nothing explicitly (or implicitly, for that matter) about the legal requirement for consent to voluntary departure—neither a reference to the statutory requirement for consent nor an explanation of what procedures are necessary to ensure consent under the law has been obtained.

This is similarly reflected in more recent training documents for processing an individual for voluntary return. The Instructor Guide (2010) on the Operations 2 phase of training details step-by-step technical instructions for how to input the information of custodial migrants into the Border Patrol's "e3" computer system in order to "process" them.[214] One of the "learning objectives" of this lesson is to be able to identify and demonstrate the steps necessary in the

[211] Instructor Guide: Field Training Program, "Processing a Voluntary Return," dated September 2007, page 10 (on file with author).
[212] See the *Flores v. Reno Settlement Agreement* (1997) and the Homeland Security Act (2002).
[213] See 8 C.F.R § 263.3(g).
[214] Instructor Guide: Operations 2, "Lesson 1: Introduction to e3 Processing; Day 1," dated May 2010, pages 26-42 (on file with the author).

computer application to "process an alien" who is receiving a "Quick VR" via Form I-826.[215] The majority of this document is heavily redacted but it is still very telling. First, it is important to reiterate that there is no such thing as a "voluntary return," much less a "Quick VR" provided for in the voluntary departure statute and regulations. Nevertheless, these instructions show how to effectuate a voluntary return (essentially a watered-down form of voluntary departure for Mexicans) using Form I-826, in violation of statute and regulations.

Notwithstanding this issue, this more recent training on "processing" is more robust in terms of process and protections than the version described above. First, the training document explains the purpose of form I-826: "Form I-826 explains to persons in custody why they have been arrested and the procedures they face, as well as to inform them of their rights"[216] (although as I will show, the form does not adequately explain these things). Moreover the training document states *when* in the process individuals arrested for an immigration offense must be provided this form ("prior to post-arrest questioning and processing") and that they must be "given adequate time to read and understand these rights."[217] The document further provides that the processing officer must input, among other things, the following information into the computer application: who read the subject their rights and in what language the rights were read. It also explains that the form does not automatically print in Spanish, and provides steps for how to print the form in Spanish.[218] These are indications that since 2007, training materials have been improved to ensure officers are implementing forms and procedures correctly and in a way that will actually convey the requisite information to the subject in custody.

However, there are several important deficiencies in these instructions that echo some of the themes from the earlier (2007) training document. With regard to the issue of rights advisals, the Instructor Guide (2010) similarly does not detail what the subject's rights are and how to make them operational; it simply says to read Form I-826 to the custodial migrant. For example, with regard to the right to the phone call that is listed in Form I-826, it does not provide when custodial migrants can make the phone call (although this is provided for in other policy documents), how long the person may have to make that phone call, and what steps to take if the custodial migrant is unable to contact the person they want to reach. It also does not elaborate on the purpose or rationale of these "rights."

With regard to the issue of language, the instructions do not explicitly state that the subject should be read their rights in a language they understand, nor does it state that the form should be written in a language the subject understands. In other words, although the Instructor Guide (2010) implies this by showing interns that there is a Spanish option for the form, they don't explicitly state those requirements.[219] They also don't explain *why* it matters that the instructions

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[215] Instructor Guide: Operations 2, "Lesson 1: Introduction to e3 Processing; Day 1," dated May 2010, page 26 (on file with the author).

[216] Instructor Guide: Operations 2, "Lesson 1: Introduction to e3 Processing; Day 1," dated May 2010, page 36 (on file with the author).

[217] Instructor Guide: Operations 2, "Lesson 1: Introduction to e3 Processing; Day 1," dated May 2010, page 36 (on file with the author).

[218] Instructor Guide: Operations 2, "Lesson 1: Introduction to e3 Processing; Day 1," dated May 2010, page 36 (on file with the author).

[219] However, the more recent CBP TEDS policy (2015), which sets forth nationwide standards governing CBP's interactions with detainees states that "all instructions and relevant information

be presented (written and read) in a language that the subject can understand—e.g. because if the migrant does not understand the information, (1) it is a violation of due process and (2) it cannot be considered a consenting voluntary departure, even if the person signs the form. Another problem with the instructions in the Guide is that they state that the form doesn't automatically print in Spanish, even though the CBP is aware that historically the vast majority of apprehensions have been Spanish speakers.[220] In other words, it requires an extra step to print the form in Spanish when it probably makes more sense for the default version of the form to be in Spanish. If the subject does not get the form read to him in a language he understands, that renders moot the rest of the training on subjects' rights and due process protections (e.g. on the purpose of the form, when the form should be given).

Migrants' access to information about their rights and options is obstructed in yet other ways related to officer training. On the one hand, the Instructor Guide (2010) states rather explicitly that voluntary return is a choice and that the choice is the undocumented immigrant's to make: "Form I-826…allows *the alien to request one of the following choices* for his disposition: request for a hearing before an immigration judge to determine eligibility to remain in the US; OR alien may indicate that he/she has a fear of persecution if returned to country of citizenship and may seek a hearing; OR alien may admit that he/she is in the United States illegally, faces no harm in country of origin and waives right to a hearing and request return to country of origin as soon as possible" (i.e. voluntary return)"[221] On the other hand, it contradicts this instruction with instructions that come right before, indicating that the officer will conduct his investigation (i.e. question the migrant) and determine an outcome *before* he provides the form or any information about rights to the custodial migrant: "After an arrest and *after an officer has determined* that removal proceedings will be instituted, or that voluntary departure (including a departure via a voluntary departure Notice, I-210) will be offered, the I-826 must be issued" (emphasis added).[222] Similarly, at the beginning of this lesson (i.e. preceding all these instructions), the Guide states that "after obtaining all pertinent data relating to the case," the processing officer will "record his/her recommendation" for a disposition based on current policy and guidelines, and provides the officer four choices: "prosecution, removal, voluntary departure, or voluntary

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must be communicated to the detainee in a language or manner the detainee can comprehend" (page #).

[220] According to CBP's website, "…over 90% of the more than one million undocumented aliens apprehended each year speak Spanish" (US Customs and Border Protection 2015). This is an outdated statistic given the dramatic drop in apprehensions in recent years but still sufficiently makes the point.

[221] Instructor Guide: Operations 2, "Lesson 1: Introduction to e3 Processing; Day 1," dated May 2010, pages 36-37 (on file with the author). Although it does not state it explicitly on the form or in the Instructor Guide, this last option is in fact voluntary return, as confirmed by the answer to a question in a pre-class assignment, which asks what three options an alien can choose from on an I-826. The answer includes "request return to country of origin as soon as possible (Voluntary Return)." See Production 8, page 42. Appendix A: Pre-Class Assignment, Question 9, May 2010, pp. 41-42.

[222] Instructor Guide: Operations 2, "Lesson 1: Introduction to e3 Processing; Day 1," dated May 2010, page 36 (on file with the author).

return without safeguards (Form I-210)."[223] These statements also contradict the instruction that the form should be provided before questioning and processing and the notion that voluntary return is a choice. The implication is that the information on the form about rights and choices is only symbolic, that voluntary return is not a genuine choice, and that the sole purpose of the form is to garner a signature to show "consent" has been obtained (i.e. it's not about the information on it). In fact, the way in which the form is administered by officers renders moot any rights on the forms.

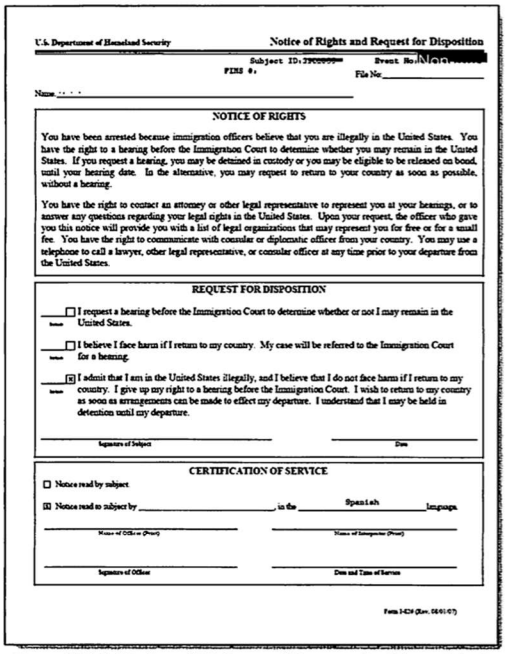
As further evidence of the fact that administrative voluntary departure is not actually presented to custodial migrants as a choice, the option for voluntary return is routinely pre-checked when officers present it to the detainee.[224] The Instructor Guide (2012) on Immigration Law even provides a graphic of Form I-826 that has pre-checked the voluntary return option (see Figure 7.1)[225] The clear message to detainees (and to officers who receive this training) is that detainees do not have any other choice—that voluntary return is their only choice. Pre-checking the voluntary box negates the need for officers to provide any further information about other options like asylum or removal proceedings or about the consequences of voluntary return *because* there is only one choice. Thus, voluntary return is a foregone conclusion. Even if the training instructs officers to provide the form before processing and questioning and to explain

[223] Instructor Guide: Operations 2, "Lesson 1: Introduction to e3 Processing; Day 1," dated May 2010, page 27 (on file with the author).

[224] "As a matter of regular practice in Southern California, defendants mechanically pre-check the "voluntary departure" box on Form I-826…Use of the pre-checked form gives the impression that accepting immediate expulsion to Mexico is the only option available to the individual" (*Lopez-Venegas* 2013: 11-12).

[225] Instructor Guide: Immigration Law, "Removal/Deportabilities," dated May 2010, page 11 (on file with author).

3. Obviously, it is advantageous to the United States and to the alien that Voluntary Departure is permitted in such cases.
4. Voluntary Return (V/R) is granted by issuance of a Form I-826 (Notice of Rights and Request for Disposition).
5. Form I-826 must be issued to all aliens eligible for an INA 240 removal hearing.



U.S. Department of Homeland Security — Notice of Rights and Request for Disposition

Subject ID: [redacted] Event No: [redacted]
FINS #: File No: _____

Name: _____

NOTICE OF RIGHTS

You have been arrested because immigration officers believe that you are illegally in the United States. You have the right to a hearing before the Immigration Court to determine whether you may remain in the United States. If you request a hearing, you may be detained in custody or you may be eligible to be released on bond, until your hearing date. In the alternative, you may request to return to your country as soon as possible, without a hearing.

You have the right to contact an attorney or other legal representative to represent you at your hearings, or to answer any questions regarding your legal rights in the United States. Upon your request, the officer who gave you this notice will provide you with a list of legal organizations that may represent you for free or for a small fee. You have the right to communicate with consular or diplomatic officer from your country. You may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to your departure from the United States.

REQUEST FOR DISPOSITION

Initials ☐ I request a hearing before the Immigration Court to determine whether or not I may remain in the United States.

Initials ☐ I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing.

Initials ☒ I admit that I am in the United States illegally, and I believe that I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure.

Signature of Subject _____ Date _____

CERTIFICATION OF SERVICE

☐ Notice read by subject.

☒ Notice read to subject by _____, in the Spanish language.

Name of Officer (Print) _____ Name of Interpreter (Print) _____

Signature of Officer _____ Date and Time of Service _____

Form I-826 (Rev. 08/01/07)

Form I-826 (Notice of Rights and Request for Disposition)
Refer to Appendix for larger version.

D. Officers who are authorized to grant Voluntary Departure prior to removal hearing (V/R) are: 8 C.F.R. § 240.25(a). (b) (7)(E)
   1. Chief Patrol Agents, (b) (7)(E)
   2. Officers in Charge of Ports of Entry and DHS sub- (b) (7)(E)

Figure 7.1 Pre-Checked Voluntary Return Form Graphic in Immigration Law Instructor Guide *Source*: USBP Instructor Guide on Immigration Law (2012) (on file with author).

the form to custodial migrants in their language, if the form is pre-checked and the officer expects the person to sign it, then there is no point to those safeguards. In other words, pre-checking precludes the point of all of those protections.

7.2 Officers' Dispensation of Erroneous Legal Advice

In contrast to the inadequate information provided in voluntary return procedures, officers sometimes convinced undocumented immigrants to take voluntary return by providing them incorrect or misleading information about voluntary return. This (mis)information often took the form of legal advice. In the state of California, immigration officers are prohibited from giving legal advice, as is anyone not licensed by the California Bar Association.[226] As lawyers described it, other than the fact that it is illegal, the problem with immigration officers providing legal advice is two-sided. Not only are immigration officers not qualified to dispense legal advice, but custodial migrants are uninformed about their rights. With regard to the first point, simply put, immigration officers are not lawyers, and, as one lawyer put it "it's not their job to give legal advice." Nevertheless, the use of legal advice to convince undocumented immigrants to take voluntary return was a common theme in lawyer narratives about their clients' experiences. The training they receive in immigration law as part of the requisite Customs and Border Protection (CBP) Border Patrol Academy they attend is arguably superficial, especially compared to the training and credentials required to be an immigration attorney.[227] As a result, they don't have the knowledge and tools to deal properly with not only the broad variety of cases they encounter but also their intricacies. As one lawyer explained it:

> They're not trained in the specifics of immigration law so the knowledge they have is just kind of secondary…[Undocumented immigrants in U.S. custody] might have the permanent bar, they might have a prior removal, [or] they might be eligible for something and they don't know their options, for example, a U-visa or prior contact with law enforcement that might get them other opportunities so [officers] just give these blanket statements based on some of their own minimal and often times incorrect knowledge of immigration law.

[226] The dispensing of legal advice without a license is referred to as the "unauthorized practice of law" (UPL) (California Business and Professions Code 6125).

[227] According to CBP's website, as part of the Academy's curriculum, all newly hired Border Patrol agents complete a 58-day course of instruction that includes a law program. The law program consists of five separate courses: Nationality Law; Immigration Law; Applied Authority, and Operations 1 and 2. Participants of the Academy must maintain a minimum overall average of 70% across these courses to pass the law program (US Customs and Border Protection 2015). In contrast, aspiring lawyers must complete three years of law school, pass a morals and ethics examination, and pass the rigorous bar exam for the state they want to practice law. In order to keep their license to continue practicing, lawyers must participate in "continuing legal education" to stay up to date on their training. Lawyers are also subject to disbarment from their profession for malpractice. Thus, the standards for becoming a lawyer and keeping one's license to practice law is very high, compared to the minimal training USBP officers receive and the lack of accountability they are held to for their actions.

Similarly, another lawyer stated:

> Voluntary return is done on the assumption that someone is in fact removable and doesn't have the possibility of qualifying for relief…Immigration officers can honestly make mistakes. They have legal training, but it's superficial…[T]hey receive some training in immigration law because they need to do their job, but it's not in-depth. They're not lawyers.

One common form of legal advice officers gave undocumented immigrants was that they did not have a viable case for remaining legally in the United States. One advocate, who worked at a support organization in Tijuana for recent deportees, described what immigrants subject to voluntary return told her about their experience in U.S. custody:

> …officers would often deceive [immigrants] in order to make them sign a voluntary return. They would say "If you want to fight your case to stay in the United States, you're going to be detained for one year and we're going to move you to a prison and you're going to be there with dangerous people and criminals and at the end, the judge is still going to deny your case because you have no way of being in the United States."

Essentially, without regard for the specifics of the individual's case or an understanding of what forms of relief from deportation the individual may be eligible for in immigration court, officers "advised" individuals they have no legal options for remaining in the U.S. and should therefore take voluntary return. This was the case despite the fact that "eligibility for immigration relief often involves a complex analysis of multiple legal and factual questions" (Koh 2013, 513). Recent evidence from the asylum context supports the notion that the dissemination of incorrect information and the implementation of incorrect procedures by officers in the custodial context is a widespread and systemic problem in the CBP.[228] In the voluntary return context, USBP officers' incorrect knowledge of immigration law, and their dispensation of incorrect information more generally (whether intentional or not), may reflect not only the inadequacy of training in subjects central to their job, like immigration law (i.e. the course/procedures may be inadequate, as illustrated in the section above) but it may also have to do with a decline in recent years in the overall amount of training officers receive and the experience they initially have when they are hired. Since the adoption of the "prevention through deterrence" strategy in the early 1990s, which resulted in a surge of resources and personnel along the southwest border, the number of new USBP agents has increased dramatically, which

[228] A recent advocacy report found that US border agents fail to ask the right questions, administer correct procedures, and/or provided incorrect information to asylum seekers at ports of entry about their rights, which effectively block asylum seekers' access to formal processes like asylum screening protection and immigration proceedings (Drake, Acer, and Byrne 2017). See, also, *Al Otro Lado v. Nielsen* (filed July 12, 2017) (class action lawsuit against the DHS and CBP challenging CBP's unlawful practice of depriving asylum seekers access to the asylum process).

has put a strain on the hiring and training of new officers.[229] Hiring requires a significant investment of time and resources because there is an extensive vetting and screening process (see Figure 7.2). Under the Clinton administration, the former Commissioner of the U.S. Immigration and Naturalization Service (INS) estimated that it took about 27 candidates to hire one Border Patrol officer (Stenglein 2017). Today, it is significantly more—the CBP estimates that in order

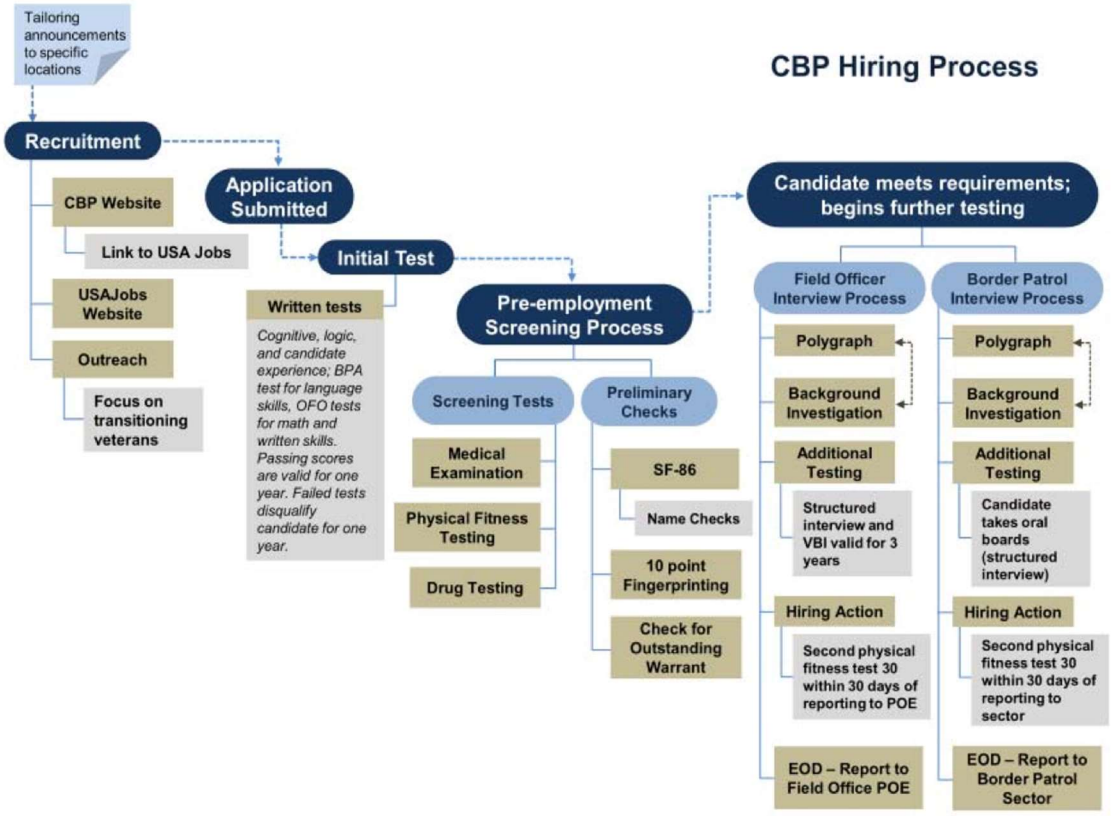


Figure 7.2 U.S. Customs and Border Protection Recruiting and Vetting Flow Diagram *Source*: CBP Integrity Workforce Study (2011).

to yield one full-time employee, it will take 133 candidates.[230] However, hiring surges create challenges for properly vetting and screening large numbers of candidates. When there is a rush

[229] "USBP staffing roughly doubled in the decade after the 1986 IRCA, doubled again between 1996 and the 9/11 attacks, and doubled again in the decade after 9/11" (Argueta 2016, 12). These hiring surges correspond with four laws that have authorized increases in Border Patrol personnel: the Immigration Act of 1990, the 1996 IIRAIRA, the 2001 PATRIOT Act, and Intelligence Reform and Intelligence Act (Table 3.1). Since taking office in 2017, President Donald Trump has called for further expansion of USBP ranks, with the proposed addition of 5,000 more agents (Rein 2017).

[230] In April 2017, when CBP requested bids for private contractors to help fulfill President Trump's order of 5,000 new agents, it wrote in its solicitation that "currently more than 133 initial applicants must be recruited in order to successfully hire and place one BPA [Border Patrol Agent]" (Department of Homeland Security 2017a).

to hire more agents, the hiring standards and training levels are necessarily lowered to keep up with hiring demand. Consequently, those hired are not as experienced or qualified. A recent report found 55 percent of the 12,000 agents hired between 2006 and 2008 failed the pre-employment polygraph test and 80 percent admitted to being involved in felony crimes, including violent crimes (Danielson 2015).

The hiring surges also pose challenges for training new officers properly to ensure they are prepared and qualified to carry out their duties correctly and lawfully. For example, there have been reports that during the hiring surge that spanned the George W. Bush and Barack Obama administrations—i.e. the National Intelligence Reform and Terrorism Protection Act of 2000, which authorized the hiring of 10,000 new agents—"new agents were rushed through training and into the field, some without completed background checks" (Naylor 2017). A Congressional Research Service report (2010) also states that the rapid expansion in the number of agents has led to a decline in the level of experience of agents in the field.[231] The report further suggests that the amount of training USBP officers need to be effectively integrated into the workforce, given their dearth of experience compared to more senior agents already at the agency, has not kept up with the hiring rate (Haddal 2010, 34).

In addition to inadequate training and experience, the other side of the problem with officers dispensing legal advice, as lawyers described it, is that undocumented immigrants are themselves not well-versed in immigration law. Thus, in the absence of a lawyer, they greatly rely on the information and assurances provided by officers to understand their choices and decide what course they should take:

> When you're looking at somebody who is not familiar with the laws…what's interesting is that these people [custodial immigrants] don't realize that, they think they're getting advice. They think they're getting immigration advice from these agents, so all the comments that were made, designed to make these people [custodial migrants] think these agents were looking out for their best interests…That they were helping them, that they were giving them ideas, helping them avoid problems, whereas it was actually creating incredible problems for their future.

