
ARTICLE

THE INTERIOR STRUCTURE OF IMMIGRATION ENFORCEMENT

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Deportation dominates immigration policy debates, yet it amounts to a fraction of the work the immigration enforcement system does. This Article maps the interior structure of immigration enforcement, and it seeks to show how attention to its structure offers both practical and conceptual payoffs for contemporary enforcement debates. First, deportation should not be conceptualized as synonymous with immigration enforcement; rather, it is merely the tip of a much larger enforcement pyramid. At the pyramid's base, immigration enforcement operates through a host of initiatives that build immigration screening into common interactions, such as with police and employers. Second, this enforcement structure has far-reaching hidden costs. Scholars have recognized some of these costs, such as the exploitation of undocumented noncitizens. Yet the full cost of this enforcement structure goes deeper. Beyond enabling exploitative actors, it leaves little room for good faith actors to incentivize socially valuable behavior. In its impact, immigration enforcement bears unappreciated structural similarities to certain low-level criminal law enforcement techniques, where a large population is likewise subject to ubiquitous monitoring by public and private actors alike. As important criminal law and sociological literature shows, this enforcement structure can carry far-reaching costs for society at large. It can create system avoidance (where the regulated population avoids contact with key

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legal institutions) and law enforcement tradeoffs (where efforts to enforce one law result in underenforcement of other laws). This Article applies structural insights from low-level criminal law enforcement to immigration enforcement to assess the costs of monitoring an undocumented population long-term. It calls for restructuring immigration enforcement to consider the full impact of interior enforcement in light of those who remain present in the United States long term.

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INTRODUCTION

Deportation dominates immigration policy debates, yet it represents a fraction of the work the immigration enforcement system does. In recent years, federal immigration authorities have carried out three to four hundred thousand removals annually.¹ The numbers are staggering on a historic scale, but they amount to no more than three to four percent of the estimated population of eleven million undocumented migrants.² The vast majority of the undocumented population remains present long-term, with the median

¹ U.S. IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2016 ICE ENFORCEMENT AND REMOVALS REPORT 2 (2016) <https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf> [https://perma.cc/YMG3-CQ34] (showing that annual removals in the past ten years ranged from approximately 235,000 to 400,000 removals per year).

² JEFFREY S. PASSEL & D'VERA COHN, OVERALL NUMBER OF U.S. UNAUTHORIZED IMMIGRANTS HOLDS STEADY SINCE 2009, at 3 (2016), http://assets.pewresearch.org/wp-content/uploads/sites/7/2016/09/31170303/PH_2016.09.20_Unauthorized_FINAL.pdf [https://perma.cc/3ZL5-R539].

length of residence being about fourteen years.³ Less than fifteen percent have been present for under five years.⁴

Given these figures, deportation plays an outsized role in immigration policy debates.⁵ Equating immigration enforcement with deportation obscures much of the interior work that the immigration enforcement system does. At worst, it lends fodder to the argument that the immigration enforcement system is simply not doing much work.⁶ It is akin to trying to understand the whole of the criminal justice system from the perspective of capital cases.

A large literature explores how immigration enforcement has absorbed the enforcement norms of criminal law.⁷ This scholarship is valuable precisely because it illustrates the erosion of the doctrinal boundaries between immigration and criminal law. Yet to the extent scholarship compares deportation to criminal punishment, it presents an incomplete portrait of both systems. Just as immigration enforcement does far more than impose deportation, criminal law enforcement reaches well beyond formal punishment. The vast majority of people who experience contact with the criminal justice system do so through low-level arrests, where there is no hefty prison sentence. Rather, they experience other penalties, such as probation, jail time, fines, lost work, or other collateral penalties that can be triggered from a mere arrest, even without a conviction. Incarceration is not the sum total of what the criminal justice system does; it is merely the top of the “penal pyramid.”⁸

³ *Id.* at 7.

⁴ *See id.* at 6 (using data from 2014 to arrive at this percentage).

⁵ This Article uses the statutory term “removal” interchangeably with “deportation.”

⁶ *See, e.g.,* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155, 156 (2008) (arguing that immigration policy does “virtually nothing to enforce the law against garden-variety illegal aliens” and that “most illegal aliens have never faced a serious threat of enforcement”); Joseph Tanfani, *Atty. Gen. Sessions Says Lax Immigration Enforcement Is Enabling Gangs Like MS-13*, L.A. TIMES (Apr. 18, 2017), <https://www.latimes.com/politics/washington/la-na-essential-washington-updates-sessions-says-lax-immigration-1492527375-htmstory.html> (describing immigration enforcement as lax for not engaging in sufficient deportation).

⁷ The literature is far too voluminous to catalogue here. For selected contributions, see generally, Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

⁸ In employing this heuristic, I am indebted to Alexandra Natapoff’s insightful scholarship on the “penal pyramid.” Alexandra Natapoff, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING 79 (Sharon Dolovich & Alexandra Natapoff eds., 2017). Natapoff’s work criticizes the dominance of felonies in criminal law scholarship and conceptualizes misdemeanors as the “base” of the criminal justice system. *Id.*

This Article argues that even as immigration enforcement has absorbed the enforcement norms of federal criminal prosecution, it has also absorbed surveillance and “managerial” techniques—namely, techniques for monitoring, tracking, and conducting risk assessment on large groups over time—from the low-level criminal law context. In comparing certain low-level criminal law enforcement and immigration enforcement, this Article makes two contributions to immigration enforcement debates. First, it argues that immigration enforcement should not be conceptualized as synonymous with deportation; rather, deportation is merely the tip of a much larger enforcement pyramid. Scholars have explored the interconnections between the tips of the “penal pyramid” and the immigration enforcement pyramid by showing how deportation is imposed in ways that increasingly resemble criminal punishment.⁹ But they have yet to examine structural similarities at the base of both pyramids, where a large population is subject to ongoing monitoring. This Article begins to fill that gap. Second, it argues that similar to the misdemeanor context, policymakers have failed to appreciate the hidden costs of monitoring a population in the long term and creating the ubiquitous possibility of escalated enforcement. A large and compelling body of literature documents how immigration enforcement techniques may create vulnerability to bad or unscrupulous actors, such as those who engage in wage theft or abuse.¹⁰ Yet the real impact of this enforcement system goes deeper. It leaves little room for good faith actors—those who do not seek to exploit vulnerable populations—to encourage socially desirable interactions. Appreciating this cost is necessary for understanding the full reach of immigration enforcement. It also suggests that the costs of this enforcement approach are not entirely unique to the immigration context. Rather, they are also partially the product of an enforcement structure that gives a host of actors the power to trigger escalated enforcement.

Immigration enforcement operates in the interior by delegating enforcement discretion to many actors, both public and private. Police officers or employers, for instance, function as so-called “force multipliers” who are supposed to engage in immigration enforcement while undertaking their normal duties.¹¹ In taking this approach, immigration enforcement borrows a

⁹ See *id.* at 72-73 (discussing how misdemeanors constitute the base of the “penal pyramid” while felonies constitute the top and noting that the vast majority of criminal defendants experience the criminal justice system through misdemeanors rather than felonies).

¹⁰ See, e.g., Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOC. Q. 593, 601-604 (2011) (noting that Latino laborers in New Orleans, Louisiana, from 2007 to 2008, of whom an estimated ninety percent were undocumented, reported widespread wage theft).

¹¹ See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005) (articulating the argument that police ought to be used as immigration “force multipliers” to engage in interior immigration enforcement and widen the enforcement “net”).

strategy from low-level criminal law enforcement. Employers, for instance, function as de facto probation officers when they monitor compliance with work requirements for probationers. In thousands of homes that are subject to “nuisance” ordinances around the country, landlords are required to monitor tenants and to evict those the police suspect of causing disturbances.¹² In both the criminal law and immigration context, such initiatives are viewed as a low-cost way to achieve enforcement objectives.

Yet taking this approach to enforcement imposes hidden costs. As criminal law scholars have recognized, for one, some populations are unlikely to be deterred. Some addicts, for instance, respond to drug enforcement crackdowns by engaging in riskier behavior to avoid getting caught.¹³ Attempts at enforcement can trigger law enforcement tradeoffs: They can come at the expense of enforcing other laws, such as wage and hour laws. They can also lead to “system avoidance,” when the regulated population avoids contact with key formal legal institutions to avoid perceived surveillance and resulting enforcement actions.¹⁴ The volume of undocumented migrants living in the United States long term demonstrates how enforcement efforts are unable to meet their stated objectives. And efforts to engage in ever-broader, ever-cheaper enforcement tactics are likely to create significant costs for society at large, such as through system avoidance and law enforcement tradeoffs. In taking this approach, interior immigration has replicated some of the flawed assumptions behind low-level criminal enforcement, particularly in overlooking the full costs of this approach.

Understanding the reach of immigration enforcement and its impact has taken on new urgency in recent years. One rationale for the Trump administration’s crackdown on illegal immigration is simple deterrence: the theory is that high-profile acts of enforcement along with a stated “zero tolerance” approach will make a significant dent in the population of eleven million unauthorized migrants who are already present.¹⁵ This Article shows why this

¹² See *infra* Part III for a discussion of these policies.

¹³ See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786 (2008) (explaining why drug courts adopt a flawed strategy by using penal techniques to motivate therapeutic behavior); Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 635 (2016) (discussing how drug courts may not change underlying behavior); Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 404-09 (2019) (discussing the costs of criminalizing opioid use).

¹⁴ See Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOC. REV. 367, 368 (2014) (“[T]he potential of surveillance may lead to lower levels of involvement in institutions that keep formal records . . .”).

¹⁵ Deterrence is not the only rationale; as others have developed, the policy changes also reflect obvious racial animus. See, e.g., Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.d335acee161d [<https://perma.cc/77BG-7RBU>] (reporting that as a presidential candidate, Donald Trump described Mexican migrants as “in many cases, criminals, drug dealers, rapists, etc.”); Laura Meckler &

theory of deterrence is oversimplified. It overlooks systemic costs of attempting to achieve deterrence, particularly costs associated with delegating enforcement discretion to actors other than federal immigration enforcement authorities.

Undocumented migrants who remain in the United States are not merely aware of the possibility that one day ICE may come knocking at their door. Rather, they have reason to perceive routine interactions with key institutions—employers, police, and others—as potential triggers for detention, deportation, or other penalties. This awareness, in turn, creates incentives to engage in system avoidance—to lay low, avoid reporting crime, or avoid reporting unsafe working conditions. Awareness of surveillance reorders relationships; it puts some in a position of power relative to others. Employers, for instance, are not merely employers. Because they routinely conduct immigration screening,¹⁶ they have the ability to credibly threaten to trigger arrest, detention, or deportation. This raises the stakes of routine interactions between undocumented workers and employers. Similar dynamics unfold with others who exercise de facto immigration enforcement power, such as police.¹⁷

Incentives to lay low exist even when employers or police themselves encourage open communication, offer fair working conditions, or otherwise encourage socially valuable interactions. This Article seeks to apply insights from criminal law enforcement to evaluating how immigration enforcement decisions affect the vast majority of undocumented migrants who remain within the United

Siobhan Hughes, *Immigration Talks Muddled Amid Trump's Vulgar Comments*, WALL ST. J. (Jan. 11, 2018), <https://www.wsj.com/articles/lawmakers-look-to-sell-immigration-deal-to-a-skeptical-white-house-1515700909> (reporting that the President referred to Haitian and African immigrants as coming from “shithole countries” and expressed a desire for more immigrants from countries like Norway). My focus is structural not because the racism in immigration enforcement is unimportant but rather because it has eloquently been discussed elsewhere. See, e.g., Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 198-200 (2019) (offering multiple examples of President Trump denigrating nonwhite immigrants in racial terms). In addition, while openly racialized rhetoric from a sitting president is deeply troubling, it is not an entirely new development; immigration law has long reflected racial biases. See, e.g., Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2071 (2017) (“The belief that immigrants are crossing the border, in the stealth of night, with nefarious desires to bring violence, crime, and drugs to the United States has long been part of the public imagination.”); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 761 (2000) (describing country caps as an example of racial biases that pervade legal immigration).

¹⁶ See Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1104-05 (2009) (conceptualizing private employers as “one particularly problematic set of immigration screeners” given that they check immigration status and have the ability to report undocumented workers who organize). For a discussion of the mechanics of employer screening, see *infra* Part II.

¹⁷ Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 559-71 (2013) (conceptualizing prosecutors as “de facto immigration courts” because they exercise functional power over deportation by deciding whether to bring pleas that will trigger deportation).

States.¹⁸ It evaluates procedural reforms and “sanctuary” policies, and it considers how to more fully assess the costs of the current enforcement structure.

This Article proceeds as follows: Part I briefly summarizes the literature comparing deportation to criminal punishment. Part II explains why deportation should be conceptualized as the tip of a larger enforcement pyramid. Part III shows how immigration enforcement bears important structural parallels to low-level criminal law enforcement techniques. Both operate by delegating enforcement discretion to public and private actors, and both carry the potential for high-stakes outcomes. It then discusses the costs of seeking to surveil and to sporadically enforce laws against a long-term undocumented population. Part IV considers how attention to the structure of immigration enforcement may affect contemporary immigration enforcement debates. In particular, it calls for recognizing the limits of proceduralist arguments in immigration enforcement, and it evaluates the limits of “sanctuary” policies in criminal justice. It also considers how to more fully evaluate the costs of immigration enforcement in the absence of a legalization program targeted toward the long-term undocumented population.

I. THE DEPORTATION-DOMINANT ACCOUNT

Immigration expansionists and restrictionists alike use removals as the most important benchmark for understanding the reach of immigration enforcement.¹⁹ There are good reasons for this approach: deportation may be experienced as punishment and imposed without adequate procedural constraints. This Part briefly summarizes the key contributions of the deportation-centric approach, including its comparison to punishment. Part II then turns to how interior immigration enforcement is far broader than the act of removal.

As immigration scholars have highlighted, deportation can function as an extraordinarily harsh penalty, one that the U.S. Supreme Court has characterized as resulting in “the loss of all that makes life worth living.”²⁰ Notwithstanding its civil label, deportation may be experienced as punitive,

¹⁸ While this Article focuses on undocumented migrants, it is important to note that many of the arguments apply to those with various forms of legal status as well. *See infra* Part II.

