NOTES

PROTECTING GOOD-FAITH COOPERATION AND INFORMATION: DEFERRAL OF REMOVAL PROCEEDINGS FOR SYMPATHETIC SNITCHES

*Tanisha Gupta**

The criminal and immigration systems in the United States have increasingly overlapped, adversely affecting noncitizens even distantly involved in criminal activity. Individuals without legal status who have engaged significantly with a criminal organization can cooperate with law enforcement in exchange for formal immigration benefits. There are no formal protections, however, for individuals residing in the country without legal status who have engaged in minor criminal activity—so minor that charges are not brought against them—even when they cooperate with law enforcement to provide information on the larger criminal scheme. This seemingly contravenes the goals of criminal and immigration law by failing to protect vulnerable accomplices who have not been charged with wrongdoing.

This Note proposes shielding such susceptible populations by expanding immigration protections. In the criminal sphere, charged individuals who lack the ability to render the substantial assistance needed for formal cooperation can still be eligible for a "safety valve" if, in good faith, they provide details on the activities that they partook in. Recipients of safety-valve protections receive sentences below the defined statutory minimums for the crimes they have committed. They do not obtain as much of a reduction in sentencing as formal cooperators or informants do but still benefit from engaging honestly with law enforcement. This Note proposes mirroring such a protection—a lesser version of the S visa modeled after the safety valve—into the immigration context.

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INTRODUCTION

Envision a thirty-year-old man who works part time for a shipping company and has been residing in the United States without legal status since 2022.[1] Now imagine that his boss, knowing that this noncitizen would not risk the potential immigration ramifications of interacting with law enforcement, involves him in a spinoff of the legitimate shipping business: narcotics transport and trafficking. All he does is unpack and repack these shipments to send to their next destination, but he does so knowingly, and this minor action inculpates him in the trade. The DHS, which has increasingly focused efforts on preventing illicit drug trade,[2] traces a shipment back to him. Brought in for questioning, he immediately shares whatever information he has on his boss's business, but his knowledge is

1. This hypothetical is based on an existing case, though certain facts have been changed to preserve anonymity.

2. For more information on DHS's efforts to target narcotics trade, see Press Release, DHS, DHS Doubles Down CBP Efforts to Continue to Combat Fentanyl and Synthetic Drugs (Oct. 26, 2023), https://www.dhs.gov/news/2023/10/26/dhs-doubles-down-cbp-efforts-continue-combat-fentanyl-and-synthetic-drugs [https://perma.cc/7BM8-MQ5D] (detailing DHS's updated strategy to disrupt the supply chain of drugs from other countries into the United States).

limited. The U.S. Attorney's Office, recognizing his complicated situation and minor involvement in the crime during a criminal proffer, decides not to bring charges.[3] Interaction with federal law enforcement, however, does not end there. Now that DHS has records indicating he is someone who entered the country without legal paperwork, he is at risk of immigration action.

The growing overlap between criminal and immigration law, coined "crimmigration,"[4] has significant effects on noncitizens in the United States. Immigration law has evolved from merely refusing entry to individuals with preexisting criminal histories to increasingly deporting people who have committed crimes or are "deemed likely to commit" certain crimes.[5]

Currently, individuals residing in the country without legal status who have engaged in criminal activity are eligible to receive immigration protections through S nonimmigrant visas if they sign on to work with government agencies as formal cooperators or informants.[6] Those protections will not, however, apply in a situation like the hypothetical above. There is no formal immigration protection available for an individual who played such a minor role in a larger criminal scheme. Even if they fully cooperate in a criminal proffer, a law enforcement agency may not value their aid to the same extent as that of a formal cooperator or

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3. Federal prosecutors have discretion over whether to bring criminal charges against individuals involved in a crime. Factors for declining to prosecute an individual include minor culpability in connection with the offense and personal circumstances that affect the accused. DOJ, Just. Manual § 9-27.230 (2023). In Fiscal Year 2022, U.S. Attorneys' Offices declined to prosecute 24,345 cases presented to them, including 3,197 cases referred by DHS. See DOJ, United States Attorneys' Annual Statistical Report Fiscal Year 2022 61 tbl.15 (2022), https://www.justice.gov/usao/file/1574596/dl?inline [https://perma.cc/8UEQ-2WVT] (listing the number of Customs & Border Protection, ICE, USCIS, Secret Service, and all other DHS cases that the DOJ declined to prosecute in Fiscal Year 2022, adding up to 3,197 cases referred by DHS that the DOJ declined to prosecute). Studies suggest that prosecutorial discretion plays a key role in the future of those involved in crime: Choosing not to prosecute minor players in a criminal activity statistically decreases their likelihood of recidivism and improves their economic outcomes. See, e.g., Michael Mueller-Smith & Kevin T. Schnepel, Diversion in the Criminal Justice System, 88 Rev. Econ. Stud. 883, 885 (2021) (finding that felony diversion, which pauses or terminates a felony case, has resulted in "[t]he probability of any future conviction declin[ing] by approximately 45% and the total number of future convictions fall[ing] by 75%" along with "quarterly employment rates improv[ing] by 49%").

4. The term "crimmigration" was first used by Professor Juliet Stumpf. See Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 Am. U. L. Rev. 367, 376 (2006).

5. Id. at 381–84.

6. In fact, the S visa can even be used to provide immigration benefits to foreign nationals living abroad who are extradited to the United States for criminal trial and who enter into cooperation agreements. See Laura A. Gavilán, A Criminal's Path to the American Dream: Extradition as a Drug Enforcement Policy Tool, 28 Geo. Immigr. L.J. 597, 612–13 (2014) (arguing that the extradition of Colombian drug traffickers creates a potential immigration pathway enabling them to seek permanent residency in the United States).

informant. This structure seemingly contravenes the goals of criminal and immigration law by failing to protect vulnerable accomplices who have not been charged with wrongdoing.[7]

Compared to the typical cooperator who "forces the government to 'buy' information that the 'concerned citizen' would have freely given,"[8] noncitizens without legal status may not feel comfortable freely interacting with law enforcement. Their willingness to work openly and truthfully with criminal agencies once discovered thus indicates "a genuine desire to make amends for wrongdoing."[9] This is especially the case for the class of individuals addressed by this Note, who were so minorly involved in criminal activity that charges were not brought against them.

This group falls into a quite unfortunate trap—they were not involved enough in criminal activity to gain formal immigration benefits, yet their contact with criminal authorities is likely the reason they are considered priority status for immigration action. Having become subject to government attention, they face a dire need for immigration protection. Whatever prejudice stems from their interaction with the criminal system should thus be expunged by their cooperation.

This Note proposes shielding such susceptible populations by expanding immigration protections. In the criminal sphere, charged individuals who lack the ability to render the substantial assistance needed for formal cooperation can still be eligible for a "safety valve" if, in good faith, they provide details on the activities that they partook in. Recipients of safety-valve protections receive sentences below the defined statutory minimums for the crimes they have committed. The information they provide need not be unknown to the government nor particularly relevant or useful in future trials of higher-ups.[10] So long as the defendant did not serve as an organizer or leader in the conduct at hand and has provided

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7. See Rachel Frankel, Note, Sharks and Minnows: Using Temporary Alien Deportation Immunity to Catch the Big Fish, 77 Geo. Wash. L. Rev. 431, 436–38 (2009) (highlighting that criminal law seeks a combination of retribution, deterrence, incapacitation, and retribution, while immigration law seeks to enforce immigration priorities to achieve justice). Frankel's innovative argument focuses on legal permanent residents who have officially been charged with crimes and now seek cooperation status—a very different subset of the population than that discussed in this Note because of both the immigration status of the noncitizen and their level of criminal involvement. Despite these differences, the general goals of law hold true in both situations. See also 18 U.S.C. § 3553(a)(2) (2018) (listing out the factors to consider upon imposing a criminal sentence).

8. Daniel C. Richman, Cooperating Clients, 56 Ohio St. L.J. 69, 83 (1995).

9. See Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 Vand. L. Rev. 1, 4 (2003) ("[F]or some cooperators, cooperation can be a vehicle through which the defendant experiences atonement. . . . [T]here is an occasional defendant for whom the decision to cooperate is motivated by a genuine desire to make amends for wrongdoing.").

10. See 18 U.S.C. § 3553(f)(5) ("[T]he fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.").

all the information that they have related to said conduct, they may qualify for safety-valve provisions.[11] Recipients do not obtain as much of a reduction in sentencing as cooperators or informants do, but they still benefit from engaging honestly with law enforcement.[12] This Note proposes mirroring such a protection—a lesser version of the S visa modeled after the safety valve—in the immigration context.

The Note proceeds in three Parts. Part I details existing avenues for working with the government to gain nonimmigrant status, which provides temporary legal residence in the United States.[13] Some of these opportunities have the potential to lead to permanent residency while others do not, depending on the level of assistance an individual provides to government officials. It then lays out current guidelines and immigration priorities for DHS officials. This Part explains why none of the existing immigration protections adequately cover the group addressed in this Note.

Part II focuses on individuals overlooked by the existing system. It highlights the high bar to serving as a cooperator or informant and the many critiques of these roles. As an alternative, this Part explores the requirements and benefits of the criminal safety valve and good-faith cooperation. It then elucidates why the S visa, as it is currently set up, cannot be expanded to include individuals who meet the truthful information-sharing requirements of the criminal safety valve and good-faith cooperation.

Finally, Part III proposes a feasible protection for such individuals based on existing movements in immigration law. Specifically, it advocates for broadened protections coupled with a deferred removal program that does not waive the right to judicial resort. While deferred removal is not

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11. Id. § 3553(f)(4)–(5). Other requirements of the safety valve include that:

> (1) the defendant does not have—
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> (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
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> (B) a prior 3-point offense, as determined under the sentencing guidelines; and
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> (C) a prior 2-point violent offense, as determined under the sentencing guidelines;
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> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
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> (3) the offense did not result in death or serious bodily injury to any person . . . .

Id. § 3553(f)(1)–(3).

12. Id. § 3553(f).

13. For a full list of available nonimmigrant statuses, see Nonimmigrant Classes of Admission, Off. of Homeland Sec. Stat., DHS, https://www.dhs.gov/ohss/topics/immigration/nonimmigrants/classes-of-admission [https://perma.cc/3QKW-Z2L5] (last visited Aug. 1, 2024).

the ideal proposal to support migrants, this Part clarifies why such a program is the most feasible option in the current immigration climate. It then highlights systematic issues to address for effective implementation of the proposal.

I. LAW ENFORCEMENT IMMIGRATION PROTECTIONS

Existing immigration protections can be broadly classified as either formal or informal. Formal protections include visas and deferred-action programs that noncitizens apply for to remain in the United States. Informal protections rely on the prosecutorial discretion of immigration agents and attorneys in choosing whether to bring charges against a noncitizen. This Part addresses each of these protections in turn, explicating why they fail to adequately protect the group of people addressed in this Note.

A. *Formal Procedures—Nonimmigrant Avenues*

A number of formal immigration protections exist specifically for individuals who have worked with government agencies in the investigation or prosecution of criminal activity. These protections are divided into two categories. Law enforcement visas provide individuals with temporary nonimmigrant status and employment authorization, which can eventually lead to permanent residency through a green card. Deferrals of removal proceedings provide individuals with temporary nonimmigrant status for however long a law enforcement agency's request remains operational.

1. *Law Enforcement Visas.* — The S, T, and U visas jointly form the subset of visas known as "law enforcement visas." These nonimmigrant visas provide temporary protections to individuals who have worked or have the potential to work with government agencies on criminal investigations and charges. The U visa grants victims of substantial crimes nonimmigrant status and employment authorization for four years in exchange for providing "specific, credible, and reliable information about the qualifying crime" they endured.[14] The T visa analogously grants victims of severe forms of trafficking nonimmigrant status and employment authorization for four years in exchange for cooperation with any "reasonable requests for assistance."[15] The S visa, in comparison, focuses on individuals involved in crime rather than victims of crime. It provides individuals with nonimmigrant status and employment authorization for three years in exchange for "critical reliable information" regarding a

14. DHS, U Visa Law Enforcement Resource Guide, at iii (2022), https://www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf [https://perma.cc/H8NG-SBXM].