In other words, custodial migrants rely on the authority of officers, even though officers are uninformed, or as the case may be, misinformed, often with a range of consequences:

> They're basically giving them completely erroneous legal advice, and a lot of the immigrants believe it because they think, "Well, this guy is wearing a uniform, and he's the officer…so he must know, so I better sign." Then they leave and learn, "Oh, wait. Now I can't fix my status from outside," or they can't fix it as

[231] Writing about the tripling of agent staffing levels between 1990 and 2002, the CRS report states: "A General Accounting Office (GAO) report in 1999 noted that the average experience level of Border Patrol agents had declined agency-wide, and that the percentage of agents with less than two years of experience had almost tripled, from 14% to 38%, between 1994 and 1998…" (Haddal 2010, 33). The report also notes that although the GAO report is from 1999, the rapid expansion of the Border Patrol in recent years suggests "the GAO's analysis of Border Patrol training may remain cogent today" (Haddal 2010, 33).

> easily or they can't fix it as quickly. Something that would've taken six months inside the U.S. is now going to take 18 months or more with them in Mexico.

One common refrain officers gave to undocumented immigrants which convinced them to accept voluntary return was that they could only fix their status from Mexico:

> A classic example, which I share with my clients, is when we talk about "My relative has been arrested three hours ago. He was picked up while driving to work." They call me on the phone or they drop by my office. I say, "Listen, does he know not to sign?" Yes, he knows not to sign." Okay, good," because two Christmases ago, a week before Christmas, a woman said, "They've picked up my husband while he was going to work," and she said that he knew not to sign. I asked her what time could she be in my office. She said three o'clock, and at three o'clock she came into the office crying and she said that he's already in Mexico. I said, "Well, what happened?" I said, he's never been deported before. He never took any other voluntary departures. Why did he sign? She said, "They tricked him." They said that you can't fix your papers inside the United States. You can only fix them in Mexico. Go to the embassy, go to the consulate. That's the only way you're going to fix it."

Attorneys and advocates reported that this happened to clients who were eligible for release from detention and had potential options for formalizing their status, either via a hearing with a judge (removal proceedings) or through an affirmative application for relief with help from a lawyer—options they effectively abandoned by "accepting" voluntary return. In the case of the individual cited above who was deceived into taking voluntary return, the lawyer explained:

> The person was in fact eligible for cancellation of removal, the ten-year cancellation rule, or other forms of release. If that person had not signed, I would have had him out before Christmas, and he'd still be here today fighting his case or with his case administratively closed by the immigration judge.

In another example, the custodial migrant even explained to the officer that he was married to a U.S. citizen but instead of releasing him or putting him in removal proceedings, where he could make a case before a judge, the officer "advised" him to take voluntary return and depicted it as the "right" (i.e. correct) way to fix his status:

> I've also seen cases where people have a clearly identifiable immigration remedy that maybe they [the custodial migrant] don't know about, and they kind of explain their situation to the officer like, "Hey, listen. I'm married to a U.S. citizen and I'm here on my visitor visa. We got married." To me, that's screaming that they have a remedy to apply for adjustment of status and stay in the country, but then, the officer's like, "Well, it doesn't matter. You're not supposed to be living here on your visitor visa. You should just do this [voluntary return] and then your wife can petition for you from Mexico. That's the right way to do it. You should sign."

Another common form of "legal advice" dispensed by officers was that taking voluntary return would not affect their ability to immigrate legally later. These assurances often took the form of comparisons to deportation:

> Another thing they tell them is that, "Oh, this is just voluntary departure. It's not going to affect your record, it's not like deportation. If you just take voluntary departure, nothing's going to happen." [The person in custody] will tell them, "Oh, I have this petition pending." Maybe they have a preference category I-130 petition that's approved, but the priority date is current. The person will tell the officer about that, and they tell them, "This [voluntary return] is not going to affect you because it's not a deportation."

While it may be the case for some migrants that voluntary return is a better deal than removal, as described in chapter 3, those who depart the country after accumulating a triggering period of unlawful presence, like the subject of the anecdote above, face years-long bars to legal admission. As a result, it undermines their eligibility for immigration status, even if they have an application pending. In other words, officers give this blanket advice regardless of what the migrant's immigration history looks like and without warning them of potential consequences. Moreover, the comparison of voluntary return to deportation is rather misleading, given that their immigration consequences can be quite similar. This characterization of voluntary return by officers, which was very common, may in part reflect USBP training and culture which depicts voluntary return as a consequence-free alternative to formal deportation. One organizational document reads:

> Those eligible may prefer to seek voluntary departure or "voluntary return" rather than undergo formal deportation. Both voluntary departure and voluntary return reduce processing times for INS personnel. At the same time they allow the individuals in question to avoid the potential penalties attached to formal removal proceedings.[232]

This is problematic because it means that in spite of changes to immigration law wrought by IIRIRA in 1996, there has been no changes in the voluntary departure statute or regulations and insufficient change to the training of officers or to organizational materials to reflect that fact that there are now consequences to taking voluntary return for those with a certain period of unlawful presence. But, in contrast to the section above on the deficient administration of voluntary return, the issue is not that officers are not informing individuals of consequences, but they are *going out of their way* to tell individuals that there are *no* consequences. The fact that individuals in USBP custody heed officers' erroneous legal advice, assuming that officers actually know immigration law and how it applies to their particular case, is evidence of the dire consequences of no access to even minimal legal advice for detainees:

> By taking voluntary return, you're a penny wise and a pound foolish. In the immediate short-term, it may appear to be a good deal, but without adequate counsel

[232] Voluntary Departure, "Authority for Voluntary Departure," undated, page 9 (on file with author).

these individuals will often abandon their rights [and] they do it in the face of overwhelming authority by a guy that's wearing a green uniform.

7.3 Partaking of Officers in a Confidence Game

In addition to legal advice, immigration officers often provided "friendly" advice intended to persuade undocumented immigrants in their custody to take voluntary return. Attorneys and advocates reported it was common for officers to manipulate custodial migrants into taking voluntary return by treating them like they were motivated by the migrant's best interest. More specifically, they intentionally misled custodial migrants by portraying voluntary return as a friendly favor they were doing for the individuals in their custody, or they would suggest it as a piece of friendly advice, framing it as the best way for the person to avoid detention, family separation, and possible deportation. The use of this strategy resembles elements of a "confidence game" (Leo 1996b), in which the officer gains the trust of the immigrant in order to induce them to comply with the voluntary return: "psychological tricks range from simple emotional appeals ['you don't want to leave your children']…to logically persuasive appeals" ['if you sign now, you can come back later very easily'] (Leo 1996b, 270). One lawyer described how officers essentially acted as "agents of transformation" (Felstiner, Abel, and Sarat, Austin 1980) who manipulated detainee's understanding of their voluntary return experience:

> [My clients] would typically be told…something to the effect of "I'm going to do you a favor." The officers, kind of playing like they're being friendly or they're cutting the person some slack, and saying, 'We're just going to do a voluntary departure. It's no problem. It's no big deal. It doesn't impact you. Just sign here…We'll take you out [of detention] today. If you come back [over the border] tomorrow, it doesn't matter." Wink, wink. Nudge, nudge. Kind of little jokes about 'Maybe you'll come back tomorrow. But if you don't want to sign then you're going to be in detention or you're going to jail. You might get deported…Kind of threatening that they would be detained for a long period of time or the judge might be really angry if they tried to see an immigration judge. Basically, being given a line about how voluntary departure is the preferable way for this person, and the officer kind of acting like they were doing them some sort of personal favor by suggesting [voluntary return].

This approach of portraying voluntary return as the "preferable" option is reflected in the Instructor Manual, which depicts voluntary return as a "privilege" and as a beneficial alternative to being formally removed. In explaining the disposition of voluntary return, the Instructor Guide (2012) on Immigration Law states the following:

> To cope with the large number of illegal entries across the Mexican border, the Department of Homeland Security for many years has used a form of Voluntary Departure *prior* to a removal hearing; this is known as Voluntary Return (V/R). A large number of removable aliens are *permitted* to leave voluntarily, and return to their country of residence without the institution of removal proceedings. This *benefit* is generally granted to aliens that are considered "seeking admission" and are

> removable as inadmissible under INA 212….Obviously, *it is advantageous to the United States and to the alien* that Voluntary Departure is permitted in such cases. Voluntary Return (V/R) is granted by issuance of a Form I-826 (Notice of Rights and Request for Disposition) (emphasis added).[233]

As one lawyer put it, the way officers see it is "the idea is that we could deport you if we want, but we'll give you voluntary departure." The document goes on to state that the "privilege" of voluntary departure will not be granted to aggravated felons, terrorists, criminals, and narcotic violators, among other categories of individuals. By essentially framing voluntary return to undocumented immigrants as a "get out of jail free" card, officers downplayed the gravity of taking voluntary departure and thereby misrepresented the consequences of taking it, assuring them that it would not impact them. This idea that voluntary departure carries no consequences and is preferable to deportation is ubiquitous (see chapter 1). Moreover, notwithstanding the false assurances of USBP officers, the informal nature of the voluntary return process, and the dearth of process altogether, may signal to the immigrant that it is not a serious procedure the way that a deportation order from a judge after a hearing in court may be perceived.

Another element of officers' friendly advice also involved encouraging the undocumented immigrant to return to the United States illegally, depicting the taking of voluntary return and re-crossing the border as the faster and easier option over staying in detention and waiting for a hearing. In other words, officers sold voluntary return to undocumented immigrants as a way to get out of detention as soon as possible so that they could return (albeit illegally) to their lives in the United States:

> Something I've heard from multiple clients which I find very interesting is that when they were offered voluntary return, and this has happened to two separate clients that I am thinking of specifically, when they were told you should choose voluntary return, the officer who was talking to them had actually told them, you can come right back over. Try going through the hills, try coming through this port of entry, so they were almost enticing them to take the voluntary return by telling them they could just come right back over. Multiple clients, also multiple people I've done consultations with that [told me] immigration is basically saying, you know you can just come back over, you know that if you try hard enough you'll be able to get back over so it's just easier for you to do the voluntary return and then come back through the hills instead of trying to fight a case that you'll never win or go into detention for months and my clients have been very surprised by the fact that these officers are telling them to just come back over. From my perspective it seems that this is a tactic to get people to sign that voluntary return.

Migrants relied on these assurances and advice, even though, unbeknownst to them, they had other options they could pursue that were undercut by the immigration consequences of taking voluntary return and returning in undocumented status to the U.S. For the period preceding 1996, taking voluntary return did not result in immigration consequences, and indeed, this process of taking voluntary return and immediately attempting re-entry to the U.S. was part

[233] Instructor Guide: Immigration Law, "Removal/Deportabilities," dated November 2012, page 10 (on file with author).

of the social process of border crossing (Singer and Massey 1998). However, as described in chapter 3, since 1996, voluntary return carries immigration consequences as a matter of immigration law, including bars to admission:

> [Talking about the 212(a)(9)(c) bar to adjustment of status or to lawful immigration through family] A lot of folks wouldn't have a second unlawful entry but for administrative voluntary return and specifically the officers telling them, 'Oh you can come back,' or 'You'll probably come back,' or in other ways telling them it's not a big deal or there are no legal consequences essentially, to them coming back. Then they go ahead and come back instead of maybe staying put and waiting for their spouse to petition for them, and then ruin their chances of legally immigrating through marriage or through family.

Some lawyers suggested that officers were aware of the pull that migrants' ties to the U.S. created for them and accordingly used those ties to leverage the option of quick release from detention via voluntary return, so they could return to the U.S. the next day:

> Most of the clients have families and children and work and are anxious to be free to get back to their jobs and they'll say, "Just sign and you'll be gone immediately and then you can come back tomorrow." They'll say things like that to them and they'll say, "But if you stay and fight the case you might be detained for six months," and that's the way they coerce them into signing. I hear that story over and over and over again. They coerce them, they kind of give them an alternative coming back, they say, "You know you can sneak back in tomorrow.

Moreover, despite the serious implications for the person's immigration status, officers would often make it sound very casual and unproblematic to depart the U.S. and return illegally. In a theme observed over and over again, officers downplayed the immigration consequences of voluntary return to convince undocumented immigrants to take it:

> This gentleman in particular, he was told, "Go down to Tijuana. Have some tacos. Come back, and you'll be fine…Don't worry about it. You'll be able to take care of this later. Otherwise, you're going to be sitting there [in detention] forever. [When I asked incredulously if he was literally told, that] "Yes, we have it in a declaration. He testified to it at his interview.

Similarly, another immigration practitioner told me:

> There have been instances and cases where we have heard the person say [immigration officers] told us "You're just going to go visit family for a month or two weeks and then you're back. The easiest thing for you to do is to make a family visit and come back."

Because information about the immigration consequences of voluntary return and about their other options is not provided on the voluntary departure form, and because USBP officers are otherwise not required to provide custodial migrants with this information, custodial migrants

are in a severe information deficit. The pressures of this information deficit, as well as the pull of family life outside detention, makes custodial migrants more likely to heed the "friendly" advice (misinformation) of officers, and thus makes them more vulnerable to making a decision that is detrimental to them. One lawyer encapsulates well how the push and pull factors to sign voluntary return work together in the context of an information deficit to induce voluntary return and to influence the migrant's decision to return (illegally) to the U.S.:

> "My sense is that the community is very uninformed about the consequences of getting sent back to Mexico and then coming back illegally. I mean, I think the basic assumption is that anybody who gets voluntary return is going to try to come back. I mean, if they have any connections here, any kind of long-term presence, they're not going to just say, 'Oh, I'm now in Mexico and I don't care about my kids. Right? They're going to try to come back. But they don't understand the ramifications of being here illegally, leaving, and then coming back…For that reason, they're probably more willing to accept voluntary return than they would be if they were properly informed about the consequences of coming back illegally.

Moreover, while it may indeed be faster and easier (at least in the short-term) to return to their life by signing voluntary return, departing the United States, and returning illegally rather than remaining in detention to wait for a hearing before an immigration judge, officers provide this "friendly" advice without also conveying information about the *downsides* of not waiting in detention for a hearing—not only the legal consequences imposed on them by signing voluntary return and returning without status to the United States, but also the opportunities afforded by due process that the custodial migrant only has access to in the context of a hearing:

> By signing a voluntary departure, you're basically ... you're withdrawing an opportunity to defend your case. That's the bottom line, and in situations where a person ... so for example, a person came to the country either with a visa and overstayed, or entered without a visa, and was apprehended within the first six months of originally entering, signing the voluntary departure could be actually a good thing, because there's really no repercussions. Well, there's no dramatic repercussions, and the person may be able to leave the country and try to either obtain a new visa or perhaps even immigrate because they married someone. Now, that is really rare, that a person signed a voluntary departure before six months [of unlawful presence]…[W]hen you are apprehended after that period of time, then a voluntary departure will carry extreme penalties. Either a three-year bar, or a ten-year bar, after being in the country for more than a year. So, by not going to an immigration judge, you're pretty much—you're signing a deportation for the next ten years...There are some waivers available, but the point is that you make your case ten years more difficult. If you go to a court, you can always get voluntary departure, because the judges have jurisdiction to give you [judicial] voluntary departure if you want to. But, you [also] open your case to other alternatives such as asylum, or any other relief that could be available in your specific case. For people who have remained here for more than a year, it's, you

know, it's typically more useful for them to go to court first, than to sign a voluntary departure.

7.4 Subtle Coercion as Agenda-Setting and Preference-Setting Power

As described in chapter 6, coercion in voluntary return is largely a result of structural factors within the USBP that make it nearly imperceptible. Stephen Lukes' (1974) framework of institutional power is useful for understanding coercion in this context as an exercise of a subtle form of power. While the first dimension of power helps us understand the conditions of detention and physical custody as a creating a form of "power dependence" between custodial migrants and USBP officers, a reliance on the definition of power in the first dimension masks the more subtle ways power operates to render voluntary return coercive. Because it describes power in dyadic exchange relations, power dependence by itself does not effectively describe the diffuse nature of power within a large institution like the USBP. In the USBP, there are systems of procedures which reflect the collective choices of various participants' knowledge, preferences and viewpoints which are baked into training and culture. As a result, the USBP can exercise agenda-setting power by controlling procedural rules—i.e. the context in which decisions are made—and thereby defining the boundaries of the system and thus the range of available choices. This enables the USBP to unobtrusively prevent custodial migrants from broaching or surfacing an issue of interest to them—either because what the less powerful party wants may not be an option (or they may not know that the option exists at all because it's not on the table), or, in the face of this persistent power differential, by deterring the person into silence. This is known the Second Face of Power ("non-decision-making power").[234]

The USBP exerts second order power by controlling the rules of voluntary return in a way that is reflective of a system geared towards processing migrants en masse and as quickly as possible and making sure they do not progress to more formal venues where they get access to their rights, as opposed to a system with the goal of ensuring each person receives due process. As explained in detail above, officers routinely failed to provide custodial migrants with information about the consequences of voluntary return (i.e. loss of procedural rights, abandonment of forms of relief, bars to admission), the migrant's right to an attorney, their right to a hearing, and the option to express fear of return to one's home country. This is a result of structural factors such as information-deficient forms (or forms that are not in a language the custodial migrant understands) and insufficient training. Moreover, custodial migrants faced structural barriers to resources that *could* provide the information for making a meaningful decision about VR—i.e. family members, attorneys, and consular officers. These include the USBP detention policy that does not require officers to provide a telephone call to custodial

[234] "The decision to act or not to act, and in particular, non-decisions or non-actions, have in turn proved to be central to understanding take-for-granted power arrangements in society. Direct power actions in the face of opposition require explicit disagreement. But much social activity that we would reasonably describe in terms of unequal power takes place without such disagreement…[T]o understand both the practice and the distributive effects of power in border enforcement, we must be attentive to the discretionary non-actions, and the reasons for them" (Heyman 2009, 368–69). The idea is that even though it's a non-action, "it requires a definite decision of some sort at the organizational or officer level, even if in many cases the reasons are taken for granted and even unconscious" (Heyman 2009, 369).

migrants until 24 hours of detention has passed, lack of infrastructure to facilitate communication between custodial migrants and those on the outside, as well as the G-28 form which poses logistical obstacles to lawyers meeting with clients being held by the USBP. The speedy practice of voluntary return can also be understood as an exercise of second dimensional power. Speed was structured into training and instructional materials, as well as in the proximity to the border, similarly posing barriers to the ability of custodial migrants to seek representation, learn about their rights, and ultimately to marshal the information necessary to make a meaningful decision about whether or not to take voluntary return (see chapter 5). By limiting (withholding) access to information about rights and controlling how the information they do share is framed (e.g. presenting VR as a "choice" but not divulging its consequences), custodial migrants did not have all the information to make an informed decision about voluntary return. Thus, the USBP (and its officers) exerted its agenda-setting power to effectively limit the "choice" of custodial migrants to voluntary return, and thus to subtly coerce them to take voluntary return.[235]

Finally, in the Third Face of Power, "ideological" or "hegemonic" power or "power as domination" as Lukes (1974) refers to it in the second edition of his book, power arises from the more powerful party's ability to lead or mislead the less powerful party into faulty understandings of their own self-interest—and thus to make them act *willingly* in ways that oppose their own self-interest. This is known as preference-setting power. In contrast to the first and second dimension of power, in the third dimension, power is employed strategically to keep grievances and conflict from materializing in the first place. The more powerful entity doesn't have to use overt power because people perceive a course of action as being in their own interest. The internalization of cultural and social norms and scripts influence how both parties see the world and their set of choices. Lukes (1974) refers to this as "the most effective and insidious use of power" (27) because power operates in invisible and intangible ways. He identifies three aspects to the Third Face of Power—manipulation, persuasion, and false consciousness. This discussion will address manipulation and persuasion. In manipulation, Actor A lies to Actor B to get him/her to comply; thus, Actor A promotes a perspective/belief that he/she doesn't actually believe (intentional act and insincere). In persuasion, Actor A affects Actor B's beliefs but Actor A believes what he/she is saying. Although intentional like manipulation, unlike manipulation, the use of persuasion is done in sincerity.

Lukes (1974) treats manipulation and persuasion as forms of power that are distinct from one another, but this study of voluntary return shows they are not separate. Officers' dispensation of erroneous legal advice, which convinced many individuals it was in their best interest to take voluntary return (often in combination with the pressures created by detention conditions—first dimensional power) can plausibly be experienced as both manipulation and persuasion. In the case of erroneous legal advice as manipulation, officers know the advice they are providing is incorrect and thus that taking voluntary return is not in the migrant's interest. The fact that

[235] The exercise of second order (agenda-setting) power can similarly be seen in the case of Central American asylum seekers detained under the Trump administration's zero-tolerance program who were presented with a form that limited their choices to either reuniting with their childr(en) and being deported with them or returning to their country of citizenship without their child, who ostensibly remains in the US to pursue their asylum case (see Appendix E for the "Separated Parent Removal Form"). Within these options, there was no possibility for the migrant to pursue his or her own asylum case or to request a hearing before an immigration judge.

officers gave the same kind of advice to so many people (i.e. you can only fix your papers from Mexico), regardless of their circumstances and without a holistic evaluation of their case, suggests this was strategic, and thus a form of manipulation. Conversely, some officers could truly have believed that none of these individuals had a viable case. Thus, it is plausible they thought they were providing valid advice and genuinely believed voluntary return was that person's best option. It is difficult to discern from the accounts of lawyers and advocates which form of power was operating without knowing the intentions of USBP officers. The fact that classification is difficult suggests that on the ground these forms of power work together and are indistinguishable.

USBP officers also exercised third dimensional power when they engaged in a confidence game in which they deceived custodial migrants into signing voluntary return by gaining their trust and convincing them they were on the same side. In so doing, they sold custodial migrants on misleading narratives about what voluntary return is, what its consequences are, and how it would affect their ability to legally immigrate later. Officers gained the trust and confidence of custodial migrants by depicting the granting of voluntary return as a favor ("rather than deporting you, we will voluntary return you because voluntary return is not deportation"). Part of this act of deception was to assure custodial migrants that by taking voluntary return, they could just easily cross back over the border the next day, even going so far as to make suggestions for how to come back into the United States illegally. Conversely, they warned (again, in a friendly way) that if they did not sign and insisted on staying to "fight their case," they would remain detained for an indefinite period of time. Officers neither disclosed that there were immigration consequences to taking voluntary return nor that there were consequences to returning illegally after taking a voluntary return. In other words, they tricked custodial migrants into thinking that voluntary return was the easier, more preferable (beneficial) way to getting what they want, which was often to be released and reunited with family (something officers were aware of and used as leverage), when in fact waiting to speak to a lawyer and see a judge may have yielded greater benefits in the long-term (like formal status).

Another context where we commonly see third order power operating is in the police custodial setting. In his seminal empirical study, Richard Leo (1996b) set out to investigate why the vast majority of custodial suspects voluntarily waive their *Miranda* rights and subsequently "make incriminating admissions and confessions to police when it so clearly violates their self-interest" (260). He found that in the wake of the *Miranda* decision, which deemed unconstitutional the use of physical violence and psychological duress in the custodial setting, police departments started training their officers to use non-physical strategies of coercion to obtain admissions and confessions. Accordingly, Leo (1996) likens modern criminal interrogations to a "confidence game" in which officers rely on the use of, among other things, manipulation, persuasion, and deception to "predispose" a suspect toward waiving their *Miranda* rights and then subsequently to extract a confession (272). In contrast to the criminal context, officers in the (civil) immigration detention setting have far more discretion and power[236] and are subject to far less independent oversight than their counterparts in criminal policing, and migrants (particularly undocumented immigrants) have far fewer and less robust protections than criminal defendants.