¹⁹ *See, e.g.*, Julia Preston, *Record Number of Foreigners Were Deported in 2011, Officials Say*, N.Y. TIMES (Sept. 7, 2012), <https://www.nytimes.com/2012/09/08/us/us-deports-record-number-of-foreigners-in-2011.html> [<https://perma.cc/TK99-ERHD>] (discussing deportations at an “all-time high” under President Obama); Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants/?utm_term=.1a195cd655dc [<http://perma.cc/YYB9-TSAZ>] (quoting President-elect Donald Trump as stating, “a lot of these people, probably 2 million, it could be even 3 million, we are [going to get] them out of our country”).

²⁰ *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)) (internal quotation marks omitted).

particularly when long-term residents are removed to dangerous countries with which they have no remaining ties.²¹

Deportation is now routinely linked to criminal punishment. In 1996, Congress vastly expanded the types of crimes that trigger mandatory deportation.²² Six years prior, Congress had also removed a form of discretion that had previously enabled sentencing judges to halt deportation on equitable grounds.²³ These statutory changes made many long-term lawful permanent residents with dated or minor convictions subject to deportation.²⁴ Given the absence of time limitations on removal, groups such as “Dreamers” who entered unlawfully as children and have never lived elsewhere are subject to deportation at any time.²⁵

Immigration scholars have shown how deportation decisions are deeply enmeshed with the criminal process.²⁶ Immigration cases not only dominate the workload of federal prosecutors; they have eclipsed every other area of prosecution.²⁷ The criminal and immigration enforcement systems are

²¹ See, e.g., Brief for Asian American Justice Center et al. as Amici Curiae Supporting Petitioner at 14-22, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 1567358 (discussing long-term unauthorized residents who were deported after minor offenses).

²² See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936 (2000) (discussing how the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act “drastically changed the consequences of criminal convictions for lawful permanent residents”).

²³ See *Padilla*, 559 U.S. at 361-62 (“This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.” (internal quotations omitted)). The JRAD was abolished in 1990. For an argument in favor of restoring the JRAD, see Jason C. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36 (2015).

²⁴ See, e.g., Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1423-32 (2011) (discussing how deportation can function as punishment and also discussing other ways that noncitizens are penalized during criminal proceedings, such as through the denial of bail); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1709 (2011) (discussing how deportation decisions fail to adequately consider “the events and relationships” that should “factor into decisions to waive deportation”); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1687 (2009) (discussing how removal decisions operate as a disproportionate punishment when it is imposed against long-time permanent residents who have committed minor crimes).

²⁵ Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 621-22 (2006) (noting that in the early twentieth century, statutory limits on deportation often existed but that today, “these time limits have all but disappeared”).

²⁶ See, e.g., Chacón, *supra* note 7, at 137 (“[P]rotective features of criminal investigation and adjudication are melting away at the edges in certain criminal cases involving migration-related offenses.”); Miller, *supra* note 7, at 618 (discussing the “criminalization” of immigration law); Stumpf, *supra* note 7, at 376 (coining the term “cimmigration”).

²⁷ Eagly, *supra* note 7, at 1281-82 (“Immigration, which now constitutes over half of the federal criminal workload, has eclipsed all other areas of federal prosecution. Noncitizens have become the face of federal prisons.” (footnotes omitted)); Sklansky, *supra* note 7, at 158 (“Immigration cases now are not only the largest category of federal criminal prosecutions; they are a *majority* of federal criminal prosecutions.”).

entwined at virtually every level, with immigration status affecting decisions such as arrest, plea bargaining, dismissal, bail, and disposition.²⁸

As Stephen Legomsky has observed, the merger of immigration and criminal law has been “asymmetric” in its incorporation of criminal law enforcement norms but its rejection of criminal law’s procedural constraints.²⁹ Since deportation is categorized as civil,³⁰ it does not trigger the protections of criminal procedure.³¹ There is no right to counsel at the government’s expense.³² Those who appear in immigration court are often unrepresented, including children.³³ As the former president of the National Association of Immigration Judges put it, removal is an arena where “complex

²⁸ See, e.g., Chin, *supra* note 24, at 1420 (“Far from being separate and independent from the criminal proceeding, deportation and other aspects of immigration status are often key considerations in the disposition of a criminal case.” (internal quotations omitted)); Eagly, *supra* note 7, 1281-82 (offering a description of how federal immigration enforcement officials and criminal law enforcement officials coordinate enforcement activity so as to maximize the reach of enforcement); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1203-06, 1225 (2016) (discussing how immigration considerations affect the plea bargaining process); Lee, *supra* note 17, at 559-71 (explaining how criminal law prosecutors, in effect, exercise immigration enforcement authority by choosing whether to charge defendants with crimes that may trigger deportation); Sklansky, *supra* note 7, at 158 (“Immigration law and criminal law . . . operate[d] largely independently for much of the twentieth century, but over the past three decades the two fields have become increasingly intertwined.”).

²⁹ Stephen H. Legomsky, *A New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007).

³⁰ See *Fong Yue Ting v. United States*, 149 U.S. 698, 729-30 (1893) (stating that deportation proceedings have “all the elements of a civil case” and are “in no proper sense a trial or sentence for a crime or offense”).

³¹ See DANIEL KANSTROOM, *DEPORTATION NATION 2* (2007) (“One wonders how those who experienced the Palmer Raids would react if they could have foreseen that, nearly a century later, over 325,000 people would face removal proceedings in a single year, many under mandatory detention, unprotected from unreasonable searches and selective prosecution, only a third represented by counsel, and none with the right to appointed counsel.”).

³² See Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2012) (providing that alien will be represented “at no expense to the Government” in removal proceedings); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (stating that aliens may obtain counsel at their own expense in removal proceedings); see also Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L.L. REV. 1, 4 (2017) (“Migrants have a right to counsel in removal proceedings, but not at the government’s expense.”); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1302 (2011) (“[T]he government can whisk immigrants away into detention thousands of miles away from their home where they lack access to the counsel, evidence, and witnesses they need to prevail in their removal proceeding . . .”).

³³ See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015) (“By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period from 2007 to 2012.”); Fernanda Santos, *It’s Children Against Federal Lawyers in Immigration Court*, N.Y. TIMES (Aug. 20, 2016), <https://www.nytimes.com/2016/08/21/us/in-immigration-court-children-must-serve-as-their-own-lawyers.html> [<https://perma.cc/SVF4-EJ4M>] (noting that unlike in criminal proceedings or child welfare proceedings, children are required to represent themselves in an adversarial proceeding against a government lawyer).

and high stakes matters . . . are being adjudicated in a setting which most closely resembles traffic court.”³⁴

In a nod to the “death is different” jurisprudence,³⁵ some writers have conceptualized deportation as a “different” penalty.³⁶ Just as the death penalty triggers heightened procedures as compared to other criminal cases, they argue, deportation should likewise trigger heightened procedural protections.³⁷ This approach focuses on how deportation is experienced, rather than attaching significance to the label of civil versus criminal. In a 2010 decision, the U.S. Supreme Court in *Padilla v. Kentucky* adopted this view of deportation and held that defense attorneys are required to advise defendants about the immigration consequences of guilty pleas.³⁸ In taking this approach, the Court emphasized how deportation carries stakes that may be far higher than the formal criminal punishment.

In sum, some immigration scholars have emphasized how deportation operates as a punishment, regardless of its formal label. They have also emphasized how deportation may be triggered without adequate procedural safeguards. The relevant point of comparison in this analysis tends to be between felony criminal enforcement and immigration enforcement.

II. THE INTERIOR STRUCTURE OF IMMIGRATION ENFORCEMENT

Despite its many contributions, the deportation-centric approach understates the reach of immigration enforcement. Deportation is not

³⁴ Memorandum from Dana Leigh Marks, President, Nat’l Ass’n of Immigration Judges 2 (Oct. 2009), https://pennstatelaw.psu.edu/_file/NAIJ%20Priorities%20Short%20List%20-%20October%202009.pdf [<https://perma.cc/28BG-EMYX>]; see also Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 182 (2017) (citing the description of immigration court given by Dana Leigh Marks).

³⁵ For a summary and critique of this jurisprudence, which triggers heightened procedural protections for capital cases as compared to other criminal cases, see Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1162-74 (2009).

³⁶ See, e.g., Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2262 (2013) (“Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.” (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting))); Aliza B. Kaplan, *Disabled and Disserved: The Right to Counsel for Mentally Disabled Aliens in Removal Proceedings*, 26 GEO. IMMIGR. L.J. 523, 524 (2012) (noting that the Supreme Court described deportation as “result[ing] in the loss of ‘all that makes life worth living’” (quoting Bridges v. Wixon, 326 U.S. 135, 147 (1945))); Markowitz, *supra* note 32, at 1301-02 (“[D]eportation does not fit neatly into the civil or criminal box, but rather . . . it lives in the netherworld in between.”).

³⁷ For a discussion of how civil legal providers and criminal defense attorneys have attempted to fill a gap in the provision of immigration legal services, see generally Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282 (2013).

³⁸ 559 U.S. 356, 374 (2010).

synonymous with immigration enforcement. It is perhaps not even the most salient benchmark for evaluating immigration enforcement. Rather, it is the tip of a much larger enforcement pyramid.

At the top of the pyramid are the relatively few who are placed in removal proceedings. At the base are those who remain present long-term without lawful immigration status. Somewhere in the middle are those who experience formal mechanisms of immigration enforcement short of deportation, such as arrest or detention.

Those who are never placed in removal proceedings still experience immigration enforcement in a number of ways. In recent years, immigration screening has been increasingly linked to routine interactions, including with police, employers, housing providers, and others. The theory behind this approach is that immigration enforcement is an additive that can be folded into the process of arrest or of employee hiring without changing the nature of the underlying relationship. In theory, it can serve as a cost-effective way of identifying and removing those who are deportable.

These enforcement mechanisms, however, create hidden costs. They reorder power dynamics; they place employers, police, and others in positions of power relative to unauthorized migrants. This, in turn, has a far-reaching impact, including on those who never experience deportation. Awareness of the possibility that routine interactions may trigger heightened enforcement can suppress socially valuable behavior.

Before proceeding further, a note on terminology is in order. While my focus is on undocumented migrants, many aspects of this analysis apply to those with legal immigration status as well. Despite popular accounts that frequently depict sharply delineated categories of “legal” versus “illegal” aliens, there is no such sharp distinction. Immigration status “can more accurately be understood as existing along a spectrum.”³⁹ Some of those currently without legal status exist in what immigration scholar David Martin has described as “twilight” statuses, where they may be eligible for legal status in the future.⁴⁰ Others with legal status are aware of the possibility that their status may be revoked or changed.⁴¹ Thus, while the analysis centers on undocumented migrants, it is not limited to undocumented migrants.

This Part sketches the contours of the immigration enforcement pyramid, describes immigration enforcement mechanisms other than deportation, and explains their impact at the base of the pyramid.

³⁹ Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1137 (2013).

⁴⁰ David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, MIGRATION POL'Y INST., June 2005, at 1 (describing how certain categories of immigrants may have claims to obtain lawful permanent resident status, such as temporary protected status).

⁴¹ For instance, lawful permanent residents may be subject to deportation based on criminal convictions.

A. *The Immigration Enforcement Pyramid*

The heuristic of the pyramid offers one way to illuminate the reach of immigration enforcement. It shows the centrality of enforcement mechanisms other than deportation, the role of actors other than federal immigration enforcement agents, and the manner in which enforcement practices at the base of the pyramid operate differently from enforcement at the top. In its reach, immigration enforcement mirrors in certain respects Alexandra Natapoff's discussion of the "penal pyramid" in the criminal justice system.⁴²

The pyramid offers one helpful analogy for understanding the reach of interior immigration. The pyramid might also be described as an iceberg: removal numbers capture the tip of the iceberg, but they do not begin to capture the impact of immigration enforcement on those at the bottom, who remain present and aware of the possibility of removal.⁴³ The heuristic of the pyramid is useful, first, in offering a visual that captures the reach of immigration enforcement beyond the removal numbers. It also shows how immigration policy debates that focus on deportation ignore much of the interior work that immigration enforcement is doing.

In the context of misdemeanors, Natapoff employs the pyramid as a way to understand the scope of the penal system. Just as felonies tend to dominate criminal law scholarship, deportation tends to dominate immigration policy discussions. In both criminal law and immigration scholarship, the focus on the most severe type of penalty—a prison term or deportation, respectively—tends to obscure the significance of other forms of enforcement.

Second, the focus on deportation obscures key elements of how immigration enforcement operates. For the vast majority who remain present long-term, immigration enforcement operates through awareness that routine interactions may trigger deportation or other associated penalties, such as arrest or family separation. Removal numbers fail to capture this dimension of immigration enforcement, just as statistics on mass incarceration—troubling as they are—fail to capture the true scope of the criminal justice system.⁴⁴

⁴² See generally Natapoff, *supra* note 8.

⁴³ I do not mean to suggest that the pyramid is the only heuristic for visualizing the reach of the immigration enforcement system. As Juliet Stumpf has helpfully suggested to me, immigration enforcement could also be conceptualized as a Venn diagram with overlapping areas of influence, such as with police and employers.

⁴⁴ As Natapoff develops, misdemeanors constitute an estimated eighty percent of state court workloads. Natapoff, *supra* note 8, at 80. The vast majority of people who experience contact with the criminal justice system do so through the misdemeanor process. *Id.* at 79-80. For recent contributions to the burgeoning literature on misdemeanors, see generally ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME (2018); Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon's Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299 (2017); Samuel R. Gross,

Third, a focus on deportation fails to capture the significance of the threat of an arrest. In the immigration context, arrest matters not just because it is the first step on the path toward deportation; it also can trigger family separation or detention in its own right. In this respect, immigration enforcement also bears similarities to low-level criminal law enforcement. Although criminal defendants are entitled to the presumption of innocence, a mere arrest carries significant penalties, such as fines, jail time, loss of work, or potential eviction from public housing, regardless of whether a criminal conviction is ultimately imposed.⁴⁵ Thus, an arrest—even if it is unlikely to result in a conviction—can carry significant costs. Similarly, the threat of an arrest—either a criminal arrest or an immigration arrest—is meaningful, even if that arrest is unlikely to result ultimately in removal.