15. DHS, T Visa Law Enforcement Resource Guide, at iii (2022), https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf [https://perma.cc/TQS4-USZ2].

criminal or terrorist organization or enterprise.[16] It can eventually lead to a green card, allowing individuals to obtain permanent legal residence in the country once the three-year visa has expired.[17]

The S visa, also known as the "snitch visa," was first established after the 1993 World Trade Center bombings and was made permanent after the attacks of September 11, 2001.[18] As established in the Violent Crime Control and Law Enforcement Act of 1994, the visa is divided into two subcategories.[19] The S-5 visa pertains to individuals "whose presence . . . is essential to the success of an authorized criminal investigation or . . . prosecution" due to the information they provide about a criminal organization.[20] The S-6 visa removes the "essential" standard and instead provides protections to individuals with information on a terrorist organization who "will be or ha[ve] been placed in danger as a result of providing such information."[21]

Though the statutory language of the S visa does not explicitly state that recipients must be formal cooperators or informants working with a government agency, this requirement is implicit.[22] First, the

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16. 8 U.S.C. § 1101(a)(15)(S) (2018).

17. See Green Card for an Informant (S Nonimmigrant), USCIS, https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-an-informant-s-nonimmigrant [https://perma.cc/V94P-AFFJ] (last updated Dec. 14, 2017). Note that if an individual applies for a green card and is denied, they no longer receive S-visa protections after three years and are therefore removable from the country. U.S. Dep't of State, Foreign Aff. Manual, 9 FAM 402.6-4(H)(a) (Sept. 23, 2024), https://fam.state.gov/fam/09FAM/09FAM040206.html [https://perma.cc/J5F5-9DXD].

18. See Carrie Johnson, 'Snitch' Visa: Tool to Get Terrorism Suspects Talking, NPR (July 16, 2010), https://www.npr.org/2010/07/16/128543298/snitch-visa-tool-to-get-terrorism-suspects-talking [https://perma.cc/GCV4-VA6M].

19. Violent Crime Control and Law Enforcement Act Title XIII § 130003, Pub. L. No. 103-322, 108 Stat. 1796, 2024 (codified at 8 U.S.C. 1101(a)(15)).

20. 8 U.S.C. § 1101(a)(15)(S)(i). Specifically, an S-5 recipient is someone who the Attorney General determines:

> (I) is in possession of critical reliable information concerning a criminal organization or enterprise;
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> (II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and
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> (III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise . . . .

Id.

21. 8 U.S.C. § 1101(a)(15)(S)(ii). An S-6 recipient must meet the same (I) and (II) requirements listed above for the S-5 recipient, focusing on information about a "terrorist organization, enterprise, or operation." Id.

22. The DOJ Criminal Resource Manual, for example, has continuously referred to the S visa as applying to witnesses and informants, stating that the visa "is particularly useful for witnesses or informants who would otherwise be in danger in their home countries. It is also a substantial benefit for many other witnesses and informants who might not otherwise

aforementioned language of "critical reliable information" to be supplied to agencies or courts suggests that recipients must be substantially involved in the activity. An S-visa recipient must also report quarterly to their sponsoring law enforcement agency,[23] indicating that the recipient must have enough information to justify a formal ongoing relationship with the agency. Unlike the T and U visas, which are self-petitioned, the S visa requires a petitioning agency to apply on behalf of the individual.[24] This further signifies that the individual and agency must have a preexisting formal relationship. Finally, the limited supply of S visas suggests it is likely that only migrants with strong ties to agencies will become visa recipients. By law, only two hundred S-5 visas and fifty S-6 visas can be granted per year, and leftover visas cannot carry over into future years.[25]

Because the S visa only applies to cooperators and informants, individuals like the one at the start of the Note cannot qualify for visa protections. Out of recognition that individuals may work with government agencies without reaching the standards of the various prosecutorial visas, deferral protections have emerged in recent years.

2. *Deferral of Proceedings.* — Agency deferrals of proceeding requests are more formalized versions of individual noncitizens' prosecutorial discretion requests.[26] They consist of both general requests that apply to any type of case, and specific requests for labor and civil rights violations. None of these existing protections effectively covers the subset of individuals this Note focuses on.

Law enforcement agencies have the broad ability to request deferred action and stay of removal for individual noncitizens who are witnesses, victims, or defendants in a criminal trial.[27] To facilitate this process, the law enforcement agency must not only compose a written request but also

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be able legally to enter or remain in the United States." DOJ Archives, Criminal Resource Manual § 1862 (2011).

23. 8 U.S.C. § 1184(k)(3)(A).

24. See DOJ Archives, supra note 22, § 1863 ("To apply for S visa classification on behalf of an eligible alien, a sponsoring law enforcement agency must complete a Form I-854 and a worksheet prepared by the Office of Enforcement Operations (OEO), together with the supporting documents specified in those forms."). Petitioning agencies broadly include federal, state, or law enforcement authorities that investigate or prosecute criminal or terrorist organizations. Id.

25. 8 U.S.C. § 1184(k)(1). In comparison, the T visa is capped at twenty times as many, and the U visa is capped at forty times as many, the number of total S-visa recipients. Id. § 1184(o)(2), (p)(2).

26. Individual prosecutorial discretion requests can follow any variety of formats depending on the individual field office's preferences. Doyle Memorandum: Frequently Asked Questions and Additional Instructions, ICE, https://www.ice.gov/about-ice/opla/prosecutorial-discretion [https://perma.cc/7AE2-THRC] [hereinafter ICE, Doyle FAQ] (last visited Aug. 1, 2024). For more on immigration prosecutorial discretion, see section I.B.

27. See ICE, Protecting the Homeland: Tool Kit for Prosecutors 4–8 (2011), https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf [https://perma.cc/87J8-4XFU].

conduct a risk and threat assessment of the noncitizen.[28] This compilation is then sent to either the local ICE Enforcement and Removal Operations (ERO) Field Office Director (FOD) or the Homeland Security Investigation's (HSI) Special Agent in Charge (SAC).[29] Along with an explanation of why they are seeking deferred action, the law enforcement official must also include the noncitizen's personally identifying information.[30] If the noncitizen is in ICE custody, officials must prove they are able to bring the individual fully into their agency's custody and monitor the individual for the duration of the deferred action.[31]

This traditional deferral program does not adequately protect the group at hand for two reasons. First, the individuals this Note addresses are not involved at trial in any of the protected capacities. Given they have limited information on ongoing criminal activity, they would not serve as strong witnesses, and thus the prosecution would likely not call them to trial. They also do not qualify as victims of crime because they participated in the criminal conduct.[32] They clearly are not defendants, as they have not been charged with any wrongdoing. Thus, law enforcement agencies would not have grounds to submit a deferred-action request. Second, as laid out above, the traditional deferred-action program contains significant procedural requirements. Given an agency's minimal prior interaction with and limited future use of the noncitizen, it likely does not want to undergo the burden of conducting a risk analysis and monitoring the individual for the duration of deferred action. The negative impacts of the procedural requirements are indicated both by available data suggesting a continual decline in the use of traditional deferred-action protections[33] and by the recent development of streamlined deferred-action requests.[34]

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28. Id. at 5.

29. Id.

30. Id.

31. Id. at 6.

32. Note that, though the criminal activity stemmed from interactions in the workplace, economic coercion alone would not qualify defendants as victims under current U.S. standards. See 18 U.S.C. § 3771(e)(2)(A) (2018) ("The term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.").

33. The lack of transparency surrounding deferred-action requests granted by ICE and USCIS makes it difficult to determine how successful law enforcement agency requests are. Shoba Sivaprasad Wadhia, Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law, 10 U.N.H. L. Rev. 1, 34–44 (2010) [hereinafter Wadhia, Sharing Secrets]. Data collected from ICE between 2003 to 2010 indicates that the number of total deferrals granted (including but not limited to those made by law enforcement agencies) have almost consistently declined yearly: The number of reported requests granted in 2003 (117) was ten times the number granted in 2010 (16). Id. at 36.

34. See infra notes 35–42 and accompanying text. Although exact numbers are not available to compare how often this traditional deferred-action program is used compared to the new streamlined program, the existence of a new program alone suggests that the original procedure has areas to be improved.

A new labor and civil rights program has streamlined DHS's typical requests for deferred-action discretion by allowing noncitizens to self-petition for protections and establishing a central intake point for all requests.[35] Individuals who specifically provide information about labor and civil rights violations may request deferred action of removal proceedings in exchange for assisting agency officials.[36] Rather than spearheading the entire process, labor agencies must simply write a supporting letter addressing specific criteria for the request.[37]

The new deferred-removal program lasts for two years at a time, though individuals can submit new requests upon expiration so long as the basis for the law enforcement agency's deferral request remains.[38] Unlike nonimmigrant visa holders, deferred-action recipients cannot apply for green cards.[39] Recipients of deferred action can, however, apply for and obtain employment authorization.[40]

This program seemingly lowers the level of involvement noncitizens need to have at trial to gain deferred-action protections. Individuals who have incurred serious enough labor or civil rights violations to serve as witnesses or victims at trial would qualify for U or T visas, which provide much greater protections than deferred action.[41] Those who apply for the deferral program, therefore, have likely undergone lesser violations or served as eyewitnesses rather than suffered as victims of crime.

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35. See Press Release, DHS, DHS Announces Process Enhancements for Supporting Labor Enforcement (Jan. 13, 2023), https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations [https://perma.cc/Y8JJ-3SJR] (last updated Jan. 18, 2024) [hereinafter DHS, Process Enhancements].

36. Relevant agency officials "include, but are not limited to, the DHS Office of Inspector General, Office for Civil Rights and Civil Liberties, Department of Justice (DOJ) Civil Rights Division Immigrant and Employee Rights Section, Department of Labor, National Labor Relations Board, Equal Employment Opportunity Commission, ERO, Homeland Security Investigations, and any relevant state counterparts." Memorandum from Kerry E. Doyle, Principal Legal Advisor, ICE on Guidance to OPLA Att'ys Regarding the Enf't of Civ. Immigr. L. and the Exercise of Prosecutorial Discretion to All OPLA Att'ys 5 & n.12 (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [https://perma.cc/8RMV-YTDB] [hereinafter Doyle Memorandum].

37. See DHS, Process Enhancements, supra note 35; see also DHS, Requests for Deferred Action for Workers in Support of Labor Agency Investigations, https://www.dhs.gov/sites/default/files/2024-01/24_0117_sec_deferred-action-infographic_english.pdf [https://perma.cc/2ERT-WFF6].

38. DHS, DHS Support of the Enforcement of Labor and Employment Laws, https://www.dhs.gov/enforcement-labor-and-employment-laws [https://perma.cc/YUK6-3SPH] (last updated July 23, 2024) [hereinafter DHS, Enforcement of Laws].

39. See id. ("[D]eferred action does not confer lawful status or excuse any past or future periods of unlawful presence . . . ."). Note that this means deferred-action recipients cannot directly petition for permanent residence in the country as part of the deferred-action program.

40. Id.

41. Id.

Immigration officials recognize that immigration status often gets exploited in labor and employment contexts and thus seek to protect all noncitizens who report such misbehavior, even if those who report are not directly affected.[42] The key problem is that the program only applies to victims and eyewitnesses of labor and civil rights violations. It would not protect the group addressed by this Note—those who were knowingly involved in criminal activity.

B. *Informal Procedures—Immigration Prosecutorial Discretion*

Given the stringent requirements of formal immigration protections, migrants who receive benefits often do so in large part based on immigration officers' prosecutorial discretion. Prosecutorial discretion is defined as "the longstanding authority of an agency charged with enforcing the law to decide where to focus its resources and whether or how to enforce the law against an individual."[43] The use of prosecutorial discretion for determining nonpriority status in immigration cases first became widespread in 1975.[44] For a myriad of financial, humanitarian, and political reasons, immigration officials have since focused their efforts on target issues rather than equally penalizing all immigration transgressions.[45]

The concept of prosecutorial discretion is most commonly associated with criminal law.[46] While the exercise of discretion in the immigration field resembles much of the practice in the criminal field, key differences embolden immigration officials more than criminal officials.[47]

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42. See Memorandum from Alejandro N. Mayorkas, Sec'y, DHS on Guidance for the Enf't of Civ. Immigr. L. & the Exercise of Prosecutorial Discretion to Tae D. Johnson, Acting Dir., ICE 5 (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/5GEG-BSM8] [hereinafter Mayorkas Memorandum] ("It is an unfortunate reality that unscrupulous employers exploit their employees' immigration status and vulnerability to removal by, for example, suppressing wages, maintaining unsafe working conditions, and quashing workplace rights and activities. Similarly, unscrupulous landlords exploit their tenants' immigration status and vulnerability . . . .").