[236] For more on discretion as a form of power and the study of discretionary decisions through the frame of power relations, (Heyman 2009).

This manipulation of information can prevent a person from learning they have been injured and thus suppress rights mobilization (Felstiner, Abel, and Sarat, Austin 1980). In the voluntary return context, this was apparent in the fact that undocumented immigrants often did not seek a lawyer after their coercive voluntary return experience, as evidenced by lawyer accounts that their clients' voluntary return experiences largely surfaced in the context of a consultation regarding another legal matter. The implication is that undocumented immigrants did not know they had suffered a grievance at all because they believed, based on what Border Patrol officers told them, that voluntary return had no long-term consequences. Relatedly, because the USBP suppressed that information, custodial migrants did not know that they could have potentially adjusted to formal status if they had not waived their right to go to court.

7.5 Conclusion

In administrative voluntary departure the waiver of one's right to a hearing (as a condition of accepting voluntary return) is considered legally permissible because by law, taking voluntary departure requires the consent of the individual taking it. Thus, it is that consent legitimizes the practice of voluntary return, making it a catch-all for the autonomy of both parties. Once a practice is characterized as consensual under the law, this prescription is taken for granted and there tends to be little critical perspective of it. In contrast, this chapter revealed the important role of (systems of) power in shaping the character of consent. It showed that the legal construction of voluntary return as a consensual process belies the ways in which power operates through structural factors in the civil immigration context to render voluntary return subtly coercive. [237] Thus undocumented immigrants are not freely giving up their rights in "voluntary" return.

Whose interests, then, does the legal requirement for consent in voluntary departure serve? On paper, it protects the interests of undocumented immigrants, to ensure they understand what they are agreeing to and giving up before they waive their right to a hearing. Yet, as my analysis suggests, the legal requirement of consent benefits the government by lending legitimacy to its summary deportation practices without actually ensuring meaningful consent has been obtained.[238] "Voluntary" return is a construction of administrative rhetoric that serves administrative expedience in the absence of sufficient resources. It permits the government, which otherwise lacks the resources to give all undocumented immigrants a hearing, to summarily expel large numbers of undocumented Mexican immigrants from the United States under the fiction that the undocumented immigrant chooses to depart. The form bearing the

[237] There are many areas of law like that including torts and contracts. Jill Weinberg has similarly noted that "legal definitions [of consent] can obscure the importance of power relations" based on, among other things, age, knowledge and expertise, gender or race (Weinberg 2015).

[238] Other studies of consent in institutional settings have similarly found that formal rules defining and governing consent benefit and protect institutions rather than the individuals whom they are in theory supposed to protect. "Socio-legal accounts of university Institutional Review Boards shows that increased expansion of rules and structures involving informed consent of human subjects in science research is not meant to maximize consent but to protect universities from legal risk. Similarly, studies in medicine…show that doctors view informed consent as a legal requirement rather than as a mechanism to maximize patient communication" (Weinberg 2015).

undocumented immigrant's signature serves as a powerful symbol of consent. The ritual of signing the form serves to signal that the USBP cares about the consent of the undocumented immigrant and about their due process rights more broadly. However, the legal requirement and this ritual of consent conceal unequal power relations. In practice, meaningful consent and the protection of the rights of undocumented immigrants are not a priority in voluntary return. Thus the law-in-action differs from the law-on-the-the books not in arbitrary and random ways but in a way that reflects unequal power relations and is symptomatic of an immigration system that lacks a commitment to the due process rights of undocumented immigrants. This lack of care by the law for genuine consent to waiver of due process is corroborated by the recent shift to summary removal procedures, which have altogether done away with the option of due process in court (i.e. removal proceedings) and therefore the need for the legitimacy provided by consent. The movement away from formally consensual voluntary return toward procedures that have eliminated the option for due process in court altogether, such as expedited removal and reinstatement of removal, exposes the legal fiction of "consensual" voluntary departure. The following chapter turns to examining summary removal procedures in the context of the Consequence Delivery System.

Chapter 8 Border Enforcement in the Era of the Consequence Delivery System

In 2011, the USBP created the "Consequence Delivery System" (CDS), which guides the decision-making of USBP officers in the field with regard to what enforcement action to take (e.g. removal proceedings vs. expedited removal vs. voluntary removal). However, a recent report by the Government Accountability Office (GAO) (2017), the investigative arm of Congress, shows evidence that USBP officers mostly do not comply with it, even though it is their own policy. While previous empirical chapters focused on the practice of voluntary return, this chapter zooms out to examine the CDS framework and the puzzle of non-compliance, arguing that the gap between the stated policy and lack of implementation on the ground supports my broader argument that the U.S. immigration system is structured in ways that undermine the procedural due process rights of custodial migrants.

As described in chapter 1, before 2005 USBP agents had at their disposal only two enforcement actions they could take against undocumented Mexican immigrants they apprehended between ports of entry: they could either voluntary return them to Mexico, or agents could initiate removal proceedings and transfer migrants to ICE custody for detention pending removal proceedings. Undocumented Mexican immigrants apprehended at the border were almost always immediately voluntarily returned rather than placed into resource-intensive removal proceedings (Heyman 1995, 1998; Singer and Massey 1998).[239] In 2000, when undocumented immigration across the southwest border was at its height, nearly 1.7 million immigrations were voluntarily returned and just 188,467 were formally deported (Department of Homeland Security 2017b). Although undocumented immigration began to slowly decline after that year, the volume of migration remained high (well over a million), and the vast majority of border apprehensions continued to be subject to voluntary return. This trend was derided by critics, who referred to voluntary return pejoratively as "catch and release,"[240] referring to the fact that undocumented immigrants were apprehended by USBP officers only to be released and attempt another entry. In response, under the Bush administration, the USBP expanded their arsenal of enforcement actions and began to limit voluntary returns for more "high consequence" outcomes.[241] High consequence enforcement, which is not the subject of a formal policy but is

[239] As explained in chapter 5, non-Mexicans could not be voluntarily returned by the USBP so USBP usually initiated removal proceedings against them and transferred them to ICE custody. Because of limited detention capacity, these individuals were commonly released by ICE pending their removal proceedings, a process pejoratively referred to as "catch and release" (cite).

[240] "Catch and release" is a derisive phrase used to describe the general practice of releasing a migrant from law enforcement custody rather than detaining them. For example, it has been used to describe both voluntary return, whereby immigration officers apprehend undocumented immigrants and quickly return them to the Mexican side of the border, and to the practice whereby immigration authorities apprehend migrants and then release them into the U.S. pending their removal proceedings.

[241] Notably, the volume of undocumented immigration remained high for years after. Accordingly, voluntary returns still constituted the main tactic for controlling undocumented immigrants in the border region (see chapter 1). In other words, although voluntary returns were declining, they still made up the vast majority of deportations from the U.S.

descriptive of the shift to more stringent border enforcement, is comprised of three categories of consequences: formal removals, which carry bars on future legal admission to the US, remote (lateral) repatriation programs to US-Mexico border locations far from where migrants were apprehended, and criminal prosecution for federal immigration crimes (Argueta 2016).

In 2011, the USBP consolidated these consequences (as well as the two traditional enforcement actions, voluntary return and removal proceedings) under one enforcement paradigm, the CDS. The CDS guides USBP agent decision-making with regard to the enforcement actions they take in the field against migrants they apprehend and its goal in part is to standardize agents' decision-making across sectors. [242] It also aims to maximize the penalties associated with unauthorized entry in order to reduce the likelihood ("risk") that the migrant will attempt another border crossing (i.e. recidivate) (Slack, Martinez, et al. 2015). Towards this endeavor, for each of a number of pre-conceived migrant categories (e.g. apprehension, family unit, suspected smuggler, etc.), the CDS ranks the consequences from "Most Effective and Efficient" to "Least Effective and Efficient" (with regard to the goal of reducing recidivism), and directs agents to apply the Most Effective and Efficient consequence whenever possible (Figure 8.1). Despite the goal of systematization and standardization of border enforcement, this chapter will show that USBP officers have ample opportunity to exercise their discretion, and that this discretion is routinely exercised to depart from their own policy. In particular, it highlights the findings of a recent GAO (2017) report on the CDS which found that in 2013, across sectors, officers applied the "Most Effective and Efficient" consequence only 28% of the time, and that this rate dropped to 18% in 2015 (18).

Among other things, the report indicates that USBP officers are hesitant to apply the Most Effective and Efficient consequence listed in the CDS guide when it is removal

[242] "The CDS is a means of standardizing the decision-making process regarding the application of consequences and provides for the evaluation of outcome effectiveness" (U.S. Border Patrol 2012, 17).

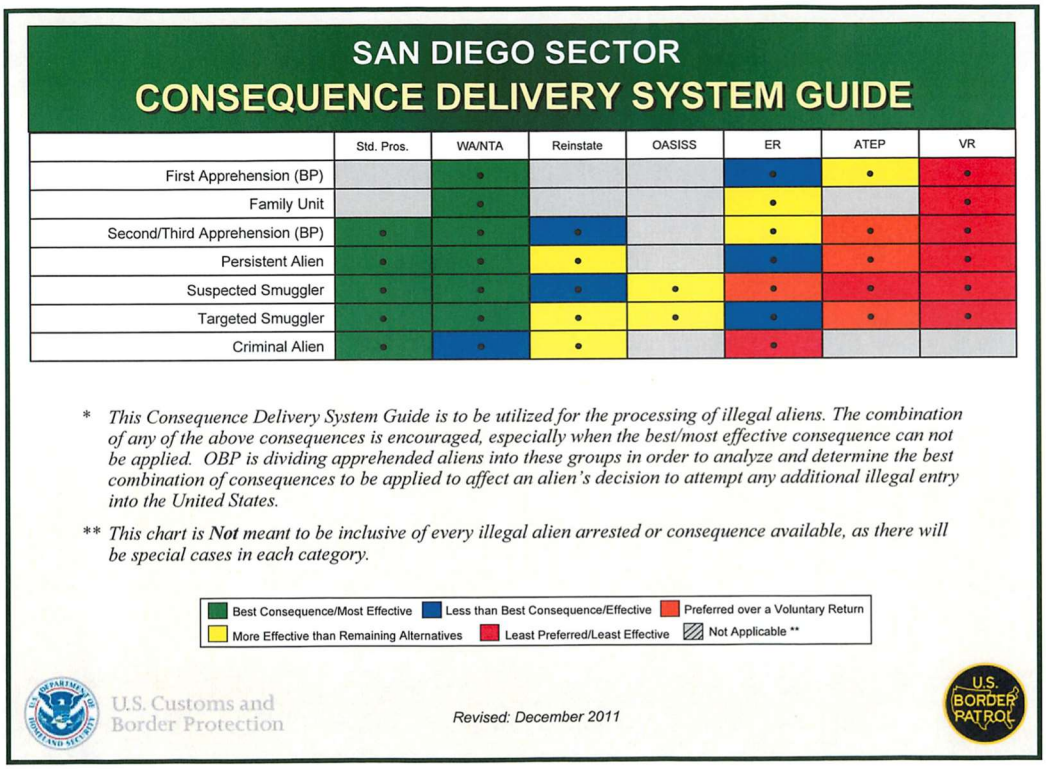


Figure 8.1 San Diego Sector Consequence Delivery System Guide (2011)*
Source: U.S. Border Patrol (on file with the author)

*This is an early iteration of the San Diego sector CDS guide and the ranking labels for consequences has since changed, although the rank order they signify remains the same. The following is a translation to the current ranking labels: Best consequence/most effective = Most effective and efficient; Less than Best Consequence/Effective = highly effective and efficient; more effective than remaining alternatives = effective and efficient; preferred over a voluntary return = less effective and efficient; Least preferred/least effective = least effective and efficient.

proceedings based on their own normative judgments about removal proceedings' lack of efficiency. In other words, even though the USBP's own policy indicates that removal proceedings are the Most Effective and Efficient course of action, officers exercise discretion to depart from it. In so doing, I argue officers are effectively appropriating the discretion and decision-making authority of courts.

Figure 8.2 shows what is at stake. Out of all the consequences in the CDS, removal proceedings are migrants' only opportunity for due process in court and the only route to apply widely for forms of relief from deportation. Notably, across all sectors, removal proceedings were the most frequently listed as the Most Effective and Most Efficient consequence out of all consequences between 2013 and 2015 (U.S. Government Accountability Office 2017a). If officers are not initiating removal proceedings, the implication then is that migrants are largely processed through a summary removal procedure or voluntary return. This is troubling given my findings in chapters 6 and 7, which showed how due process in summary deportation in the process of voluntary return is undermined by structures in the USBP custodial context, such as deficient officer training, barriers to legal representation, and information-deficient forms. I argue that these USBP structures, as well as the CDS itself, encourage officers to appropriate the

adjudicatory power of immigration courts by "managerializing" the legal concept of due process—i.e. re-casting it in

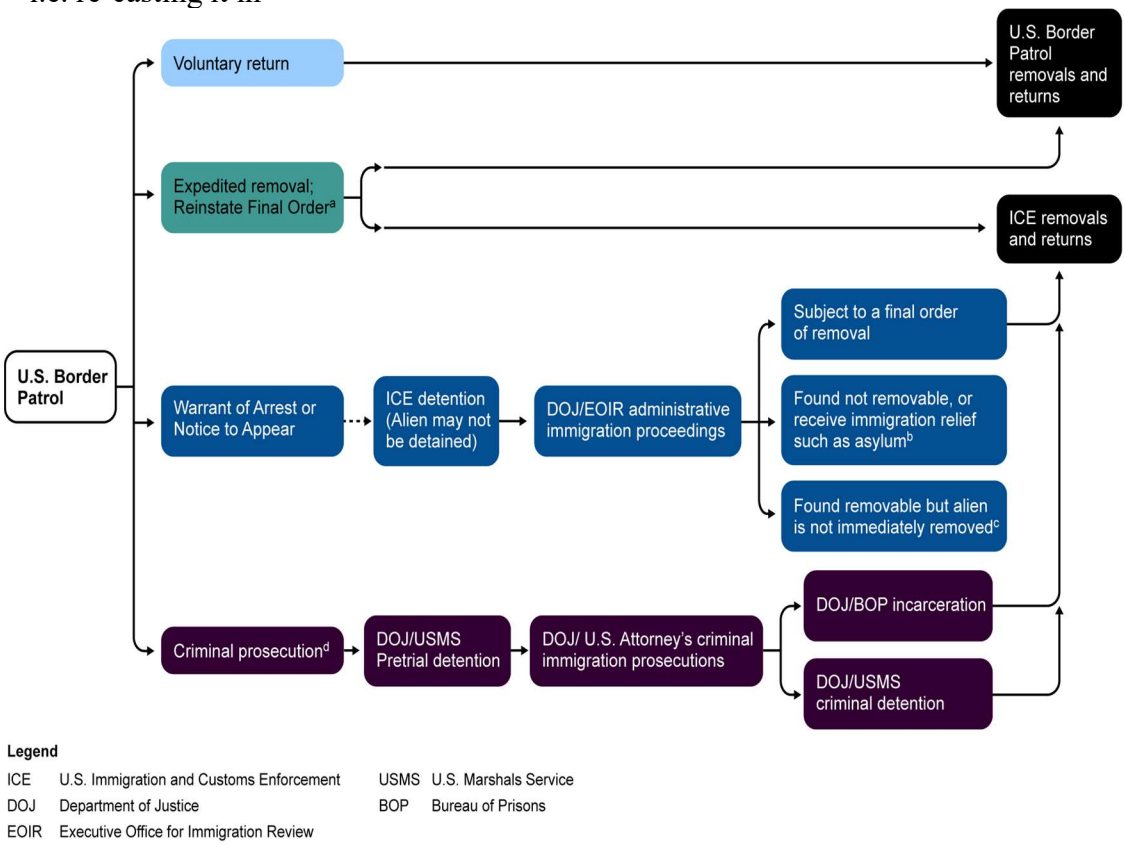


Figure 8.2 Federal Agency Roles in Administering CDS Consequences *Source*: U.S. Government Accountability Office (2017a)

[a]These actions are also applied in conjunction with the Alien Transfer Exit Program. Program. For the Operation Against Smugglers Initiative on Safety and Security, Border Patrol sectors' prosecution and international liaison unit coordinates with officials from the Government of Mexico to coordinate transfer.
[b]Removal proceedings conclude with the respondent being found not removable or obtaining relief or protection from removal in the United States.
[c]Removal proceedings conclude with the respondent ordered removed, but removal order has not become administratively final, or a final order of removal has not yet been effectuated by ICE/Enforcement and Removal Operations.
[d]Criminal Prosecution includes both Streamline and Standard Prosecution.

terms of the organizational objectives of effectiveness and efficiency and thus de-emphasizing its legal aspects.

This chapter proceeds in the following way. It begins by providing background on the CDS and describing the context for its emergence, including the circumstances leading to the shift to "high consequence" enforcement. It then draws on USBP organization materials obtained through the AIC FOIA litigation materials to explain and analyze how the CDS guide for each sector is annually developed, providing insight into what factors the USBP weighs and prioritizes—and which notably it doesn't—in deciding how to rank consequences for each

migrant category. While researchers have examined the effect(iveness) of the programs that constitute the CDS (Grimes et al. 2013; De León 2013; Lydgate 2010; Slack et al. 2015), little remains known about the CDS as a whole and how it works. This chapter fills this void. It also describes the "evaluation process" that USBP agents are expected to follow in determining what enforcement action to take against each migrant they apprehend, and shows the extent to which USBP officers have reign to exercise their discretion when selecting an enforcement decision—in spite of the CDS goal to standardize decision-making. Moreover, it shows that because the CDS only views migrants in terms of their risk of recidivating, the evaluation process omits consideration of due process and humanitarian protection concerns. Given these critiques, this chapter asks how the CDS is actually implemented on the ground and examines the findings in the GAO report.

This chapter concludes by arguing that the "loose coupling" (Edelman 1992) between the actions of officers and the stated policies of the CDS suggests that the USBP is a "symbolic structure" created by the USBP to bolster its own legitimacy in the face of political pressure to more stringently enforce immigration law, rather than a rational response to an actual problem of undocumented immigration. The CDS was enacted during a period in which undocumented immigration had dramatically dropped to its lowest levels in decades and continued to be in decline. Moreover, as I will show, most apprehensions in recent years have been of noncriminal, non-repeat border-crossers. Together, this suggests the CDS is trying to solve a problem that doesn't exist, and that it in fact may be a ploy for legitimacy. Thus, although the CDS signals a systematically "effective and efficient" approach to border enforcement, it belies the messy reality of discretionary decision-making by officers that persists—decision-making that subverts rights processes.

8.1 The Evolution of "High Consequence" Enforcement

8.1.1 "Prevention through Deterrence" Enforcement Strategy

The CDS is the product of the evolution of a strategy of deterrence that began in the mid-1990s. In 1994, in response to growing public perception since the 1970s that the Southwest border was being overrun by undocumented immigration and drug smuggling (i.e. the "Latino threat")[243] (Chavez 2001, 2008), the USBP adopted an enforcement strategy that relied heavily (and ultimately unsuccessfully) on natural deterrence to stem the flow of undocumented immigrants (Slack, Martínez, et al. 2015). As part of "prevention through deterrence," rather than arresting undocumented immigrants after they illegally cross, the USBP sought to deter undocumented immigrants from crossing altogether. Accordingly, by concentrating enforcement at traditional points of entry, the effect (both intended and actual) was to funnel the usual flow of undocumented immigration from long-established routes that were safe into remote, inhospitable terrain along the US-Mexico border that would ostensibly discourage them from crossing (Andreas 2000; Nevins 2002; Dunn 1996, 2009; Rubio Goldsmith and Reineke 2010; Ewing 2014).

Although this strategy was ineffective in deterring future crossings, it made crossing much riskier and deadlier (Eschbach et al. 1999; Cornelius 2001, 2005; Cornelius and Lewis 2007; Nevins and Aizeki 2008). During this period, all Mexican migrants who survived the

[243] As explained in chapter 3, undocumented immigration had stabilized by the 1970s.

journey and crossed the border were immediately returned via voluntary return, rather than placed into resource-intensive removal proceedings—at which point it was common for the migrant to attempt another crossing until achieving successful entry (see chapter 3).

8.1.2 "High Consequence" Enforcement Strategy

The emergence of a "high consequence" enforcement strategy in 2005 in response to political pressure during the Bush administration to end "catch and release" began a new era of border enforcement that limited voluntary returns in favor of a series of more punitive enforcement actions, including summary removal procedures, the expansion of criminal prosecution, and lateral repatriation programs (see Table 8.1). Summary removal procedures, including expedited removal and reinstatement of removal, which were put into effect in all sectors starting in 2005, essentially place the power of formal removal, traditionally reserved for immigration judges, into the hands of Border Patrol officers, authorizing them to act as "police, jailor, and judge" (Wadhia 2015, 5). Individuals placed in expedited removal proceedings or who are subject to reinstatement of removal have no right to a hearing before an immigration judge and face a ban on readmission for five years to life (Table A5). Although once limited to migrants apprehended at ports of entry (i.e. at the border, not yet in the US), expedited removal was expanded to almost all undocumented immigrants apprehended between ports of entry within 100 miles of the border (i.e. interior of the US) and who could not furnish evidence of having been continuously and physically present during the 14 days prior to the encounter with immigration authorities (Ayelet Schahar).

Table 8.1 Consequences in USBP's Consequence Delivery System

Category of consequence	Consequence/Enforcement Action	Definition
Administrative	Voluntary Return/administrative voluntary departure	Used at the discretion of Border Patrol agents and their supervisors to return a migrant to his or her country of origin without being subject to formal removal proceedings/a formal order of removal.
Administrative	Expedited removal (ER)	A formal removal order issued by a USBP officer within 100 miles of the U.S. border against a migrant who has not been physically present in the U.S. for a period longer than 14 days immediately before the arrest. Migrants in ER proceedings have no right to a hearing before an immigration judge.
Administrative	Reinstatement of removal	The reinstatement of a pre-existing order of removal by a USBP officer without reopening or reviewing the original removal order. Migrants subject to reinstatement of removal have no right to a hearing before an immigration judge.