Relatedly, for both immigration and for low-level criminal offenses, public and private actors have broad discretion to initiate arrest by contacting law enforcement.⁴⁶ Arrest decisions reflect a number of factors other than probable cause. Race in particular plays an important role in determining who is arrested for both immigration crimes and other crimes.⁴⁷ Black and Latino men are significantly more likely to be arrested than whites.⁴⁸ In the immigration context, “appearance of Mexican ancestry” may be used to justify stops.⁴⁹

Errors in Misdemeanor Adjudication, 98 B.U. L. REV. 999 (2018); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381 (2018); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018); Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017); Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648 (2019); Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171 (2017); and Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731 (2018).

⁴⁵ Jain, *Proportionality and Other Misdemeanor Myths*, *supra* note 44, at 954 (explaining how the constraints of criminal procedure do not work as intended, given the impact of arrest even without conviction).

⁴⁶ To be clear, criminal law enforcement and immigration enforcement, in practice, have substantial overlap. See, e.g., Eagly, *supra* note 7, at 1288 (discussing role overlap with federal prosecutors and immigration prosecutors); Sklansky, *supra* note 7, at 159 (“Immigration enforcement and criminal justice are now so thoroughly entangled it is impossible to say where one starts and the other leaves off; growing numbers of practitioners describe themselves as working in the merged field of ‘crimmigration.’”).

⁴⁷ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (determining that New York City police officers made 4,400,000 stops pursuant to its “stop and frisk” policy in an eight-year period from 2004 to 2012 and that over eighty percent of those stopped were racial minorities); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 817-25 (2015) (summarizing arrest statistics and providing potential reasons for high rates of arrest).

⁴⁸ Arrests themselves have a significant racialized impact. One out of every three American youths can expect to be arrested by the age of twenty-three. Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012). Approximately forty-nine percent of black men and forty-four percent of Latino men will be arrested by the age of twenty-three. Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).

⁴⁹ See Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1548-49 (2011) (discussing Supreme Court doctrine that has sanctioned the practice of using racial identity as “a basis for determining whether a person is undocumented or ‘illegal’”).

Immigration enforcement of course has important differences from misdemeanor enforcement. Misdemeanors matter because they trigger significant hidden costs, such as loss of work, potential jail time, and other consequences of a criminal record.⁵⁰ But in the absence of more serious charged conduct, an arrest alone is not the first step toward a lengthy prison sentence. By contrast, arrest in the immigration context may also be the first step on the path toward deportation—though in practice, the vast majority of undocumented migrants will never be removed.

The bottom of the immigration enforcement pyramid is also far less defined than the bottom of the misdemeanor pyramid. Generally, the size of the misdemeanor system is estimated by the number of arrests filed in any given year.⁵¹ Yet the size of the bottom of the immigration enforcement pyramid is murky. The same forces that lead undocumented migrants to lay low and avoid detection also make it hard to measure the size of undocumented population, its characteristics, and the impact of immigration enforcement.

The balance of this Part focuses on two important aspects of immigration enforcement at the bottom of the pyramid: the role of enforcement mechanisms other than deportation and the role of actors other than federal immigration enforcement officials.

B. *Enforcement Mechanisms*

Although deportation receives the lion's share of attention, other immigration enforcement mechanisms, such as arrest, detention, or family separation, affect far more people.⁵² In some cases, these mechanisms operate in tandem with deportation: the prospect of prolonged immigration detention, for instance, leads some undocumented migrants to agree to "voluntary" removal.⁵³ In other cases, these enforcement mechanisms combine with deportation; those who are ultimately removed first experience arrest and detention.

⁵⁰ See, e.g., JAMES JACOBS, *THE ETERNAL CRIMINAL RECORD* 1-8 (2015) (discussing the impact of a criminal record).

⁵¹ A common complaint about misdemeanors is shoddy recordkeeping that makes it difficult to identify exactly how many cases are processed each year. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 ("Unlike felony cases and convictions, about which federal and state governments keep relatively good records, the world of misdemeanor cases is radically underdocumented."); Stevenson & Mayson, *supra* note 44, at 733-34 (noting that the lack of data regarding misdemeanors extends even to basic information such as the number of misdemeanor filings each year).

⁵² These are mechanisms of immigration enforcement insofar as they "give force to" immigration laws. For an explanation of how "private enforcement" of immigration laws functions to give effect to immigration law, see, e.g., Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 784 (2008).

⁵³ "Voluntary" removal does not carry the bar on readmission that is triggered by formal removal. However, in practice, it is not voluntary in the sense of being freely chosen or desired. Those who are voluntarily removed, for instance, may be accompanied by an ICE escort.

Arrest is one important mechanism of immigration enforcement. Since 2013, when Secure Communities was rolled out on a nationwide basis, every custodial criminal arrest—meaning one where the arrested individual is taken to the precinct and fingerprinted—has triggered immigration screening.⁵⁴ Secure Communities operates as an information sharing arrangement between local police, the FBI, and the Department of Homeland Security (DHS).⁵⁵ When an arrested individual is booked, his fingerprints are taken and shared with DHS, which then cross-checks the fingerprints against a separate immigration-related fingerprint database. The goal is to screen for unauthorized presence.⁵⁶ If the cross-check returns a “hit,” that signals that the arrested individual may be present without authorization.⁵⁷ If DHS makes a probable cause determination that the arrested individual is present without authorization, the agency has the discretion to send a detainer request to the local jail.⁵⁸ The detainer notifies the jail that the arrested individual is suspected of lacking lawful immigration status and requests that the jail retain custody of the arrested individual for an additional forty-eight hours after he would otherwise be released, so that immigration enforcement officials can come to the facility and assume custody.⁵⁹ Secure Communities thus vastly raises the stakes of low-level arrests.⁶⁰ Any arrest, regardless of the charge—and regardless of whether it is ultimately dismissed—may trigger deportation.

⁵⁴ For a discussion of the rollout of Secure Communities, see Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 87-90 (2013).

⁵⁵ While Secure Communities is the most widespread use of arrests as an immigration enforcement tool, it is not the only use of arrest as an immigration enforcement tool. Some arrests are for immigration-related crime, such as misdemeanor illegal reentry or felony illegal reentry following deportation. See, e.g., Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 103(a), 100 Stat. 3359, 3380 (codified as amended at 18 U.S.C. § 1546(b)) (“Whoever uses . . . an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor . . . shall be fined under this title, imprisoned not more than 5 years, or both.”). ICE agents also make their own immigration arrests.

⁵⁶ See Jain, *supra* note 47, at 826-27 (describing the information-sharing arrangement of the Secure Communities program).

⁵⁷ This enforcement approach is underinclusive because the immigration database only contains entries for those who have previously been fingerprinted by DHS, such as those who entered lawfully and then overstayed a visa. Those who have never previously been fingerprinted, such as those who entered unlawfully and were not detected by immigration enforcement officials, would not return a hit.

⁵⁸ In the original iteration of Secure Communities, detainers were not supported by probable cause. Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 131-33 (2015) (discussing case law finding Fourth Amendment violations in cases where detainers were unsupported by probable cause).

⁵⁹ *Id.* at 131; see also Jain, *supra* note 47, at 828-29.

⁶⁰ The vast majority of arrests are for low-level offenses, and many of them never result in conviction. Low-level marijuana arrests, for instance, far outstrip arrests for more serious crimes. Christopher Ingraham, *More People Were Arrested Last Year over Pot than for Murder, Rape, Aggravated Assault and Robbery—Combined*, WASH. POST (Sept. 26, 2017),

Beyond arrest, immigration detention itself serves as an enforcement mechanism, albeit one closely associated with deportation.⁶¹ In practice, immigration detention is indistinguishable from criminal detention.⁶² Some immigrant detainees are housed in the same prisons and jails as prisoners.⁶³ The threat of detention plays an important role in giving both criminal and immigration prosecutors more leverage than they would otherwise have. Prosecutors can leverage the threat of prolonged detention to induce “voluntary” removal. This pattern unfolded on a mass scale in a 2008 immigration raid in Postville, Iowa. Over the course of four days, 270 workers signed “‘exploding’ plea agreements, entered binding felony guilty pleas in court, and received criminal sentences.”⁶⁴ The workers agreed to the pleas in part because they were aware that they would otherwise face continued detention.⁶⁵ As Juliet Stumpf has observed, “Some workers spoke up, asking for immediate deportation instead of the insistence on incarceration.”⁶⁶

https://www.washingtonpost.com/news/wonk/wp/2017/09/26/more-people-were-arrested-last-year-over-pot-than-for-murder-rape-aggravated-assault-and-robbery-combined/?utm_term=.f3d402333229 [<https://perma.cc/RQ92-H6F7>].

⁶¹ See, e.g., Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 137-38 (2013) (documenting a dramatic increase in detention over the past twenty-five years). ICE now reports an average daily detained population of close to 38,000, and the Trump administration recently sought to increase funding to support an average daily population of 48,000 adults. Laurel Wamsley, *As It Makes More Arrests, ICE Looks for More Detention Centers*, NPR (Oct. 26, 2017), <https://www.npr.org/sections/thetwo-way/2017/10/26/560257834/as-it-makes-more-arrests-ice-looks-for-more-detention-centers> [<https://perma.cc/TYF8-TPEW>]; see also Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010) (noting that “detention now represents a deprivation as severe as removal itself”).

⁶² See Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1024-37 (2017) (explaining how immigration detention is experienced as punitive, notwithstanding the civil label); see also César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014) (“Whatever the actual reason for detention and despite immigration detention’s legal characterization as civil, individuals in immigration confinement are frequently perceived to be no different than individuals in penal confinement.”); Eli Rosenberg, *So Many Immigrants Are Being Arrested that ICE Is Going to Transfer 1,600 to Federal Prisons*, WASH. POST (June 7, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/06/07/so-many-immigrants-are-being-arrested-that-ice-is-going-to-transfer-1600-to-federal-prisons/?utm_term=.8b6caa17934e [<https://perma.cc/WQ49-735J>]. Dora Schriro, a former director of the Office of Detention Policy and Planning, stated, “Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways.” DORA SCHRIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 (2009).

⁶³ Rosenberg, *supra* note 62.

⁶⁴ Eagly, *supra* note 7, at 1301; see also Juliet Stumpf, *The Process Is the Punishment in Crimmigration Law*, in *THE BORDERS OF PUNISHMENT* 59 (Katja Franko Aas & Mary Bosworth eds., 2013) (noting that the majority of the workers took the deal because “[t]he plea offered the certainty of quicker release and the avoidance of formal proceedings . . .”).

⁶⁵ Stumpf, *supra* note 64.

⁶⁶ *Id.*

In addition to arrest and detention, the threat of family separation functions as a highly visible enforcement mechanism. Just as the presence of family in the United States constitutes part of the “pull” factor of immigration,⁶⁷ the risk of family separation plays an important role in immigration enforcement. Unauthorized or “mixed” immigration status families with minor children in particular report being keenly aware of the possibility of separation.⁶⁸

As in the criminal context, any arrest, including a minor one, can trigger family separation. Immigration-related arrests, however, create heightened susceptibility to family separation, and they also magnify the likelihood that children will be left without adequate supervision. For one, in the criminal context, arrest typically occurs individually. By contrast, interior immigration enforcement has periodically occurred on a mass scale, with workplace raids that round up and apprehend hundreds of suspected unauthorized workers at a time. This, in turn, magnifies the likelihood of prolonged family separation. When police make arrests, they are supposed to follow protocols designed to ensure that minor children are provided with social services support.⁶⁹ Immigration lawyers, however, have argued that similar protocols have not been followed in workplace raids, given factors such as language barriers and the possibility that arrested workers may be transported and detained in remote facilities.

A lawsuit challenging a factory raid in Massachusetts over a decade ago remains illustrative. ICE agents arrested over 300 employees, placed them in custody for civil immigration violations, and transported them to detention in Texas.⁷⁰ The workers alleged that child welfare agencies were not given sufficient notice of the raid, which left minor children without adult supervision.⁷¹ Recent raids have taken place on an even larger scale and exhibited similar dynamics.⁷² Immigration advocates have documented prolonged family

⁶⁷ See, e.g., Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 630 (2014) (“The vast majority of immigrants who acquire permanent residency each year do so based on family ties.”).

⁶⁸ See RANDY CAPPS ET AL., A PROFILE OF U.S. CHILDREN WITH UNAUTHORIZED PARENTS 1 (2016) (reporting that 4,100,000 U.S. citizen children live with at least one parent who is an unauthorized migrant); Leisy J. Abrego & Cecilia Menjivar, *Immigrant Latina Mothers as Targets of Legal Violence*, 37 INT'L J. SOC. FAM. 9, 12-14 (2011) (describing how fear of family separation influences decisions of undocumented mothers, such as deciding to keep children from school and avoiding contact with public agencies); Nina Rabin, *Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in a Border County*, 47 J.L. & EDUC. 1, 15-20 (2018) (discussing how fear of separation affects youth); Vikki Ortiz, *Mixed-Status Immigrant Families Fear Trump's Policies to Come*, CHI. TRIB. (Jan. 18, 2017), <http://www.chicagotribune.com/news/ct-immigrants-mixed-status-trump-met-20170118-story.html> (discussing how long-term undocumented parents with U.S. citizen children fear family separation).

⁶⁹ See Jain, *supra* note 47, at 841-42 & nn.170-74 (discussing protocols that police departments take to notify social services in order to care for minor children after a custodial parent's arrest).

⁷⁰ *Aguilar v. U.S. Immigration & Customs Enf't*, 510 F.3d 1, 6 (1st Cir. 2007).

⁷¹ *Id.*

⁷² See, e.g., Raquel Aldana, *Of Katz and 'Aliens': Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1092-93 (2008) (“ICE arrested 1,282 workers [during a raid on six Swift & Co.

separation, with mass arrest and detention leaving children of workers “stranded at daycare centers and with babysitters,” landlords, or relatives.⁷³

Until recently, family separation has typically been conceptualized as a collateral or inevitable “third party” harm that results from enforcement decisions, rather than as a means of deterrence in itself.⁷⁴ Yet in the immigration context, family separation itself has been appropriated as a means of deterrence.⁷⁵ During a six-week period in April and May 2018, DHS separated nearly 2000 children from their parents.⁷⁶ The numbers are unprecedented in recent history. By way of comparison, during a spike in unlawful entry during the summer of 2013, when Border Patrol apprehended over 6000 families, less than 500 were transferred to ICE custody for any purpose.⁷⁷ The 2018 family separations involved more than just those apprehended during the course of unlawful entry. They also included asylum seekers who entered lawfully by appearing at a port of entry and who

meatpacking plants] on immigration violations and some existing criminal warrants. Most workers arrested were placed in immigration removal proceedings. About 240 workers were charged criminally.”)