43. ICE, Doyle FAQ, supra note 26.

44. Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law, 9 Conn. Pub. Int. L.J. 243, 246 (2010) [hereinafter Wadhia, Prosecutorial Discretion].

45. See id. at 244–45 ("The theory behind prosecutorial discretion is seemingly simple and two-fold. The first theory is monetary. . . . The second theory is humanitarian."); see also Nicole Hallett, Rethinking Prosecutorial Discretion in Immigration Enforcement, 42 Cardozo L. Rev. 1765, 1767 (2021) ("[T]he congressional impasse on immigration has emboldened successive administrations to stretch executive power to its limits in attempts to accomplish what Congress either cannot or will not. The result is an immigration policy that swings violently depending on the administration in office.").

46. For a basic understanding of criminal prosecutorial discretion, see supra note 3.

47. Similarities include the financial and humanitarian motives underlying prosecutorial discretion and the need for discretion due to overinclusive lists of activities that constitute infractions. Earlier immigration-discretion guidelines also relied on criminal guidelines to determine policies, thereby resulting in similar outlooks on prosecutorial

Immigration officials have both the power to arrest and the power to bring charges against migrants, going beyond criminal prosecutors' sole discretion over charges.[48] Although criminal prosecutors do work closely with law enforcement agents who conduct arrests, their powers are still distinct, which provides greater checks on the criminal system than the immigration system. The standard for proving an immigration violation is also far lower than that for a criminal violation, so immigration officials have fewer institutional incentives against charging individuals.[49] Finally, because migrants are not guaranteed a right to counsel in immigration court, immigration officials hold even greater power in the adjudication process than criminal prosecutors do.[50] Recognizing immigration officials' vast authority, guidelines on immigration-enforcement priorities push for consistent discretion in immigration cases. This section first outlines prosecutorial-discretion guidelines under the current administration and then evaluates prosecutorial discretion in practice.

1. *The Mayorkas and Doyle Memoranda.* — Memoranda published at the start of each administration establish guidelines for immigration agencies' enforcement of civil immigration law. On September 30, 2021, Secretary of Homeland Security Alejandro N. Mayorkas released a final memorandum to the Acting Director of ICE on the use of prosecutorial discretion.[51] Based on Supreme Court precedent emphasizing the exercise of immigration-enforcement discretion[52] and on the belief that "[j]ustice and our country's well-being require [discretion],"[53] Secretary Mayorkas underscored the importance of rewarding noncitizens' contributions to society. Specifically, the Mayorkas Memorandum guides immigration officials to use their discretion to focus efforts on noncitizens who are (1) a threat to national security, (2) a threat to public safety, or (3) a threat to border security.[54] The memo also highlights aggravating and mitigating factors for determining who constitutes a "threat to public safety."[55]

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discretion. For more on this, see Wadhia, Prosecutorial Discretion, supra note 44, at 268–72 (applying criminal prosecutorial discretion to the immigration context due to certain similarities in the two fields).

48. Id. at 274.

49. Id. at 277–78.

50. Id. at 277; see also Doyle Memorandum, supra note 36, at 8–9 ("Fundamentally, OPLA attorneys play a significant and important role as officers of the court and DHS representatives . . . . OPLA attorneys should be particularly mindful of their role and the important impact that their representation of DHS can have in cases involving pro se respondents.").

51. Mayorkas Memorandum, supra note 42.

52. Arizona v. United States, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials.").

53. Mayorkas Memorandum, supra note 42, at 2.

54. Id. at 3–4. Note that any noncitizen who is caught while attempting to enter unlawfully or who has entered unlawfully after November 1, 2020, meets "threat to border security" criterion. Id.

55. Id.

To further elucidate these priorities, Kerry E. Doyle, the Principal Legal Advisor at ICE, distributed her own memorandum among Office of the Principle Legal Advisor (OPLA) attorneys in April 2022.[56] OPLA is comprised of more than 1,300 attorneys who represent DHS in immigration removal proceedings and provide legal advice and other services to ICE offices.[57] The Doyle Memorandum elaborates on Secretary Mayorkas's three categories to maintain consistency among OPLA attorneys and inform their work before immigration courts, specifically the Executive Office for Immigration Review (EOIR).[58]

The Mayorkas Memorandum, and by extension the Doyle Memorandum, have faced significant challenges in court. From March through June 2022, a nationwide injunction limited DHS's discretion to release individuals in mandatory detention and to grant discretionary stays of removal when disallowed by statute.[59] While this first case was being argued in the Sixth Circuit, a separate suit vacated the entirety of the Mayorkas Memorandum on the grounds that it was arbitrary, contrary to law, and violative of procedures mandated by the Administrative Procedure Act.[60] The Mayorkas and Doyle Memoranda were thereby invalidated in June 2022.[61] The Supreme Court finally reinstated the Mayorkas and Doyle Memoranda one year later.[62] The guidelines laid out in the Memoranda have thus been the guiding principles for immigration officials since June 2023.

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56. Doyle Memorandum, supra note 36.

57. Office of the Principal Legal Advisor, ICE, https://www.ice.gov/about-ice/opla [https://perma.cc/LRC3-JJSQ] [hereinafter ICE, OPLA] (last visited July 31, 2024).

58. Doyle Memorandum, supra note 36, at 3. The EOIR adjudicates all immigration removal decisions in the United States. Executive Office for Immigration Review, Organization, Mission and Functions Manual, DOJ, https://www.justice.gov/doj/organization-mission-and-functions-manual-executive-office-immigration-review [https://perma.cc/WWG7-5HTX] (last visited July 31, 2024) [hereinafter DOJ, EOIR Manual].

59. In March 2022, the states of Arizona, Montana, and Ohio won a suit in the Southern District of Ohio for a preliminary injunction barring use of specific aspects of the Mayorkas Memorandum. Arizona v. Biden, 593 F. Supp. 3d 676, 736 (S.D. Ohio 2022). Four months later, the Sixth Circuit overturned this injunction. Arizona v. Biden, 40 F.4th 375, 380 (6th Cir. 2022).

60. Texas v. United States, 606 F. Supp. 3d 437, 450 (S.D. Tex. 2022).

61. Texas v. United States, 40 F.4th 205, 213 (5th Cir. 2022).

62. United States v. Texas, 143 S. Ct. 1964, 1976 (2023). The Supreme Court held that Texas and Louisiana lacked Article III standing to challenge the guidelines because lack of prosecution does not result in a legally and judicially cognizable harm. Id. This case was clearly controversial, as many states filed amicus briefs in favor of Texas and Louisiana. See Brief of the States of Arizona, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Wyoming as Amici Curiae in Support of Respondents at 4, *Texas*, 143 S. Ct. 1964 (No. 22A17), 2022 WL 16708872; Brief of State of Florida as Amicus Curiae in Support of Respondents at 3, *Texas*, 143 S. Ct. 1964 (No. 22-58), 2022 WL 16239734.

Undocumented migrants like the individual discussed at the start of this Note are likely deemed enforcement priorities under current memo guidelines. The Mayorkas Memorandum deems individuals who entered the country unlawfully after November 1, 2020, to constitute "threat[s] to border security" under the third enforcement priority.[63] This would encompass a significant number of people currently living in the United States who, for no reason besides their timing of entry, are deemed removal interests. Other individuals who knowingly engaged "in the smuggling of noncitizens" or immigration benefit fraud may also fall under this category, even if they were not criminally charged with such offenses.[64] Individuals may also be subject to enforcement as "threat[s] to public safety" per the second enforcement priority.[65] The Doyle Memorandum clarifies that "an individual's convictions or prosecutions are not the only indicators of whether or not an individual poses a current threat to public safety."[66] This not only means that individuals with convictions do not necessarily pose a threat to public safety but also that individuals without convictions may still be deemed to pose such a threat.[67] Based on a plain reading of the Doyle Memorandum, the fact that the government learned of an undocumented migrant's presence due to their interaction with the criminal justice system may be enough for an OPLA attorney to determine that the migrant is an enforcement priority.[68] The distinction between a witness and an involved individual is crucial here—though a witness would likely not be deemed a "threat" to public safety, an individual even minorly involved in a crime could be.[69]

Although mitigating factors may point toward protecting migrants who provide truthful information to the government, current guidelines on this issue are unclear. The Doyle Memorandum lays out mitigating circumstances that could weigh in favor of nonprosecution, including "status as a cooperating witness or confidential informant."[70] Here, the individual's official status appears to be key—someone who does not qualify to serve as a cooperator or informant likely would not qualify for

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63. See Mayorkas Memorandum, supra note 42, at 4.

64. Doyle Memorandum, supra note 36, at 6. For example, a noncitizen who has willfully misrepresented a material fact to a U.S. official in hopes of gaining a "benefit under U.S. immigration laws"—even without intent to deceive—is deemed inadmissible under immigration law even without a criminal case. Overview of Fraud and Willful Misrepresentation, USCIS, https://www.uscis.gov/policy-manual/volume-8-part-j-chapter-2 [https://perma.cc/RB34-XGV5] (last visited Aug. 1, 2024).

65. Mayorkas Memorandum, supra note 42, at 3.

66. See Doyle Memorandum, supra note 36, at 4.

67. Id.

68. See id. ("[A] removable noncitizen may play a role in the criminal activities of a violent organization but may not yet have been arrested or prosecuted . . . . Such individual may be deemed a significant threat, nonetheless.").

69. See id. at 5 (explaining that cooperating as a witness is a mitigating factor in determining whether one poses a threat to public safety).

70. Id.

such discretionary protections.[71] The Memorandum mentions that "other assistance sought from the noncitizen by, or provided by the noncitizen to, federal, state, local or tribal law enforcement" could mitigate against enforcement but does not clarify how this factor is applied in practice.[72] Individuals who speak to police officers or prosecutors but are not charged with offenses typically do not receive documentation of such dialogue, such that there is no easy method to substantiate a claim of assistance. Even if an individual tracks down the specific government officials that they spoke to and those officials vouch that the migrant truthfully assisted in a police interrogation or attorney proffer,[73] there is no established baseline for what constitutes "other assistance" provided to receive immigration protections. These systematic hurdles likely affect most individuals in situations analogous to the hypothetical at the start of the Note. The nature of immigration prosecutorial discretion suggests that some individuals who truthfully provide information to the government will be protected under this vague provision while others will not. Such outcomes will not only be based on the specific facts of individuals' cases but will also likely depend on which OPLA attorney happens to be assigned to their case.[74]

2. *Prosecutorial Discretion in Practice*. — OPLA attorneys have the power to exercise discretion by not filing a Notice to Appear (NTA), dismissing or terminating proceedings, or administratively closing a case.[75] Because discretion decisions are made on a case-by-case basis, it is difficult to predict how any individual case will turn out. Since the first official discretion guidelines were released, immigration agencies have made clear that "[g]eneral guidance . . . cannot provide a 'bright line' test that may easily be applied to determine the 'right' answer in every case" because "minds reasonably can differ."[76] Although such flexibility is meant

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71. Notably, the Doyle Memorandum does not clarify how formally one's "status" needs to be documented. There may be police offices without formal registries of official informants. Cooperation agreements almost always have formal proof. See Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 Vand. L. Rev. 1, 4–7 (1992) (emphasizing the formality of cooperation agreements, which could include making formal grants in public proceedings).

72. Doyle Memorandum, supra note 36, at 5. The Memorandum specifically highlights assistance to labor and civil rights enforcement agencies, creating further ambiguities about how the guidelines would be applied to people working with other law enforcement agencies. Id. The Memorandum also looks to "readily available, persuasive evidence of mitigating factors" to "clearly overcome" someone's priority determination, which likely requires greater evidence than provided at this stage. Id. at 7; see also infra note 73 and accompanying text.

73. This is not an easy feat—officers and prosecutors do not benefit from helping minor players who have already provided all the information they have. Criminal law enforcement's willingness to corroborate these past encounters thus cannot be assumed.