Administrative	Warrant/Notice to Appear (WA/NTA)	USBP processes and initiates formal removal proceedings (a hearing) before an immigration judge. After the NTA is issued by a USBP officer, the migrant is transferred from CBP custody to ICE, which prosecutes the removal case in immigration court and detains the migrant pending removal proceedings (if warranted).
Administrative	Quick Court*	Formal removal proceedings before an immigration judge in an accelerated hearing at a USBP station (i.e. same location where migrants are detained).
Administrative	Administrative Removal*	A formal removal order issued by USBP without a hearing before an immigration judge against migrants who are convicted of aggravated felonies.
Programmatic	Alien Transfer Exit Program (ATEP)	Mexican migrants are deported (via expedited removal, reinstatement of removal, or voluntary return) through a port of entry in a different Border Patrol sector from the one in which they were apprehended (i.e. deportation through geographic regions different/far away from where they were apprehended). It is intended to disrupt the smuggling cycle.
Programmatic	Mexican Interior Repatriation Program (MIRP)*	Offers apprehended eligible Mexican migrants in the Yuma and Tucson Sectors during the summer months the option of a flight to Mexico City and bus transportation to their hometown in the interior of Mexico, rather than being dropped off at the border. Not clear what disposition is used (i.e. voluntary return?)
Criminal	Operation Against Smugglers Initiative on Safety and Security (OASISS)	Bilateral criminal prosecution agreement between the U.S. and the government of Mexico. Allows the USBP to refer apprehended migrants suspected of smuggling offenses for prosecution in the Mexican judicial system.
Criminal	Operation Streamline	USBP refers apprehended migrants for criminal misdemeanor prosecution for unlawful entry or re-entry offenses, in groups of up to 70 migrants at a time, in U.S. magistrate courts. Relies heavily on collaborative efforts by CBP, the U.S.

		Marshal's Service, ICE, and the DOJ EOIR.
Criminal	Standard Prosecution	USBP refers apprehended migrants to the DOJ for federal criminal felony prosecution for violation of U.S. immigration laws and/or any other federal laws the CBP has the authority to enforce.

Source: U.S. Government Accountability Office (2017a); Capps, Hipsman, and Meissner (2017).

*These programs have been discontinued as part of the CDS at least as of 2015.

As a matter of prosecutorial discretion, USBP officers are expected to apply expedited removal only to Mexican nationals with histories of criminal or immigration violations (cite to policy in federal registrar), but it is not clear the extent to which this is being administered on the ground. As indicated earlier in this dissertation, the vast majority of expedited removals are of Mexican nationals (cite). Reinstatement of removal authorizes a USBP officer to reinstate a prior order of removal without reviewing or reopening the original removal order (Wadhia 2015). USBP officers in Tucson were also given the option of placing apprehended migrants through a process known as Quick Court. Although it is not clear when this program started, it has been discontinued (see Eagly and Shafer 2016). Migrants in Quick Court were placed in streamlined removal hearings at Border Patrol stations (i.e. where migrants apprehended by the USBP were being held/detained) or in judges' chambers, where immigration judges made "lightning-fast" decisions[244] about their cases without the benefit of council[245] (Eagly and Shafer 2016).

In addition to formal removals, high consequence enforcement also involves the use of two remote or lateral repatriation programs, the Mexican Interior Repatriation Program (MIRP) and the Alien Transfer Exit Program (ATEP), which deport undocumented immigrants through/to border regions distant from where they were apprehended, as opposed to the nearest Mexican port of entry, to deter them from attempting future crossings. The Mexican Interior Repatriation Program (MIRP) which began in 2004 and was discontinued to 2011,[246] was a bilateral program with the Mexican government which gave apprehended eligible Mexican migrants in the Yuma and Tucson Sectors during the summer months the option of a flight to Mexico City and bus transportation to their hometown in the interior of Mexico, rather than being dropped off at the port of entry (Slack et al. 2013). Migrants who were deported via MIRP were usually voluntarily returned. The stated goal, in addition to dissuading future crossings by disrupting the smuggling cycle, was to reduce migrant deaths from high desert temperatures and to protect migrants from victimization by criminals in border regions. Similarly, under ATEP, which went into effect in most sectors in 2008, USBP officers deport (via expedited removal, reinstatement of removal, or voluntary return) undocumented immigrants through ports of entry distant from where they were

[244] "97 percent of detained cases in Tucson were decided within one day" (I. Eagly and Shafer 2016, 10).

[245] Quick court hearings resulted in Tucson having the "lowest detained representation rate in the country" between 2007 and 2012, wherein 0% of detainees were represented (I. Eagly and Shafer 2016, 10).

[246] Although MIRP has been discontinued, this program was resurrected in 2012 by ICE and renamed the Interior Repatriation Program (U.S. Immigration and Customs Enforcement 2013).

apprehended, in an effort to separate migrants from their paid crossing guide (*coyote*) who is waiting for them in Mexico (De León 2013).

Finally, high consequence enforcement includes the more stringent application of existing federal laws that criminalize unauthorized immigration. Although laws criminalizing illegal entry and reentry, among other things, [247] have been on the books for a while, historically most migrants apprehended making unauthorized crossings have not been subject to criminal charges. However, in recent years, the DHS has begun cooperating with the Department of Justice to increase the proportion of migrants apprehended at the border who are charged with immigration-related criminal offenses, namely for illegal entry and reentry. In addition to standard prosecution via U.S. Attorneys Offices (USAO) in the jurisdictions that overlap with USBP sectors, six USBP sectors also utilize Operation Streamline,[248] an expedited, en masse criminal justice processing program that prosecutes as many as 80 migrants at a time before a District Court judge (Lydgate 2010). Most are migrants facing felony charges for illegal re-entry but nearly all of them "agree" to plead guilty to misdemeanor illegal entry charges, a move that streamlines the resolution of cases (Lydgate 2010). USBP officers may also refer apprehended migrants suspected of smuggling to be prosecuted by the Mexican judicial system through Operation Against Smugglers Initiative on Safety and Security (OASISS), a bilateral agreement with the Mexican government initiated in 2005 (Capps, Hipsman, and Meissner 2017).[249]

8.1.3 The Inception of the Consequence Delivery System

What is the CDS and why was it created?

This new set of consequences was consolidated in 2011, along with voluntary return and traditional removal proceedings (the traditional enforcement actions before 2005), under the CDS, which is "designed to increase the penalties associated with unauthorized migration in order to convince people not to return" [250] (Slack et al. 2015). The CDS marks a departure from the passive deterrent strategy of the 1990s, which relied on the natural hazards of the border terrain to deter migrants, to a strategy that "actively punishes, incarcerates, and criminalizes them" in an effort to deter them (Slack et. al 2015). It ranks the range of consequences according to their effectiveness and efficiency with regard to reducing the likelihood that he/she will

[247] "Migrants apprehended at the border may face federal immigration-related criminal charges for illegal entry (8 U.S.C. § 1325) or (on a second or subsequent apprehension) illegal re-entry (8 U.S.C. § 1326), and in some cases they may face charges related to human smuggling (8 U.S.C. § 1324) and visa and document fraud (18 U.S.C. § 1546), among other charges. Unlawful *presence* in the United States absent additional factors, however, is a civil violation, not a criminal offense" (Seghetti 2013, 8).

[248] Operation Streamline was rolled out to all except three Border Patrol sectors between 2005 and 2008 (Seghetti 2013, 8). The El Centro and San Diego, the two California sectors, do not participate in Operation Streamline, and the Big Bend Sector in Texas "experiences too few apprehensions to warrant the use of the program" (Slack, Martínez, et al. 2015).

[249] About 3,000 individuals were processed through OASISS between FY 2005 and FY 2013 (Seghetti 2013, 8).

[250] The CDS was expanded to the Northern and Coastal border sectors in September 2012 (U.S. Government Accountability Office 2017a, 2).

attempt another border crossing and instructs officers to apply the "Most Effective and Efficient" consequence to the migrant, based on the officer's classification of the migrant (criminal vs. noncriminal, previous apprehensions, suspected of smuggling activity, etc.)[251] (see Table 8.1).

The CDS's tailored approach to border enforcement, which requires agents to "uniquely evaluate" each migrant they apprehend at the border, is also a stark contrast to USBP practice in previous years, during which it was common practice for agents to give VR indiscriminately to those who crossed. According to the USBP, this individualistic approach is possible because of the "reduction" in the "volume of illegal traffic along our borders" which enables agents to "manage" as opposed to "react" to undocumented immigration (U.S. Border Patrol 2012, 17). In fact, at the time of the initiation of the CDS, unauthorized border crossings, particularly of Mexican immigrants, was at a near-historic low after having been in long-term decline since 2001. When high consequence enforcement began in 2005, USBP apprehended 1.2 million undocumented immigrants in the southwest border region—but by 2011, when the CDS was put into place, this number had dropped dramatically to 327,577. Thus, although the goal of the CDS is to increase deterrence by increasing consequences, the vast majority of border apprehensions (i.e. individuals processed through the CDS) are of migrants who have crossed the border once or twice and have no criminal record (Figure 8.3). In FY 2013 and 2014, 47 percent of apprehensions were first time apprehensions, and 21 percent of the FY 2014 apprehensions were second or third time apprehensions (Capps, Hipsman, and Meissner 2017, 11). Family units (which are also often first, second, or third time apprehensions) comprised 14 percent of all apprehensions in FY 2014 (Capps, Hipsman, and Meissner 2017, 11). In contrast, two percent of apprehensions in FY 2014 were involved in smuggling or other known criminal activities and six percent had prior criminal convictions (but that includes convictions for illegal entry and re-entry into the US) (Capps, Hipsman, and Meissner 2017, 11). Together, this suggests a disconnect between the USBP's stated goal of the CDS ("focusing enhanced capabilities against the highest threats and rapidly responding along the border" (U.S. Border Patrol 2012, 17) and the social reality of immigration control (i.e. most apprehensions are non-criminal, non-repeat immigration violators). The existence of the CDS signals that the USBP is solving some major problem, but the data shows this problem is one that barely exists.

Is the CDS Effective? What are the (un) intended consequences?

More troublingly, despite USBP claims that these programs significantly decrease migrants' likelihood of returning,[252] at least two recent empirical studies have found that the CDS and its consequences are largely ineffective at meeting the stated goal of deterrence, and that the deterrent effect of consequences is especially ineffective for those with social and familial ties in the U.S. and/or who consider the U.S. their home. One study, commissioned to the University of

[251] Although neoliberal approaches, which focus on punitive crime control, individual responsibility, and the market logic of efficiency, are latent broadly in the configuration of borders and state apparatuses of immigration control, the discourse is very explicit in the CDS, with its emphasis on individually tailored consequences and effectiveness and efficiency of punishment.

[252] As Slack et. al (2015) point out, these claims "have never been externally evaluated or proven using reliable data, with the exception of recidivism rates, which have their own limitations" (114).

Arizona's National Center for Border Security and Immigration by the DHS Office of Immigration Statistics in an effort to "calibrate" the criteria for the CDS, surveyed 1,016 recently apprehended individuals in the summer of 2012 inside the Tucson sector headquarters.[253] It found that detainees who are

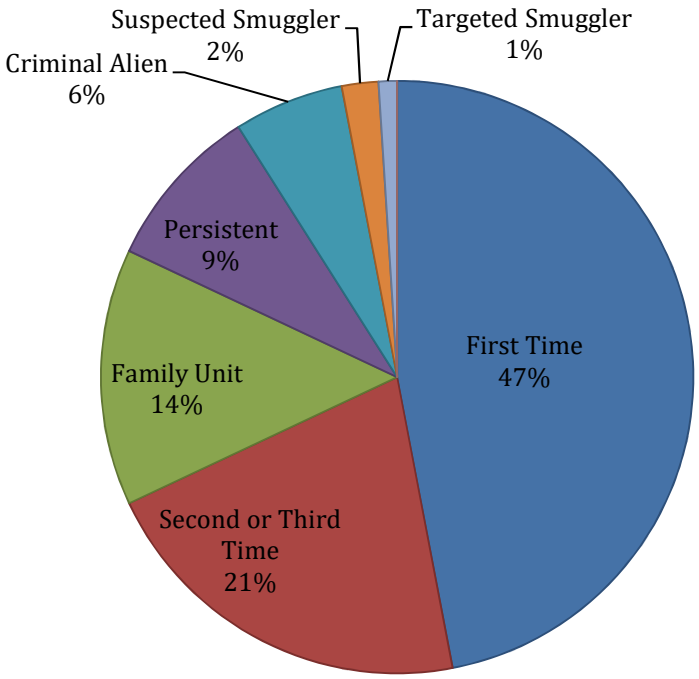


Figure 8.3 FY 2014 Southwest Border Apprehensions Processed Through the CDS, by Migrant Classification* *Source*: Capps, Hipsman, and Meissner (2017).

*This data is based on "CDS trackable" apprehensions, i.e. apprehensions for which fingerprints were taken. Because the Border Patrol does not fingerprint children under the age of 14 or individuals above the age of 65, the number of CDS trackable apprehensions is marginally smaller than the total number of apprehensions (less than one percent).

more likely to attempt to re-cross the border are those that, among other things, have relatives (spouse, sibling, parent, or child) or friends in the United States and/or live in the United States (or consider the United States their home), and that for individuals with these motivations, "the consequences of apprehension do not seem to be a deterrent" (Grimes et al. 2013, 1).[254] Another study, which draws on survey interviews with 1,100 deportees between 2009 and 2012, shows that rather than deterring migrants, "arrest, incarceration, and removal," as consequences

[253] All survey questions related to two principal questions: (1) do you think you will attempt to cross again in the next seven days? (2) do you think you will return to the US someday?
[254] Other motivations for returning include having a job in the US, having relatively more education than other detainees, relative familiarity with crossing options and dangers, and/or have made relatively more attempts at crossing (Grimes et al. 2013, 1).

manifested in the CDS,[255] have instead caused migrants to extend their stays in the US, thus increasing and strengthening social and familial ties there (Slack et al. 2015). Similar to the study cited earlier, this one shows that these ties make deported migrants more likely to return, in spite of the consequences they received: "[t]he majority of respondents expressed that they intend to return to the United States sometime in the future (55 percent), with the rate being 18 percentage points higher for people who consider their current home to be located in the United States (66 percent versus 48 percent)" (Slack et al. 2015, 114). The authors argue that the USBP's approach to immigration enforcement under the CDS "has caused disproportionately negative impacts" on those removed who have family in the U.S. (2015, 111).

Although we know that the CDS and its various programs are (in)effective at the stated goal of deterring migrants from attempting to cross again, and that the CDS largely impacts noncriminal immigrant populations with stakes in the US, we know very little, if anything, about *how* the CDS as a whole ostensibly works to guide agent decision-making, as the USBP has not publicized its "standardized" methodology for calculating "risk" or applying consequences. The next section turns to providing new insights on these processes. Drawing on FOIA materials and a number of reports, it explains how the guide for each sector is developed annually and the various criteria that affect how the consequences are ranked in the CDS guide. Moreover, it explains and analyzes how USBP agents are expected to evaluate migrants they apprehend via their CDS guide to select the appropriate consequence.

8.3 The Consequence Delivery System: Effectiveness and Efficiency

8.3.1 How the CDS Guide is Developed ("Analysis of Alternatives")

Despite the empirical evidence that the CDS is ineffective at its stated goal of deterring border crossing, and the evidence for the fact that it is having disproportionately negative effects on those with ties to the U.S. (including from one study commissioned by the DHS itself), the CDS, in all aspects and processes, prioritizes the goal of deterrence over all other considerations, including due process and humanitarian concerns. In other words, through the lens of the CDS, migrants are viewed only in terms of their "risk" of crossing again, without regard for other factors that should affect USBP's treatment of the migrant, such as their eligibility for legal relief, based on their familial ties and length of residence in the US, or asylum.

This approach is reflected not only in how agents are expected to implement the CDS in the field, but it also greatly informs the USBP's process for developing the CDS guides. The annual development of a CDS guide for each sector relies in part on the discretion of officers and is in general a very insular process (i.e. little oversight and intervention from outside), emblematic of USBP organizational culture more broadly. Each of the nine Border Patrol sectors in the southwest has its own unique CDS guide, which is developed annually on the basis of input from USBP personnel from that sector, including agents and management personnel ("command staff"), as well as existing CDS data and resource considerations (Capps, Hipsman, and Meissner 2017, 6). This development process, as well as the implementation of the program broadly, is overseen by the Consequence Delivery System Program Management Office (CDS PMO) within its Strategic Planning, Policy, and Analysis Division. The CDS PMO provides guidance, training, analytical and other support for implementation of the CDS across all sectors

[255] Slack et al.'s (2015) analysis largely focuses on migrants' experience being processed through ATEP and Operation Streamline.

(U.S. Government Accountability Office 2017a, 9). Each year it requires all USBP sectors to assemble a number of field staff, such as USBP agents, and "subject matter experts"[256] to assess fifteen performance-, cost-, and schedule-related factors related to the efficiency and effectiveness of each consequence for each migrant classification (Table 8.2; see also U.S. Government Accountability Office 2017a, 10). The CDS PMO refers to this process as the "Analysis of Alternatives (AoA)."[257] Although the AoA (i.e. the actual weight assigned to each factor) is itself redacted in the FOIA materials, the factors themselves are revealing about what the USBP considers and prioritizes as part of its calculus

It is noteworthy that there are no factors other than those the USBP considers to be key to determining the effectiveness and efficiency of a consequence for deterring future crossings. Twelve of those factors are based on data from the previous fiscal year, and are provided to field staff by the CDS PMO (U.S. Government Accountability Office 2017a, 10). Of these, effectiveness factors include the percentage of individual migrants who are re-apprehended during the same fiscal year (i.e. recidivism), percentage of apprehensions that are a second or subsequent apprehension of the same individual in a single fiscal year (i.e. re-apprehensions), and average number of apprehensions per recidivist (Table 8.2) Efficiency factors include average time between apprehension and re-apprehension, average personnel hours per case, and average time required for USBP processing (Table 8.2). The CDS PMO asks the field staff to use their "professional judgment" to assess the remaining three factors: the extent a consequence requires the assistance of strategic partners (i.e. U.S. Attorneys' offices, U.S. Marshals Service, and ICE), is perceived as severe by apprehended aliens, and has a deterrent effect on other aliens who consider crossing the border illegally (U.S. Government Accountability Office 2017a, 10).

In addition to assessing the preferences of the field staff, the CDS PMO conducts a survey of sector management which asks them to weigh the relative importance of all the factors for each consequence regardless of migrant classification, and uses their responses to inform the ranking of consequences (U.S. Government Accountability Office 2017a, 10). It then analyzes this information from both management and agents and creates a sector-specific guide and unique ranking of consequences, from Most Effective and Efficient to Least Effective and Efficient for each of the migrant classifications.

8.3.2 The CDS "Evaluation Process"

The CDS guide is then provided to agents, in laminate form, to guide their decision-making in the field with regard to the enforcement actions they take against migrants they apprehend (Figure 8.1). To implement the CDS in the field, agents must first classify the apprehended immigrant into one of seven noncriminal or criminal categories, which are based on the following factors: number of apprehensions,[258] whether the migrant is traveling alone or with family, is suspected of smuggling, or has any criminal convictions (see Table 8.3 for the migrant

[256] Subject matter experts are supervisors over operations, operational programs, and prosecutions (see Capps, Hipsman, and Meissner 2017, 4).

[257] See, e.g., Memorandum, "San Diego Sector Consequence Delivery System, Analysis of Alternatives Re-Evaluation and Distribution," dated December 29, 2011 (on file with author).

[258] "CDS relies on the Enforcement Integrated Database (EID)—which uses fingerprint data to link multiple apprehensions to one individual—to do this" (Capps, Hipsman, and Meissner 2017, 10).

Table 8.2 Factors for Evaluating Efficiency and Effectiveness of CDS Consequences

Effectiveness Factors (i.e. "performance")	Efficiency Factors (i.e. "schedule" & "cost")
• Recidivism (% of individual migrants who are re-apprehended during the same fiscal year) • Re-apprehension (% of apprehensions that are a second or subsequent apprehension of the same individual in a single fiscal year) • Average number of apprehensions per recidivist (with a minimum of two, as only migrants who have been re-apprehended are counted in the denominator) • Awareness/message/deterrence* (a factor estimated by USBP subject matter experts in each sector to measure migrants' awareness of consequences and their impact on migrant behavior) • Displacement (% of re-apprehensions that occur in a different sector from prior apprehension) • % of amenable apprehended migrants processed into the program • Severity of the consequence* (sector-specific and based on the judgment of USBP subject matter experts)	• Average time between apprehension and re-apprehension • Average personnel-hours per case • Average time required for USBP processing • Dedication and contribution of strategic partners (i.e. other federal agencies)* • USBP staffing (full-time) dedicated to the program • USBP cost per apprehension • Cost per hour of USBP processing • Cost per border mile patrolled

Source: USBP PowerPoint Slide, "Analysis of Alternative Factors," dated March 2012 (on file with author); Capps, Hipsman, and Meissner (2017)
*Assessed on the basis of the judgment of USBP field staff and management personnel

classifications and Table 8.4 for the evaluation process). There are no categories that reflect the interests of migrants, such as the circumstances under which he or she was apprehended (e.g. crossing the border vs. somewhere within the "border zone"), the migrant's length of presence in the US, or family ties in the U.S. Despite what CDS rhetoric and the migrant classifications might imply, previous chapters showed that long-term residents of the border region, who have lived and worked there for years and have potential claims for relief from deportation, have routinely been swept up in USBP enforcement. By omitting these considerations, the CDS papers over this reality and suggests they do not exist at all.

Based on the classification the agent chooses, the agent then identifies and applies one or more consequences determined to be most effective and efficient to discourage future crossings—consequences that are categorized as administrative, programmatic, or criminal (Table 8.1; U.S. Government Accountability Office 2017a, 6–7; Capps, Hipsman, and Meissner 2017, 6). Border Patrol guidance states that agents must apply at least one administrative consequence to every apprehended migrant (i.e. voluntary return, expedited removal, reinstatement of removal, or removal proceedings) but may apply more than one consequence,

Table 8.3 Migrant Classifications in USBP's Consequence Delivery System

Noncriminal or Criminal?	Migrant Classification	Definition
Noncriminal	First time apprehension	A migrant apprehended for the first time ever by the USBP.*
Noncriminal	Second or third time apprehension	A migrant apprehended for the second or third apprehension ever by the USBP.*
Noncriminal	Persistent apprehension	A migrant apprehended for the fourth or greater apprehension ever by the USBP.*
Noncriminal	Family Unit apprehension	A migrant parent or guardian who is accompanied by a dependent.
Criminal	Suspected smuggler	A migrant who has been positively identified or suspected of having a nexus to a criminal smuggling organization and was acting in that capacity when apprehended/those apprehended based on activities, actions, or intelligence.
Criminal	Targeted smuggler	A migrant who has been identified as having a nexus to a criminal or smuggling organization and for whom an investigative file, preapproved prosecution, or other similar identifier or predetermined course of action exists/those apprehended migrants with documented smuggling activity prior to the current apprehension.
Criminal	"Criminal alien" (DHS classification)	A migrant with one or more prior criminal convictions.