⁷³ See Maria Sacchetti, *ICE Raids Meatpacking Plant in Rural Tennessee; 91 Immigrants Arrested*, WASH. POST (Apr. 6, 2018), <https://www.lmtonline.com/news/article/ICE-raids-meatpacking-plant-in-Tennessee-97-12812525.php> [<https://perma.cc/H6FR-V3DK>] (describing an immigration raid that resulted in ninety-seven arrests, one of the largest workplace raids in a decade); Samantha Schmidt, *‘Utter Chaos’: ICE Arrests 114 Workers in Immigration Raid at Ohio Gardening Company*, WASH. POST (June 6, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/06/06/utter-chaos-ice-arrests-114-workers-in-immigration-raid-at-ohio-gardening-company/?utm_term=.b7ed0035b407 [<https://perma.cc/Z28B-DYFP>] (reporting a mass raid carried out by 200 federal immigration officials that resulted in 114 arrests); see also Elizabeth Oglesby, *U.S. Communities Can Suffer Long-Term Consequences After Immigration Raids*, CONVERSATION (June 18, 2018), <https://theconversation.com> (search “US communities can suffer long-term”; then follow article hyperlink) [<https://perma.cc/98S7-PWVJ>] (describing the effects on the community of the 2008 Massachusetts raid, including children who were separated from their parents and found in empty apartments by their landlords).

⁷⁴ Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1400 (2002) (describing “third party interests” in criminal law and offering the interests of families of a criminal defendant as an example of a “collateral consequence visited upon others when an offender is punished”).

⁷⁵ See, e.g., *Transcript: White House Chief of Staff John Kelly’s Interview with NPR*, NPR (May 11, 2018), <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr> [<https://perma.cc/AT5Z-F9B2>] (stating that family separation serves as a deterrent to illegal immigration); see also Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 239 (2019) (drawing on “literature in psychology, behavioral economics, and criminology to suggest that detention as deterrence is unlikely to operate in the way that some policymakers might expect or desire”).

⁷⁶ Michael Scherer & Josh Dawsey, *Trump Cites as Negotiating Tool his Policy of Separating Immigrant Children from Their Parents*, WASH. POST (June 15, 2018), https://www.washingtonpost.com/politics/trump-cites-as-a-negotiating-tool-his-policy-of-separating-immigrant-children-from-their-parents/2018/06/15/ade82b80-70b3-11e8-bf86-a2351b5ecec9_story.html?utm_term=.88a424bbe9f [<https://perma.cc/X5N3-G8YA>].

⁷⁷ Declaration of Ronald Vitiello at 7, *Flores v. Lynch*, 212 F. Supp. 3d 907 (2015) (No. 85-4544), <https://www.aila.org/File/Related/14111359n.pdf> [<https://perma.cc/FC7U-L45Y>].

articulated a credible fear of persecution.⁷⁸ In hundreds of cases, family separation remained prolonged. Two months after a federal judge ordered the families reunited, over 400 children remained separated from their parents.⁷⁹

The 2018 family separations had far-reaching implications, and not only because of their scale and duration. They represented a deliberate decision to use family separation itself as an enforcement tool, rather than treating family separation as an unfortunate but inevitable byproduct of the decision to deport adults. As a widely circulated audio recording of separated children demonstrated, line-level enforcement officials were well aware that the policy of separating children imposed stark and immediate trauma.⁸⁰ The separations, in effect, signaled a choice to impose trauma on children with the aim of deterrence. They also signaled what leading immigration scholar David Martin described as an “astounding casualness about precise tracking of family relationships—as though eventual reunification was deemed unlikely or at least unimportant, even for toddlers and preschoolers.”⁸¹ The family separations also showed the limits of legal rules. Government officials missed

⁷⁸ Karoun Demirjian, *GOP, Democrats Are Outraged but at Odds over Ending Family Separation at the Border*, WASH. POST (June 17, 2018), https://www.washingtonpost.com/powerpost/gop-democrats-are-outraged-but-at-odds-over-ending-family-separation-at-border/2018/06/17/6667f3a4-7247-11e8-b4b7-308400242c2e_story.html?utm_term=.bab7d23d4734 [<https://perma.cc/JTN2-TJZZ>] (quoting Republican Senator Susan Collins as noting “numerous credible media accounts” revealing that parents who appear at a legal port of entry and claim asylum are being separated from their children); Miriam Jordan, *Family Separation at Border May Be Subject to Constitutional Challenge, Judge Rules*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/family-separations-migrants-court.html> [<https://perma.cc/SQ62-GTV6>] (discussing the case of an asylum seeker who appeared at a port of entry and was forcibly separated from her seven-year-old daughter, who was placed in a separate detention facility, for a period of four months); Joshua Barajas, *More than 400 Migrant Children Remain Separated from Their Parents. Here’s What We Know*, PBS (Sept. 7, 2018, 5:11 PM), <https://www.pbs.org/newshour/nation/more-than-400-migrant-children-remain-separated-from-their-parents-heres-what-we-know> [<https://perma.cc/Z46D-WR7M>] (reporting on DHS’s adaptation of new regulations that would allow the government to detain children of migrants for periods longer than twenty days); Joel Rose, *Doctors Concerned About ‘Irreparable Harm’ to Separated Migrant Children*, NPR (June 15, 2018), <https://www.npr.org/2018/06/15/620254326/doctors-warn-about-dangers-of-child-separations> [<https://perma.cc/Q6E7-A9XH>] (describing the potential long-term medical consequences of holding separated migrant children in a shelter, such as behavioral problems and poor brain development).

⁷⁹ Barajas, *supra* note 78.

⁸⁰ See Ginger Thompson, *Listen to Children Who’ve Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2018), <https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy> [<https://perma.cc/G3FX-WXRB>] (presenting audio recording of children weeping while a border patrol agent comments that “we have an orchestra here” and “[w]hat’s missing is a conductor”).

⁸¹ See Letter from David A. Martin, Professor, Univ. of Va. Sch. of Law, to Kirstjen M. Nielsen, Sec’y of Homeland Sec. (July 16, 2018) (stating reasons for resigning from the Homeland Security Advisory Council (HSAC)) (on file with author). Professor Martin further noted that the family separation policy “crystallized for many HSAC members profound doubts about the administration’s commitment to the rule of law.” *Id.*

court-imposed reunification deadlines because they deported some parents without reuniting them with their children first.⁸²

C. Multiple Enforcement Agents

In the past twenty years, federal immigration enforcement has become remarkably diffuse; a host of public and private actors engage in enforcement, not just federal immigration enforcement officials. Immigration screening and surveillance occurs during the process of booking an arrested individual and during the process of employee hiring.⁸³ In the context of policing, Secure Communities automates information sharing between local police and DHS.⁸⁴ In the context of employment, E-Verify automates the process of determining whether new employees have lawful immigration status as required by the Immigration Reform and Control Act of 1986.⁸⁵ This dynamic is the product of technological changes that permit immigration screening and surveillance in routine circumstances,⁸⁶ and federal decisions to delegate enforcement authority to an array of actors. In addition, states and localities have periodically made efforts to assert their own immigration enforcement power.⁸⁷

One stated rationale for these programs is to widen the enforcement net in a cost-effective way. While unlawful entry receives the lion's share of attention, a significant percentage of the undocumented population entered

⁸² John Burnett, *Government Misses Migrant Family Reunification Deadline*, NPR (July 10, 2018), <https://www.npr.org/2018/07/10/627821359/government-misses-migrant-family-reunification-deadline> [<https://perma.cc/JGS9-VVM7>].

⁸³ See Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 8 (2014) (identifying “four distinct sets of immigration surveillance practices: identification, screening and authorization, mobility tracking and control, and information sharing” (emphasis omitted)); Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY BILL RTS. J. 549, 554 (2012) (“While there are many social institutions through which migrants move, two have emerged as central to immigration law’s interior enforcement agenda: the workplace and the criminal justice system.”).

⁸⁴ Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1108 (2013).

⁸⁵ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(b), 100 Stat. 3359, 3365-68 (codified at 8 U.S.C. § 1324a(b) (2012)); Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U.C. IRVINE L. REV. 381, 383 (2012). Some states passed similar laws prior to IRCA. See Pham, *supra* note 52, at 787 (“In 1971, fifteen years before IRCA, California passed a law that prohibited employers from knowingly hiring unauthorized workers and threatened them with civil fines of \$200 to \$1000 for violations. Ten states and one city soon followed suit, passing similar legislation.” (footnote omitted)).

⁸⁶ Kalhan, *supra* note 83, at 8.

⁸⁷ The most well-known example is Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act, commonly known as S.B. 1070. 2010 Ariz. Legis. Serv. 113 (West). In 2012, the U.S. Supreme Court struck down several provisions of the law, including a provision that gave local police officers the ability to conduct warrantless arrests of anyone “the officer has probable cause to believe . . . has committed any public offense that makes the person removable.” *Arizona v. United States*, 567 U.S. 387, 393 (2012). For a discussion of S.B. 1070, see Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 626-34 (2013).

lawfully and then overstayed a visa.⁸⁸ Any effective immigration enforcement policy therefore must contain an interior enforcement component. State and local police act as “force multipliers” who, in the words of Kris Kobach, cast an immense net by providing “occasional, passive, voluntary [assistance] . . . during the course of normal law enforcement activity.”⁸⁹ In other words, the theory is that police can conduct immigration enforcement without undertaking any significant additional work.⁹⁰

Another stated rationale for some programs is to reduce the risk of racial profiling. One theory is that if immigration screening occurs on every arrested individual at the time she is taken into custody and fingerprinted, then police officers will not try to seek out those who they suspect are undocumented on the basis of crude racial proxies or the use of Spanish. In launching Secure Communities, the Obama administration described the value of immigration screening taking place “behind the scenes” of the arrest.⁹¹ The goal was for the executive to “acquire information about where all the formally deportable noncitizens [were], and what they [were] up to, in order . . . to make systematic rather than arbitrary decisions about whom to deport.”⁹²

In practice, however, linking arrests to immigration enforcement still creates incentives for police officers to engage in racial profiling, even when the immigration screening is done on the back end. Police remain aware of the likelihood that all arrests trigger immigration screening. As Hiroshi Motomura has discussed, police who view deportation as a desirable end have incentives to make arrests on the basis of suspected unauthorized status, even if those arrests are unlikely to result in a criminal conviction.⁹³

Relatedly, police and other public and private actors also have incentives that deviate from those of federal immigration enforcement officials. Employers

⁸⁸ JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY* 1, 16 (2006) (finding that in 2006, of the approximately 11,000,000 unauthorized immigrants in the United States, twenty-five to forty percent entered lawfully but overstayed a visa).

⁸⁹ Kobach, *supra* note 11, at 181.

⁹⁰ See Kobach, *supra* note 6, at 160 (“If a strategy of attrition through enforcement were implemented nationwide, it would gradually, but inexorably, reduce the number of illegal aliens in the United States.”).

⁹¹ Memorandum from Immigration & Customs Enf’t, U.S. Dep’t of Homeland Sec., *Secure Communities Talking Points* (Jan. 12, 2010), https://www.ice.gov/doclib/foia/secure_communities/talkingpointsjanuary122010.pdf [<https://perma.cc/M4XF-FQAU>].

⁹² Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 61.

⁹³ For an elaboration of this argument, see Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819, 1845 (2011).

routinely ignore laws prohibiting the hiring of undocumented workers.⁹⁴ Undocumented migrants comprise five percent of the overall U.S. workforce, and they make up a much higher percentage of certain industries, such as farming and construction.⁹⁵ Common explanations for why employers hire undocumented workers include labor shortages, the ease with which employment documents can be falsified, lack of employer training in conducting effective immigration screening, and incentives to hire cheaper workers.⁹⁶

While police and employers are the most common enforcement agents, they are far from alone. Other sites of enforcement include schools and courthouses. In recent years, “school resource officers”—police officers posted inside schools—have reported students to ICE on suspicion of gang membership. Yet in practice, “gang membership” is an amorphous term untethered from any uniform legal standards,⁹⁷ which enables relatively common and innocuous behavior to trigger immigration penalties. For instance, in March 2018, a Baltimore student spent six months in ICE detention after a school resource officer reported that the student had been part of a group that threatened a classmate.⁹⁸ In January 2018, a Houston student was detained by ICE for four months after a fight with another student.⁹⁹

Court personnel have also assisted immigration enforcement officials. Enforcement in courthouses is not restricted to those convicted of criminal offenses that render them deportable. It also includes those who are arrested for minor offenses as well as those who appear as victims or witnesses.¹⁰⁰

⁹⁴ See Lee, *supra* note 16, at 1106 (“[W]hile it is true that IRCA formally prohibits employers from hiring unauthorized immigrants under threat of civil and criminal sanction, it has been so infrequently enforced that employers can escape detection in all but the most egregious circumstances.”).

⁹⁵ See Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the United States*, PEW RES. CTR. (Nov. 28, 2018), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s> [<https://perma.cc/ZD5P-46DA>] (noting that unauthorized migrant workers account for twenty-four percent of the farming industry and fifteen percent of the construction industry); see also MAYOR’S OFFICE OF IMMIGRANT AFFAIRS, STATE OF OUR IMMIGRANT CITY 18 (2018) (observing high labor force participation of undocumented workers in New York City).

⁹⁶ See e.g., David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 414 (2015) (discussing the use of false documents to circumvent federal immigration policy); Pham, *supra* note 52, at 825 (noting that private employers have no centralized source for immigration enforcement training).

⁹⁷ See Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member”*, 2007 U. CHI. LEGAL F. 317, 320 (“No uniform legal standards govern the identification of criminal street gang members for purposes of ICE enforcement, and while the ‘associates’ of criminal street gang members are often removed, there are no legal standards defining who constitutes an associate of a criminal street gang member.”).

⁹⁸ Hannah Dreier, *He Drew His School Mascot—and ICE Labeled Him a Gang Member*, PROPUBLICA (Dec. 27, 2018), <https://features.propublica.org/ms-13-immigrant-students/huntington-school-deportations-ice-honduras/> [<https://perma.cc/SG67-6ZG4>].