74. For more on factors leading to varying case outcomes, see infra section I.B.2.

75. Doyle Memorandum, supra note 36, at 10.

76. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv. on Exercising Prosecutorial Discretion to INS Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, and

to help migrants, it may actually result in arbitrariness and lack of consistency, which harms individual relief-seekers.[77]

The crux of the issue stems from the fact that once an agency reaches a priority decision, few if any opportunities exist to overturn such discretion. OPLA attorneys are instructed to defer to any priority decisions made by ICE, USCIS, and U.S. Customs and Border Protection (CBP) after the institution of the Mayorkas Memorandum.[78] These three agencies work jointly to enforce U.S. immigration law: ICE enforces detention and removal operations, USCIS evaluates immigration and naturalization benefits, and CBP administers law at and between ports of entry into the country.[79] Their agents' decisions to bring charges thus cannot be easily altered. If an OPLA attorney made the initial discretionary decision, they have greater flexibility in changing priority or nonpriority status, though this still requires the field location's Chief Counsel's approval.[80] Outside of this process, cases can only be changed if individual migrants themselves submit affirmative requests for prosecutorial discretion with the agency.[81] All other cases deemed to be enforcement priorities cannot benefit from subsequent prosecutorial discretion by OPLA attorneys; attorneys are expected to abide by priority decisions and to litigate such cases to completion.[82]

Furthermore, the use of discretion has varied significantly based on the location of a given ICE office.[83] Thus, without OPLA attorneys or judges retaining the ability to overturn agency decisions, the removal

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Reg'l & Dist. Couns. 8 (Nov. 17, 2000), https://www.aila.org/aila-files/AD41F82E-81E2-4AFE-92FA-827D2927EF69/00112702.pdf [https://perma.cc/46RL-SYCV].

77. See Maria A. Fufidio, Note, "You May Say I'm a Dreamer, but I'm Not the Only One": Categorical Prosecutorial Discretion and Its Consequences for US Immigration Law, 36 Fordham Int'l L.J. 976, 1015–16 (2013) ("This may result in arbitrary decision-making made at the individual level, and a lack of consistency across similar cases.").

78. Doyle Memorandum, supra note 36, at 7.

79. Immigration Enforcement Actions Annual Flow Report, DHS, https://www.dhs.gov/ohss/topics/immigration/enforcement-AFR#:~:text=CBP%20enforces%20immigration%20laws%20at,for%20immigration%20and%20naturalization%20benefits [https://perma.cc/E4PZ-US2B] (last visited Aug. 1, 2024).

80. Doyle Memorandum, supra note 36, at 8. OPLA has twenty-five field locations in the country, each of which is headed by a Chief Counsel, whose role includes guiding DHS lawyers in EOIR immigration courts. See ICE, OPLA, supra note 57.

81. Doyle Memorandum, supra note 36, at 8, 10. For the official guidance given to individuals seeking prosecutorial discretion, see ICE, Doyle FAQ, supra note 26. Even though this guidance exists, information about such requests may not be widely known in migrant communities. This issue is likely further exacerbated by the lack of appointed counsel in immigration matters. See infra section III.B.1 for more on this issue.

82. Doyle Memorandum, supra note 36, at 10.

83. See Madison Burga & Angelina Lerma, The Use of Prosecutorial Discretion in the Immigration Context After the 2013 ICE Directive: Families Are Still Being Torn Apart, 42 W. St. L. Rev. 25, 33 (2014) ("[T]he use of prosecutorial discretion has varied from state to state, ranging from approximately three percent of cases in Las Vegas, San Antonio, and New York to twenty-four percent in Los Angeles and thirty-one percent in Tucson, Arizona." (footnote omitted)).

process remains a haphazard geographical lottery. This is exacerbated by the fact that deeming a case as nonpriority simply delays an outcome, rather than officially closing the case.[84] Without a clearer definition of "other assistance" or the ability to authenticate that such assistance has occurred, prosecutorial discretion will likely continue to uphold a state of uncertainty regarding one's immigration status in the country. As such, the existence of prosecutorial discretion alone does little to alleviate immigration repercussions for noncitizens who have engaged in minor criminal behavior.

II. MISSING PROTECTIONS

This Note seeks to provide benefits to individuals who remain unprotected under the current system by applying the idea of the safety valve and good-faith cooperation from the criminal context into the immigration context. This Part first highlights the high bar to serving as a cooperator or informant and explores the criminal safety valve and good-faith cooperation as an alternative. It then delves into why limitations of the S visa suggest that working within the existing framework to broaden visa protections will not sufficiently safeguard the population at hand.

A. *The Unaccounted-For Group*

To understand the predicament facing unprotected individuals, this section delves into the criminal law parallels to the immigration protections in Part I. It first explores the roles of cooperators and informants and the many critiques of their functions. It then explores the criminal safety valve and good-faith cooperation as an alternative means of protection.

1. *High Bar to Becoming Government Cooperators and Agency Informants.* — Government cooperators and agency informants form the backbone of the criminal legal system. Confidential informants provide intelligence and operational assistance to officers and agents conducting ongoing criminal investigations.[85] Defendant cooperators assist criminal attorneys in the investigation and prosecution of other individuals through both information-sharing and witness testimony.[86]

Nevertheless, the government holds inordinate power in these relationships.[87] Section 5K1.1 of the United States Sentencing

84. Doyle Memorandum, supra note 36, at 10.

85. Though some informants work for money, the relevant group to this Note works in exchange for leniency on criminal charges.

86. DOJ, Just. Manual § 9-27.410 (2023); DOJ, Just. Manual § 9-27.420 (2018).

87. See Ian Weinstein, Regulating the Market for Snitches, 47 Buff. L. Rev. 563, 577 (1999) ("[T]he government is the sole gatekeeper for cooperation departures."); Shana Knizhnik, Note, Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator's Dilemma, 90 N.Y.U. L. Rev. 1722, 1724 (2015) ("Prosecutors essentially have unilateral bargaining power to obtain any and all inculpatory information possessed by a

Commission's Guidelines allows sentences to be reduced below the conduct's guidelines when individuals provide "substantial assistance in the investigation or prosecution of another person."[88] Because § 5K1.1 parameters do not clarify what constitutes "substantial assistance" and sentencing benefits are provided only "[u]pon motion of the government," agencies have nearly full authority in the cooperator determination.[89] Thus, each agency sets its own expectations for its cooperators or informants,[90] and even within agencies, there may be inconsistencies in how the "substantial" requirement is evaluated.[91] Despite these individual differences, agencies uniformly uphold a high bar for reaching the "substantial" standard.[92] Prosecutors from varying districts indicate that insufficient and unhelpful information constitute some of the most frequent reasons that individuals do not receive cooperation agreements.[93] In comparison, a defendant being "too culpable relative to others" in criminal activity rarely serves as a barrier to cooperation agreements.[94] This means that individuals marginally involved in a larger organized crime or conspiracy likely do not have enough novel insight to be considered "substantial" assisters.[95]

The high bar to receiving cooperator and informant benefits has resulted in significant critiques of the process. Out of a desire to gain maximum leniency, cooperators may purposefully spin court testimony in favor of the government.[96] In a similar vein, informants may persuade

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defendant—regardless of whether providing that information will actually result in a lesser sentence.").

88. U.S. Sent'g Guidelines Manual § 5K1.1 (U.S. Sent'g Comm'n 2023).

89. Id.

90. Prosecutors typically make the final call on what constitutes "substantial assistance" but are often heavily influenced by agency expectations in doing so. For example, the type of information considered "substantial" enough to gain informant status for the FBI may be different than for DHS. See generally Shari A. Brandt, Margaret W. Meyers & Jamie A. Schafer, United States: Avoiding Common Pitfalls When Cooperating with Government Investigations, Ams. Investigations Rev., Oct. 2020, at 125 (outlining the guidelines various agencies have espoused for defendants to receive cooperation benefits).

91. See Knizhnik, supra note 87, at 1732 ("There is no definition of 'substantial assistance' to guide prosecutors in their decisionmaking and, indeed, individual United States Attorneys' offices vary widely with respect to 5K1.1 motions.").

92. Brandt et al., supra note 90, at 135.

93. Jessica A. Roth, Anna D. Vaynman & Steven D. Penrod, Why Criminal Defendants Cooperate: The Defense Attorney's Perspective, 117 Nw. U. L. Rev. 1351, 1392 tbl.5 (2023).

94. Id.

95. Knizhnik, supra note 87, at 1726.

96. Daniel C. Richman, Informants & Cooperators, *in* Bridging the Gap: A Report on Scholarship and Criminal Justice Reform 279, 287 (Erik Luna ed., 2017) [hereinafter Richman, Informants & Cooperators] ("[C]ooperators seeking to gain maximal leniency via the prosecutor's recommendation will shade their testimony to favor the government, at the expense of the defendant.").

others to commit crimes.[97] There are particular concerns that individuals will use the government power backing them to target and implicate criminal rivals.[98] Even if such perverse incentives do not influence an individual cooperator or informant, the threat that such incentives exist results in social instability.[99] Cooperators and informants are thus vulnerable to both physical and psychological retaliation due to the way their actions are perceived in the broader community.[100]

These prevailing problems are particularly accentuated in the immigration context. Susceptible populations, such as individuals facing deportation, often feel pressured into cooperator and informant work because of the unique challenges they face.[101] These informants have less bargaining power and face potentially more serious consequences for failing to meet agency demands, thereby increasing their incentives to fabricate information and incriminate innocent individuals.[102] This has been a problem particularly in the S-6 terrorism context, in which the FBI has reportedly persuaded individuals with no prior experience to serve as informants in exchange for immigration protections.[103] These relationships have damaged the sentiment of community safety, reduced

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97. See Lesley Stahl, Confidential Informants, CBS News (Dec. 6, 2015), https://www.cbsnews.com/news/confidential-informants-60-minutes-lesley-stahl/ [https://perma.cc/GN33-RGYY].

98. Alexandra Natapoff, Snitching: The Institutional and Communal Consequences, 73 U. Cin. L. Rev. 645, 674 (2004); Richman, Informants & Cooperators, supra note 96, at 284.

99. Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice 137–38 (2d ed. 2022).

100. Id. at 189.

101. See id. ("Vulnerable informants . . . are more subject to coercion, less likely to be able to make good decisions on their own behalf, and as a result more likely to enter into bad deals or get hurt as a result of their cooperation.").

102. Emily Stabile, Comment, Recruiting Terrorism Informants: The Problems With Immigration and the S-6 Visa, 102 Calif. L. Rev. 235, 246 (2014).

103. See, e.g., Wadie E. Said, The Terrorist Informant, 85 Wash. L. Rev. 687, 710 (2010) ("In cases where the individuals refuse the FBI's invitation [to become informants], the agency increases the pressure by seeking to deport them, in the hopes that the threat of being forcibly removed from the United States will cause them to change their minds."); Diala Shamas, A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants, 83 Brook. L. Rev. 1175, 1191 (2018) ("[A]n FBI training presentation obtained by civil liberties groups 'on recruiting informants in the Muslim community suggest[ed that] agents exploit "immigration vulnerabilities" because Muslims in the United States are "an immigrant community."' Another presentation urged agents to leverage the 'immigration relief dangle.'" (alteration in original) (footnote omitted) (first quoting ACLU, Unleashed and Unaccountable 40 (2013); then quoting Cora Currier, Revealed: The FBI's Secret Methods for Recruiting Informants at the Border, The Intercept (Oct. 5, 2016), https://theintercept.com/2016/10/05/fbi-secret-methods-for-recruiting-informants-at-the-border/ (on file with the *Columbia Law Review*))).

the prevalence of cooperative intelligence information, and even led to the entrapment of innocent individuals.[104]

In response to the high bar for attaining cooperator or informant status and the societal challenges outlined above, there has been an increasing push toward other forms of protection from criminal prosecution.

2. *Other Forms of Protection: Criminal Safety Valve and Good-Faith Cooperation.* — A large class of individuals who are willing to cooperate with the government fail to gain cooperation status due to their lack of information about ongoing criminal activity.[105] This may occur for a range of reasons: the individual was not involved enough to learn details about other illicit activity,[106] a similarly situated individual already signed on to cooperate and provided the same information,[107] law enforcement agents learned the same information through their own investigations,[108] or a higher-up member of the group signed on with even more information than this individual can provide.[109] Even when official cooperator or informant benefits are not available, other forms of protection exist for individuals who work truthfully with law enforcement. These include the safety-valve protection for certain crimes with statutory mandatory minimums and downward variance in sentencing for all crimes without mandatory minimums.