Source: U.S. Government Accountability Office (2017a)
*Refers to all apprehensions by the USBP. Apprehensions by other federal, state, or local agencies are not counted.

including using a combination of administrative, criminal, and programmatic consequences to one individual (U.S. Government Accountability Office 2017a, 7). Given that three of the administrative consequences are fast-track deportations (voluntary return, expedited removal, and reinstatement of removal), it is troubling then that the evaluation process does not provide any articulation of how officers should weigh humanitarian and due process considerations, such as claims for legal relief (noncitizens in fast-track proceedings are barred in many cases from applying for most forms of relief available from an

Table 8.4 USBP "Evaluation Process" for the Consequence Delivery System

Step 1	Record Checks	E3 system (USBP database); FinsLink, Fed Query, TRACS (federal databases)
Step 2	Review History	Prior criminal, immigration history; prior consequences applied and outcome(s)
Step 3	Review Nexus	Connections to criminal organization or DHS target/priority (smuggling, trafficking, immigration entry violation, etc.)
Step 4	Classify/Verify Entrant Classification	• First apprehension (BP)* • Second or third apprehension (BP)* • Family unit • Persistent alien • Suspected or targeted smuggler • Criminal alien
Step 5	Review Consequence Delivery	• Previous actions • Expected outcomes • Possible path forward • Best available CDS
Step 6	Execute	• Record disposition • Place alert • Information sharing with strategic partners

Source: USBP PowerPoint Slide, "Evaluation Process," dated March 2012 (on file with author)

*Refers to all apprehensions by the USBP. Apprehensions by other federal, state, or local agencies are not counted.

immigration judge in removal proceedings) and asylum protection (which would merit referral to removal proceedings before an immigration judge) (Table A4). Nor is there guidance on how to weigh these considerations in relation to each consequence. Moreover, because the CDS is oriented towards applying maximum "consequences," all outcomes reflected in the guide aim to punish and/or criminalize migrants. Accordingly, there is no consideration given to, for example, circumstances that might merit the exercise of prosecutorial discretion by officers, such as in the case of an immigrant without a criminal record who has equities in the U.S.

Although CDS guidance encourages Border Patrol agents to consult their guide to select the Most Effective and Efficient consequence based on the migrant's classification, CDS PMO officials have indicated that "agents can use discretion in selecting the consequence or

consequences they apply to an alien based upon the circumstances of the subject's apprehension, federal partner agencies' capacity to provide support, and the prioritization of a consequence in that sector" (U.S. Government Accountability Office 2017a, 8–9). In other words, USBP agents have latitude to decide what consequence(s) to implement, based on their (subjective) assessment of the resource constraints of other federal agencies required to effect the consequence, how the CDS ranks consequences in that agent's sector and the context for the migrant's arrest. Thus, although the goal of the CDS is in part the standardization of decision-making regarding enforcement actions across sectors,[259] this data suggests there is still substantial agent discretion involved at both the level of classifying the migrant and selection of enforcement action(s). The effects of discretion may be compounded by the fact that in three out of nine sectors (San Diego, El Centro, and Del Rio), USBP management does not currently provide oversight of their agents' compliance with CDS guidance. In a recent report, the GAO reported that some sectors are not monitoring their progress (i.e. the extent that agents are applying the consequences defined in CDS guides as Most or Least effective and Efficient) with regard to meeting performance targets, and across all sectors there are no "controls" for ensuring that agents classify migrants in accordance with CDS guidance (even though classification directly affects what consequence officers apply) (U.S. Government Accountability Office 2017a, 28, 30). Moreover, "Border Patrol does not routinely nor comprehensively collect information from agents on why they did not apply the Most Effective and Efficient consequence" (U.S. Government Accountability Office 2017a, 23). This lack of oversight, in combination with the substantial discretion officers have, is troubling.

8.4 The CDS on the Ground: How Noncompliance Subverts Due Process

Given these critiques of the CDS, what does the implementation of the CDS look like on the ground? A recent GAO report on USBP compliance with the CDS suggests one possible explanation, but I argue more research is needed. In 2017, the GAO was enlisted by the chairman of the DHS to conduct a study of the USBP's implementation of the CDS along the southwest border (U.S. Government Accountability Office 2017a, 3). Among other things, the report addresses the following question: [for the years 2013-2015] to what extent have Border Patrol agents applied the consequences identified in CDS guides as most effective and efficient in each southwest border sector? Despite the mandate from the Chief U.S. Border Patrol officer to all sectors that "every effort should be made to apply the most effective and efficient consequence to the greatest number of apprehensions,"[260] the GAO found that the application of consequences identified in the CDS as Most Effective and Efficient in each sector is low, and in fact that it declined between 2013 and 2015 from 28 percent to 18 percent (U.S. Government Accountability Office 2017a, 18).

While the USBP has not collected data to explain this, in its own investigation, the GAO interviewed agency officials—managers and agents—from all nine southwest border sectors "to obtain their views on the CDS," and visited three of Border Patrol's southwest sectors—San

[259] "CDS standardizes the decision-making process regarding the application of consequences and gives the Border Patrol the ability to examine the efficiency and effectiveness of individual consequences on various classes of aliens." USBP PowerPoint Slide, "CDS Iterations," dated March 2012 (on file with author).

[260] See, e.g., Memorandum, "San Diego Sector Consequence Delivery System, Analysis of Alternatives Re-Evaluation and Distribution," dated December 29, 2011 (on file with author).

Diego, Tucson, and Rio Grande Valley—"to observe how agents in these sectors applied CDS in their operations" (U.S. Government Accountability Office 2017a, 3). In addition, they interviewed officials at USBP headquarters, including staff at CDS PMO, about CDS guidance and implementation throughout the southwest border, and reviewed program documentation. Among the "challenges" to applying the Most Effective and Efficient consequence identified by the CDS, USBP officials expressed concern that the agencies with which they must cooperate to effectuate certain consequences "do not have the capacity to *timely and fully* implement" that consequence, "which may result in apprehended aliens remaining in the United States for an indeterminate amount of time" (U.S. Government Accountability Office 2017a, 21). In contrast to the insular nature of the process for creating the CDS guide, it is noteworthy that most consequences require coordination with other federal agencies "to detain, prosecute, litigate, and adjudicate removability of, or remove" migrants apprehended by the USBP (Figure 8.2; U.S. Government Accountability Office 2017a, 11). The implication is that USBP officers are restricted in how consistently they can apply some of these consequences because of resource constraints faced by partner agencies.

Thus, in the report, Border Patrol officials in some sectors cited that officers may be limited in their ability to apply the Most Effective and Efficient consequence if is Standard Prosecution or Operation Streamline because their sector is aligned with a USAO district that categorically limits the number of criminal immigrant cases they will take from the USBP. If volume exceeds this quota, agents must apply an alternative consequence. The Rio Grande Valley sector, for example, can only refer about 40 immigration-related cases each day to the USAO Southern District of Texas (U.S. Government Accountability Office 2017a, 22). A recent MPI report of the CDS similarly states that in 2014 Operation Streamline in Tucson was limited to 70 people per day "due to courtroom space, detention space provided by the U.S. Marshals Service, and staff requirements at the U.S. Attorney's office and the U.S. district court" (U.S. Government Accountability Office 2017a, 20). The quota for Standard Prosecution is often much smaller, given that cases are handled individually in U.S. district courts and require multiple hearings (Capps, Hipsman, and Meissner 2017, 21). In 2014 the Tucson sector averaged about 30 referrals for standard prosecution a day (Capps, Hipsman, and Meissner 2017, 21). The explanation in the GAO report thus suggests that the practical resource limitations of federal agencies that the USBP depends on to carry out consequences objectively restrict the ability of officers to fully comply with the mandate of the CDS.

Conversely, the report indicates USBP officials also made *normative* judgments about the ability of other agencies, namely ICE and immigration courts, to efficiently and effectively carry out the listed Most Effective and Efficient consequence. These officials stated that officers may not apply the Most Effective and Efficient consequence listed in the CDS guide if it a Warrant/NTA to appear before an immigration judge since "it involves ICE detention and monitoring of an alien awaiting an immigration court date" (U.S. Government Accountability Office 2017a, 21). Border Patrol officials in one (unnamed) sector in Southern California stated that ICE may release noncriminal immigrants from detention pending/prior to the conclusion of their removal proceedings because migrants' merits hearing may be years away, and "agents are concerned that aliens released from detention will not show up for their immigration proceeding" (U.S. Government Accountability Office 2017a, 21). Although there is a substantial nationwide immigration court backlog that causes years-long delays in hearings (TRACImmigration 2018), my research does not indicate this backlog or ICE's decision to release migrants pending their proceedings are explicit criteria to be considered when applying the CDS, and yet that seems to

drive the decision here. USBP officers are making a value judgment that removal proceedings are not a desirable course of action because ICE will not handle the case appropriately. Because they are couching the decision not to initiate removal proceedings in terms of efficiency, rather than considering the issues that would merit removal proceedings, I argue USBP officers are effectively appropriating the discretion and decision-making authority of immigration courts.

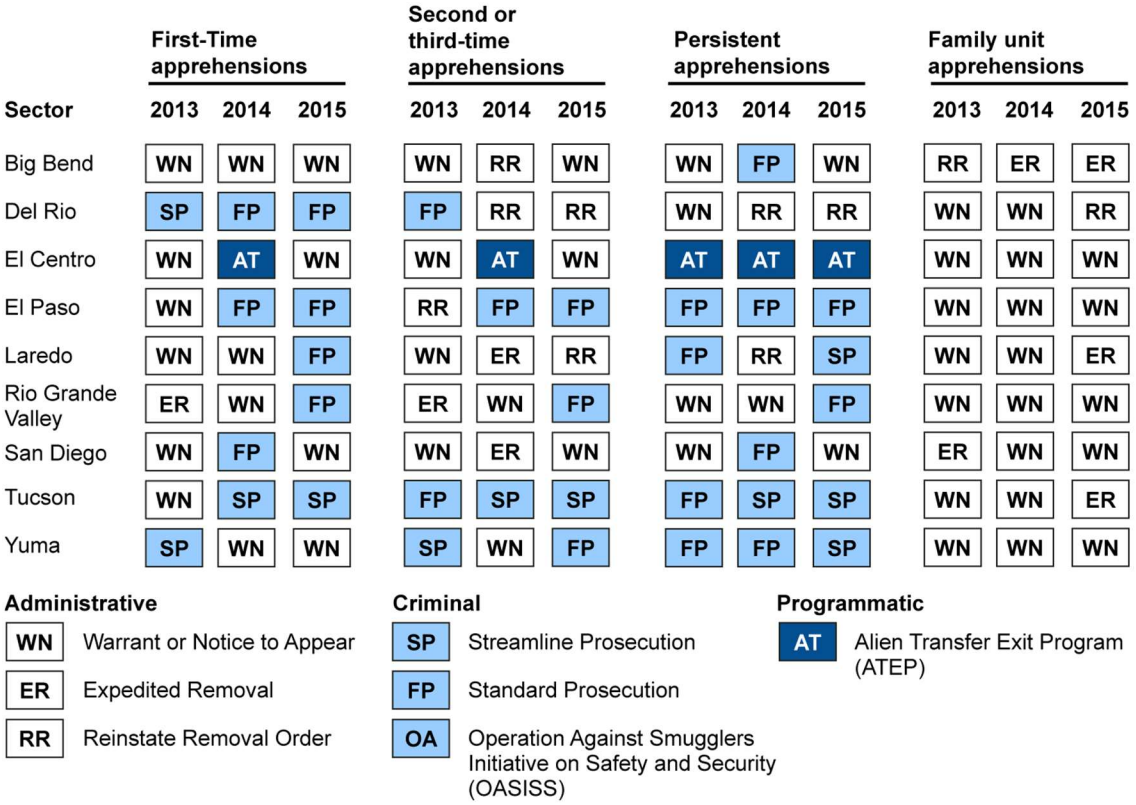


Figure 8.4 Most Effective and Efficient Consequence for U.S. Border Patrol Non-Criminal Apprehensions for Southwest Border Sectors, FY 2013 - 2015 *Source*: U.S. Government Accountability Office (2017a).

This is troubling because there are reasons codified into statute that merit putting an immigrant into removal proceedings, such as the possibility that the person may be eligible for discretionary relief from deportation that they can only obtain in court, that they may have a case for asylum, or they may be eligible to adjust their status. In other words, faithful enforcement of immigration laws means something more than prompt removal of undocumented immigrants; there is also an important system of benefits in the form of relief and protections like asylum that officers are expected to uphold. Arguably the law provides for due process, however narrow the channels, so that custodial migrants who might be eligible to apply for these rights and benefits may pursue them. Yet the USBP agents are making these judgments and deflecting migrants from court, with limited information and little understanding of immigration law (see chapter 7). They thereby foreclose these opportunities for relief, against what the law promises in terms of due process.

These normative judgments are made all the more troubling by the fact that removal proceedings are the *only* administrative consequence in the CDS that provides for due process in

court and the only route for migrants to apply for most forms of relief (Figure 8.2). If the immigrant is not placed into proceedings, the implication is that (because the officer must select at least one administrative consequence) he or she is removed in one of three remaining ways—expedited removal, reinstatement of removal, or (less commonly) voluntary return. As chapters 6 and 7 showed, structures in the USBP custodial context, such as those that pose barriers to legal representation, create information deficiencies, and produce inhumane detention conditions, undermine the very few due process protections that are built into these fast-track procedures. I argue that these structures, which underpin the process of voluntary departure (and likely other fast-track removal procedures), as well as the CDS itself, actually encourage agents to appropriate the discretion of courts. The CDS, in both the development phase and the evaluation process on the ground, re-casts the legal construct of due process (i.e. in removal proceedings) in terms of the managerial objectives and "rhetorics" of effectiveness and efficiency. This "managerialization of the law" (Edelman, Fuller, and Mara-Drita 2001) serves organizational interests and prerogatives, but de-emphasizes the legal aspects of due process. It is therefore plausible that even where their own policy provides for removal proceedings, officers believe their exercise of discretion is legitimate because their understanding of due process has been reframed in service of managerial objectives. For example, the GAO report (2017) states that officials from one sector indicated their agents may not always select the Most Effective and Efficient consequence identified in the guide because it did "not always reflect what they believe is the Most Effective and Efficient consequence" for certain migrant classifications (U.S. Government Accountability Office 2017a, 20). This normative judgment suggests officers believe they are just doing their job—processing migrants as effectively and efficiently as possible—and that their departure from the rules is therefore justified. Arguably, by insisting they are making decisions in the interest of effectiveness and efficiency, officers may not even realize they are making normative judgments because, as my research in chapters 6 and 7 suggested, they do not have a good sense of what the immigrant is giving up by bypassing immigration court. Their focus on "effective and efficient" processing belies how their discretion operates as a wall that prevents any meaningful consideration of alternatives.

8.5 The CDS as a Symbolic Ploy for Legitimacy

The "loose coupling" between the CDS and compliance with the policy by USBP officers suggests the CDS is a "symbolic structure" that the USBP enacted to gain institutional legitimacy, rather than a rational, informed response to the "problem" of "catch and release" and "recidivism" (Edelman 1992). Organizations often adopt new policies in response to normative pressures from the public or other organizations in their field and thus to gain legitimacy (Meyer and Rowan 1977). "But normative pressure from the legal environment does not easily erode long-held managerial prerogatives" (Edelman 1992, 1535). As a result, these formal structures can be loosely coupled, or decoupled, from the governance activities of organizations "in order to reduce the extent to which law constrains managerial functions" (Edelman 1992, 1543). Edelman (1992), for example, shows the efforts of organization to comply with equal employment opportunity and affirmative action (EEO/AA) law by adopting formal policies and procedures that signal compliance but which are implemented in ways that continue to fit their own interests (Edelman 1992). Although there was no requirement to adapt organizational structures to the new law, organizations took it upon themselves to "comply" with EEO/AA law

in order to reduce the risk of legal liability and "social disapproval" (i.e. to gain or otherwise preserve their legitimacy).

Loose coupling may happen for a number of reasons. First, it commonly happens when new procedures conflict with the organization's existing practices. It may also be the case that there are weak mechanisms for enforcement, so that implementation on the ground is a matter of discretion. Moreover, the new policy may be inefficient to implement, or organizations may not have the resources necessary to implement the program. The new program may also be ambiguous with regard to the meaning of compliance, and thus there may be various different interpretations of how to comply. As a result of loose coupling, traditional practices persist, but symbolic structures function to conceal this reality, thereby preserving both managerial interests and the legitimacy of institutions (see, e.g., Edelman 1992, 1990).

Similarly, there was no legal requirement to create the CDS or the attendant CDS PMO; instead their inception was seemingly a response to political pressure to more stringently enforce immigration law against undocumented immigrants at the southwest border (see, e.g., Spagit 2012; McCombs 2011). In fact, at the time of the initiation of the CDS, unauthorized border crossings, particularly of Mexican immigrants, was at its lowest point in decades after having been in long-term decline since 2001. Furthermore, the Border Patrol's own CDS data indicates that most individuals processed through the CDS are have only been apprehended once or twice and have no criminal record, which dispels the notion that undergirds the rationale for the CDS in the first place—that there is a lot of recidivism. Thus, the CDS, which seeks to inflict maximum consequences on border crossers to deter them from future crossings, seems to be a disproportionate response to a problem that barely exists. This suggests the CDS was created as ploy for legitimacy, rather than an informed response to an actual problem.

Moreover, the conditions for loose coupling are rife. The new systematic and standardized approach to enforcement that the CDS emphasizes departs heavily from the more discretionary nature of enforcement that for decades preceded it. The CDS is novel because, as described earlier, it functions in theory to eliminate much of the variability in enforcement that existed before and directs officers to take a certain enforcement action (or actions, as the case may be). Thus, for example, it constrains officers' discretion by instructing them when they *must* initiate removal proceedings, which may interfere with the normal modes and routines of case processing, under which the initiation of removal proceedings was arguably largely discretionary. As my research in previous chapters has shown, USBP officers have long processed most undocumented immigrants through procedures that bypass courts—historically through voluntary return, and more recently, through summary removal procedures. In contrast, an analysis by the GAO shows (surprisingly) that the most frequently listed consequence across sectors between 2013 and 2015 was a Warrant/Notice to Appear (36 percent) (Figure 8.4).[261] If we consider only the non-criminal migrant categories, which make up most of the individuals who are processed through the CDS, my own analysis shows this proportion is even higher—46 percent. In some sectors, it was even more common to see removal proceedings listed as the Most Effective and Efficient consequence. In the San Diego sector specifically, in 2015, the Most Effective and Efficient consequence for *all* non-criminal apprehensions (in all categories)

[261] This declined over the period of that time, and the MEE shifted more towards criminal prosecution.

listed in the CDS guide was a Warrant/NTA.[262] Arguably, officers may be expected to initiate removal proceeding more than what they are used to.

Moreover, as explained earlier, there is little oversight of how officers implement the CDS, and few controls over the process at the local level, which means there is little to ensure compliance is happening on the ground. Thus, while the CDS signals a visible commitment to stringent border enforcement that is more informed and systematic (via the Analysis of Alternatives and the step-by-step evaluation process officers are expected to undergo for each migrant apprehended), it also hides the reality that the old norms and practices around enforcement endure. In fact, as is the case with symbolic structures, the CDS gives cover to the messy reality of discretionary decision-making that subverts rights processes.

[262] In contrast, officers applied the Most Effective and Efficient consequence only 10% of the time in that year (across criminal and non-criminal migrant categories).

Chapter 9 Conclusion

This dissertation is a study of the structural challenges to due process in fast-track deportations in the border setting, and their consequences. Broadly, it examined two big, understudied empirical questions: (1) what is the scope of the deportation regime? (2) what are its mechanisms? I examined these questions through the lens of the practice of administrative voluntary departure, or "voluntary return," by the U.S. Border Patrol, a disposition akin to a plea bargain whereby an undocumented immigrant (ostensibly—on paper) "agrees" to waive their right to a hearing before an immigration judge and in exchange, he or she (again, ostensibly) avoids the immigration consequences of being removed by a judge, and is required to "return" to their country of origin. Administrative voluntary departure is therefore not legally constructed as deportation, or "removal." Nevertheless, my research shows that historically, the vast majority of noncitizens required by the state to depart the U.S. have done so via administrative voluntary departure—and thus at the hands of frontline immigration officers, rather than immigration judges. Most voluntary departures have been of Mexican nationals by the U.S. Border Patrol in the opaque border region. By shifting the empirical focus of "deportation studies" (Coutin 2015) outside the purview of courts, I have showed that the deportation regime is much more expansive but at once more geographically concentrated (at the southwest border with Mexico) and less visible than we have understood it to be.

By virtue of the fact that voluntary departures bypass courts, my research shows that the deportation regime is also more egregious with regard to due process deprivations than a focus on courts lets on. My research showed that on paper, voluntary return is extremely deficient with regard to procedural protections compared to removal proceedings, and that on the ground, even the limited rights and protections that exist under voluntary return are regularly not implemented. Federal regulations provide that immigration officers may not grant voluntary departure unless the custodial migrant "requests it" and "agrees to its terms and conditions," and that officers may exercise discretion to allow the migrant up to 120 days to depart the country so that he or she may have time to get her affairs in order (8 C.F.R. §240.25(c)). Moreover, the statute is neutral with regard to country of origin. In contrast, interviews with lawyers and advocates show that voluntary return overwhelmingly affects their Mexican clientele, many of whom are long-term residents of the San Diego border region and would have benefited from removal proceedings. It was not uncommon to have clients who had received a series of voluntary returns over the course of their years-long presence within the United States. Lawyers and advocates also described the experience of voluntary return as exceedingly fast, and that undocumented immigrants were regularly pressured, deceived, misled or otherwise coerced to sign for voluntary departure and "returned" to the Mexican side of the border, under the supervision of the USBP, within hours of apprehension. Before this point, they were rarely, if ever, properly informed of their right to a lawyer and/or to the alternative of a hearing before an immigration judge. Even if custodial migrants were informed of their rights by the USBP or were otherwise aware of these rights, they faced challenges to mobilizing them, often due to officers' obstructions and attempts to block rights.

My research shows that the experience of voluntary departure as racially discriminatory, speedy, and coercive is a result of the way in which the voluntary departure statute and regulations are interpreted in USBP voluntary departure training and instruction materials. In other words, USBP structures undermine the law-on-the-books. For example, USBP instruction materials explicitly encourage officers to give voluntary return specifically to undocumented

Mexican immigrant because it is "advantageous" to both the migrant and the USBP (cite). Furthermore, these materials show Mexicans are subject to a much more cursory voluntary departure process than what is provided for in the statute and regulations. They distinguish statutory voluntary departure, which is not country-of-origin specific, from "voluntary return," a Border Patrol-specific disposition/term (not in the statute/regulations) used by officers to expel Mexican nationals immediately and with little if any process. In fact, these materials write the period to depart entirely out of the voluntary departure process for Mexican nationals.

The prevalence of voluntary return among Mexican nationals suggests that its practice in the border region is systematic, and indeed, lawyers and advocates reported that their clients were apprehended by the USBP through tactics including traffic checkpoints, traffic stops (by both local law enforcement and the USBP itself), and raids of public transportation by the USBP within migrant communities. These policing tactics have historically been used by the USBP to police without impunity well within the bounds of the U.S. under the guise of enforcing the "border," which has been expansively defined as 100 miles into the interior of the U.S (American Civil Liberties Union, n.d.). Their accounts also suggest a reliance on racial profiling to target Mexican nationals, which is permissible under the law (see *United States v. Brignoni-Ponce 1975*).

San Diego's close proximity to the border with Mexico, as well as the USBP's detention policy (which doesn't require officers to provide telephone access to custodial migrants until 24 hours of detention has passed but which also encourages officers to process migrants within 12 hours and no later than 24 hours), together create perverse incentives to voluntary return undocumented immigrants before the passage of time triggers the legal duty of officers to inform migrants in their custody of their rights. The combination of speediness and systematic enforcement that is structured into the system of voluntary return, and into law enforcement at the border more broadly, has enabled the en masse deportation of Mexican nationals.