⁹⁹ *Id.*

¹⁰⁰ See Devlin Barrett, *DHS: Immigration Agents May Arrest Crime Victims, Witnesses at Courthouses*, WASH. POST (Apr. 4, 2017), <https://www.washingtonpost.com/world/national-security/dhs->

The enforcement actions discussed thus far represent systematic delegation of immigration enforcement authority, meaning that federal immigration agents require or encourage other actors to function as immigration enforcement agents through formal programs. Public or private actors also engage in immigration enforcement pursuant to state or local ordinances that require immigration screening. One well-known example is the ultimately invalidated Hazleton, Pennsylvania, ordinance that required landlords to check immigration status.¹⁰¹ Some private actors also engage in immigration screening because they misunderstand what their legal obligations are—they may believe that they are required to report those suspected of being undocumented. As Huyen Pham has discussed, for a period of time Greyhound Bus Lines instructed employees not to sell tickets to anyone suspected of being an illegal alien and included warnings that employees look out for Spanish words that could reference smuggling.¹⁰² Individual companies or actors may also be motivated to engage in immigration enforcement for other reasons. In a violation of consumer protection law and in apparent contradiction with its own business interests, employees at the Motel 6 Hotel chain provided confidential personal information of 9000 customers to ICE agents in the absence of any warrant.¹⁰³

Immigration enforcement thus has an important hidden impact at the bottom of the pyramid. The vast majority of the undocumented population never experiences formal mechanisms of immigration enforcement. They are not detained or arrested. They are certainly never deported. Yet they are keenly aware that key institutions have the ability to trigger immigration enforcement. Employers wear two hats: they are simultaneously employers and immigration screeners. Police likewise fulfill their community role as police officers while simultaneously wielding the power to trigger immigration screening.

This dynamic opens the door to racial discrimination and to the exploitation of undocumented workers. But it also does more. It creates

immigration-agents-may-arrest-crime-victims-witnesses-at-courthouses/2017/04/04/3956e6d8-196d-11e7-9887-1a5314b56a08_story.html?noredirect=on&utm_term=.312d9eae7c4 [https://perma.cc/8NW5-PAKH] (“Just because they’re a victim in a certain case does not mean there’s not something in their background that could cause them to be a removable alien,” David Lapan, a Department of Homeland Security spokesman, said in a briefing to reporters.”).

¹⁰¹ See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1734 (2010) (discussing Hazleton ordinances, adopted in 2006 and 2007 which prohibited employers from hiring undocumented workers and landlords from renting to undocumented migrants). The ordinances were found to be preempted by federal immigration law. *Lozano v. City of Hazleton*, 724 F.3d 297, 300 (3d Cir. 2013).

¹⁰² See Pham, *supra* note 52, at 795. In response to a lawsuit from immigrant advocacy organizations, Greyhound modified its policy. *Id.* at 796.

¹⁰³ Alicia A. Caldwell & Chris Kirkham, *Washington Attorney General Sues Motel 6 for Sharing Guest Info with Feds*, WALL ST. J. (Jan. 3, 2018), <https://www.wsj.com/articles/washington-attorney-general-sues-motel-6-for-sharing-guest-info-with-feds-1515016334>.

incentives for undocumented migrants to lay low and to avoid interactions that may result in arrest, detention, family separation, and deportation.¹⁰⁴ It chills workers from reporting unsafe conditions or from filing police reports about unlawful activity.¹⁰⁵ Importantly, these incentives exist to some degree regardless of how immigration screening is in fact exercised.

Interview-based accounts with undocumented communities show that undocumented migrants report substantial uncertainty about whether routine interactions might trigger immigration enforcement. For instance, some undocumented migrants report not taking children, including U.S. citizens, to health care providers because they fear that either the children or parents may be reported to immigration enforcement officials.¹⁰⁶ They are less likely to obtain health insurance for undocumented family members.¹⁰⁷ Some report avoiding school on days of suspected immigration raids.¹⁰⁸ These dynamics are pervasive, and they are reported even in so-called “sanctuary” jurisdictions.¹⁰⁹

¹⁰⁴ Rose Cuisan Villazor has deployed the analogy of “the undocumented closet” to describe the dynamic of undocumented migrants living “closeted lives” that reflect “awareness of the ever-present threat of being deported.” Rose Cuisan Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 42 (2013) (internal quotation marks omitted); see also Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 805 (2017) (observing that undocumented migrants “understand that if they are arrested by the federal immigration authorities it will likely lead to deportation” and therefore they “live in constant fear of removal and the attendant separation from their family, friends, community, and property”).

¹⁰⁵ See, e.g., Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html> [<https://perma.cc/F7W5-PKZC>] (describing Houston’s rapid drop in domestic violence reports in light of tough new immigration enforcement).

¹⁰⁶ See, e.g., Abrego & Menjivar, *supra* note 68, at 15-16 (collecting interview-based accounts describing how mixed immigration status families will go to great lengths to avoid social services providers, such as for medical care and food stamps); Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion*, 37 L. & POL’Y 265, 273-76 (2015) (“When [individuals] do not understand the kind of legal standing and entitlements that immigrants in liminal, humanitarian legal statuses officially have, immigrants may experience blocked mobility, a persistent fear of deportation, instability, confusion, and self-blame.”); Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 716 (2015) (noting how indefinite administrative grace periods create even more anxiety for “liminal legal subjects”); Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOC. 999, 1000 (2006) (describing the pervasive sense of anxiety created by long-term uncertainty for undocumented migrants from Guatemala and El Salvador); Rabin, *supra* note 68, at 5.

¹⁰⁷ JOANNA DREBY, *EVERYDAY ILLEGAL* 104-06 (2015) (reporting that of 212 children living in eighty-one families that were interviewed, “legal status was the primary indicator of insurance coverage,” and noting that two-thirds of U.S. citizen children in mixed immigration status families had health insurance, while none of the forty-eight children who lacked legal immigration status did).

¹⁰⁸ See Abrego & Menjivar, *supra* note 68, at 15 (presenting interview-based accounts of undocumented mothers keeping children home from school after an immigration raid).

¹⁰⁹ MAYOR’S OFFICE OF IMMIGRANT AFFAIRS, *supra* note 95, at 22 (discussing an increase in ICE arrests and the impact on undocumented migrants who, in response, avoid areas where they fear immigration raids).

To some degree, this dynamic is inevitable. No one has perfect information about enforcement choices. In a world where many people are legally removable at any time but few will actually be removed, the executive makes decisions about how to gather information about undocumented migrants and prioritize removals. The enforcement process is discretionary, which in turn creates uncertainty about how enforcement choices are made.

As a practical matter, this approach shifts discretion from the executive to street-level agents. Immigration enforcement officials have nowhere near the funding necessary to identify and remove the millions of noncitizens who are legally removable. In the absence of systemic discretion about who ought to be prioritized, removal decisions reflect who happens to be picked up by local agents. As a result, front-end decisions to make arrests or to otherwise trigger immigration enforcement carry much more weight. That, in turn, diminishes the ability of the executive branch to determine which undocumented migrants will be selected for removal.¹¹⁰

Administrations have periodically attempted to address this dynamic through enforcement guidance. One approach is to prioritize certain types of removals while shielding other undocumented migrants from removal. The approach taken by the Obama administration, for instance, prioritized removal of those with certain felony convictions above those with certain misdemeanor convictions.¹¹¹ The Deferred Action for Childhood Arrivals (DACA) program also provided temporary relief for certain youth who met various other criteria, such as completing high school and not having certain criminal records.¹¹²

¹¹⁰ See Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1264 (2015) (“Secure Communities achieved the ultimate delegation downward of enforcement discretion and, as a result, deprived the executive branch of the ability to steer the course of immigration enforcement policy.”).

¹¹¹ President Obama described the approach this way: “Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.” Address to the Nation on Immigration Reform, 2014 DAILY COMP. PRES. DOC. 2 (Nov. 20, 2014). More specifically, the “first priority” category included those apprehended when crossing the border, those who posed a national security threat, and those convicted of certain felonies. Behind this group were those with certain misdemeanor convictions and recent unlawful entrants. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski et al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<https://perma.cc/2C7J-KUEP>] (establishing priorities effective January 5, 2015).

¹¹² See Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. 1 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/H6JF-G7FZ>]. For a discussion of DACA and DAPA, see Chacón, *supra* note 106, at 719, which notes that criteria for DACA eligibility include those “who were under thirty-one on the date of the announcement, who had entered the United States before June 15, 2007, as children under the age of sixteen, who had completed high school, and who did not have disqualifying criminal records.”

One policy-based criticism of this approach is that it does not do enough to offer security against the possibility of immigration enforcement.¹¹³ Delegating immigration enforcement to other actors also magnifies the risk that employers, for instance, will make mistakes or engage in strategic enforcement decisions that serve their own business interests. Employers and private enforcers are not trained on how to conduct immigration enforcement. Nor do they have incentives to invest time in learning how to most effectively conduct immigration screening.¹¹⁴ Some employers have financial incentives to hire undocumented workers and underpay them, banking on their reluctance to seek legal protections.¹¹⁵ As a result, the use of employers to check immigration status and keep undocumented migrants from working has been ineffective.

In addition, even when employers attempt to adhere faithfully to all their legal obligations, there remains a risk of what Professor Kathleen Kim has described as “structural coercion,” where workers “acquiesce or decline to improve poor working conditions because of the constraining effects of their unauthorized status.”¹¹⁶ This dynamic can harm workers and employers alike because it can chill socially useful communication about dangerous or unsafe working conditions.

Thus, even with clear enforcement guidance, there is a risk that undocumented migrants will have powerful incentives to avoid drawing attention to themselves. This concern has perhaps been magnified with recent enforcement guidance that broadens the categories subject to priority removal.¹¹⁷ Removal priorities established in January 2017 do not differentiate between arrest and conviction, and they also do not distinguish based on the severity of the charged offense.¹¹⁸

¹¹³ During the early days of Secure Communities, a significant percentage of removals did not fall within a stated priority area. *Aguilar v. U.S. Immigration & Customs Enf't*, 510 F.3d 1, 6 (1st Cir. 2007) (“The ICE agents cast a wide net and paid little attention to the detainees’ individual or family circumstances . . . [and subsequently] releas[ed] dozens of employees determined either to be minors or to be legally residing in the United States . . .”); Jain, *supra* note 47, at 829 (“[A]pproximately twenty percent of those deported [from the interior] had no known criminal convictions at the time of removal.”).

¹¹⁴ Huyen Pham raises this point in the context of transportation providers who have been required by some local anti-immigrant ordinances to check immigration status. Pham, *supra* note 52, at 777.

¹¹⁵ See, e.g., *United States v. Calimlim*, 538 F.3d 706, 708-09 (7th Cir. 2008) (involving conviction of an employer for subjecting undocumented worker to forced labor conditions).

¹¹⁶ Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1562 (2015).

¹¹⁷ A January 2017 executive order listed broad enforcement priorities, including those who have been convicted of or charged with any criminal offense, regardless of the severity. It also included anyone who had committed acts that could be charged as a criminal offense. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

¹¹⁸ *Id.*

Recent high-profile deportations give undocumented migrants incentives to avoid activities that might draw attention to their immigration status.¹¹⁹ The practice of arresting and deporting foster families who offered to take in detained migrant children offers one example.¹²⁰ Pursuant to a memorandum of agreement between the Department of Health and Human Services and DHS, potential foster families are subject to background checks and fingerprinting. The stated rationale is to ascertain whether there is “a documented risk to the safety of the unaccompanied child.”¹²¹ However, federal immigration enforcement officials have recently used the fingerprinting process as a means of conducting immigration enforcement. Forty-one potential foster care sponsors were arrested in June 2018 for immigration violations.¹²² Of those arrested, a reported seventy percent had no criminal records.¹²³ These enforcement actions create powerful incentives for undocumented individuals to avoid serving as foster parents. They conflict with the enforcement objectives of Health and Human Services to ensure the safety of children. They also create other costs, such as raising the likelihood of children remaining in detention rather than with families.¹²⁴

News reports of interior immigration enforcement also create incentives for undocumented migrants to lay low. Consider a few examples. Pablo Calderon had lived in the United States for a decade when he was arrested on route to deliver pizza to an Army base. He was placed in immigration detention for fifty-three days before a federal judge ordered his release.¹²⁵ The release order noted that aside from his immigration violation, Calderon

¹¹⁹ As Asad L. Asad has observed, this dynamic applies to documented immigrants who have incentives to stay off the radar as well. Asad L. Asad, *On the Radar: System Embeddedness and Latin American Immigrants’ Perceived Risk of Deportation 2* (Dec. 19, 2018) (unpublished manuscript), <https://osf.io/preprints/socarxiv/dcgfw> (“Documentation affords some protection from deportation, but it can also heighten fears since the bureaucracies that ‘document’ immigrants have a greater perceived ability to surveil and expel them.”).

¹²⁰ The policy was in place for approximately six months in 2018. Colleen Long, *U.S. Reverses Policy on Migrant Children’s Sponsors*, AP NEWS, (Dec. 18, 2018), <https://www.apnews.com/f34ab3a0085b453ca0d98f92bbbcb83> [<https://perma.cc/8SD9-4HBB>].

¹²¹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-506T, UNACCOMPANIED CHILDREN: DHS AND HHS HAVE TAKEN STEPS TO IMPROVE TRANSFERS AND MONITORING OF CARE, BUT ACTIONS STILL NEEDED 8 (2018).

¹²² Caitlin Dickerson, *Migrant Children Moved Under Cover of Darkness to a Texas Tent City*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html> [<https://perma.cc/KQW7-FEK3>].

¹²³ *Id.*

¹²⁴ Tal Kopan, *The Simple Reason More Immigrant Kids Are in Custody Than Ever Before*, CNN POLITICS (Sept. 14, 2018), <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html> [<https://perma.cc/5M4C-5GFM>].