Congress passed the first safety-valve provision in 1994[110] in response to the influx of incarceration for low-level drug crime and the difficulty in achieving cooperator benefits.[111] The safety valve provides defendants

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104. See Said, supra note 103, at 715–33 (analyzing high-profile terrorism cases post-9/11 that have relied on informant testimony to evaluate their entrapment claims and concluding that these cases all had valid entrapment defenses, even though the court did not rule in favor of any of them); Stabile, supra note 102, at 246–58 (laying out how use of immigrant informants chills free speech, encourages religious and ethnic profiling, damages cooperative intelligence efforts, and leads to entrapment).

105. See supra note 93 and accompanying text.

106. See Knizhnik, supra note 87, at 1726 ("[D]efendants peripherally involved in such conspiracies are not likely to hold the sort of novel evidence that could be considered 'substantial.'").

107. See id. at 1725 ("[T]he additional information necessary to receive a substantial assistance motion must be inculpatory as to crimes for which the government does not yet have sufficient evidence.").

108. See id. (asserting the government will only sign on cooperators for information it does not already have proof of).

109. See Weinstein, supra note 87, at 611–14 ("[H]igher level defendants will be better able to trade upon their supposedly more valuable information to receive lower sentences through cooperation than their less culpable, but less well informed underlings.").

110. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985–86 (codified at 18 U.S.C. § 3553(f) (2018)).

111. See Philip Oliss, Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines, 63 U. Cin. L. Rev. 1851, 1886–88 (1995) (arguing that the safety valve is a "congressional acknowledgement of the failings of mandatory minimum sentencing and an attempt to prevent future inequitable consequences").

convicted of certain nonviolent drug crimes with the ability to receive sentences below the defined statutory minimums.[112] Specifically, if the defendant has limited criminal history, was not a leader in the offense, did not use violence or credible threats of violence, and did not possess a firearm or other dangerous weapon in connection to the offense, then as long as the crime did not result in death or serious bodily injury to any person, the defendant may benefit from the safety valve.[113] To do so, the defendant must "truthfully provide[] to the Government all information and evidence the defendant has."[114] So long as this truthfulness requirement is met, even if the defendant provides "no relevant or useful other information" and "the Government is already aware of the information," the government can still recommend to the judge that the defendant receive safety-valve protections.[115]

Similar benefits exist for individuals charged with crimes that do not have statutory mandatory minimums. As held in *United States v. Booker*, judges are not required to impose a sentence within the range set by the Sentencing Guidelines but rather can consider other factors and establish a reasonable sentence below the range.[116] Judges can thus take into account readiness to cooperate and truthful but irrelevant information when determining a sentence.[117] This discretion applies to any crime without a mandatory minimum, thereby having a far greater impact than the safety valve's limited applicability in the drug context.

The criminal safety valve and advisory sentencing guidelines under *Booker* address one of the biggest inconsistencies of cooperation. Cooperators and informants typically retain substantial knowledge about ongoing criminal activity, which is why the government signs them on in the first place.[118] Providing sentencing benefits to these individuals without providing similar benefits to individuals less involved in criminal conduct seemingly contravenes the objective of fairness in criminal law.[119] In

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112. 18 U.S.C. § 3553(f).

113. Id. § 3553(f)(1)–(4).

114. Id. § 3553(f)(5).

115. Id.; see also id. § 3553(e) (requiring government motion for safety valve to take effect).

116. 543 U.S. 220, 264–65, 267–68 (2005).

117. See id. (noting that judges should be afforded flexibility to "individualize sentences where necessary").

118. Richman, Informants & Cooperators, supra note 96, at 282.

119. This is often referred to as the "cooperation paradox," which suggests that higher-level members of criminal activity often have more substantive information to share than less culpable codefendants, so they are the ones benefitting from cooperation deals. Weinstein, supra note 87, at 611–14. Data suggest that this is not necessarily the case, as lower-level participants in crime may have better insight on daily conduct than higher-ups. Id. Even if it does not apply in all contexts, the paradox likely does apply to some cases, as some individuals are so minimally involved that they do not have enough substantive information to share to get cooperator or informant benefits. For more on the cooperation paradox and its critiques, see id.

response, the safety valve and *Booker* provisions provide a route for less-involved members to engage in their own sharing of information and seek their own reductions in sentencing.

There have been increasing movements to expand the protections under the criminal safety valve to mirror the broad range of *Booker*. Most recently, the First Step Act (FSA) of 2018 broadened the offense categories and prior criminal history for eligible defendants.[120] Despite these changes, the FSA still narrowly limits eligibility for the safety valve to nonviolent drug offenses.[121] This leaves a wide range of low-level participants in nondrug offenses without a statutory route for leniency. In response to this continual problem, advocates have pushed for expanding the truthfulness benefit of the safety valve to other types of crime on the grounds of "good-faith cooperation."[122] Under this proposal, minor players would receive benefits for voluntarily and truthfully providing information to government officials, even if such information would not reach the current standard of cooperator or informant intelligence.[123] Additional proposals push for judges to consider good-faith assistance without a government motion to do so, whether that be by the judge's own volition or through the defendant's motion for consideration.[124] Such a system would recognize the contributions that good-faith cooperators and informants have made and proportionately reward them for truthfully working with the government. This would transform the current binary benefits program of the safety valve into a holistic, sliding-scale benefits program of good-faith cooperation and information. It would also likely diminish reliance on fabricated evidence by reducing the need to achieve cooperator or informant status and enabling the government to fact-check between defendants. Viewed together, these suggestions demonstrate a strong desire to provide protections for individuals who cannot reach the official status of cooperator or informant.

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120. First Step Act of 2018, Pub. L. No. 115-391 § 402, 132 Stat. 5194, 5221 (codified at 18 U.S.C. § 3553(f)). For a discussion of the political history of federal drug crime sentence changes leading up to the First Step Act of 2018, see generally Jesselyn McCurdy, The First Step Act Is Actually the "Next Step" After Fifteen Years of Successful Reforms to the Federal Criminal Justice System, 41 Cardozo L. Rev. 189 (2019).

121. First Step Act, § 402.

122. See I. India Geronimo, Comment, "Reasonably Predictable": The Reluctance to Embrace Judicial Discretion for Substantial Assistance Departures, 33 Fordham Urb. L.J. 1321, 1339–42 (2006); Knizhnik, supra note 87, at 1754–57.

123. See Geronimo, supra note 122, at 1339–42 ("Judges should . . . reduc[e] the sentences of offenders who provide a good faith effort to cooperate, where reasonableness so requires."); Knizhnik, supra note 87, at 1754–57 ("Just as Congress placed discretion in the hands of judges to determine defendants' qualification for the safety valve departure, the discretion to evaluate evidence regarding a defendant's attempted good faith cooperation also should be in judges' hands." (footnote omitted)).

124. See Geronimo, supra note 122, at 1342 (advocating for granting judges the power to consider good faith on their own); Knizhnik, supra note 87, at 1755–57 (advocating for granting defendants the ability to file a good-faith motion in front of a judge, who may be more sympathetic to lack of knowledge than a prosecutor would be).

B. *Reforming the S Visa Is Not Enough*

Despite multiple levels of cooperator protections in the criminal system, the immigration system has taken a narrower approach. The S visa only applies to formal government cooperators and agency informants; it does not safeguard recipients of safety valve or post-*Booker* downward variance protections who have exercised good-faith cooperation.[125] It thus definitely does not protect uncharged good-faith cooperators like the person at the start of this Note. While one proposal might be to broaden the S visa to cover these other forms of cooperation, this will likely fail. The S visa has faced significant criticism for its failure to adequately protect formal cooperators and informants. In light of these shortcomings, it appears highly infeasible to expand the S visa to cover good-faith cooperators and informants who have not attained official status.

Use of the S visa has continuously declined since its peak in 2001.[126] A study of foreign citizens admitted through the S-visa program from its inception in 1995 until 2018 indicates that the S visa has never been used to its full capacity of 250 visas in a year, and the S-5 visa has only once been used at more than half capacity.[127] A DOJ audit report of the S-visa program finds "diminished perceptions of the program's ability to achieve its intent."[128] Due to significant backlog and processing time, law enforcement agencies often determine it is not worth the effort to pursue visa protections, especially given such protections are not legally promised to cooperators in the first place.[129] Because of these barriers, no S-5 or S-6 visas have been issued since Fiscal Year 2013.[130]

The largest hurdle facing individuals appears to be convincing an agency to sponsor them. The problem is twofold. First, the visa application process requires the sponsoring government official to work through multiple layers of bureaucracy. Once a Form 1-854 application is prepared

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125. See supra notes 22–25 and accompanying text.

126. Brad Gershel, Nat'l Ass' of Crim. Def. Laws., Shining a Light on the "S" Visa: A Long History of Unfulfilled Promises and Bureaucratic Red Tape 23 chart 1 (2021), https://www.nacdl.org/getattachment/91baa4d2-05d0-42b3-833c-d466a544ca93/shining-a-light-on-the-s-visa-a-long-history-of-unfulfilled-promises-and-bureaucratic-red-tape.pdf [https://perma.cc/GXN5-V4RJ].

127. Id. at 20–21 & tbl.1.

128. Off. Inspector Gen., DOJ, Audit of the Department of Justice's Use of Immigration Sponsorship Programs 5 (2019), https://www.oversight.gov/sites/default/files/oig-reports/a1932.pdf [https://perma.cc/T527-QBQG].

129. See Gershel, Nat'l Ass'n of Crim. Def. Laws., supra note 126, at 21 ("[T]he potential benefits LEAs stand to gain from making use of the visa's availability are outweighed by the lengthy process involved, especially if an LEA is free to circumvent the process or break its promises without recourse.").

130. For yearly reports on the issuance of visas, see U.S. Dep't of State, Nonimmigrant Visa Statistics, Travel.State.Gov, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html [https://perma.cc/2AZT-D44A] (last visited Aug. 1, 2024).

and certified by the law enforcement agency's highest-ranking official, it is then sent to the Assistant Attorney General of the Criminal Division. At that point the Office of Enforcement Operations (OEO) balances the value of an individual's cooperation against the factors favoring their ineligibility.[131] If the Assistant Attorney General concurs with the OEO's conclusion to move the application forward, it is next sent to DHS. It is there that the ICE Homeland Security Investigations (ICE-HSI) directorate conducts its own evaluation.[132] The application is then sent to DHS's Executive Associate Director, who finally submits the application to USCIS for a final decision.[133] Because an application can be rejected at any point during this process, sponsoring agencies are likely wary to take on any applications that do not meet the highest of standards. Published data indicate that approximately eighty-six percent of submitted S-visa applications have been approved, but the bar to applying is rigid; S-visa recipients on average provide information for the conviction of 211 defendants in the fiscal year their visa is issued.[134] This suggests that recipients are typically involved in large-scale, multi-level criminal organizations.

The second, related issue is a lack of government incentives to follow through with S-visa applications. Law enforcement agencies face no consequences by reneging on discussions to apply for S visas because they cannot legally promise or provide immigration protections in the first place.[135] Government agencies have reportedly used the S visa to compel noncitizens to work for them, only to renege on their end of the deal and not apply for protections when the time comes.[136] While scholars have

131. Gershel, Nat'l Ass'n Crim. Def. Laws., supra note 126, at 12–14.

132. Id.

133. Id.

134. Id. at 26 & tbl.4.

135. 28 C.F.R. § 0.197 (2024); see also Prerna Lal, Reforming a Visa to Snitch: The Case for Self-Petitioning, 3 Accord Legal J. for Pracs. 63, 66 (2014).