Moreover, speed is an important coercive strategy in voluntary departure, which robs individuals of the time necessary to marshal information about their case and make a meaningful decision about whether or not to waive their right to a hearing. The speed built into voluntary departure procedures is one of many structures in the USBP context which undermine the conditions for consent. In general, as my analysis of the voluntary departure statute, regulations, and case law showed, the legal meaning of consent in voluntary departure is vague if not completely ambiguous. In the absence of explicit guidance on the practical requirements for ensuring consent in voluntary departure, I formulated four conditions for consent, distilled from a reading of the normative literature on freedom and autonomy and a complaint filed by the ACLU alleging coercive voluntary return practices in San Diego. Together these four conditions served as a baseline for consent against which I assessed the practice of voluntary departure on the ground—(1) an absence of direct coercion (i.e. threats or pressure to make a particular decision); (2) access to an to an adequate range of options; (3) access to information about one's range of options; and (4) the possession of certain cognitive and psychological abilities.

I found that these four conditions were regularly violated by coercive structures in the USBP context. Thus, attorneys and advocates described how custodial migrants were pressured to sign voluntary departure by the inhumane physical conditions of detention (e.g. *hieleras*), their indefinite isolation as a result of policies and procedures (or lack thereof) that impeded communication with family members and legal representatives (e.g. USBP detention policy precluding telephone access until 24 hours of detention had passed; lack of policy or structure for accommodating calls and in-person visits from family members and legal representatives—

reflecting the weak nature of the administrative right of custodial migrants to a lawyer), and the pressures (e.g. on family life) created by the prospect of indefinite detention if they decided to wait for a hearing—pressures which were often a result of direct threats of long-term or indefinite detention from officers. The coercive forces arising from the physical custody and detention context were effective in large part because of the information deficit (i.e. another coercive force) custodial migrants faced with regard to the immigration consequences of voluntary departure, the options they might have in court, and their prospects for bond and release. This information deficit precluded their ability to make a meaningful decision about voluntary departure. Without legal representation, custodial migrants' only source of information was immigration officers and the USBP voluntary departure forms and procedures they administered. However, case law provides that immigration officers are not required to provide regulatory rights advisals until *after* removal proceedings have been initiated, which voluntary return entirely precludes (*Matter of ERMF & ASM* 2011). Thus, immigration officers have no legal obligation to inform custodial migrants subject to voluntary return about their right to a lawyer at their own expense. Furthermore, my research showed that voluntary departure procedures were largely information-deficient (e.g. no information about the legal consequences of voluntary departure, including the loss of procedural rights and bars to legal admission) and/or incorrectly administered by officers (e.g. not reading/providing the voluntary departure form in the custodial migrant's native language).

In addition to inadequate information in voluntary departure procedures, USBP officers provided misinformation in the form of both erroneous legal advice and "friendly" advice as part of a "confidence game" (see, e.g. Blumberg 1967) that misrepresented the consequences of taking voluntary departure. Officers arguably reverted to these informal scripts due to deficient training in immigration law, declining USBP hiring standards (which have resulted in the hiring of less qualified officers), as well as deficient instructions with regard to how to administer voluntary return procedures to ensure custodial migrants have genuinely consented. Thus, my analysis showed that custodial migrants often experienced multiple forms of coercion as a result of the fact that coercive structures affected every aspect of the voluntary departure process. Because coercion is structural, I argued that it is largely invisible and can thus be conceptualized as a subtle exercise of power by USBP officers against custodial migrants, in the form of "power-dependence," information control ("agenda-setting"), deception, persuasion, and manipulation ("preference-setting") (Lukes 1974). These forms of power operate with and through each other to subtly shape the character of consent. Thus, although there is an assumption of equal power relations built into the ritual of the migrant signing the form, my research shows how unequal power changes the meaning of consent and "voluntary" on the ground. This analysis adds nuance to our understanding of power in the immigration enforcement context, which is largely depicted as overt and direct (see, e.g., Martínez, Slack, and Heyman 2013; Phillips, Rodriguez, and Hagan 2002; Phillips, Hagan, and Rodriguez 2006).

My findings about the immigration custodial context show that similar to the context of the criminal justice system, U.S. immigration enforcement agencies are inherently structured in ways that undermine the few procedural due process and substantive rights that custodial migrants have under the law, and moreover, that this process (of undermining) can be subtle and even indiscernible. Both systems tend to emphasize crime control values through, for example, efficiency of case processing, finality of decisions, and ultimately, efforts to move people out of the system before they can access more formal rights and systems (Packer 1964). As a result, the structural incentives for officers in both contexts make these systems not in the interest of those

subject to them. However, as I argued, there are also significant differences between the criminal context and immigration context that bear on the rights of the individuals in them. A return to the plea bargaining analogy invoked in chapter 1 is illustrative. In both criminal plea bargaining and voluntary departure, the individual waives their right to due process in court, but in plea bargains, the criminal defendant has the constitutional right to a government-appointed lawyer and makes his or her plea in open court. In contrast, my research shows that the process of voluntary departure is rather Orwellian;[263] it is akin to plea bargaining with the police officer who arrests you at the scene of the alleged crime, thus effectively making the officer your judge, jury, and jailor. You must negotiate with the police officer without the benefit of a lawyer, and with insufficient information and very few legal protections, if any at all. Moreover, voluntary return is administered by frontline workers who have no independent obligation to justice and who have substantially more discretion than police officers. Accordingly, the deck is effectively stacked against you. Because of the severe dearth of rights and protections in the civil immigration custodial context, the practice of voluntary return is arguably more egregious than the practice of plea bargaining. Thus, although voluntary departure has been largely depicted by empirical scholars as something that undocumented immigrants take in their own self-interest, my findings regarding the immigration custodial context complicate these claims.

My study also disputes the claim by legal scholars and courts that voluntary departure is a "privilege" of sorts based on the fact that it enables the migrant to avoid the stigma and consequences of formal removal. Although voluntary return used to be more permissive, these accounts do not consider the changes to legal and social conditions in recent years, which have together increased the settled population of undocumented immigrants in the U.S. (and thereby increased their social and familial ties to the US), and which impose immigration consequences on those who take voluntary return after a triggering period of unlawful presence in the U.S. These consequences include the loss of procedural rights (such as the right to apply for relief in court) and years-long bars to admission, Those who return to the U.S. after their voluntary return (a common phenomenon given the pull factor of family life in the U.S. and the push factor of USBP officers' encouragements to return as an inducement to convince custodial migrants to take voluntary return) face a "permanent" bar to admission. As my secondary historical analysis of U.S. immigration enforcement showed, the coercive practice of voluntary departure by the USBP was built up for decades before immigration consequences were enacted. My study of contemporary voluntary return showed these practices have continued since the enactment of consequences, but without a concomitant (and proportionate) increase in protections.

Accordingly, lawyers and advocates described how scores of their clients who were eligible to adjust their status in proceedings or could have formalized their status through, for example, family sponsorship for a Green Card, lost those opportunities by taking voluntary departure under duress and returning to the U.S. (in part because of encouragements by USBP officers), thus creating irreparable harm. Despite a legal settlement in 2015 between the ACLU and the immigration enforcement agencies in Southern California which enacted systemic reforms to the practice of voluntary return in San Diego (see *Lopez-Venegas v. Johnson* 2013), my research shows that the large-scale, systematic nature of voluntary return practices in the region over decades has had deleterious effects, undermining the ability of tens of thousands of families in the border community to bring their family members into formal status and creating an entire

[263] This is a reference to George Orwell's dystopian account of a future totalitarian state in his book, *1984*.

community with potentially realizable rights that have been lost. For those who remained in Mexico after their voluntary return, instead of returning to the US, voluntary return has led to family separations and economic hardships for these family units, akin to the social effects of deportation.

Although more research is necessary to understand the ways in which voluntary departure has impacted the border community, the mass processing of individuals without due process is reminiscent of the system of mass incarceration and the stratification effects it has on poor communities of color, namely Black Americans. Both Mexican nationals subject to voluntary departure and Black Americans subject to mass incarceration experience invasive surveillance and policing of their communities, which leads them to be disproportionately processed through these systems. Both groups also experience large-scale loss of rights and diminished citizenship. Moreover, these systems have spillover effects that extend beyond the returned/confined individual, including family separation, disruption of employment, the financial and psychological toll of these events on family members, and the destabilization of the structure and social organization of whole communities which create disadvantages for the populations who live there. Thus, I showed the ways in which these systems act similarly on these different groups, and how the social inequalities they experience are similarly structured.

I also argued, however, that there are important ways in which the state repression of undocumented immigrants subject to voluntary return is distinct from that of Black Americans subject to the system of mass incarceration. While both the experiences of voluntary return and mass incarceration are punitive, the consequences that individuals subject to voluntary face are administrative, and, though severe, are not considered "punishment" and so are not subject to due process protections associated with criminal sanctions. As a result, migrants subject to voluntary return are vulnerable to the caprices of state power in ways that Black Americans are not. This study of voluntary return, therefore, is also a study of administrative punitiveness, and how the administrative state exercises power over individuals (see, e.g., Beckett and Herbert 2010).

The recent movement of the immigration enforcement system away from the predominant use of voluntary returns to summary removal procedures, such as expedited removal and reinstatement of removal, merely represents a formalization of due process deprivations in the long-standing practice of voluntary returns, which have been in use since the inception of the U.S. Border Patrol in the 1920s. Migrants in summary removal proceedings (with the exception of stipulated removal, which, on paper, still requires the deportation order to be reviewed and approved by a judge) are explicitly barred from a hearing, and are therefore arguably voluntary return without the fiction of consent. In the final empirical chapter of this dissertation, I showed how even where USBP's own policy stipulates the initiation of removal proceedings, USBP officers exercise their discretion to implement fast-track procedures (i.e. expedited removal, reinstatement of removal, or voluntary return) instead, thereby subverting rights processes. Under the Consequence Delivery System (CDS), the decision-making framework created by the USBP which guides the enforcement actions of agents in the field, officers are directed to implement the Most Effective and Efficient consequence listed in the CDS guide. Thus, the goal of the CDS is to deter future migrant crossings by inflicting maximum consequences. Despite the CDS' efforts to standardize and systematize decision-making with regard to enforcement actions, my research found that it affords plenty of opportunity for officers to exercise their discretion—discretion that officers routinely exercise to depart from their own policy. In particular, a recent GAO investigation of the CDS found that USBP officers are "hesitant" to initiate removal

proceedings, even when it is listed as the Most Effective and Efficiency consequence, because of its perceived lack of efficiency (see U.S. Government Accountability Office 2017a). The implication of officers' decisions not to initiate removal proceedings is that they are instead implementing a fast–track deportation. This is troubling, given that removal proceedings are custodial migrants' only opportunity for due process in court, and also given my findings about how structures in the USBP setting undermine what few due process protections custodial migrants have in fast-track proceedings. By exercising discretion on the basis of normative judgments, I argued the USBP is effectively appropriating the discretion and decision-making power of more rights-protective immigration courts. Furthermore, I argued that USBP structures encourage the exercise of normative judgments, and may in fact encourage officers to appropriate discretion by "managerializing" due process prerogatives in terms of the organizational objectives of efficiency and effectiveness and thus de-emphasizing its due process aspects (Edelman, Fuller, and Mara-Drita 2001). However, officers may not even realize they are exercising discretion because, as my research suggests, USBP officers do not have an understanding of what custodial migrants are giving up by foregoing due process in court. Finally, I argued that non-compliance with the CDS suggests the CDS is a "symbolic structure" which outwardly signals a measured, systematic crackdown on undocumented immigration that lends legitimacy to the USBP, but in reality, it belies the persistence of discretionary decision-making by officers, which undermines due process. The implication is that discretion combined with lack of due process in enforcement mechanisms creates the conditions for state power without limits.

In light of these findings, where do we go from here? One question that emerges from my findings about voluntary return is whether a truly consensual practice of voluntary return is even possible. Given that coercion is a result of problems endemic to the civil immigration custodial and detention context, genuine consent in this setting may be impossible. Consent in voluntary departure may always be a legal fiction, albeit a legal fiction that is increasingly unnecessary as summary removal procedures have become the main means of removing individuals. Yet, because the problems with voluntary return are structural, changing the structures may help create the conditions for consent in voluntary return. The *Lopez-Venegas* settlement in 2015 created a number of systemic reforms to the practice of voluntary return in Southern California that are instructive. Among other things, immigration enforcement officers are required to refrain from providing legal advice regarding the availability of relief from removal, the potential length of detention, or the likelihood that an individual will be allowed to return to the United States if he or she elects voluntary return; to cease pre-checking the box selecting "voluntary return" on the VR form and provide a copy of the form to each individuals; provide oral advisals regarding all the possible legal consequences of voluntary return (including the loss of relief only available within the US, the triggering of unlawful presence bars, the possibility of bond/release or alternatively the possibility of detention if voluntary return is declined), and the option of rescinding a voluntary return before departing the United States; permitting individuals to use a working phone, provide them with a list of free legal service providers, allow them to call the consulate, and allow them two hours to reach a legal representative, the consulate, or a family member before deciding whether to accept voluntary return; provide lawyers meaningful access to detained clients and accommodate any incoming calls from attorneys or BIA accredited representatives; and create and maintain a toll-free advisal hotline and provide individuals access to the hotline before offering them VR (*Lopez-Venegas v. Johnson* 2015). Moreover, the settlement stipulates that Form I-826 be modified to include all the legal consequences of

voluntary departure and that notice of the oral advisals will be posted in English and Spanish in any location where voluntary returns are processed (*Lopez-Venegas v. Johnson* 2015). To ensure all the conditions of consent articulated in chapter 6 are being met, I would add the need to make detention conditions more humane; improve the training of new officers and re-train existing ones to change incentives and ensure they implement procedures in compliance with the above listed reforms; create more rights-protective processes for children and the mentally ill (and improve screening requirements for detecting this need for the latter); and modify the voluntary departure statute and regulations to reflect a commitment to informed consent, as well as explicit, practical guidance on what that requires. Together, these structural reforms would help reduce the barriers to (correct) information and advice and reduce coercive forces stemming from the detention environment, so that custodial migrants are better informed about their choices (and the consequences of those choices) and can willingly and knowingly make their decision. They would also arguably help make the balance of power between the immigration officers and the custodial migrant a little more equal.

On the other hand, it is important to recognize the limits of structural reform and what it can accomplish. Even if laws and policies and structures do change to be more rights protective and thus geared towards ensuring meaningful consent, it may take longer for the entrenched culture of lack of accountability for abuses of power to change, and coercive practices may nevertheless persist. Although the USBP has a system for custodial migrants to report complaints of abuse by immigration authorities, it is rarely used, despite the fact that abuse of custodial migrants is a common and systematic problem (Martínez, Slack, and Heyman 2013). It is estimated that only about 10% of victims of abuse by immigration authorities actually make a complaint through this system (see Martínez, Cantor, and Ewing 2014). Complaints could only be filed in English until 2015. CBP made available a Spanish-language complaint in April of that year but did not announce this until eight months later, on December 28, 2015 (Cantor and Ewing 2017, 5). Even for those incidents of abuse that are reported, there is very little accountability. In a study of 2,178 cases of alleged misconduct by Border Patrol agents and supervisors filed between January 2012 and October 2015, 95.9 percent of the 1,255 cases in which a formal decision was issued resulted in "no action" against the officer or agents accused of misconduct[264] (Cantor and Ewing 2017). A study of the CBP conducted in 2011 by the DHS itself found that revisions to the disciplinary process were necessary because it was outdated and under-resourced—the workforce had grown considerably but the disciplinary system had not experienced a corresponding growth (Homeland Security Studies and Analysis Institute 2011). Thus while complaint structures signal that the agency cares about immigrant rights, their inefficacy in holding officers accountable suggests they are just symbolic (Edelman 1992). The lack of accountability is exacerbated by an organizational culture at CBP which encourages officers to abide by a "code of silence" when it comes to their colleagues' errors, misconducts, or crimes" (Homeland Security Studies and Analysis Institute 2011, 8). Together these insights

[264] Similarly, an earlier report found that of 809 complaints of alleged abuse filed against Border Patrol agents between 2009 and 2012, 97 percent resulted in "no action taken" (Martínez et al. 2014). Moreover, for those cases, on average CBP took 122 days to arrive at a decision when one was made (Martínez, Cantor, and Ewing 2014). Among all complaints, 40 percent were still "pending investigation" when the complaint data were provided to the Immigration Council (Martínez, Cantor, and Ewing 2014).

suggest there are formidable barriers to changing the immigration custodial and detention context to be more rights protective.

To what extent do my findings matter given the current immigration context, which is seeing undocumented immigration from Central America, largely asylum-seeking families, outpacing unauthorized immigration from Mexico? My questions about consent and my findings about structural obstacles to due process in the custodial context have become more pressing recently given reports that Central American asylum seekers, detained and separated from their children under the Trump administration's ill-conceived "zero-tolerance" policy, have been forced by CBP and ICE officers to sign forms which present two stark choices: reunite with their children and be "repatriated" with them or to "affirmatively, knowingly, and voluntarily request to return" to their country of citizenship without their minor children who will (ostensibly) remain and pursue their asylum claims—all before the chance to see a judge or speak with counsel (see Appendix E for the "Separated Parents Removal Form"). This binary forces parents to "choose" between abandoning their child's asylum case so that they may be reunited with their child, or being indefinitely separated from them, across international lines, so that their child may pursue their asylum case by themselves. Both "choices" require the signatory to relinquish important procedural rights and the opportunity to advance to more formal venues whereby they can pursue their own asylum case. A complaint filed by the AIC and the American Immigration Lawyers Association (AILA) with the DHS's Office of the Inspector General and Office for Civil Rights and Civil Liberties on behalf of separated families detailed, among other abuses, the following methods used my immigration officers to coerce custodial migrants to sign away their rights: physical and verbal threats, deception, and intimidation; solitary confinement and deprivation of food and water for days; and threats from officers that they would never see their children again if they did not sign.[265] The complaint also indicated that some parents were reunited in detention with their children and given pre-completed forms affecting their rights to reunification; those who refused to sign were separated again from their children. These kinds of "choices" which are provided under duress and in the context of a major information deficit about one's rights (i.e. no access to a judge/hearing or legal counsel) cast doubt on whether the decision is truly voluntary, and whether it is even possible for it to be voluntary.

A motion filed in June 2018 by the ACLU for a preliminary injunction against the deportation of reunited families was granted by the judge in part because of concerns that immigration authorities were not providing sufficient opportunity to parents reunited with their children to consult with their own counsel, their children's counsel, and their child(ren) and to "receive[…] accurate, effective information" about their rights in order to "affirmatively, knowingly, and voluntarily" decide whether or not they want to leave their children behind to pursue asylum claims separate from their own.[266] Despite the injunction on this family

[265] American Immigration Council and American Immigration Lawyers Association, "The Use of Coercion by U.S. Department of Homeland Security (DHS) Officials Against Parents Who Were Forcibly Separated From Their Children" (legal complaint), AILA Doc. No. 18082235, August 23, 2018. Available at https://www.aila.org/infonet/the-use-of-coercion-by-us-department-of-homeland.

[266] Plaintiff's Motion for Stay of Removal and Emergency TRO Pending Ruling on the Stay Motion, United States District Court, Southern District of California, dated July 16, 2018 (TRO granted the same day) available at

separation plan, there are reports that the Trump administration is considering another similar program referred to as "binary choice," which would "detain asylum-seeking families together for up to 20 days, then give parents a choice—stay in family detention with their child for months or years as their immigration case proceeds, or allow children to be taken to a government shelter so other relatives or guardians can seek custody" while they remain in detention (Miroff, Dawsey, and Sacchetti 2018). This program has many of the hallmarks of the original one and requires asylum-seeking parents to choose, under duress, between two stark choices, in order to pursue their right to asylum—indefinite incarceration and family separation.

Relatedly, in early 2017, in the midst of the Trump administration's so-called "Muslim travel ban," which barred the nationals of seven Muslim-majority countries from entering the US, there were reports that (legally) arriving immigrants seeking admission were detained by CBP and signed voluntary return documents which effectively withdrew their application of admission, without knowledge of what they had signed or being otherwise coerced to sign under threat of being removed, and all before the opportunity to seek advice from a lawyer (Pérez-Peña, Mueller, and Kulish 2017). Thus, my findings about how structural coercion undermines due process have broad implications which extend well beyond the voluntary departure context. Relatedly, these events show that "voluntary return" is a malleable concept and that it is its informality that enables immigration enforcement agencies to manipulate it to serve their organizational interests of rapid case processing and, ultimately, rapid case disposal.

