

Modernizing Immigration Enforcement

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Amanda Frost, [Cooperative Enforcement in Immigration Law](#), 103 **Iowa L. Rev.** 1 (2017).

Public rhetoric about immigration paints the issues in stark terms. Immigrants are either criminals and terrorists or they are family members, workers, and survivors of persecution. Immigration is either our secret sauce, the key to our national prosperity, or it is the sleeper cell in our midst, the [smooth-talking snake](#). It is about inclusion or exclusion, banishment or return, belonging or outcast. Immigrants are virtual citizens, or vicious vipers. They are law-abiding; they are lawless.

[Amanda Frost's Cooperative Enforcement in Immigration Law](#) describes how this dichotomy in the discourse plays out in approaches to deportation policy. Deportation policy, she observes, is stuck in two parallel grooves. It demands either unfettered deportation of unlawfully present noncitizens, or the exercise of prosecutorial discretion to permit prescribed groups of noncitizens to remain in the United States without a recognized status.

Cooperative Enforcement carves a third path, one that emphasizes compliance with immigration policy. Frost suggests we retrofit immigration enforcement using a well-oiled administrative law concept: cooperative enforcement. This term sounds like it is ripped from the pages of the [Secure Communities](#) program. Secure Communities relied on a veneer of cooperation between nonfederal police and immigration authorities in apprehending fugitive or dangerous noncitizens. That narrative of cooperation evaporated when [courts revealed](#) that the immigration “detainers” that Secure Communities depended on were in fact invitations to police to make expensive unconstitutional arrests.

This sort of interaction bears no resemblance to Frost’s cooperative enforcement concept. Her proposal, instead, is a total re-envisioning of the role of DHS’s immigration enforcement agencies, from an enforcement model to a compliance model. Sound radical? This approach may feel new to immigration law, but it borrows from an administrative law approach that is as old as [Saturday Night Fever](#).

Remain calm. Frost is not suggesting we retrofit the Border Patrol with [big hair](#), [velour uniforms](#), and [wide lapels](#). The concept of cooperative enforcement has been de rigueur in other areas of administrative law, updating “the rigid, adversarial, command-and-control regime that dominated the regulatory environment in the 1970s and 1980s.” Over the past 20 years, the household names of administrative agencies—OSHA, the FDA, the EPA, and the SEC—have adopted a “collaborative approach to rulemaking and enforcement. They pioneered initiatives to use education, consultation, and flexible interpretations of legal standards to work together with regulated entities to come into legal compliance.”

Frost proposes that the immigration bureaucracy do the same. She envisions a new model under which government officials would proactively assist specific categories of unauthorized immigrants to come into compliance with the law. [A sizable chunk of unauthorized immigrants qualify](#) for at least one pathway to lawful status, but most are unaware of it or are stymied by the complexity of process. The immigration bureaucracy has an important role to play in navigating through the opportunities and

complex procedural pathways “through education, assistance, adoption of streamlined, user-friendly procedures, and the liberal exercise of discretion, just as federal agencies such as OSHA, FDA, EPA, and SEC regularly assist the entities and individuals they regulate come into compliance with federal law.”

In the current moment, when command and control suffuses the immigration enforcement creed, a compliance-oriented approach seems like heresy. But Frost offers compelling reasons. “As in other regulatory contexts,” she points out, “the use of adversarial, command-and-control style enforcement of immigration law is both costly and inefficient.” Removing a single noncitizen costs an average of about \$12,000, and “the immigration bureaucracy has the resources to remove only about 4% of the undocumented population each year.” “Deportation alone,” she concludes, “cannot solve the nation’s unauthorized immigration problems, just as enforcement actions alone cannot ensure compliance with environmental or workplace safety laws and regulations.” Working with eligible unauthorized immigrants to take advantage of existing pathways to legal status “reduces the unauthorized population without expending resources, harming the economy, or amending the immigration statute.”

“Cooperative enforcement is both more legally defensible and politically palatable than the extensive use of prosecutorial discretion,” Frost asserts. It can’t be more controversial than President Obama’s efforts to expand prosecutorial discretion to include unlawfully-present parents of citizens and lawful permanent residents, she says, pointing to the persistent criticism and prolonged litigation that [DAPA](#) attracted. Rather, a cooperative enforcement approach “seeks to use existing laws to assist unauthorized immigrants to regularize their status, and thus cannot be attacked as lawless or an abuse of executive power.”

Following in the footsteps of other agencies toward a flexible, cooperative approach to immigration enforcement isn’t just about legitimacy or efficiency. Complying with immigration law is as much about recognizing an individual’s right to remain as it is about requiring removal. Frost’s idea, at bottom, is about enforcing all of the laws, not just those that favor deportation.

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