136. Although exact statistics on how often the government promises to apply for S visas and fails to follow through with this promise are unavailable, prominent news coverage seems to suggest the issue is not minute. See Lal, supra note 135, at 66–70 (providing a laundry list of case studies demonstrating how the government has failed to follow through on promises to provide S visa protections); see also Andrew Becker, Retired Drug Informant Says He Was Burned, NPR (Feb. 13, 2010), https://www.npr.org/2010/02/13/122357350/retired-drug-informant-says-he-was-burned [https://perma.cc/BXT8-8WAL] ("They cited bureaucratic bungling, mistreatment and broken promises of being shielded from deportation in exchange for their cooperation in dangerous investigations. The informants have been willing to put their lives on the line, but now they face the prospect of harm in their native countries if they're sent back."); Helen O'Neill, Immigrants for Feds Face Deportation, NBC News (Feb. 13, 2010), https://www.nbcnews.com/id/wbna35383376 (on file with the *Columbia Law Review*) ("[T]he deal was straightforward: In exchange for working as informants, ICE would help the Mayas get coveted S visas, which, in rare instances, are awarded to immigrants who help law enforcement. . . . [F]or reasons they do not understand, ICE agents abruptly turned against them—and they now face imminent deportation."); Maria Sacchetti, ICE Says They Arrested a Human-Rights Violator. Retired Federal Agents Call Him a Hero., Wash. Post

suggested reforming the visa program to allow informants and cooperators to self-petition for the S visa, such a change is likely not feasible without an overhaul of the multi-step bureaucratic process currently in place.[137] Even if this adjustment were to take place, it is difficult to imagine how the existing system would be expanded to such an extent as to cover all official cooperators and informants, let alone include good-faith cooperators and informants.

The stark precedent that has been set over the past thirty years for the level of criminal involvement requisite for S-visa eligibility suggests that a new approach is needed to protect individuals with all levels of involvement in crime. This Note seeks to fill some of the gap by proposing a novel solution for individuals with low-level involvement in crime.

III. EXPANDING PROTECTIONS

While the S visa may not feasibly expand enough to protect good-faith cooperators and informants, the new deferred-action program provides a compelling framework to adopt. Just as the labor and civil rights deferral program serves as a lesser version of the U and T visas, it would be practicable to establish a deferred-action program for good-faith cooperators and informants as a lesser version of the S visa.

The protections afforded by the deferred-action program in the immigration system mirror those provided by the criminal safety valve in the criminal system. Just as the safety valve and *Booker* analysis proportionately reward individuals for their attempted cooperation through criminal benefits, the deferred-action program proposed by this Note proportionately rewards individuals for their good-faith cooperation through immigration benefits. The subset of the population covered by this Note likely would not have been given priority status for immigration action had they not encountered criminal authorities. Their perception in the criminal context is thus inextricably linked with their outcome in the immigration context. They do not need criminal benefits, as they have not been charged with any wrongdoing in the first place. Their good-faith cooperation thus limits response in the immigration context just as attempted cooperation encourages leniency in the criminal context.

To establish a well-rounded program for good-faith cooperators and informants, this Part lays out a three-part proposal. It then highlights

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(May 31, 2017), https://www.washingtonpost.com/local/ice-says-they-arrested-a-human-rights-violator-retired-federal-agents-call-him-a-hero/2017/05/31/29a3fad0-382d-11e7-b4ee-434b6d506b37_story.html (on file with the *Columbia Law Review*) ("[H]e is a confidential FBI informant who risked his own safety to save American lives and should have received a Green Card. Instead, he faces deportation to a country where his history of spying for the United States could get him killed.").

137. See Lal, supra note 135, at 72 (advocating for the ability to self-petition but recognizing that this would require a simplification of the current S-visa process to only involve the law enforcement agency with whom cooperation took place, the Attorney General's office, and USCIS).

underlying structural issues that must be addressed and offers feasible solutions for effective implementation of such a program.

A. *The Three-Part Solution*

To best protect good-faith cooperators and informants, this Note proposes that: (1) the Mayorkas and Doyle Memoranda should broaden protections to explicitly include serving as a good-faith cooperator or informant as a mitigating factor; (2) DHS should establish a streamlined, self-petitioned, deferred-removal program with clear guidelines for letters written by agencies; and (3) such a program should not prohibit applicants from presenting their case before an immigration judge as a last resort.

1. *Broaden Protections Under the Prosecutorial Discretion Memos.* — The most immediate method of providing protections to individuals would be through guidance to immigration officials and attorneys under the Mayorkas and Doyle Memoranda. The Mayorkas Memorandum lists a handful of mitigating factors and clarifies why the exercise of certain legal rights, including in the labor and civil rights contexts, deserves unique protections through immigration discretion.[138] An updated memo could add a provision for good-faith cooperation and information to the mitigating factors, emphasizing why individuals are so minimally involved in criminal schemes that they have not faced criminal charges deserve protection through immigration discretion.[139] The Doyle Memorandum lists assistance to labor and civil rights agencies as part of "other assistance" through which individuals without official informant or cooperator status can gain protection.[140] A subsequent memorandum could simply include good-faith cooperation and information provision in this list of "other assistance."[141]

Enshrining this protection in the prosecutorial discretion memos is crucial because it is the only avenue in the three-step solution through which noncitizens can receive the protection without advocating for it themselves. One of the key issues in the immigration sphere is that immigrants facing removal proceedings are not guaranteed the right to an attorney, as deportation is considered a civil rather than criminal penalty.[142] This puts indigent migrants who cannot afford counsel in an

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138. See Mayorkas Memorandum, supra note 42, at 3–5.

139. Along with a broader description emphasizing the importance of good-faith cooperation later on in the memo, this protection could be solidified by adding a new bullet point to the list of potential mitigating factors that states, "status as a good-faith cooperator or informant in criminal legal proceedings."

140. Doyle Memorandum, supra note 36, at 5.

141. Hypothetical language that amends existing memo language could state "or other assistance sought from the noncitizen by, or provided by the noncitizen to, federal, state, local or tribal law enforcement, including labor and civil law enforcement agencies, and good-faith cooperation and information provided to criminal law enforcement agencies."

142. See Am. Immigr. Council, Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice 10 (2013),

incredibly tough position. Immigrants who have lawyers are "much more likely to prevail in their removal case than those who [do] not," such that not having guaranteed access to counsel "may have the most profound impact on immigrants' ability to receive a fair hearing."[143] This same rationale likely applies to official nonimmigrant programs as well: Individuals with access to attorneys are likely better able to reap the benefits of such programs, due to both attorneys' abilities to craft strong applications and migrants' potential lack of knowledge about these opportunities. It is therefore valuable to have immigration officials themselves weigh good-faith cooperation when conducting a discretionary analysis to determine whether to bring a case in the first place. Noncitizens may not even realize that their good-faith cooperation or information qualifies them for immigration protections yet may receive such protections through the work of diligent immigration agents and OPLA attorneys.

Relying on prosecutorial discretion alone, however, results in many of the same qualms expressed earlier.[144] Both the Mayorkas and Doyle Memoranda make clear that the protections listed "[are] not intended to, [do] not, and may not be relied upon to create or confer any right or benefit . . . enforceable at law or equity by any individual or other party, including in removal proceedings."[145] Individual agents have the right to weigh aggravating and mitigating factors as they deem best, and the decisions they reach cannot be easily overturned.[146] To best protect noncitizens, therefore, changes in informal prosecutorial discretion should be accompanied by formal program changes as well.

2. *Establish an Official Deferral Program.* — A deferred-action program would benefit noncitizens by providing a formal procedure to affirmatively request temporary residence in the country. Good-faith cooperators and informants would be considered lawfully present in the United States while their deferred-action protection exists.[147] They would also be eligible to apply for employment authorization under this program.[148] This program

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https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [https://perma.cc/JPX7-R2S4] ("Of all the differences between criminal and removal proceedings, the lack of appointed counsel may have the most profound impact on immigrants' ability to receive a fair hearing.").

143. Id. See also Doyle Memorandum, supra note 36, at 9 ("OPLA attorneys should be particularly mindful of their role and the important impact that their representation of DHS can have in cases involving pro se respondents.").

144. See supra section I.B.2.

145. Doyle Memorandum, supra note 36, at 17; see also Mayorkas Memorandum, supra note 42, at 7 ("This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at laws by any party in any administrative, civil, or criminal matter.").

146. See supra notes 78–82 and accompanying text.

147. Deferred-action protections typically last for two years. DHS, Enforcement of Laws, supra note 38.

148. Id.

would empower noncitizens to get involved in the community and push back against injustice by "righting this power imbalance between" legal and illegal immigration status-holders.[149] It would provide a layer of protection to noncitizens seeking to escape coercion into criminal activity by safeguarding reports of such behavior. It would also widen opportunities to avoid such interactions in the first place by providing employment authorization to leave the informal economy and join the formal economy.[150]

The self-petitioned, streamlined aspects of the deferral program overcome key issues with the S visa. As discussed previously, government agencies are wary to submit applications unless practically certain that individuals will receive protections, in large part because of the time and effort it takes on the agency's end to engage in this process.[151] The deferral program overcomes this issue by only requiring the agency to write one letter in support of the applicant.[152] After that, the burden is on the applicant—who presumably has much greater willingness to engage in bureaucratic hurdles, given the personal nature of the application—to compile information and submit the request. This process simultaneously ensures that law enforcement agencies have authority over the sensitive information provided in the application[153] while reducing the burden on these agencies to follow through with said applications. The streamlined deferral process also removes much of the administrative backlog

149. See Meredith Cabell, Lynn Damiano Pearson & Jessie Hahn, Nat'l Immigr. L. Ctr., Building Worker Power Through Deferred Action 2, 6 (2024), https://www.nilc.org/wp-content/uploads/2024/01/NILC_WorkersRightsReport-1.12.2024_-1.pdf [https://perma.cc/S4DD-9HVZ] ("The guidance, issued by the Department of Homeland Security (DHS), empowers immigrant workers to file complaints with labor agencies, participate in labor investigations, and to build power together with U.S.-born workers—without the fear of potential deportation hanging over their heads.").

150. See, e.g., Zenen Jaimes Pérez, Ctr. for Am. Progress, How DACA Has Improved the Lives of Undocumented Young People 3 (2014), https://www.americanprogress.org/wp-content/uploads/sites/2/2014/11/BenefitsOfDACABrief2.pdf [https://perma.cc/U5K5-SGG7] ("[Deferred Action for Childhood Arrivals] has opened new doors for undocumented youth, leading to a stronger economy for everyone. . . . [I]t means being able to exit the informal economy and move on to better-paying jobs.").

151. See supra notes 131–134 and accompanying text.

152. See supra notes 27–31 and accompanying text.

153. Law enforcement agencies must provide all exculpatory and impeachment evidence to defendants in a criminal trial. See, e.g., Giglio v. United States, 405 U.S. 150, 154 (1972); Brady v. Maryland, 373 U.S. 83, 87 (1963); see also DOJ, Just. Manual § 9-5.001(B) (2020) ("Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial."). Enforcement officials and criminal prosecutors may therefore want to closely monitor the language used in immigration petitions to ensure that the language describing a good-faith cooperator's aid matches the charges brought against the defendant to avoid a *Brady* violation. By having law enforcement agencies write letters of support, the potential for *Brady* violations likely decreases.

associated with the S visa, making the process smoother for both the immigration agency and the applicant.

Although individuals would likely prefer a longer-term visa over temporary deferred action, a deferral program seems most feasible in the current immigration climate. Despite academic proposals for labor-specific visas,[154] both congressional[155] and advocacy group[156] proposals have understood existing limitations and pushed for deferred action in the labor and civil rights context as a minimum protection. Most notably, deferred-action protections remain in the executive's discretion.[157] Thus, they do not have to overcome the political turbulence of visa protections, which must be passed by the legislature.[158] The existing labor and civil rights deferral program reflects many of the requests outlined by the above-mentioned groups, providing a substantive guide for a good-faith criminal cooperator and informant deferral program. This proposed self-petitioned deferral program would provide noncitizens with one central intake point to submit requests for deferred action. The same documentation requisite for the existing deferral program could be applied here as well, with a letter or statement of interest from a criminal

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154. See, e.g., Farhang Heydari, Note, Making Strange Bedfellows: Enlisting the Cooperation of Undocumented Employees in the Enforcement of Employer Sanctions, 110 Colum. L. Rev. 1526, 1564 (2010) ("The most surgical alteration—leaving intact existing visas—would be the creation of a new visa category. While legislation would likely be contentious and difficult to ratify, targeted legislative reform designed to give law enforcement an additional tool in its arsenal has distinct advantages.").