¹²⁵ Liz Robbins, *Pizza Delivery Man Detained by ICE Is Freed by Judge*, N.Y. TIMES (July 24, 2018), <https://www.nytimes.com/2018/07/24/nyregion/pizza-deliveryman-deportation-judge-questions.html> [<https://perma.cc/3G5G-TP9G>].

had otherwise been a “model citizen” who paid taxes, had a clean criminal record, and who worked to support his U.S. citizen spouse and U.S. citizen children.¹²⁶ Ten-year-old Rosa Maria Hernandez, who had been living in the United States since the age of three months, was detained in a Texas hospital while undergoing an emergency surgery.¹²⁷ She was then placed in a shelter typically used for unaccompanied children who are apprehended while crossing the border.¹²⁸ In another widely reported Texas case, an undocumented migrant was arrested at a courthouse when seeking a protective order and reporting domestic abuse.¹²⁹

These enforcement actions have an impact that goes well beyond the arrested individual. While any given undocumented migrant has a low likelihood of being detained and removed, indiscriminate interior enforcements signals that undocumented migrants risk being apprehended on the basis of commonplace, desirable interactions. Proponents of this approach view the creation of a wide enforcement net as a way to encourage “self-deportation.” The theory is that by appropriating individual actors as immigration enforcement agents, and by sending the message that even seeking medical care or legal assistance is fraught with the potential for arrest, detention, or deportation, the state can encourage those present without authorization to make the decision to leave.¹³⁰ Yet in practice, this approach also leads those present long-term to make other choices. It creates incentives for the undocumented to refuse to serve as foster families, to steer clear of places where they might be fingerprinted or asked to show identification, to forgo medical care or avoid reporting crime. At the bottom of the immigration enforcement pyramid, the threat of immigration enforcement—in its many forms—has a powerful impact, even when it does not result in the act of removal.

III. LESSONS FROM LOW-LEVEL CRIMINAL LAW ENFORCEMENT

In delegating enforcement discretion to a range of public and private actors, immigration enforcement is not unique. It employs enforcement techniques that are also widely used in low-level criminal law enforcement. Misdemeanor enforcement routinely renders a large population subject to ongoing

¹²⁶ Calderon v. Sessions, 350 F. Supp. 3d 944, 949-50 (S.D.N.Y. 2018).

¹²⁷ Marwa Eltagouri, *A 10-Year-Old Immigrant Was Rushed to the Hospital in an Ambulance. She Was Detained on the Way.*, WASH. POST (Oct. 27, 2017) https://www.washingtonpost.com/news/post-nation/wp/2017/10/26/a-10-year-old-immigrant-was-rushed-to-the-hospital-in-an-ambulance-she-was-detained-on-the-way/?utm_term=.bfb4e86ae5co [<https://perma.cc/WT4G-Y85Y>].

¹²⁸ *Id.*

¹²⁹ Engelbrecht, *supra* note 105.

¹³⁰ K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1882 (2019) (describing the concept of “self-deportation” as one where immigration enforcement is designed to make “unbearable” the lives of people the state wishes to remove).

surveillance and to the threat of serious sanctions by public and private actors alike. Police who engage in “order maintenance” policing make high-volume, low-level arrests. The goal is not to maximize convictions, but to gather data about people over time, which is then used for risk assessment. Prosecutors monitor how many arrests a certain individual has had within a given period of time to determine whether to pursue criminal charges.¹³¹

Private actors engage in monitoring as well. Employers, for instance, function as law enforcement officers for parolees and probationers when they monitor whether the supervised population complies with court-ordered work requirements. They, in effect, have the ability to determine whether a probationer ends up in prison. Landlords function as law enforcement when “nuisance” ordinances require them to evict tenants based on suspected disorderly or criminal activity. Landlords who have the ability to credibly threaten eviction based on calls to 911 wield significant leverage over tenants.

Beyond formal monitoring mechanisms, arrests alone—regardless of whether they result in conviction—can trigger serious penalties, such as jail time for those who owe outstanding child support,¹³² eviction for arrested individuals who live in public housing,¹³³ or loss of custody, particularly if a parent is already involved with social services supervision.¹³⁴ These civil penalties may be experienced as more harmful than any formal criminal sentence.

Thus, it is not only undocumented migrants who experience ongoing monitoring and the potential for serious adverse consequences triggered by routine interactions. For many, low-level contact with the criminal justice system can also have outsized consequences. While immigration scholars have assessed how deportation can resemble criminal punishment, thus far, they have overlooked how immigration enforcement techniques short of deportation resemble low-level criminal law techniques.

Recognizing the structural parallels between immigration enforcement and low-level criminal law enforcement has important conceptual payoffs. It shows that certain costs of immigration enforcement—undocumented workers being subject to exploitation or avoiding contact with the police—are neither unique to immigration enforcement, nor are they inevitable. They should be anticipated when enforcement discretion is broadly delegated to public and

¹³¹ Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 668 (2014); see also Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 455 n.12 (1990) (discussing the shift to aggregate risk assessment, rather than individual culpability determinations, as part of the “new penology”).

¹³² Cortney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125, 126 (2018).

¹³³ See *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002) (permitting a family’s eviction from public housing based on the off-premises drug arrest of a household member); Jain, *supra* note 47, at 834 (discussing *Rucker*).

¹³⁴ Jain, *supra* note 47, at 842.

private actors. It also reveals hidden costs of the “force multiplier” strategy on society at large, not just on undocumented migrants. These costs emerge not just in immigration, but also in the low-level criminal law enforcement, where the stakes are supposedly much lower. The comparison shows the limits of certain deterrence arguments and suggests that some costs of monitoring a population long-term are structural; they are not unique to immigration.

This Part takes a step back from immigration and explores structural parallels between immigration enforcement and low-level criminal law enforcement. It first briefly explains why it is that some populations are unlikely to be effectively deterred by criminal law enforcement. It then analyzes structural similarities between immigration and criminal law techniques for monitoring and considers their hidden costs.

A. *The Limits of Deterrence*

One rationale for highly visible interior immigration enforcements—meaning publicized efforts to prosecute, identify and remove undocumented migrants—is deterrence. Proponents argue that such efforts will cause those who are already present without authorization to leave. A decade ago, Kris Kobach put it this way:

The twelve to twenty million illegal aliens in the United States need not be rounded up and forcibly removed through direct government action. Illegal aliens can be encouraged to depart the United States on their own . . . Illegal aliens are rational decision makers. If the risks of detention or involuntary removal go up, and the probability of being able to obtain unauthorized employment goes down, then at some point, the only rational decision is to return home.¹³⁵

This argument justifies expanded interior enforcement. However, it rests on a number of unsupported assumptions.¹³⁶ It assumes that in the face of escalated enforcement, a rational cost–benefit calculus would lead to the decision to depart or “self-deport.”¹³⁷ While this approach may work for recent arrivals or others who can easily return to their countries of origin, it can lead those who have deep ties to the United States to make a rational decision to try to stay off the radar and avoid detection. The “self-deportation” approach also does not account

¹³⁵ Kobach, *supra* note 6, at 156.

¹³⁶ The author provided no support for the assertion that there are “twelve to twenty” undocumented migrants in the United States as of 2008. The Pew Research Center estimated between eleven million and twelve million unauthorized immigrant populations during that time. See PASSEL & COHN, *supra* note 2. Kobach’s argument also does not recognize how some undocumented migrants may have legal claims to remain. See Martin, *supra* note 40, at 1 (discussing “twilight” statuses).

¹³⁷ See generally Park, *supra* note 130.

for the full costs of enforcement, including the social costs of policies that impact society at large and on “mixed” immigration status families.¹³⁸

Like immigration enforcement, criminal law enforcement routinely reaches conduct that it does not effectively deter. For those who lack the ability or the incentives to comply with the law, or those who believe that they are unlikely to get caught, enforcement efforts can simply drive prohibited behavior underground. This, in turn, can lead to more harmful behavior.¹³⁹ For instance, jurisdictions that take away the drivers’ licenses of those with unpaid criminal justice debt may see an uptick in driving without a license.¹⁴⁰ Drug crackdowns may lead to a market for more dangerous crimes, such as drug trafficking.¹⁴¹

Undocumented migrants who have lived and worked in the United States long-term have much at stake in remaining. Many have U.S. citizen children or other deep roots in the United States.¹⁴² Over time, connections to their countries of origin may have withered, particularly given the difficulty of returning to visit. Even if undocumented migrants are interested in returning to their countries of origin, doing so is no easy task. Moving itself is expensive and the prospect of re-establishing roots after over a decade away can be daunting. These factors, along with the relatively low likelihood of detection, make long-term undocumented migrants unlikely to return to their countries of origin in significant numbers.

Engaging in immigration enforcement designed to encourage “self-deportation” also poses serious costs. The balance of this Part unpacks hidden costs, such as the risk of creating more crime, undermining other law enforcement goals, and leading populations to avoid reporting crime and engaging in other socially useful behavior.

¹³⁸ See Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL’Y & L. 103, 111 (2006) (discussing the impact of immigration enforcement on mixed immigration status families); see also Hiroshi Motomura, *Making Legal: The DREAM Act, Birthright Citizenship, and Broad-Scale Legalization*, 16 LEWIS & CLARK L. REV. 1127, 1131 (2012) (summarizing common arguments for immigration reform in the context of the Dream Act, including the need to integrate undocumented children).

¹³⁹ See generally David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947 (2012) for an elaboration of this argument.

¹⁴⁰ See, e.g., LAWYERS’ COMM. FOR CIVIL RIGHTS, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 14 (2015) (noting that seventeen percent of adult Californians have had a license suspension for failure to pay a debt and that suspended license cases lead to further penalties when people drive without licenses to get to work).

¹⁴¹ Jaros, *supra* note 139, at 1947; see also William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1873 (2000) (discussing how enforcement of certain “vice crimes” such as those enforced during Prohibition “might prove self-defeating . . . by undermin[ing] the norms on which they rest”).

¹⁴² PASSEL & COHN, *supra* note 2, at 6.

B. *Hidden Enforcement Costs*

Immigration scholars have tended to confine their analyses of the “force multiplier” phenomenon to immigration law. But the practice of delegating enforcement discretion to an array of actors is an exceedingly common one in criminal law enforcement as well. This Section explores structural parallels to immigration enforcement in the context of workplace enforcement, housing enforcement, and policing decisions. In each of these contexts, the approach is designed to deter, but in practice, can carry serious hidden costs.

Work requirements and “nuisance ordinances” are important examples of surveillance and enforcement delegation in the criminal law context. In each regime, private actors have the ability to trigger serious harm, even if it is not the most serious harm of long-term incarceration or deportation. As discussed further below, both of these enforcement mechanisms carry related hidden enforcement costs. They can undermine enforcement of other laws, and they can create new forms of lawbreaking.

Work requirements are a common condition of probation.¹⁴³ Some states also compel parents to work if they owe child support.¹⁴⁴ The rationales for work requirements vary. In the child support context, work requirements are imposed to try to deter so-called “deadbeat” parents from shirking support obligations. In the probation context, work requirements were “[i]nitially conceived as a way to reintegrate offenders into the community through a close interpersonal relationship between [the enforcement] agent and offender.”¹⁴⁵ The theory was that work itself—even when court-ordered and enforced with the threat of prison—would serve a rehabilitative function. As Jonathan Simon and Malcolm Feeley have observed, this rationale evolved over time to a “managerial” one, with supervision of work requirements used as a “monitoring technique” designed to “detect high rates of technical violations” and lead to further discipline.¹⁴⁶ In other words, work requirements are used as one way to measure the supervised individual’s ability to “get with the program” and to adhere to the conditions of court-ordered probation. Those who are able to comply with work requirements are viewed as less risky; those who are not are likely subject to further discipline.

Employers as well as probation officers monitor compliance. Probation officers have the ability to make unannounced inspections in homes and

¹⁴³ See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L. J. 291, 310 (2016) (“In nearly every jurisdiction in [this] study, working or going to school is a central requirement of being on probation.”).

¹⁴⁴ See *United States v. Ballek*, 170 F.3d 871, 874 (9th Cir. 1999) (“We conclude that child-support awards fall within that narrow class of obligations that may be enforced by means of imprisonment without violating the constitutional prohibition against slavery.”).

¹⁴⁵ Feeley & Simon, *supra* note 131, at 455 n.12.

¹⁴⁶ *Id.* at 455.

workplaces.¹⁴⁷ They have the ability to interview employers to assess compliance. Employers in some cases also operate like probation officers, and they report directly to courts. A judge in a Syracuse drug court put it this way: “Your employer is now on a team of people who are reporting to me. When he calls me up and tells me that you are late, or that you’re not there, I’m going to send the cops out to arrest you.”¹⁴⁸ Both the worker and the employer are aware that the employer has the ability to trigger a serious penalty. The system essentially “deputizes” the employer as a probation officer.¹⁴⁹

On the surface, work requirements in the context of probation or child support may appear to have nothing to do with work in the context of undocumented migrants. As a matter of substantive law, these legal regimes are opposites: probationers are required to work, while undocumented migrants are prohibited from working. The parallels emerge not as a matter of substantive law, but rather in terms of enforcement structure and its impact on power dynamics within workplaces. In both contexts, workers are keenly aware that their employers are not just employers; they are also enforcement agents for a large and powerful enforcement bureaucracy, be it criminal law or immigration law. In some cases, employers are likewise keenly aware of their dual role as well. These dynamics alter workplace power dynamics by giving employers an enormous amount of leverage over workers.

This dynamic creates law enforcement tradeoffs, meaning enforcement of one law—the requirement that the supervised individual work—creates the likelihood that other laws will not be enforced. Those subject to work requirements have incentives not to report dangerous working conditions, unlawful discrimination, or other forms of misconduct. In the immigration context, exploitation of migrants—both unauthorized workers and legally present guestworkers—is well documented.¹⁵⁰ Similar opportunities for exploitation occur with probationers, who are aware that they must “get to work or go to jail.”¹⁵¹ The vast majority of affected workers are low income, with typical earnings of less than \$1,000 per month.¹⁵² Work requirements can create conditions that trigger a cycle of punishment, lost work, and

¹⁴⁷ Doherty, *supra* note 143, at 296.

¹⁴⁸ James L. Nolan, Jr., *Therapeutic Adjudication*, 39 *SOC’Y*, Jan.–Feb. 2002, at 29, 32.

¹⁴⁹ NOAH ZATZ ET AL., *GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT* 12 (2016); *see also* Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 *SEATTLE U. L. REV.* 927, 933 (2016) (explaining how child support enforcement effectively makes debtors work or risk criminal sanctions).

¹⁵⁰ *See generally* S. POVERTY LAW CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* (2013) (documenting, based on lawsuits and interviews, exploitation in guestworker programs).

¹⁵¹ ZATZ ET AL., *supra* note 149, at 4.

¹⁵² *Id.* at 5.

homelessness. The threat of jail time is not an idle one: an estimated 9000 people are currently incarcerated for violating work requirements.¹⁵³

Work requirements, in effect, give employers more bargaining power relative to workers. Coercive employers can take advantage of these dynamics by engaging in unlawful activity, such as wage theft, with the knowledge that employees may be unlikely to complain.¹⁵⁴ But even when employers act in good faith, the threat of jail time or another significant penalty can suppress socially valuable activity. It can lead employees to avoid engaging in open communication about work conditions.