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Appendices

A. Tables

Table A1 Raw Data for Figure 1.1

Year	Number of Administrative Voluntary Departures	Number of Formal Removals	Percent of Administrative Voluntary Departures
1927	31,417	15,012	32%
1928	30,464	19,946	40%
1929	31,035	25,888	45%
1930	24,864	11,387	31%
1931	27,886	11,719	30%
1932	26,490	10,775	29%
1933	25,392	10,347	29%
1934	14,263	8,010	36%
1935	13,877	7,978	37%
1936	16,195	8,251	34%
1937	16,905	8,788	34%
1938	17,341	9,278	35%
1939	14,700	9,590	39%
1940	12,254	8,594	41%
1941	7,336	6,531	47%
1942	5,542	6,904	55%
1943	5,702	11,947	68%
1944	8,821	32,270	79%
1945	13,611	69,490	84%
1946	17,317	101,945	85%
1947	23,434	195,880	89%
1948	25,276	197,184	89%
1949	23,874	276,297	92%
1950	10,199	572,477	98%
1951	17,328	673,169	97%
1952	23,125	703,778	97%
1953	23,482	885,391	97%
1954	30,264	1,074,277	97%
1955	17,695	232,769	93%

1956	9,006	80,891	90%
1957	5,989	63,379	91%
1958	7,875	60,600	88%
1959	8,468	56,610	87%
1960	7,240	52,796	88%
1961	8,181	52,383	86%
1962	8,025	54,164	87%
1963	7,763	69,392	90%
1964	9,167	73,042	89%
1965	10,572	95,263	90%
1966	9,680	123,683	93%
1967	9,728	142,343	94%
1968	9,590	179,952	95%
1969	11,030	240,958	96%
1970	17,469	303,348	95%
1971	18,294	370,074	95%
1972	16,883	450,927	96%
1973	17,346	568,005	97%
1974	19,413	718,740	97%
1975	24,432	655,814	96%
1976	38,471	955,374	96%
1977	31,263	867,015	97%
1978	29,277	975,515	97%
1979	26,825	966,137	97%
1980	18,013	719,211	98%
1981	17,379	823,875	98%
1982	15,216	812,572	98%
1983	19,211	931,600	98%
1984	18,696	909,833	98%
1985	23,105	1,041,296	98%
1986	24,592	1,586,320	98%
1987	24,336	1,091,203	98%
1988	25,829	911,790	97%
1989	34,427	830,890	96%
1990	30,039	1,022,533	97%
1991	33,189	1,061,105	97%
1992	43,671	1,105,829	96%
1993	42,542	1,243,410	97%
1994	45,674	1,029,107	96%

1995	50,924	1,313,764	96%
1996	69,680	1,573,428	96%
1997	114,432	1,440,684	93%
1998	174,813	1,570,127	90%
1999	183,114	1,574,863	90%
2000	188,467	1,675,876	90%
2001	189,026	1,349,371	88%
2002	165,168	1,012,116	86%
2003	211,098	945,294	82%
2004	240,665	1,166,576	83%
2005	246,431	1,096,920	82%
2006	280,974	1,043,381	79%
2007	319,382	891,390	74%
2008	359,795	811,263	69%
2009	391,283	582,584	60%
2010	381,593	474,166	55%
2011	385,778	322,073	46%
2012	415,900	230,333	36%
2013	433,034	178,663	29%
2014	405,589	163,223	29%
2015	326,962	129,429	28%
2016	340,056	106,167	24%

Source: Department of Homeland Security, Table 39 (2017b)

Table A2 Raw Data for Figure 1.2

Year	Number of Returns	Number of Mexico Apprehensions @ Southwest Border
2000	1,675,876	1,615,081
2001	1,349,371	1,205,390
2002	1,012,116	901,761
2003	945,294	865,850
2004	1,166,576	1,073,468
2005	1,096,920	1,016,409
2006	1,043,381	973,819
2007	891,390	800,634
2008	811,263	653,035
2009	582,584	495,582
2010	474,166	396,819
2011	322,073	280,580
2012	230,333	262,341
2013	178,663	265,409
2014	163,223	226,771
2015	129,429	186,017
2016	106,167	190,760

Source: Department of Homeland Security, Table 39 (2017b); United States Border Patrol (2017a)

Table A3 Summary Removal Procedures in Comparison

	Voluntary Returns	Expedited Removals	Reinstatement of Removals	Other Removals
2005	1,096,920	87,888	43,137	115,406
2006	1,043.381	11,0663	49,539	120,772
2007	891,390	106,196	77,696	135,490
2008	811,263	112,716	91,318	155,761
2009	582,584	106,025	116,903	172,237
2010	474,166	109,720	122,198	149,675
2011	322,073	122,129	123,535	140,114
2012	230,333	163,187	143,669	109,044
2013	178,663	192,559	164,508	75,967
2014	163,223	175,937	159,867	69,785
2015	129,429	140,043	130,671	56,248
2016	106,167	141,518	143,003	55,535

Source: Department Homeland Security (2017b); Baker (2017); Department of Homeland Security (2010)

Table A4 Statutory Forms of Discretionary Relief from Removal

Form of Relief/Legal Remedy from Removal	Requirements/Who is eligible?	Effect of Voluntary Return
Cancellation of removal and adjustment of status for certain nonpermanent residents ("cancellation of removal")	An immigration judge may grant cancellation of removal to an individual who has (1) been present in the United States for a continuous ten-year period, (2) displayed good moral character, (3) no qualifying criminal convictions, and (4) a U.S. citizen or lawful permanent resident spouse, parent, or child who would suffer exceptional and extremely unusual hardship as a result of the individual's removal (8 U.S.C. § 1229b(b)).	Cancellation of removal is only available to individuals who have been placed in removal proceedings before an immigration judge. By signing a voluntary departure form and thereby waiving his/her right to a hearing, the individual loses this opportunity. The individual also loses any period of continuous physical presence that had accrued prior to the voluntary departure for purposes of future cancellation of removal applications. *See, e.g., Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974-75 (9th Cir. 2003).
Adjustment of status under Immigration and Nationality Act ("INA") §§ 245(a) and 245(i)	Under INA § 245(a), an individual who entered the United States after being inspected may seek to adjust her status without leaving the United States, even if her status has since expired. *See* 8 U.S.C. § 1255(a). Similarly, under INA § 245(i), an individual who entered the United States without inspection but is the beneficiary of an immigrant visa petition filed on or before April 30, 2001 may seek to adjust her status without leaving the United States (8 U.S.C. § 1255(a)).	If an individual who could have adjusted her status under either provision leaves the United States after accruing a triggering period of unlawful presence, then she is barred from re-entering the United States for three or ten years/from lawful petitions to re-enter (INA § 212(a)(9)(B).

The Deferred Action for Childhood Arrivals (DACA) Program	DACA is a form of administrative relief available to non-citizen youth who lack legal status. To qualify for DACA, an individual must satisfy a number of requirements, including continuous presence in the United States since June 15, 2007.	Expulsion from the United States through voluntary departure breaks continuous physical presence and renders the individual ineligible for DACA in the future.
Adjustment of status with a Provisional Unlawful Presence Waiver	An applicant for an immigrant visa for lawful permanent residence who is an immediate relative of a US citizen may apply for a provisional waiver of unlawful presence, which would allow her to remain in the United States with her family while the waiver is adjudicated before departing for a consular interview abroad (8 C.F.R. § 212.7(e)).	A visa applicant who has taken voluntary departure must remain outside the United States and away from her family while she awaits consular adjudication of her request for a waiver of the unlawful presence bar.
The Trafficking Victims Protection Act (TVPA or T visa)	To qualify for relief under TVPA, a victim of a severe form of trafficking must be physically present in the United States. *See* 8 C.F.R. § 214.11(b). This is a particularly significant form of relief in Southern California, where a substantial proportion of undocumented immigrants have been victims of human trafficking.[267]	Expulsion from the U.S. via voluntary return disqualifies the person from relief under TVPA because it does away with their ability to remain physically present in the United States, a requirement to qualify.

[267] Findings from a 2012 interview-based study of 826 undocumented migrant laborers (98% Mexican nationals) in San Diego County show that the majority (58%) of the unauthorized migrant laborers currently in the work force have experienced at least one type of

The Violence Against Women Act (VAWA)	To qualify for VAWA relief, a victim of domestic violence that was inflicted by a U.S. citizen or lawful permanent resident spouse must be physically present in the United States at the time of application for such relief (8 C.F.R. § 204.2(c); 8 U.S.C. § 1229b(b)(2)).	Expulsion from the U.S. via voluntary return disqualifies the person from relief under VAWA because it does away with their ability to remain physically present in the United States, a requirement to qualify.
Asylum, withholding of removal, and protection under the U.N. Convention Against Torture (CAT)	These forms of relief provide protection for people who have a well-founded fear of persecution, whose lives or freedom are likely to be threatened, or who are likely to be tortured in their home countries,[268] Over the past several years, Mexican nationals have increasingly sought asylum, withholding, and CAT protection because of the drug wars and other violence in Mexico (see Hennessey-Fiske 2012) .	A person can raise asylum as a defense against removal from the U.S. A defensive application for asylum requires the person to be in removal proceedings before an immigration judge. Alternatively, a person can also make an affirmative application for asylum (i.e. they haven't been apprehended by immigration law enforcement) An affirmative asylum for relief can be obtained from an immigration officer of USCIS, but it requires, among other things, for the person to be physically present in the United States (U.S. Citizenship and Immigration Services 2015). Withholding of removal and relief under the CAT are part of the same application as asylum but they are only available to individuals who have been placed in removal proceedings before an immigration judge. By signing a voluntary departure form and thereby waiving his/her right to a hearing, the individual loses these opportunities opportunity.

trafficking violation or abusive practice. Of that population, 31% are estimated to have experienced abuse that meets the legal definition of human trafficking (Zhang 2012, 11).

[268] Withholding and relief under the CAT are very limited forms of relief in the sense that they are much more challenging to obtain and they provide more limited benefits than asylum. On the other hand, unlike other forms of relief, they are mandatory rather than discretionary (i.e. anyone who meets the criteria MUST be granted withholding or CAT).

Table A5 Summary Removal Procedures

Procedure	What is it? Who/where does it apply? What are the consequences?	Statutory/Regulatory Procedural Protections
Expedited Removal (ER)[269]	Allows immigration officers to issue removal orders which have the same effect as one issued by an immigration judge—a ban on future admission that ranges from five years to life. Geographically limited to ports of entry and within 100 miles of the U.S. border with Mexico or Canada, with limited exceptions,[270] any noncitizen who has not been admitted or paroled and who cannot prove that he or she has been continuously and physically present in the U.S. during the 14 days prior to the encounter with immigration authorities. Individuals in expedited removal are detained until removed.[271]	A person subject to ER has no right to a hearing before an immigration judge or to appeal the removal order to the BIA.[272] There are some statutory exceptions to expedited removal. An individual claiming to be a U.S. citizen, lawful permanent resident or refugee cannot be ERed.[273] If an immigration officer cannot determine the person's status, an immigration judge must review the expedited removal decision.[274] Moreover, a noncitizen who expresses a credible fear of persecution and/or indicate the intent to apply for asylum" to the examining CBP officer also cannot be subject to ER.[275] During initial processing for ER, CBP officers are required to read a script to the noncitizen, with the assistance of interpretive services if necessary, which explains the ER process and its consequences and advises noncitizens to ask for protection if they have reason to fear being returned home.[276] Subsequently officers are required to ask a series of questions to ascertain fear of return, and are expected to record this information.[277] After reading this statement to the noncitizen (or having it read to

[269] 8 U.S.C. § 1225
[270] As a matter of prosecutorial discretion, DHS applies expedited removal to only those Mexican and Canadian nationals with histories of criminal or immigration violations ("such as smugglers or aliens who have made numerous illegal entries"), as well as persons from other countries who are transiting through Mexico or Canada (69 Fed. Reg. 48878 (August 11, 2004)).
[271] 8 U.S.C. section 1225(b)(2)(A).
[272] 8 CFR §235.3(b)(2)(ii)
[273] INA § 235.3(b)(1)(A)(i) and (ii); 8 C.F.R. §§ 235.3(b)(4) and (b)(5)
[274] 8 C.F.R. § 235.3(b)(5)(i)
[275] 8 CFR § 235.3(b)(4)
[276] 8 CFR § 235.3(b)(2)(i)
[277] 8 CFR § 235.3(b)(2)(i)

		him/her), the noncitizen must sign each page of the statement attesting to its accuracy.[278] If the noncitizen expresses a fear of return, the officer must not proceed with the ER and must provide the noncitizen with a written description of the "credible fear" interview (CFI) process, notice of the right to consult with others before the interview, and other information.[279] The officer is then supposed to refer the person to an asylum officer who will interview the noncitizen and assess whether or not the fear of return is "credible" and therefore merits a hearing before an immigration judge. The noncitizen remains detained throughout this process.[280]
Reinstatement of Removal[281]	Allows immigration officers to reissue a prior order of removal. Can be applied nationwide. Presumably no statute of limitations so an individual can be subject to reinstatement at any time after their reentry.[282] A person with a reinstated order is barred from reentering the U.S. for up to 20 years—unless they have an aggravated felony conviction, in which case they are barred for life. In addition to	There is no right to a hearing before an immigration judge[283] and an immigration officer will determine whether the individual qualifies for reinstatement.[284] There is an internal procedure for challenging the order but no right to appeal it to an IJ or the BIA. There is also no avenue for reopening/reviewing the prior order of removal.[285] Officers are required to give the noncitizen notice of the reinstatement in writing and advise him/her that he/she may contest the determination with a written or oral statement and provide them an opportunity to do so.[286] There is no requirement that the statement be provided in a

[278] 8 CFR § 235.3(b)(2)(i)
[279] 8 CFR § 235.3(b)(4)(i)
[280] 8 CFR § 235.3(a) and 8 CFR 235.3(b)(4)(ii)
[281] 8 U.S.C. § 1231(a)(5)
[282] A reinstatement of removal may occur "at any time after the reentry." 8 U.S.C. section 1231(a)(5)
[283] 8 CFR § 241(a)(2016)
[284] 8 CFR § 241.8(a) The immigration officer must determine the following: whether (1) the noncitizen was subject to a prior order or removal, (2) the noncitizen is the same person as the one named in the prior order, and (3) the noncitizen unlawfully reentered the country. Once these requirements have been satisfied, the noncitizen "shall be removed" (8 C.F.R. section 241.8(c)).
[285] 8 U.S.C. § 1231(a)(5)
[286] 8 C.F.R. § 241.8(b)

	these civil penalties, a person who reenters the U.S. after being deported can be federally prosecuted for illegal reentry.	language the noncitizen can understand, and no waiting period to allow the noncitizen to obtain counsel.[287] There is no option for relief, [288] except in very limited cases. Noncitizens who express a fear of return to the processing immigration officer must be referred to an asylum officer for an interview to ascertain whether the noncitizen has "a reasonable fear of persecution and torture" in their home country[289]--although neither the statute nor the regulations provide that the immigration officer must inform the noncitizen of this option so it may not otherwise surface. Following a determination of reasonable fear by the asylum officer, noncitizens are referred to restricted immigration court proceedings, known as "withholding only" proceedings—where they can only apply for withholding of removal or protection under CAT.[290] A denial of the application by an IJ may be appealed to the BIA.[291] Moreover, a negative finding from the asylum officer may be appealed to an IJ.[292] If the IJ agrees with the asylum officer, the decision *may not* be appealed to the BIA.[293] If the IJ disagrees with the asylum officer, noncitizen may apply for withholding or CAT relief.[294] A person whose removal order is reinstated can appeal to a federal court of appeals within 30 days after the reinstatement becomes final.[295] Again, neither the statute nor the regulations indicate that immigration officers must inform noncitizens of this right. There's also nothing in the regulations that requires officers to provide the noncitizen the opportunity to obtain a lawyer who might otherwise

[287] See generally 8 C.F.R. § 241.8 (describing the reinstatement of removal order process).
[288] 8 U.S.C. § 1231(a)(5)
[289] INA § 241(b)(3)(A).
[290] 8 C.F.R. § 1208.31(e)
[291] 8 C.F.R. § 1208.31(e)
[292] 8 C.F.R. § 1208.31(f), (g)
[293] 8 C.F.R. § 1208.31(g)(1)
[294] 8 C.F.R. § 1208(g)(2)
[295] INA § 242(b)(1)

		inform the noncitizen of this right and help them file the appeal. Moreover, record of this review is limited, as a court of appeals can only review the administrative record on which the reinstated order was based.[296]
Administrative Removal[297]	Another form of accelerated removal which allows an immigration officer to deport non-citizens who are not lawful permanent residents (LPRs) and who have been convicted of certain criminal offenses (including "aggravated felonies," which are not necessarily felonies under criminal laws, and "crimes involving moral turpitude") without seeing a judge. This includes conditional lawful permanent residents.[298] Can be applied nationwide and at any time, even after removal proceedings have already been initiated.[299] They typically take place while the	The implementing regulations provide that DHS initiate proceedings by serving a "Notice of Intent" to the noncitizen, which contains the factual and legal allegations against the noncitizen.[300] The form must also advise the noncitizen that he or she has the right to be represented at no expense to the government; may request limited forms of relief through withholding of removal or CAT; may inspect the evidence supporting the charge; and may rebut the charges.[301] It must be translated or orally interpreted in a language the respondent understands.[302] The immigration officer must provide the noncitizen with a current list of available free legal service providers.[303] Importantly the notice does not advise noncitizens that they may challenge the aggravated felony designation, even though it may be the most common basis for contesting deportability in administrative removal.[304] Also note that the rebuttal of allegations must be

[296] INA § 242(b)(4)(A)&(B) Importantly, filing a petition does not automatically stay the removal.
[297] 8 U.S.C. § 1228b
[298] Non-LPRs may include individuals with conditional lawful permanent residence (1) due to having acquired status through less than two years of marriage; (2) valid temporary visa holders (e.g. students or high-skilled workers); and (3) individuals with limited immigration relief including DACA or withholding of removal (Koh 2016).
[299] 8 C.F.R. § 238.1(e)(permitting an IJ to terminate regular removal proceedings at the government's request so that administrative removal may be pursued).
[300] 8 C.F.R. § 238.1(b)(2)(i).
[301] 8 C.F.R. § 238(b)(2)(i)
[302] 8 C.F.R. § 238.1(b)(2)(v)
[303] 8 CF.R. § 238(b)(2)(iv)
[304] The form provides three options for contesting deportability (1) I am a citizen or national of the Untied States; (2) I am a lawful permanent resident of the United States; or (3) I was not convicted of the criminal offense described in allegation number 6 above (Wachtenheim, Kesselbrenner, and Wachtenheim 2017, 7).

	noncitizen is locked up, either serving their criminal sentence or in immigration detention (Koh 2017, 210).	"accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge."[305] This evidentiary support must be marshaled as part of the rebuttal within 10 days of service of the notice of charges.[306] If the noncitizen does provide a timely rebuttal of the charges or otherwise "concedes removability," an immigration officer other than the charging officer must decide whether deportability is established[307] by clear, convincing, and unequivocal evidence.[308] If the officer finds that the charges establish deportability, the officer will issue the final order of removal.[309] If the noncitizen contests the evidence, the deciding officer must determine whether to proceed with the administrative removal or, if the immigration officer believes the rebuttal raises an issue that challenges deportability, to refer the case to an IJ.[310] If during proceedings, the noncitizen raises a fear of return, after issuing the final order of removal, the officer must refer the noncitizen to an asylum officer for a reasonable fear interview.[311] The statute provides that the noncitizen may apply for judicial review of the decision from a federal court of appeals,[312] although neither statute nor regulations indicate the deciding officer must inform the noncitizen of this right. The DHS is not permitted to deport the noncitizen for 14 days after issuance of the

[305] 8 C.F.R. § 238.1(c)(2).
[306] 8 C.F.R. § 238.1 (c)(1).
[307] I8 U.S.C. § 1228(b)(4)(F); INA section 238(b)(4)(F); 8 C.F.R. section 238.1(1)
[308] This is a higher standard than that for removal proceedings under section 240, which requires only "clear and convincing" evidence (Wachtenheim, Kesselbrenner, and Wachtenheim 2017).
[309] 8 C.F.R. § 238.1(a), (d)(1)
[310] 8 C.F.R. § 238.1(d)(2)(iii).
[311] 8 C.F.R. §§ 238.1(f)(3), 208.31
[312] 8 U.S.C. § 1228(b)(3); INA § 238(b)(3); 8 U.S.C. §§ 1252(a)(1), (b)(1); INA § 242(a)(1), (b)(1).

		order of removal so that the person has an opportunity to apply for judicial review.[313] This temporary waiting period can be waived by the noncitizen in writing.[314]
Stipulated Removal[315]	Noncitizens "agree" to accept a removal order and waive their right to an immigration court hearing. Can be applied nationwide against any non-citizens, including lawful permanent residents as well as undocumented immigrants. It is used primarily on immigrants who are detained, who do not have lawyers, and who face deportation due to minor immigration violations ((Koh 2013; Koh, Srikantiah, and Tumlin 2011).	Federal regulations provide that noncitizens sign the stipulated order, which, among other things, provides an admission that all factual allegations in the charging document are true and correct as written; a concession of deportability or inadmissibility as charged; a statement that the noncitizen makes no application for relief under the INA; a statement that the noncitizen "understands the consequences of the stipulated request" and that he/she "enters the request voluntarily, knowingly, and intelligently," and a waiver of appeal of the order.[316] Immigration officers are tasked with obtaining the signature on the stipulated order and thus securing the noncitizen's waiver of their right to see an immigration judge. The role of the IJ is restricted to determining that this waiver of a hearing is "voluntary, knowing, and intelligent" in cases where the noncitizen is unrepresented (by legal counsel or another representative which may include a "near relative, legal guardian, or friend").[317] Regulations permit that the IJ may issue the order of removal (and thus ostensibly make this determination of a "voluntary, knowing, and intelligent" waiver) without a hearing and in the absence of the noncitizen in court, and solely "based on a review of the charging document, the written stipulation, and supporting documents, if any."[318]

[313] 8 U.S.C. § 1228(b)(3) (2015).
[314] 8 U.S.C. § 1228(b)(3) (2015); 8 C.F.R. § 238.1(f)(1).
[315] U.S.C. § 1229a(d)
[316] 8 C.F.R. § 1003.25(b)(1-8)
[317] 8 C.F.R. § 1003.25(b)
[318] 8 C.F.R. § 1003.25(b)

B. Form I-210 Voluntary Departure and Verification of Voluntary Departure (A- File Copy and Alien Copy)

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

VOLUNTARY DEPARTURE AND VERIFICATION OF DEPARTURE

To: (Alien's Last Name, First Name, Address)	**Alien's Phone Number**	**A: Number**
		FIN Number

☐ You have violated the terms of your admission as a nonimmigrant. Consequently, the permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☐ On _____ you were granted voluntary departure by the ☐ IJ ☐ BIA ☐ DHS. You are required to depart from the United States on or before _____ ☐ at your expense. ☐ at government expense. ☐ under safeguard.

☐ Your request for an extension of time to depart from the United States has been _____ (Granted/Denied). You are required to depart on or before _____.

☐ You state that you will be departing the United States on _____ through _____ (Port of Departure) on _____ (Give Airlines, Flight Number and Time or Other Manner of Departure)

NOTICE: The Immigration Judge's Alternate Order of Removal will take effect if the alien does not depart within the time specified. Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your removal. A warrant for your arrest will be issued if this office has not received verification of your departure by the specified date. Failure to depart on or before the specified date may also subject you to a possible civil penalty of not less than $1,000 and not more than $5,000, and render you ineligible for a period of 10 years for any further authorization for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Immigration and Nationality Act.

Additionally, if an Immigration Bond has been posted on the alien, the DHS will initiate the appropriate action in accordance with the terms of the executed bond and any attached rider or riders specified.

To any U.S. official: This document can be completed and transmitted to DHS/ICE Headquarters Office of Detention and Removal via VD-Bond-Verifications@dhs.gov .

_____ _____
Alien's Acknowledgement of Conditions and Receipt of Form — Date

_____ _____
Signature of Authorized DHS Official — Date

_____ _____
DHS Official Serving Form (Name and Title) — Office

(Photo of Alien)	**If Available**	(Right Index Fingerprint)

Verification of Departure
(Completion by an official of the Department of Homeland Security or the U.S. Department of State)

Printed Name/Title	Signature of Official Verifying Identity	Office	Date	Phone Number

U.S. Departure Place		Date
Method of Departure	☐ Air ☐ Train ☐ Boat ☐ Other:	
Comments		

A-File Copy — ICE Form I-210 (08/08)

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement

VOLUNTARY DEPARTURE AND VERIFICATION OF DEPARTURE

To: (Alien's Last Name, First Name, Address)	**Alien's Phone Number**	**A: Number**
		FIN Number

☐ You have violated the terms of your admission as a nonimmigrant. Consequently, the permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☐ On _____ you were granted voluntary departure by the ☐ IJ ☐ BIA ☐ DHS. You are required to depart from the United States on or before _____ ☐ at your expense. ☐ at government expense. ☐ under safeguard.

☐ Your request for an extension of time to depart from the United States has been _____ (Granted/Denied). You are required to depart on or before _____.