155. See, e.g., Letter from Pramila Jayapal, Jerrold Nadler, Zoe Lofgren, Veronica Escobar, and Raúl Grijalva, Members of Cong., to Hon. Alejandro Mayorkas, Sec'y, DHS 1 (Sept. 29, 2022), https://jayapal.house.gov/wp-content/uploads/2022/09/Letter_to_DHS_Relief_for_Immigrant_Workers_09_29_2022.pdf [https://perma.cc/MB9D-NFEA] ("To be effective, this process should include, at a minimum, the following components: Consistent processing by United States Citizenship and Immigration Services (USCIS), where immigrants in civil rights or labor disputes can affirmatively request parole and deferred action (where eligible) . . . .").

156. See, e.g., Letter from African Cmtys. Together et al. to Hon. Alejandro Mayorkas, Sec'y, DHS 1 (Nov. 17, 2022), https://www.nilc.org/wp-content/uploads/2022/11/DHS-Sign-On-Letter-Regarding-Prosecutorial-Discretion-Labor-Disputes-Nov-2022.pdf [https://perma.cc/MJ4H-9FYD] ("We . . . urge DHS to immediately release written guidance that clarifies the process by which undocumented workers, guestworkers, and others with precarious immigration status who are victims or witnesses of labor exploitation may seek prosecutorial discretion.").

157. See Am. Immigr. Council, Deferred Action for Childhood Arrivals (DACA): An Overview 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/deferred_action_for_childhood_arrivals_daca_an_overview_0.pdf [https://perma.cc//F9SH-TUGM] (clarifying that the deferred-action program is an "exercise of prosecutorial discretion" that is "[u]nlike federal legislation").

158. Visa protections must pass the legislature and be preserved in the U.S. code. See U.S. Dep't of State, U.S. Visa Law & Policy, Travel.State.Gov, https://travel.state.gov/content/travel/en/legal/visa-law0.html [https://perma.cc/MCY5-9VUW] (last visited Aug. 22, 2024) (explaining that laws enacted by Congress govern visas and travel into the United States).

agency addressed to DHS supporting the request.[159] The same guidelines for agency letters that exist in the labor context could be applied to the criminal context.[160]

Law enforcement agencies would likely be willing to work with migrants to fulfill deferral requests because the implementation of such a deferral program also benefits the government. The practice "of offering discretionary protection on a case-by-case basis to victims who lack employment authorization directly increases the ability of [relevant] agencies to more fully investigate" violations under their purview.[161] Law enforcement agencies heavily rely on inside information to ascertain what criminal activity has taken place and thus need mechanisms to incentivize attempts to cooperate. The impact of this improved investigation ability will likely extend beyond the narrow group addressed in this Note. By protecting good-faith cooperators, government lawyers can improve their general reputation in migrant communities, thereby increasing the likelihood that other individuals with information on criminal activity speak up. This may also improve relations with defense attorneys, as the government demonstrates its commitment to protecting vulnerable cooperators and informants.

In addition, this policy may improve federal and local relations, particularly with localities that have adopted sanctuary city programs.[162] Approximately 200 cities, counties, and states have adopted such

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159. In the labor context, requisite documentation in addition to the letter of support includes a written request signed by the noncitizen stating the basis for the deferred-action request, evidence to establish that the individual falls within the scope of the agency's investigation, and evidence of any additional factors that support use of discretion. DHS, Enforcement of Laws, supra note 38. Noncitizens are responsible for providing identifying documentation such as proof of their identity and nationality, evidence relating to their immigration history or status, and Form G-325A biographic information for deferred action. Id. Individuals seeking employment authorization must also fill out the Form I-765 application for employment authorization and Form I-765WS worksheet. Id.

160. Specifically, the statement of interest should address the nature of the agency's investigation and need for DHS support, the agency's enforcement interests that provide the basis for the request, the individuals with information who would be helpful with the investigation, and a point of contact in the agency who can respond to follow-up questions from DHS. See id.

161. Id.

162. Many cities have designated themselves as "sanctuary cities" and chosen not to cooperate with federal immigration agencies. Despite arguments that sanctuary cities will suffer economically as a result, studies suggest that public safety and economic outcomes are better in these cities. See, e.g., Tom K. Wong, Ctr. for Am. Progress & Nat'l Immigr. L. Ctr., The Effects of Sanctuary Policies on Crime and the Economy 1–3 (2017), https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf [https://perma.cc/2H8E-SDVZ] (finding that sanctuary cities have, on average, higher median household income, less poverty, less reliance on public assistance, higher labor force participation, higher employment-to-population ratios, and lower unemployment).

programs,[163] and many others have informally limited cooperation with immigration authorities without going so far as to become formal sanctuary cities.[164] By proving to state and local governments that federal authorities are willing to protect migrants against negative immigration action, the federal criminal and immigration systems may advance their relationships. Of course, the proposed program would only protect a specific subgroup of the migrant population, so its impact will be limited; still, all parties involved will hopefully embrace a step in the right direction.

3. *Allow for Judicial Resort.* — Finally, this proposal ensures access to immigration court to try one's case as a last resort. If an OPLA attorney has decided not to exercise prosecutorial discretion and has rejected a deferred-action application, the case comes to the EOIR and an immigration judge makes the final removal determination.[165] Immigration judges have discretion to terminate proceedings if they find a noncitizen not removable at the time of the hearing.[166] Termination does not provide the noncitizen with official immigration status, and a new case can be brought against them at any time,[167] but it still provides a period of relief somewhat analogous to deferred action.

Individuals who apply for the S visa must waive their right to contest removal should they be deemed ineligible for the visa unless they meet specific grounds for withholding of removal.[168] This means that applicants often cannot advocate their case in front of an immigration judge. This rule is broadly related to the prevalence of immigration waivers in criminal plea agreements, which bind people against contesting deportation

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163. Is New York Rethinking Its Sanctuary-City Status?, The Economist (Mar. 7, 2024), https://www.economist.com/united-states/2024/03/07/is-new-york-rethinking-its-sanctuary-city-status (on file with the *Columbia Law Review*).

164. See, e.g., Alejandra Lopez, Sanctuary Communities: A New Approach to Comprehensive Migratory Policy, Routed: Migration & (Im)mobility Mag. (May 26, 2024), https://www.routedmagazine.com/post/sanctuary-communities-a-new-approach-to-comprehensive-migratory-policy (on file with the *Columbia Law Review*) ("Sanctuary Communities serve as bridges between informal practices and formal policies, offering insight into the relationship between formal and informal governance. They provide a much more thorough understanding about host communities that receive migrants, [and] the policies and practices that have been adopted to integrate migrants . . . .").

165. See DOJ, EOIR Manual, supra note 58.

166. DOJ, Executive Office for Immigration Review: An Agency Guide 5 (2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/ [https://perma.cc/MS93-W4ZS].

167. Id.

168. 8 U.S.C. § 1184(k)(3) (2018). Withholding of removal is only provided by an immigration judge when a noncitizen proves they will more likely than not be subject to persecution (specifically based on race, religion, nationality, membership in a particular social group, or political opinion) or torture in their home country if forced to return there. 8 C.F.R. § 208.16 (2024).

proceedings.[169] It is important that the official deferred-action program does not adopt a similar rule superseding the migrant's right to fight a removal decision in immigration court as a last resort. The changes proposed in this Note are thus twofold. First, the deferral program should not include any provision denying access to immigration courts as a condition to applying for protections.[170] Second, the deferral program should ensure that good-faith cooperators and informants are not coerced into signing an immigration defense waiver in exchange for an agency's letter of support. Individuals would likely have a compelling reason not to sign such a waiver if they understood the ramifications.[171] Signatories frequently do not grasp the full weight of the defense waivers they are presented with, such that enforcement of these waivers violates legal ethics and public policy goals.[172] Furthermore, criminal agencies likely would not have a credible reason to mandate such waivers to be signed by individuals who have not even been charged with criminal conduct. Thus, access to immigration court should be protected.

Notably, noncitizens cannot rely on the existence of the deferral program or the exact text of the prosecutorial discretion memorandum to argue on their behalf in immigration court.[173] They also cannot use the existence of these programs to bring cases in federal district court.[174] Thus,

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169. Prosecutors have frequently used immigration defense waivers in federal plea agreements in recent years. See Donna Lee Elm, Susan R. Klein & Elissa C. Steglich, Immigration Defense Waivers in Federal Criminal Plea Agreements, 69 Mercer L. Rev. 839, 842 (2018) (highlighting the prevalence of "coercive aspect[s] of plea bargains," including "waivers of most of the defendant's substantive and procedural rights"). Districts set their own requirements, including mandating those who sign on to plea deals to agree to removal, admit they are removable, agree to reinstatement of previous removal orders, guarantee to not contest previous removal orders, waive particular rights in immigration proceedings, abandon existing immigration litigation, and even abandon persecution and torture-based protections in immigration hearings. Id. at 845–48.

170. The existing labor and civil rights deferral program does not appear to have this condition, so explicitly ensuring this right should not be particularly controversial.

171. This is not always the case, as waivers of civil claims sometimes provide coveted criminal immunity to defendants who themselves waive certain constitutional rights by taking plea agreements rather than going to trial. See Town of Newton v. Rumery, 480 U.S. 386, 393–97 (1987) ("In many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action."). The *Rumery* majority analysis would likely not apply here, however, because the noncitizen has not been charged with a crime and is therefore not acquiring "immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost." Id. at 394.

172. See Elm et al., supra note 169, at 871–85 (pushing back against immigration waivers because public education on the waivers is limited, public interest against the waivers is significant, and criminal defense attorneys and judges are not informed enough on the topic to ethically advise noncitizens).

173. See supra note 145 and accompanying text.

174. See supra note 145 and accompanying text; see also 8 U.S.C. § 1252(g) (2018) (providing that, with minor exceptions, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney

the fact that an individual served as a good-faith cooperator or informant does not guarantee protection or a finding of "not removable as charged." This can, however, be one of several factors that the judge considers in concluding whether a migrant is removable.[175] The noncitizen seeking protection from removal must prove in their Motion to Terminate Removal Proceedings why good-faith cooperation or information deserves favorable discretion.[176] A judge could reach an outcome in favor of the applicant even if immigration attorneys felt otherwise in their discretionary evaluation.[177]

B. *Ensuring Effective Implementation*

The three-part proposal laid out in this Note covers the key avenues through which uncharged noncitizen good-faith cooperators and informants can be recompensed in the immigration sphere for their aid in the criminal sphere. The effective implementation of this proposal requires additional steps to address lasting structural issues in the crimmigration domain. Though this Note suggests some feasible solutions, these problems will likely never be fully resolved, and they ought to be monitored accordingly.

1. *Information Dissemination.* — The most critical barrier to the effective implementation of the proposal is poorly disseminated information about immigration benefits in the criminal sphere. The issue is twofold. First, individuals not charged with a crime may never access an attorney and may not have the requisite background to push for protections themselves. Second, even if individuals gain access to criminal defense attorneys, the attorneys may not know enough about the immigration protections to advise their clients.

General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter"); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 485 (1999) (holding that judicial review outside of immigration court is limited such that "'no deferred action' decisions and similar discretionary determinations . . . will not be made the bases for separate rounds of judicial intervention"). But see Shoba Sivaprasad Wadhia, The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions, 16 Harv. Latino L. Rev. 39, 77 (2013) ("[N]oncitizens possibly do have a procedural right to challenge a prosecutorial discretion decision by the agency under the [Administrative Procedures Act] because there exists 'more than enough law' against which a judge can determine whether a decision was rationally made."). This argument does not appear to be adopted widely enough to be deemed an established method of judicial protections at the time of Note-writing.

175. Judges can evaluate any information a noncitizen provides to argue they merit a favorable exercise of discretion, so long as the information abides by the applicable submission requirements. See 8 U.S.C. § 1229a(c)(4)(B) (establishing that the immigration judge "shall weigh the credible testimony" submitted by migrants in favor of relief from immigration action "along with other evidence of record").

176. See id. § 1229a(c)(4)(A)–(B) (stating that noncitizens bear the burden to submit documentation in favor of removal relief and to prove their credibility in court).

177. See id. § 1229a(c)(1)(A) ("The determination of the immigration judge shall be based only on the evidence produced at the hearing.").