Private actors also exercise quasi-criminal law enforcement power in housing. Nuisance ordinances are a common example of the “force multiplier” strategy for low-level cases. According to one estimate, approximately 2000 nuisance ordinances exist in the United States.¹⁵⁵ They have received scant attention by legal scholars, but they represent an important legal intervention.¹⁵⁶ Nuisance ordinances are designed to be a cost-effective means of removing tenants who cause disturbances in rental homes. Developed as a response to overburdened 911 lines, the ordinances permit, or in some cases require, landlords to evict tenants after calls to the police.¹⁵⁷ If multiple 911 calls are placed from or about a particular residence in a certain timeframe,

¹⁵³ *Id.*

¹⁵⁴ In addition, undocumented workers who do speak out about unlawful activity may not be entitled to all of the same remedies as other workers. *See, e.g., Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151-53 (2002) (holding that an undocumented worker who was illegally fired for trying to organize a union was not entitled to the remedy of backpay because the worker was not authorized to work in the United States).

¹⁵⁵ *Crime Free Multi-Housing: Keep Illegal Activity off Rental Property*, INT’L CRIME FREE ASS’N, <http://www.crime-free-association.org/multi-housing.htm> [<https://perma.cc/9FQP-YYAD>]. *See generally* Gretchen Arnold & Megan Slusser, *Silencing Women’s Voices: Nuisance Property Laws & Battered Women*, 40 LAW & SOC. INQUIRY 908 (2015); Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117 (2012); Peter Edelman, *More Than a Nuisance*, NEW REPUBLIC (Apr. 10, 2018), <https://newrepublic.com/article/147359/nuisance-laws-making-poverty-crime> [<https://perma.cc/Y7G5-VN57>].

¹⁵⁶ In contrast to the dozens of articles on immigration-criminal law enforcement, nuisance ordinances have been understudied. For an important forthcoming discussion of how “crime-free” housing ordinances promote residential segregation, see Deborah Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 117 MICH. L. REV. (forthcoming 2019). For additional literature on nuisance enforcement, see generally Amanda K. Gavin, Note, *Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into “Nuisances” in the Eyes of Municipalities*, 119 PENN ST. L. REV. 257 (2014); Salim Katach, Note, *A Tenant’s Procedural Due Process Right in Chronic Nuisance Ordinance Jurisdictions*, 43 HOFSTRA L. REV. 875 (2015); and Sarah Swan, Comment, *Home Rules*, 64 DUKE L.J. 823 (2015).

¹⁵⁷ Desmond & Valdez, *supra* note 155, at 121.

the landlord will receive a letter from the police indicating that the subject property is a “nuisance” that must be “abated,” including by eviction.¹⁵⁸

The particulars of the ordinances vary by jurisdiction: some localities send nuisance abatement letters after three or more 911 calls in a thirty-day window, while others require only two or more calls within a one-year window.¹⁵⁹ Depending on the locality, police have broad discretion to categorize conduct as a nuisance. For instance, some ordinances include “crime free” provisions, which either require or permit evictions if a tenant or guest “allegedly engages in criminal activity on or near the property, regardless of whether the resident was a victim.”¹⁶⁰ Others are broadly worded to permit eviction on the basis of offenses such as littering and excessive noise.¹⁶¹ Landlords risk penalties—“fines, property forfeiture, or even incarceration”—if they do not “abate the nuisance,” such as by evicting problem tenants.¹⁶²

As with immigration, nuisance enforcement is designed to expand the enforcement net. Landlords are expected to deal with offenses deemed nuisances precisely because they do not merit police resources.¹⁶³ Yet downgrading the offense creates high stakes for tenants, who have much to lose by eviction. In expensive cities, tenants face extraordinary difficulty in finding affordable housing. To put it mildly, it is a landlord’s market. Over eleven million families spend over half their income on housing, and some spend up to eighty percent of their income on housing.¹⁶⁴ Evicted tenants face the possibility that they may be unable to find alternative housing and become homeless.¹⁶⁵ Evicted families with children have a particularly hard time finding other homes.¹⁶⁶ Moving itself is not cheap; it can be cost-

¹⁵⁸ See, e.g., Arnold & Slusser, *supra* note 155, at 910 (describing such procedures in St. Louis’s nuisance ordinance).

¹⁵⁹ Desmond & Valdez, *supra* note 155, at 122 (discussing Milwaukee’s ordinance, which classifies a premises that has generated more than two 911 calls within thirty days as a nuisance); Arnold & Slusser, *supra* note 155, at 910 (noting that the St. Louis, Missouri ordinance required landlords to abate a nuisance after two calls to 911 in a one-year period).

¹⁶⁰ U.S. DEP’T. OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE & CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE 5-6 (2016).

¹⁶¹ Desmond & Valdez, *supra* note 155, at 122.

¹⁶² *Id.* at 120.

¹⁶³ See *id.* at 119-20 (describing how nuisance ordinances arose in response to police being unable to respond to the volume of 911 calls).

¹⁶⁴ See Pam Fessler, *Welcome to Rent Court, Where Tenants Can Face a Tenuous Fate*, NPR (Mar. 28, 2016), <https://www.npr.org/2016/03/28/470522433/welcome-to-rent-court-where-tenants-can-face-a-tenuous-fate> [<https://perma.cc/96F9-FGV6>].

¹⁶⁵ *Id.*

¹⁶⁶ See Matthew Desmond & Carl Gershenson, *Who Gets Evicted? Assessing Individual, Neighborhood, & Network Factors*, 62 SOC. SCI. RES. 362, 372 (2017) (presenting an empirical study finding evidence of discrimination the basis of family status and theorizing that landlords may have an interest in “replacing large households with smaller ones, or families with childless tenants . . .

prohibitive for those with little disposable income. For all these reasons, tenants have powerful incentives to avoid triggering nuisance enforcement, even when it comes at the expense of not reporting crime.

Nuisance enforcement alters power dynamics between tenants, the police, and landlords in far-reaching ways. It can create law enforcement tradeoffs, meaning that nuisance enforcement results in other laws not being enforced. And it can create the conditions that allow serious forms of crime to flourish, precisely because tenants have limited practical ability to call the police.

All tenants are entitled to police protection, but nuisance enforcement creates an incentive not to report crime. It has a chilling effect on the reporting and prosecution of domestic violence. Some domestic violence victims make the rational decision to forgo police protection in order to avoid eviction. In one widely reported example, Lakisha Briggs chose not to call 911 after being assaulted in her home because her landlord had warned her that any additional calls to 911 would result in her eviction.¹⁶⁷ While Briggs' example is unusual in that it received media attention, it is not an isolated one. An empirical study by Matthew Desmond and Nicol Valdez over a two-year period in Milwaukee found that domestic violence calls represented one-third of all citations.¹⁶⁸ Nuisance enforcement also encourages some landlords to interfere with private living arrangements, with some landlords directly informing tenants not to call 911 except in life-threatening situations or informing them to oust boyfriends who cause domestic disturbances.¹⁶⁹ Nuisance enforcement can thus chill reporting and prosecution of other types of crime.

Absent the ordinance, a landlord would have little apparent incentive to regulate a tenant's calls to the police. Nuisance enforcement, however, creates incentives for landlords to quell calls to 911. It places landlords in a position of

[b]ecause children can cause added stress on property, disturb neighbors, and attract unwanted scrutiny by child welfare agents or law enforcement officers").

¹⁶⁷ A neighbor called 911 to report the assault and to seek medical attention for Briggs, who ended up being airlifted to the hospital. Afterward, she was served with an eviction notice. Erik Eckholm, *Victims' Dilemma: 911 Calls Can Bring Eviction*, N.Y. TIMES (Aug. 16, 2013), <https://www.nytimes.com/2013/08/17/us/victims-dilemma-911-calls-can-bring-eviction.html> [<https://perma.cc/2CWK-2Q5V>]; *Briggs v. Borough of Norristown et al.*, ACLU (Sept. 18, 2014), <https://www.aclu.org/cases/briggs-v-borough-norristown-et-al?redirect=womens-rights/briggs-v-borough-norristown-et-al> [<https://perma.cc/W2LN-PR72>].

¹⁶⁸ See Desmond & Valdez, *supra* note 155, at 131, which also quotes a landlord informing tenants,

You can't be calling the police because your boyfriend hit you again. They're not your big babysitter. It happened last week, and you threw him out. But then you let him back in, and it happens again and again. Either learn from the first experience or, you know, leave. Don't take him back and get hit because you tell him, I don't know, "I don't want to sleep with you."

Other landlords reported explicitly informing tenants that they would begin eviction proceedings if the tenants called the police in "*non-life threatening*" situations. *Id.* at 134.

¹⁶⁹ *Id.* at 131.

power relative to tenants. Landlords may use that power in a way that deters people from seeking police protection. These dynamics unfold against a backdrop of legal regulation where tenants are often practically unable to assert their legal rights, given understaffed housing courts and lack of access to counsel in housing court.¹⁷⁰

Like regulations aimed at deterring unlawful immigration, nuisance enforcement also facilitates unlawful discrimination. Desmond and Valdez found that “properties located in black neighborhoods were more likely to receive nuisance citations for domestic violence” even after controlling for relevant factors, such as the overall presence of domestic violence calls.¹⁷¹ “All else being equal, a property located in an 80 percent black neighborhood . . . was over 3.5 times more likely to receive a nuisance citation” than other properties.¹⁷² Thus, expanded enforcement discretion also expands the opportunities for racial discrimination.

In addition to private actors, police of course also exercise significant discretion. Arrest decisions can trigger serious harm, even for low-level arrests. This can lead to “system avoidance”—an unwillingness of those who have prior contacts with the criminal justice system to engage with certain key institutions, such as police.¹⁷³

Undocumented migrants are far from the only population with good reason to avoid minor contact with the police. Probationers face the possibility of probation revocation for minor law enforcement encounters, such as speeding or a parking ticket—or even a mere complaint about a potential legal violation.¹⁷⁴ Those who owe criminal justice debt can end up in jail because of their inability to pay.¹⁷⁵ This dynamic unfolds in two ways. First, the criminal process is used to punish failure to pay certain types of

¹⁷⁰ See, e.g., Fessler, *supra* note 164 (observing that many tenants in housing court are not represented by a lawyer and do not know what their rights are).

¹⁷¹ Desmond & Valdez, *supra* note 155, at 132.

¹⁷² *Id.* at 132.

¹⁷³ Brayne, *supra* note 14, at 368.

¹⁷⁴ Doherty, *supra* note 143, at 301.

¹⁷⁵ This dynamic unfolds in spite of the prohibition against debtors’ prisons. See *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (holding that imprisonment due to a prisoner’s inability to pay a debt violates the Fourteenth Amendment’s Equal Protection Clause); see also *Bearden v. Georgia*, 461 U.S. 660, 668-69, 672-73 (1983) (holding that the practice of imprisoning a probationer who was unable to pay off his legal debts violates equal protection). But see Laura I Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1489-90 (2016) (describing how states have informally re-created debtors’ prisons); Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), <https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> [<https://perma.cc/X7VV-BSM6>] (explaining that a quarter of people in a county jail for misdemeanor offenses over a four-month period in 2013 were there because they had not paid court fines and fees).

debt, such as child support and penal debt. Second, those who owe child support and penal debt—broadly defined as “debt stemming from civil and criminal penalties and fines, prosecution costs, court fees, usage fees, and interest”—find that unlike many other categories of debt, these debts are not dischargeable in bankruptcy court.¹⁷⁶ Thus, debtors have restricted remedies if they are unable to pay.

For debtors, these dynamics magnify the stakes of arrest. Unpaid debt triggers a downward spiral. It may trigger arrest warrants, which can lead to jail time or suspension of a driver’s license, which in turn can lead to loss of work and additional debt.¹⁷⁷ The cycle then repeats itself.

This is the pattern that unfolded for Walter L. Scott, who was shot in the back and killed when he fled from police in 2015. Scott fled after he was pulled over for a broken taillight; he was not involved in any criminal activity. Scott, however, had good reason to avoid arrest. Scott’s child support debt had previously led to an outstanding criminal warrant. At the time of his fatal encounter with the police, he had already experienced losing what he described as the “best job [he] ever had” when unpaid child support led to a two-week stint in jail.¹⁷⁸ His awareness of the possibility of being jailed again due to the debt may have led him to flee from the police, which in turn, led to a police officer using deadly force. His case is not an anomaly. According to a recent report, “[i]n major cities, 5% of all fathers are incarcerated for falling behind on child support.”¹⁷⁹

These enforcement choices may create lasting incentives to avoid the police and other institutions that are perceived as participating in surveillance. Sociologist Sarah Brayne found that those with prior contact with the criminal justice system avoid interactions with “surveilling” institutions, meaning institutions that keep formal records, such as banks, hospitals, or the police.¹⁸⁰ Brayne coined the term “system avoidance” to describe the pattern of avoidance with institutions that keep records (that put people “in the system”),

¹⁷⁶ Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 919 (2017) (footnote omitted); see also *Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1727 (2015) (describing usage fees in the criminal context); Zatz, *supra* note 149, at 931 (explaining that unlike private debts, criminal justice debts are not dischargeable in bankruptcy and can result in imprisonment for nonpayment).

¹⁷⁷ See Brandon L. Garrett & William Crozier, *Driver’s License Suspension in North Carolina 2* (Duke Law Sch., Pub. Law & Legal Theory Series No. 2019-27), <https://ssrn.com/abstract=3355599> (finding that fifteen percent of North Carolinians had their driver’s licenses suspended and that most suspensions were for failure to appear in court and summarizing research showing that the suspension of a driver’s license has a negative impact on employment).

¹⁷⁸ Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html> [<https://perma.cc/2SWD-B4QZ>].

¹⁷⁹ ZATZ ET AL., *supra* note 149, at 2.