☐ You state that you will be departing the United States on _____ through _____ (Port of Departure) on _____ (Give Airlines, Flight Number and Time or Other Manner of Departure)

NOTICE: The Immigration Judge's Alternate Order of Removal will take effect if the alien does not depart within the time specified. Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your removal. A warrant for your arrest will be issued if this office has not received verification of your departure by the specified date. Failure to depart on or before the specified date may also subject you to a possible civil penalty of not less than $1,000 and not more than $5,000, and render you ineligible for a period of 10 years for any further authorization for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Immigration and Nationality Act.

Additionally, if an Immigration Bond has been posted on the alien, the DHS will initiate the appropriate action in accordance with the terms of the executed bond and any attached rider or riders specified.

To any U.S. official: This document can be completed and transmitted to DHS/ICE Headquarters Office of Detention and Removal via VD-Bond-Verifications@dhs.gov .

_____ _____
Alien's Acknowledgement of Conditions and Receipt of Form — Date

_____ _____
Signature of Authorized DHS Official — Date

_____ _____
DHS Official Serving Form (Name and Title) — Office

(Photo of Alien)	**If Available**	(Right Index Fingerprint)

Verification of Departure
(Completion by an official of the Department of Homeland Security or the U.S. Department of State)

Printed Name/Title	Signature of Official Verifying Identity	Office	Date	Phone Number

U.S. Departure Place		Date
Method of Departure	☐ Air ☐ Train ☐ Boat ☐ Other:	
Comments		

Alien Copy — ICE Form I-210 (08/08)

C. Form I-826 Notice of Rights and Request for Disposition (English and Spanish)

Department of Homeland Security
Bureau of Customs and Border Protection

Notice of Rights and Request for Disposition

File No: _____

Name: _____

NOTICE OF RIGHTS

You have been arrested because immigration officers believe that you are illegally in the United States. You have the right to a hearing before the Immigration Court to determine whether you may remain in the United States. If you request a hearing, you may be detained in custody or you may be eligible to be released on bond, until your hearing date. In the alternative, you may request to return to your country as soon as possible, without a hearing.

You have the right to contact an attorney or other legal representative to represent you at your hearing, or to answer any questions regarding your legal rights in the United States. Upon your request, the officer who gave you this notice will provide you with a list of legal organizations that may represent you for free or for a small fee. You have the right to communicate with the consular or diplomatic officers from your country. You may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to your departure from the United States.

REQUEST FOR DISPOSITION

_____ Initials ☐ I request a hearing before the Immigration Court to determine whether or not I may remain in the United States

_____ Initials ☐ I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing.

_____ Initials ☐ I admit that I am in the United States illegally, and I believe I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure.

_____ Signature of Subject

_____ Date

CERTIFICATION OF SERVICE

☐ Notice read by subject

☐ Notice read to subject by _____, in the _____ language.

_____ Name of Service Officer (Print)

_____ Name of Interpreter (Print)

_____ Signature of Officer

_____ Date and Time of Service

Form I-826 (4-1-97)N

Department of Homeland Security
Bureau of Customs and Border Protection

Notificación de Derechos y Solicitud de Resolución

App. Zone:_____ Entry Zone:_____ POB: _____ DOB:_____/_____/_____ A# _____

Nombre: _____ Father:_____ Mother:_____

NOTIFICACION DE DERECHOS

Usted ha sido detenido porque el Servicio de Inmigración opina que se encuentra en los Estados Unidos ilegalmente. Tiene derecho a una audiencia ante el Tribunal de Inmigración, con el fin de decidir si puede permanecer en los Estados Unidos. En el caso de que Usted solicite esa audiencia, pudiera quedar detenido o tener derecho a la libertad bajo fianza hasta la fecha de la audiencia. Tiene la opción de solicitar el regreso a su país a la brevedad posible, sin que se celebre la audiencia.

Usted tiene derecho a comunicarse con un abogado u otro representante legal para que lo represente en la audiencia, o para responder a cualquier pregunta acerca de sus derechos conforme a la ley en los Estados Unidos. Si Usted se lo pide, el funcionario que le haya entregado esta Notificación le dará una lista de las asociaciones jurídicas que podrían representarlo gratuitamente o a poco costo. Tiene derecho a comunicarse con el servicio consular o diplomático de su país. Puede usar el teléfono para llamar a un abogado, o a otro representante legal, o a un funcionario consular en cualquier momento anterior a su salida de los Estados Unidos.

SOLICITUD DE RESOLICION

_____ Iniciales ☐ Solicito una audiencia ante el Tribunal de Inmigración que resuelva si puedo o no permanecer en los Estados Unidos.

_____ Iniciales ☐ Considero que estaría en peligro si regreso a mi país. Mi caso se trasladará al Tribunal de Inmigración para la celebración de una audiencia.

_____ Iniciales ☐ Admito que estoy ilegalmente en los Estados Unidos, y no considera que estaría en peligro si regreso a mi país. Renuncio a mi derecho a una audiencia ante el Tribunal de Inmigración. Deseo regresar a mi país en cuanto se pueda disponer mi salida. Entiendo que pudiera permanecer detenido hasta mi salida.

_____ Firma del sujeto

_____ / / Fecha

CERTIFICATION OF SERVICE

☐ Notice read by subject
☐ Notice read to subject by _____, in the Spanish language.

_____ Name of Service Officer (Print)

_____ Name of Interpreter (Print)

_____ Signature of Officer

_____ / / hrs. Date and Time of Service

Form I-826 (4-1-97)N

D. The Voluntary Return of Unaccompanied Mexican Minors

The racialized, coercive approach to immigration enforcement via voluntary return against Mexicans (described in chapter five) is also evident in the distinction between the legal procedures for unaccompanied minor children (UAC) who are residents or nationals of non-contiguous countries versus those from contiguous countries (i.e. Mexico and Canada). Until 2008, the USBP, as a matter of practice, returned Mexican UAC to Mexico through the nearest port of entry and rendered them to the custody of a Mexican official within 24 hours (Kandel 2017, 5). In 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) (2008), which sought to strengthen federal trafficking laws and added provisions that govern the rights of unaccompanied immigrant children who enter the U.S. Among these provisions were additional screening requirements for Mexican children, which, ironically, have effectively created hurdles for getting before an immigration judge. Before a Mexican child can be referred to an immigration judge, the border officer who apprehends him or her must first interview the child and assess whether he or she is a potential victim of or at risk of trafficking and whether he or she has a possible claim to asylum. If the border officer finds that the Mexican child has a potential asylum or trafficking claim, only then will that child be referred to the Department of Health and Human Services (HHS) Office of Refugee Settlement (ORR) and placed in removal proceedings before a judge. Otherwise, if the border officer is not convinced the child has a claim, the officer must then determine whether the child can (and does) voluntarily agree to go back home (i.e. the officer VRs the child). (If this last criterion is not met, then the child cannot be VRed and must be put into removal proceedings).

Conversely, children from non-contiguous countries do not undergo screening requirements by border officers. Instead, border officers who apprehend an unaccompanied child of an "other than Mexican" (OTM) nationality must instead automatically (within 72 hours) refer him or her to the Department of Health and Human Services (HHS) Office of Refugee Settlement (ORR), at which point they will be placed in removal proceedings before a judge, and to the extent possible, provided access to counsel. The differences in these legal procedures are reflected in the USBP organizational materials, which distinguish between the "Special Rules for Children from Contiguous Countries" and "all other children."[319]

This comparison surfaces three issues of note that illustrate the way in which Mexican nationals are treated differently from non-Mexicans, and more specifically, how there is effectively a crime control approach to processing Mexicans, whereas non-Mexicans are treated more in line with the due process approach. The first is the fact that the TPVRA requires additional screening for Mexicans in the first place, and not for other than Mexican (OTM) UAC. Where non-Mexican UAC get almost immediate access to rights and procedures under the law, Mexican UAC must first overcome additional hurdles before they can see a judge and have a hearing. Moreover, as the ACLU (year) has pointed out, these screening requirements have the effect of narrowing the grounds on which a Mexican UAC can enter and remain in the U.S. A Mexican UAC can only see a judge if he or she can convince a border officer that he or she has an asylum or trafficking claim (or alternatively, if the government chooses to pursue a formal removal order instead of a voluntary return). Under the TPVRA, other valid claims for relief will not get a Mexican child who is arrested in the border zone into court where they can present that

[319] Instructor Guide: Operations 2, "e3 Processing: Day 5," dated May 2010, pages 23-25 (on file with the author).

claim/will not trigger a right to go to court and be heard by a judge. On the other hand, non-Mexican children arrested at the border are not pre-screened by CBP and will have the opportunity to raise *any* claim for relief in their removal proceedings (Mehta 2014, 74).[320]

The second issue of note is that the TPVRA tasks immigration enforcement officers with implementing these screenings. Another way to put this is that while OTMs are seen through a rights/protections lens, Mexicans are viewed through an enforcement lens. Thus, border officers are tasked with making very complicated assessments to determine whether the child can move forward into the system and get access to rights. Although the TVPRA requires "specialized training" to implement these screenings, several reports show that officers don't receive it. According to an UNHCR study, which included interviews with 102 unaccompanied Mexican children:

> CBP officers failed to ask several (or sometimes any) of the required screening questions; sometimes conducted interview without an interpreter; by default, interviewed children in public places about sensitive issues; had no training in child-sensitive interviewing techniques; and did not understand the legal background and rationale for the screening activities. In some cases, children were told to sign forms that had already been filled out (see Mehta 2014, 76).

Another study of 130 unaccompanied minors conducted by a public interest organization states that the priority for officers is facilitating rapid repatriations, and therefore, decisions are not made in the best interest of the child:

> "Most unaccompanied Mexican minors do not understand their rights and are not making an 'independent decision' to [voluntarily] return to Mexico…[M]any children stated that they were never asked whether they wanted voluntary departure; they were simply told that they would be returning to Mexico" (Cavendish and Cortazar 2011).

The result of putting this assessment in the hands of CBP officers has been "the virtual automatic voluntary return" of Mexican unaccompanied children (see Mehta 2014, 76). This is the third issue—that officers have the ability to swiftly and with little due process repatriate Mexican children via voluntary return, where there they have no such ability with unaccompanied OTMs. In FY2013, the vast majority—about 96 percent—of Mexican UAC were voluntarily returned rather than referred to ORR and afforded the opportunity to see a judge.[321] In contrast, the UNHCR found that 64 percent "had potential international protection needs, particularly from violence and coercion to assist smugglers" (see Mehta 2014, 140, FN 414). Similarly, Refugees International reports that violence in the form of activities such as kidnappings and extortions are at "their highest levels in more than 15 years" and that children in particular have been victims of kidnapping, assassination, extortion, and disappearances (see Mehta 2014, 73). In other words, Mexican children face many of the same conditions of risk that

[320] The intention here is not to idealize the ORR or immigration courts but to show that unaccompanied OTM children are afforded access to formal rights and systems that Mexican children, by virtue of their nationality, are not.

[321] The UNHCR report has similarly put this estimate at 95.5 percent (see Mehta 2014, 74).

children from non-contiguous countries face, but they nevertheless face greater barriers to rights and protections by virtue of the way the law treats their nationality.

E. Separated Parents Removal Form

U.S. Immigration and Customs Enforcement
Enforcement and Removal Operations

Separated Parent's Removal Form

Purpose: This form is for detained alien parents with administratively final orders of removal who are class members in the *Ms. L. v. I.C.E.*, No. 18-0428, (S.D. Cal. Filed Feb. 26, 2018) lawsuit. Class members are entitled to be reunited with their child(ren) and may choose for their child(ren) to accompany them on their removal or may choose to be removed without their child(ren). Any such decision must be made affirmatively, knowingly, and voluntarily.

Instructions: This form must be read to the alien parent in a language that he/she understands. The alien parent should indicate which option he/she is choosing by signing the appropriate box below.

Parent Name / Nombre de Padre: _____
Parent A # / A # de Padre: _____
Country of Citizenship / Pais de Ciudadania: _____
Detention Facility / El Centro de Detención: _____

Child(ren) Name(s) / Nombre de Hijo:
_____
Child(ren) A # / A # de Hijo: _____
Shelter / Albergue: _____

English: *I am requesting to reunite with my child(ren) for the purpose of repatriation to my country of citizenship.*

Signature / Firma: _____

English: *I am affirmatively, knowingly, and voluntarily requesting to return to my country of citizenship without my minor child(ren) who I understand will remain in the United States to pursue available claims of relief.*

Signature / Firma: _____

Certificate of Service

I hereby certify that this form was served by me at _____ (Location)
on _____ (Name of Alien) on _____ (Date of Service), and the contents of this notice were read to him or her in the _____ (Language) language.

_____ Name and Signature of Officer
_____ Name or Number of Interpreter (if applicable)

F. Participant Consent Form

Introduction

My name is Mina Barahimi. I am a graduate student at the University of California, Berkeley, working as a Student Researcher with my faculty advisor, Professor Sarah Song, in the department of Jurisprudence and Social Policy. I am planning to conduct a research study, which I invite you to take part in.

You are being invited to participate in this study because of your legal expertise in voluntary departure and/or what you may know about how voluntary departure is being implemented in your community.

Purpose

The purpose of this study is to examine the views of key stakeholders in discretionary immigration law enforcement at the US-Mexico border.

Procedures

If you agree to be in this study, you will be asked to participate in an interview. With your permission, I will audiotape and take notes during the interview. The recording is to accurately record the information you provide, and will be used for transcription purposes only. If you choose not to be audiotaped but feel uncomfortable at any time during the interview, I can turn off the recorder at your request. Or if you don't wish to continue, you can stop the interview at any time.

*Study time***:** The interview will range between 30 minutes and one hour. I may ask for your permission to follow up with additional questions in a subsequent (shorter) interview.

Study location: The interview will take place in a location of your choosing.

Risks/Discomforts

- The risks of participation are minimal. In order to avoid potential risk, subjects will be advised not to say anything that may place them at risk of civil or criminal liability, or cause damage to their financial standing, employability or reputation.
- *Breach of confidentiality*: As with all research, there is a chance that confidentiality could be compromised; however, we are taking precautions to minimize this risk.

Benefits

There are no direct benefits to you for participating in the study. However, your answers may help us learn more about the impact and implementation of voluntary departure, a consequential yet little understood area of immigration law.

Confidentiality

Your study data will be handled as confidentially as possible. If results of this study are published or presented, individual names and other personally identifiable information will not be used.

To minimize the risks to confidentiality, the study procedures will be conducted solely by me, the Student Researcher. I will temporarily store audio recordings of the interviews in encrypted format on my personal laptop computer, and the computer will be password-protected. These recordings will then be transcribed within eighteen months, and personally identifying information will then be removed from the transcript, with identification by interview number. Audio recordings will subsequently be permanently erased. The key to identifying the interview transcripts will be stored in an electronic database, which will be encrypted and reside on my password-protected computer. I will have sole access to the computer, password, and decryption key. No names or other identifying information will be included in any reports, publications, or presentations. The key to identifiers will be destroyed within ten years after the study.

You will be asked for oral rather than signed consent.

Retaining research records: When the research is completed, I may save the interview transcripts for use in future research done by myself or others. I will retain this study information for up to ten years after the study is over. The same measures described above will be taken to protect confidentiality of this study data.

Rights

Participation in research is completely voluntary. You have the right to decline to participate or to withdraw at any point in this study without penalty or loss of benefits to which you are otherwise entitled.

Questions

If you have any questions or concerns about this study, you may contact me at mina.barahimi@berkeley.edu or 425-286-7829. You may also contact Sarah Song, the Principal Investigator, at ssong@law.berkeley.edu or 510-643-5637.

If you have any questions or concerns about your rights and treatment as a research subject, you may contact the office of UC Berkeley's Committee for the Protection of Human Subjects, at 510-642-7461 or subjects@berkeley.edu.

Consent

If you agree to participate, please say so. You will be given a copy of this form to keep for your own records.

G. Interview Guides

IMMIGRATION PRACTITIONERS

I) Background

1. How long have you been an immigration practitioner?
    a. How long have you been an immigration practitioner in San Diego?
    b. Have you practiced anywhere else? If so, where?

2. What kind of services do you provide? In other words, what kinds of matters/cases constitute most of your work? What are most of your clients seeking help with?

3. Have you had or do you have clients who have been affected by taking voluntary return?
    a. Without telling me anything about your confidential communications with your clients, can you describe a specific example of one such client and the nature of their experience with voluntary return? (probing questions below)

4. Without identifying this person or sharing with me any identifying information, can you please tell me more about this client?

    a. Nationality?
    b. Length of lawful or unlawful residence in the US?
    c. Family ties in the U.S. (U.S. citizen or LPR)?

5. How did this client come to your attention? Did they or a family member contact you?
    a. When were you contacted by him/her about their case?

II) The Process of Voluntary Return

6. By whom was he or she apprehended? ICE or Border Patrol?

7. Can you describe what context and under what circumstances your client was apprehended?

8. What happened after your client was apprehended?
    a. Where was he or she taken?
    b. Was he/she detained?
    c. Was he/she able to contact family members to let them know his/her whereabouts?
    d. Was he/she provided a translator (if needed)?
    e. What was he/she told by arresting officers? What questions was he/she asked?
    f. How did he/she describe his/her experience/interactions with law enforcement?
    g. Was he/she informed of her right to a lawyer, orally and/or on paper? Was he/she provided the opportunity to seek legal representation?
    h. Was he/she informed of her right to a hearing, orally and/or on paper?

9. How did he or she come to take voluntary return? What did that process look like? What factors did he/she consider in making that decision?

10. How soon after your client was arrested was he or she voluntarily returned to Mexico?

11. How did he/she understand what was happening to him/her?

III) The Effects of Voluntary Return

12. Without providing any identifying information, can you please explain what effect voluntary return has had on the life of this person and the effect(s) on his/her family?

    a. Without telling me anything about your confidential communications with your clients, can you describe a specific example of one such client and their experience?

13. Have you had any clients who have suffered immigration consequences as a result of once having taken voluntary return?

    a. Without telling me anything about your confidential communications with your clients, can you describe a specific example of one such client and their experience?

14. How does the practice of voluntary return affect the border community? How do you know this?
    a. Is knowledge of the USBP's practice of voluntary return widespread among the immigrant community in this region?
    b. Do immigrant residents of this region and those on the other side of the border know what it is?

IV) Broad Patterns in the Practice of Voluntary Return

15. How common is the practice of voluntary return experienced by your clients? Are the cases you've encountered anomalous, or is this more a widespread pattern? How do you know this?

16. How widespread would you say is this practice of voluntary return outside of the San Diego area—in other parts of the border region? How do you know this?

17. In your experience, what is the typical demographic profile of the client who contacts you about a voluntary return case or has had their case affected by having taken voluntary return?

a. Nationality?
b. Long-term resident of US? How long?
c. U.S. citizen or LPR family members in the US?

18. What patterns do you see among the clients who come to you with cases concerning voluntary return?
    a. Are there any similarities across cases in terms of who is getting apprehended and voluntarily returned, what they are doing when they are apprehended, etc.? Or is who it affects random and arbitrary?

19. In your estimation, what proportion of your clients (or potential clients you consulted with but were not hired by) have taken a voluntary return in the past, at any time?

20. What is legally problematic voluntary return (on-the-books)? What is legally problematic about its practice in San Diego?

21. Do you have any hunches for why you think the voluntary return is being implemented in the way your clients have experienced it?

V) <u>Removal Proceedings</u>

22. In your estimation and based on your experience, how would your clients who took voluntary return have fared if they had been put into removal proceedings instead? How do you know that?
    a. In your experience, what are the differences in the experience of a client who takes voluntary return vs. a client who gets put into removal proceedings?
    b. What is the difference in the outcome?
    c. Can you provide specific examples from your clients, without breaching attorney-client privilege?

VI) <u>Closure</u>

Is there anything else you'd like to tell me that I didn't ask about?

BORDER ADVOCATES

I) Background

1. Can you please tell me a little bit about your history as an immigrant advocate? Specifically:
    a. How long have you worked in border advocacy?
    b. Have you worked in other parts of the border region other than San Diego?

2. Can you tell me about your current role at [named organization]?
    a. What issues do you work on?
    b. What constitutes the bulk of your day-to-day work?
    c. What populations do you serve?

3. In your advocacy work, do you have or have you encountered immigrants who have been affected by taking voluntary return?
    a. Can you describe a specific example of one such person and the nature of their experience with voluntary return without identifying them or providing any identifying information about them? (probing questions below)

4. Without identifying this person or sharing with me any identifying information, can you please tell me more about this client?
    a. Nationality?
    b. Length of lawful or unlawful residence in the US?
    c. Family ties in the U.S. (U.S. citizen or LPR)?

5. How did you come into contact with them/learn of their experience? Did they or a family member contact you?
    a. When were you contacted by him/her about their case?

II) The Process of Voluntary Return

6. By whom was he or she apprehended? ICE or Border Patrol?

7. Can you describe what context and under what circumstances this person was apprehended?

8. What happened after your client was apprehended?
    a. Where was he or she taken?
    b. Was he/she detained?
    c. Was he/she able to contact family members to let them know his/her whereabouts?
    d. Was he/she provided a translator (if needed)?
    e. What was he/she told by arresting officers? What questions was he/she asked?
    f. How did he/she describe his/her experience/interactions with law enforcement?

g. Was he/she informed of her right to a lawyer, orally and/or on paper? Was he/she provided the opportunity to seek legal representation?
h. Was he/she informed of her right to a hearing, orally and/or on paper?

9. How did he or she come to take voluntary return? What did that process look like? What factors did he/she consider in making that decision?

10. How soon after your client was arrested was he or she voluntarily returned to Mexico?

11. How did he/she understand what was happening to him/her?

III) <u>The Effects of Voluntary Return</u>

12. Without providing any identifying information, can you please explain what effect voluntary return has had on the life of this person and the effect(s) on his/her family?
    a. Can you describe a specific example of one such client and their experience?

13. How does the practice of voluntary return affect the border community? How do you know this?
    a. Is knowledge of the USBP's practice of voluntary return widespread among the immigrant community in this region?
    b. Do immigrant residents of this region and those on the other side of the border know what it is?

IV) <u>Broad Patterns in the Practice of Voluntary Return</u>

14. How common is the practice of voluntary return experienced by your clients? Are the cases you've encountered anomalous, or is this more a widespread pattern? How do you know this?

15. How widespread would you say is this practice of voluntary return outside of the San Diego area—in other parts of the border region? How do you know this?

16. In your experience, what is the typical demographic profile of the client who contacts you about voluntary return?
    a. Nationality?
    b. Long-term resident of US? How long?
    c. U.S. citizen or LPR family members in the US?

17. What patterns do you see among those affected by voluntary return?
    a. Are there any similarities across cases in terms of who is getting apprehended and voluntarily returned, what they are doing when they are apprehended, etc.? Or is who it affects random and arbitrary?

18. In your estimation, what proportion of the Mexican immigrants you have encountered in your capacity as a border advocate have taken a voluntary return in the past, at any time?

19. What is problematic about the practice of voluntary return from your perspective as an immigrant advocate?

20. Do you have any hunches for why you think the voluntary return is being implemented in the way your clients have experienced it?

VIII) Closure

Is there anything else you'd like to tell me that I didn't ask about?