Individuals charged in a criminal prosecution have the right to assistance of defense counsel free of charge.[178] They also maintain this right to counsel while held in police custody.[179] The right does not exist, however, during police interrogation or questioning that takes place when an individual is not in custody.[180] Noncitizen good-faith cooperators and informants, who engage with officers or agents to share information about a larger criminality but are not officially arrested or prosecuted, likely never enter custody and may therefore never interact with a criminal defense attorney. Attorneys are crucial driving forces behind the provision of protections: While pro se defendants[181] receive certain protections in criminal trials,[182] the same is not true for unrepresented individuals interacting informally with government officials. The average noncitizen likely does not have detailed knowledge of the immigration protections they can receive, and good-faith informants presumably do not have time before their unplanned interaction with the government to learn relevant information. They therefore may not be aware of what information to obtain from the criminal agents they speak to. Because there is no requirement placed on government agents to inform noncitizens of these benefits,[183] defense attorneys likely play a crucial role in advocating for and obtaining deferral protections.

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178. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

179. See Miranda v. Arizona, 384 U.S. 436, 492 (1966) (speaking of the "right to consult with an attorney and to have one present during the interrogation" for an individual who was arrested and taken into custody).

180. Id. at 444; see also Thompson v. Keohane, 516 U.S. 99, 112 (1995) (establishing that the custody determination is based on "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave" (footnote omitted)); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) ("[R]espondent was not taken into custody for the purposes of *Miranda* until Williams arrested him.").

181. Pro se defendants are individuals charged with crime who choose to forego attorney representation. This decision is likely due to dissatisfaction with the quality of the representation and concern about whether their best interests will truly be represented. See Erica J. Hashimoto, Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant, 85 N.C. L. Rev. 423, 460–76 (2007). Some defendants feel strongly against having any lawyer represent them out of general apprehension about the field, whereas others make the decision based on the specific lawyer they have been assigned. Id. Although these rationales for declining attorney representation may be valid, they cannot be presumptively applied to new defendants, who should be given a chance to decide for themselves whether they want legal advice.

182. See Sharon Finegan, Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice, 58 Cath. U. L. Rev. 445, 472–85 (2009) (arguing that judges play a key role in advising pro se defendants on both procedural rules and substantive issues of the case, straying from the "detached overseer of the adversarial system" to become a "proactive participant" helping the defendant navigate the process).

183. Criminal defense attorneys have the responsibility to advise noncitizens of the potential immigration ramifications to their criminal plea deals. Padilla v. Kentucky, 559 U.S. 356, 374 (2010). The Supreme Court has not explicitly extended the same burden to government attorneys. Therefore, although the DOJ Office of Immigration Litigation has advocated that "prosecutors . . . have a basic understanding of the immigration

Even when criminal defense attorneys are present, however, they may not have adequate information on the immigration deferral program to appropriately guide noncitizens. Criminal and immigration law are treated as distinct fields despite the growing overlap between the two, such that it is often difficult for criminal defense attorneys to remain up to date on changes to the immigration side.[184] Although it is "quintessentially the duty of counsel to provide her client with available advice about an issue like deportation," it is also true that "[i]mmigration law can be complex," and there may be "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain."[185] This is especially the case for good-faith cooperation, as individuals are not charged with an offense and therefore do not receive the typical deals that defense attorneys handle. Defense attorneys likely have no obligation in this situation.[186] The concern here is not that a particular agreement will lead to deportation but rather that negotiation could protect *against* deportation. The immigration consequences are thus beneficial rather than adverse, and only exist because the individual never faced criminal charges. Without easy access to updates in the immigration sphere or a legal requirement to exert time and effort finding these updates, defense attorneys may overlook good-faith cooperator and informant protections. Therefore, even if a good-faith cooperator is given the opportunity to speak to counsel, it is unclear how beneficial the attorney will be.

This problem is best addressed by widespread publicization of the good-faith cooperation and information protections.[187] This can be done at multiple levels to simultaneously target defense attorney circles and migrant communities. An ideal long-term solution would target even deeper issues at play by protecting greater access to counsel and broadening the range of crimmigration information that a defense attorney must legally advise on. Such proposals, however, take far more time to implement and may not be as palatable in the current judicial

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consequences that flow from a[] [noncitizen]'s guilty plea," it has clarified that the responsibility lies on "defense attorneys to advise aliens of the potential risks of immigration consequences." Off. of Immigr. Litig., DOJ, Immigration Consequences of Criminal Convictions: *Padilla v. Kentucky*, at i–ii (2010), https://www.justice.gov/sites/default/files/civil/legacy/2011/05/03/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf [https://perma.cc/8RZR-SVQT].

184. Stumpf, supra note 4, at 376.

185. *Padilla*, 559 U.S. at 369, 371.

186. *Padilla* holds that "[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." Id. at 369.

187. In addition to publicizing the new benefits, it would be impactful if DHS publicized the facts of individual cases that receive deferred action. This would likely help noncitizens and their attorneys evaluate the likelihood of their own chance to receive such protections. A more transparent process would also improve efficiency, accuracy, and consistency in deferral cases. See Wadhia, Sharing Secrets, supra note 33, at 64–65.

climate.[188] Effective information dissemination should therefore be the first priority.

2. *Letters of Recommendation.* — Another lasting issue hampering successful implementation of the proposal concerns agency abuse of protections. As discussed previously, government agencies have reportedly dangled the promise of applying for the S visa to compel noncitizens to cooperate, only to fail to actually complete the application once the cooperation has taken place.[189] Without speaking directly to agency officials who have withheld S-visa applications, it is unclear how much their decision is swayed by the workload of applying for an S visa[190] more than by a general lack of care for migrants and willingness to abuse immigration benefits to accomplish agency goals. Regarding the former, the deferral program imposes far less work on agencies. Rather than putting together all the paperwork and tracking a complicated web of visa proceedings for years, the agency must only once write a letter of recommendation and leave the rest of the hassle to individual applicants. This mitigates at least some factors pushing agencies against applying for deferral proceedings. The latter reasons, however, may still pose a threat.

The most effective solution to this problem would likely be to legally require agencies to write letters of recommendation for good-faith cooperators and informants within a specific time frame from when they provided aid. This would ensure that all individuals who meet the requirements of a good-faith cooperator or informant can have their case evaluated by the immigration system. The set time frame also provides noncitizens with an opportunity to meet with an attorney or research themselves how their good-faith aid impacts immigration and return to request a letter thereafter. This proposal simultaneously protects law enforcement officials from unreasonable duties. Criminal investigators already have a slew of paperwork to complete on the job;[191] the addition

188. There have been pushes to reform the immigration system to provide guaranteed access to counsel for years. See, e.g., Michael Kagan, Toward Universal Deportation Defense: An Optimistic View, 2018 Wis. L. Rev. 305, 316 (highlighting considerable "obstacles to universal deportation defense" but still advocating that such a change can and should be implemented). Noncitizens are "ten-and-a-half times more likely to successfully avoid deportation if they had counsel representing them." Ingrid Eagly, Second Chances in Criminal and Immigration Law, 98 Ind. L.J. 977, 994 (2023). But as seen in other fields like housing, right to counsel is not easily implemented from a municipal to a national scale. See Ericka Petersen, Building a House for Gideon: The Right to Counsel in Evictions, 16 Stan. J. C.R. & C.L. 63, 91–97 (2020) (outlining the growth of the right to counsel in eviction proceedings in large cities but noting that it has not yet been adopted at a national scale).

189. See supra note 136 and accompanying text.

190. Along with expending the time and effort required to apply for an S visa, some offices protest that they do not have the resources required to quarterly monitor recipients who do eventually receive an S visa. See, e.g., Becker, supra note 136 ("Mark Bartlett, the first assistant U.S. attorney for Western Washington, said his office isn't equipped to monitor Gamboa or any confidential informants who have an S visa, as required.").

191. For example, FBI agents must complete a daily report on Form FD-28, log information gathered in an interview that could eventually be used for testimony on Form

of one more piece of paperwork, used in limited circumstances when noncitizens meet the requirements of good-faith cooperators or informants, will thus likely not impose an undue burden.[192] Limits on the duration of the requirement further protect agents by ensuring that there is a limit to being bound to noncitizens' requests.

Although the implementation of a formal letter of recommendation requirement would be ideal, the three-part proposal also establishes buffer protections to accommodate the status quo lack of requirement. Neither prosecutorial discretion nor judicial review explicitly requires letters from agencies to prove noncitizens' good-faith cooperation and information.[193] Individuals therefore have alternate routes to seek immigration protection should agency officials refuse to write letters of support. Though such letters would clearly bolster cases for prosecutorial discretion and judicial review, noncitizens' own testimony about the aid they provided may be enough to grasp immigration benefits from a benevolent judge.

CONCLUSION

Individuals without legal status who try to cooperate but lack enough information for the government to sign on face a unique challenge in the oft-grim crimmigration system. Though not necessarily more "deserving" of protections than other migrants—such as those never arrested on criminal matters to begin with—they arguably have a greater need for swift immigration protection. Having been forced to encounter government officials, the individuals addressed in this Note have a strong appeal for personal assistance.

While deferred-action protections could theoretically expand beyond the class of this Note to include good-faith cooperators charged with criminal activity, the implications of such an enlargement are outside the scope of this piece. Noncitizen good-faith cooperators and informants who

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FD-302, and register interactions with "assets" like informants on Form FD-209. Government Attic, Forms Used by the Federal Bureau of Investigation (FBI) 2003-2004, at 11–14 (2022), https://www.governmentattic.org/44docs/FBIforms_2003-4.pdf [https://perma.cc/QY8N-8RXQ].

192. Compare this burden to other proposals that have suggested allowing criminal agencies themselves to provide immigration benefits so that criminal agents and noncitizens need not worry about navigating the immigration sphere separately. See Frankel, supra note 7, at 449–50 ("Congress should override, or DHS should repeal, § 0.197 of Title 28 of the CFR. Section 0.197 prevents prosecutors from entering binding cooperation agreements that promise nondeportation without the written authorization of the DHS Under Secretary." (footnote omitted)). The creation of a new power would likely add significant work to federal law enforcement agencies' plates. It also might not resolve the issue at hand, as there would still be ample opportunity for agency abuse. Noncitizens questioned without an attorney present may not understand what language is legally binding and what is not, such that they may be coerced into good-faith cooperation only to not receive benefits after-the-fact because the language did not legally constitute a promise.

193. See supra sections III.A.1 and III.A.3 for the specific language used and requirements set.

are so minorly involved in criminal activity that they do not face charges play a unique role in the criminal system. Their limited involvement in criminal activity, lack of formal charges brought against them, and willingness to work openly with criminal agencies once discovered provide particularly compelling reasons for protections in the immigration system.

The benefits of such a proposal go beyond the impact that they have on individual noncitizens. Just as deferred-action protections have emboldened migrant workers to speak out against abusive employment practices in the labor and employment field,[194] the current proposal seeks to encourage migrants to feel comfortable reporting attempts to coerce them into criminal activity. This improves both migrant and overall community safety, such that even conservative law enforcement agents and judges will likely find compelling reasons to help noncitizens.

As informal and formal mechanisms for protecting noncitizens evolve, it is important to remember those who are too often written off as "threats" to public safety or border security. By broadening prosecutorial discretion protections, establishing an official deferred removal program, and allowing for judicial resort, this Note seeks to recognize and restrain the particularly difficult situation that noncitizens without legal status face in this country.

194. See DHS, Process Enhancements, supra note 35 (explaining that deferred-action protections facilitate the reporting of unlawful working conditions); see also Stephen Lee, Workplace Enforcement Workarounds, 21 Wm. & Mary Bill Rts. J. 549, 552 (2012) ("[T]he Executive's increased reliance on local law enforcement to identify 'criminal aliens' undermines competing commitments in the realm of workplace enforcement, which sets out to identify and punish 'exploitative employers.'"); Heydari, supra note 154, at 1572–73 ("[O]ur marginalization of undocumented communities 'makes it difficult for people here illegally to report crimes—driving a wedge between communities and law enforcement, making our streets more dangerous and the jobs of our police officers more difficult.'" (quoting Barack Obama, President, U.S., Remarks by the President on Comprehensive Immigration Reform (July 1, 2010), https://obamawhitehouse.archives.gov/realitycheck/the-press-office/remarks-president-comprehensive-immigration-reform [https://perma.cc/FW3S-FRAX])).