¹⁸⁰ Brayne, *supra* note 14, at 368.

and she argues that the rise in surveillance mechanisms related to criminal justice has led to a “concomitant increase in efforts to evade” that surveillance.¹⁸¹ Those with prior criminal law contact avoided institutions like schools, employers, or hospitals, but not community organizations that did not collect data, such as churches.¹⁸² Prior negative contact with the criminal justice system also diminishes other forms of social engagement. Sociologist and legal scholar Sara Greene found that prior encounters with the criminal justice system led to diminished engagement with the civil legal system, for instance, in the form of not seeking civil legal services.¹⁸³

System avoidance is harmful precisely because it deters so many socially useful interactions. Those who avoid access to recordkeeping institutions, such as banks, hospitals, or the police, are more likely to be at risk of crime or adverse health care outcomes. Communities as a whole are also less well off when large classes of people are unable to access medical care or report crime.

Situating immigration enforcement in the context of other quasi-criminal enforcement mechanisms shows the reach of informal mechanisms of enforcement. In both systems, routine interactions with private and public actors can trigger escalated penalties. In the immigration context, as in the criminal law context, these dynamics constitute an important type of enforcement, even if it is not the most severe type of enforcement. Both systems create costs that emerge from power imbalances between the regulated population and other actors.

The comparison to criminal law also reveals why escalated enforcement will not necessarily lead those present without authorization to make a rational decision to return to their country of origin. Those subject to ongoing surveillance and low-level criminal law enforcement do not systemically leave neighborhoods where they are disproportionately subject to police stops or nuisance enforcement. The costs of moving may be prohibitive or they may lack desirable options for relocation. Instead, some regulated populations avoid contact with surveilling institutions in order to minimize the likelihood of escalated enforcement.

Criminal law comparisons also help to illuminate the costs of delegating enforcement discretion to a host of different actors. This enforcement structure creates both incentives and opportunities for key actors to abuse their positions of power by engaging in discrimination or exploitation. In addition, even when enforcement agents do not seek to take advantage of vulnerable populations, awareness of surveillance and the possibility of enforcement can lead to outcomes like system avoidance. What matters are

¹⁸¹ *Id.* at 367-68.

¹⁸² *Id.* at 385.

¹⁸³ Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1267 (2016).

the perceptions of how enforcement mechanisms work, not only how enforcement is actually exercised in any given case.

IV. RESTRUCTURING IMMIGRATION ENFORCEMENT

Immigration enforcement reaches well beyond those who are removed; it also affects the vast majority who remain. It does so by creating or exacerbating structural power imbalances between undocumented migrants and others. Given these dynamics, how should enforcement unfold?

This Part considers how to conduct immigration enforcement given that the vast majority of undocumented migrants will not be removed. It first evaluates the limits of procedural solutions and considers “sanctuary” policies as an attempt to ameliorate some of the costs of system avoidance. It then considers how to make interior immigration enforcement choices in light of the hidden costs of enforcement. It uses insights from misdemeanor reform to evaluate preliminarily how to better account for the costs of conducting interior enforcement.

A. Procedural Remedies

Procedural remedies—meaning remedies aimed at improving the process implemented in immigration courts—tend to loom large in immigration enforcement debates.¹⁸⁴ That is because the procedures that accompany removal proceedings are grossly inadequate to their stated purpose. Children, for instance, appear without lawyers and represent themselves in immigration court.¹⁸⁵ The majority of those who are formally removed never actually have the opportunity for adjudication before an immigration judge because their cases are disposed of in a variety of “summary” or “expedited” proceedings.¹⁸⁶

Noncitizens in criminal proceedings also face barriers to making fully informed plea agreements. Criminal defense attorneys are now required to inform defendants who are lawfully present if their pleas will trigger mandatory deportation.¹⁸⁷ Yet there is no similar obligation for attorneys in the many cases where criminal pleas may potentially trigger deportation but deportation is not mandatory.¹⁸⁸ Thus, in both criminal and in immigration proceedings,

¹⁸⁴ See, e.g., Koh, *supra* note 34, at 183 (discussing critiques of immigration court and noting that given the inadequate procedures in immigration adjudication, it “logically follows that the lion’s share of reform proposals have focused on improving the law, policies, and resources associated with the immigration courts”).

¹⁸⁵ Jerry Markon, *Can a 3-Year Old Represent Herself in Immigration Court? This Judge Thinks So.*, WASH. POST (Mar. 5, 2016), https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?noredirect=on&utm_term=.7b93383bb014 [https://perma.cc/EBD6-Z2KP].

¹⁸⁶ See Koh, *supra* note 34, at 183-86 (noting that approximately half of removal orders were in absentia in 2015 and describing how “various enforcement measures . . . effectively bypass the immigration courts”).

¹⁸⁷ *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010).

¹⁸⁸ *Id.*

improved procedures—designed with the aim of ensuring that noncitizens have the opportunity for adjudication, access to counsel, information about their remedies, and translation services—can play an important role. Indeed, access to counsel itself makes a significant difference in the likelihood of removal.¹⁸⁹ Likewise, the ability to appear before a judge in person, as opposed to via remote adjudication, also appears to affect outcomes.¹⁹⁰

As valuable as improved procedures would be for those who are placed in removal proceedings, they would do relatively little work at the bottom of the immigration enforcement pyramid. Here, criminal cases are illustrative as well. Criminal procedure does considerably less work in the context of misdemeanors as compared to felonies. Due to well-documented funding deficits for public defenders, long delays in misdemeanor courts, and steep collateral consequences triggered by arrest alone, criminal defendants often choose to waive all procedural rights and plead guilty.¹⁹¹ They also routinely do so without the knowledge that minor convictions can carry lasting penalties, such as by posing barriers to employment.¹⁹²

Procedural remedies—namely, adopting important criminal procedure protections in immigration proceedings—do not offer a meaningful solution to the unintended consequences of interior immigration enforcement. The vast majority of undocumented migrants do not experience removal; what they instead experience is uncertainty about how and when immigration enforcement may unfold. Procedural protections can do little to address this type of uncertainty, particularly when undocumented migrants are aware that they run the risk of putting themselves on the radar for escalated immigration enforcement if they come forward and seek legal protections. Thus, while improved procedures could be valuable at the tip of the immigration

¹⁸⁹ Eagly & Shafer, *supra* note 33, at 9.

¹⁹⁰ Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. L. REV. 933, 937 (2015).

¹⁹¹ See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 30-33 (1979) (explaining that the “process costs”—the hassle of being a defendant in misdemeanor court—outweigh the formal punishment); Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 953 (1983) (observing that “[a] misdemeanor defendant, even if innocent, usually is well advised to waive every available procedural protection (including the right to counsel) and to plead guilty at the earliest possible opportunity,” given that the perceived benefits of an acquittal are outweighed by the costs of seeking adjudication); Joe, *supra* note 44, at 743 (discussing funding shortages for public defenders).

¹⁹² See, e.g., JAMES JACOBS, *THE ETERNAL CRIMINAL RECORD* 4 (2015) (“[C]riminal records today are widely used to assess, sort, and categorize people in such diverse contexts as immigration, employment, housing, university admissions, voting, possessing firearms, serving on a jury, and qualifying for social welfare benefits.”); Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2267 (2018) (discussing how “criminal conviction, charge, and even arrest” can make it difficult for individuals to “find[] and keep[] a job”).

enforcement pyramid, they would have relatively little impact on the vast majority who remain present long-term.

B. “Sanctuary” as a Managerial Strategy

“Sanctuary” has become a flashpoint in conversations about immigration reform. Some opponents depict sanctuary jurisdictions as soft on crime, while some proponents connect immigrant-protective policies to a principled opposition to deportation.¹⁹³ In practice, sanctuary policies in criminal justice do not necessarily reflect a robust commitment to immigration expansionism or integration. While the substance of certain policies may well be motivated by a desire to welcome noncitizens, they should also be understood as an attempt to make policing decisions in a way that reflects law enforcement goals. As such, sanctuary policies with respect to criminal justice cannot be understood apart from underlying policing practices.

“Sanctuary” is an imperfect umbrella term for a range of distinct approaches to immigration enforcement, including policies outside the context of law enforcement.¹⁹⁴ Some policies prohibit police from inquiring about immigration status when it is unrelated to any suspected criminal violation.¹⁹⁵ Other sanctuary policies govern information sharing with ICE, such as by prohibiting local law enforcement from sharing information about the timing of criminal case dispositions with ICE, restricting ICE access to local jails to conduct interviews, or otherwise limiting the conditions under which local police will comply with ICE detainer requests.¹⁹⁶ The stated rationales for noncompliance also vary, and they range from the locality’s interest in welcoming immigrants to its interest in not paying for federal immigration enforcement efforts.¹⁹⁷

¹⁹³ See, e.g., Trevor George Gardner, *Immigrant Sanctuary as the ‘Old Normal’; A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 3-4 (2019) (collecting quotes from government officials criticizing sanctuary policies as a “gift” to gangs); Barbara E. Armacost, “Sanctuary” Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1199, 1205 (observing that the modern sanctuary movement differs in important ways from its namesake in the church-led sanctuary movement of the 1980s).

¹⁹⁴ For recent contributions to the literature, see generally Armacost, *supra* note 193, at 1205; Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016); Christopher N. Lasch et al., *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703 (2018); Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 437 (2018) (observing that “sanctuary has come to mean many things” and arguing that it is important to “distinguish decisions to intervene affirmatively in immigration enforcement from decisions not to intervene affirmatively but instead to decline involvement”).

¹⁹⁵ Lasch et al., *supra* note 194, at 1707.

¹⁹⁶ *Id.*

¹⁹⁷ Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 288, 293 (2016).

Some sanctuary policies recognize that immigration enforcement does not take place in a vacuum; decisions by unauthorized migrants to avoid the police have feedback effects on crime control.¹⁹⁸ Police have reason to worry if policies deter the reporting of serious crimes and damage their relationships with policed communities.¹⁹⁹ Consistent with this concern, some local prosecutors have stated that they will avoid prosecuting low-level cases that trigger disproportionate penalties.²⁰⁰

In taking this approach, sanctuary policies are not unique to the immigration context. Some localities that have adopted immigrant-protective policies also take similar measures in other cases where low-level convictions trigger disproportionate consequences. For instance, prosecutors in some jurisdictions take a similar approach to minor convictions that have a direct impact on a defendant's ability to work or go to school.²⁰¹

Sanctuary is thus partially an adaptive response to immigration enforcement decisions that cut against a law enforcement agency's institutional interests. Law enforcement agencies that take this approach do not necessarily oppose immigration enforcement at large; rather, they oppose enforcement in a way that alters or undercuts their own objectives.

Sanctuary policies hold promise in part because of the demographics of undocumented migration. Undocumented migrants are concentrated in particular localities in the United States. The majority of unauthorized residents live in six states and in twenty metropolitan areas.²⁰² California alone is home to over two million unauthorized migrants.²⁰³ Sanctuary policies in areas with a relatively high concentration of undocumented migrants thus have

¹⁹⁸ See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1461 (2006) (discussing how the threat of deportation may prevent noncitizens from reporting crime).

¹⁹⁹ See Laura Sullivan, *Police, Banks Help Undocumented Workers Shake 'Walking ATM' Label*, NPR (Jan. 20, 2014), <https://www.npr.org/2014/01/20/263505387/police-banks-help-undocumented-workers-shake-walking-atm-label> [<https://perma.cc/SR9B-ECYZ>] (reporting on the targeting of undocumented immigrants by thieves); see also Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) (discussing consequences of lack of trust in the police).

²⁰⁰ Eagly, *supra* note 197, at 306; Jain, *supra* note 28, at 1219-20.

²⁰¹ Jain, *supra* note 28, at 1216.

²⁰² See Jeffrey S. Passel & D'Vera Cohn, *20 Metro Areas Are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, PEW RES. CTR. (Feb. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/02/09/us-metro-areas-unauthorized-immigrants/> [<https://perma.cc/V4JQ-554G>] (noting that the New York and Los Angeles metro areas contain unauthorized immigrant populations of 1,200,000 and 1,000,000, respectively); *U.S. Unauthorized Immigration Population Estimates*, PEW RES. CTR. (Nov. 6, 2016), <http://www.pewhispanic.org/interactives/unauthorized-immigrants/> [<https://perma.cc/N8Q5-6G7Q>] (Nov. 6, 2016) ("California has by far the largest number of unauthorized immigrants, about 2.3 million in 2014. About six-in-ten unauthorized immigrants live in the six states with the largest populations of unauthorized immigrants—California, Florida, Illinois, New Jersey, New York and Texas.").

²⁰³ See *U.S. Unauthorized Immigration Population Estimates*, *supra* note 202.

the potential to significantly impact how large portions of the undocumented population experience contact with the criminal justice system.

As a regulatory strategy, however, sanctuary is imperfect. Sanctuary jurisdictions do not opt out of the fingerprint sharing aspect of Secure Communities. Instead, they reduce the efficacy of Secure Communities, such as by limiting communication with federal immigration enforcement officials and by refusing to honor federal detainer requests. They thus offer no safe harbors from deportation. Sanctuary jurisdictions also exclude important categories of migrants from their policies. For instance, Chicago's "Welcoming City" ordinance as a general matter prevents police from inquiring about immigration status, and it restricts information sharing with federal immigration enforcement officials.²⁰⁴ But there are important exceptions: the restrictions do not apply if the arrested individual has open arrests, prior felony convictions, or appears in a gang database.²⁰⁵ The exceptions are wide-ranging, and they also create uncertainty about who exactly is likely to be shielded. If undocumented migrants lack knowledge about the particulars of how sanctuary policies work, they may not view such policies as a meaningful intervention.

More fundamentally, sanctuary also cannot be understood apart from underlying policing practices. Some police departments and local governments have identified themselves as adhering to "sanctuary" policies while at the same time pursuing policing practices that necessarily place a number of people on the radar for immigration enforcement. Police departments that make high-volume, low-level arrests in the context of public order policing necessarily conduct immigration screening on arrested individuals. For low-level offenses, ones that could be regulated by means other than criminal law, this raises the question: why arrest in the first place?²⁰⁶

In addition, the expressive message of "sanctuary" may not carry much weight if communities view underlying policing practices themselves as unjustified. In jurisdictions such as Baltimore, New York, and Chicago, among others—those with a well-documented and recent history of police misconduct—sanctuary policies may do little on the ground given the history of distrust between communities and police.²⁰⁷

²⁰⁴ CHI., ILL., CODE §§ 2-173-005, 2-173-020, 2-173-030 (2019).

²⁰⁵ *Id.* at § 2-173-042. For a discussion about potential overbreadth with gang member provisions, see Chacón, *supra* note 97, at 320.

²⁰⁶ Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 316-17 (2016).

²⁰⁷ See, e.g., *United States v. Brown*, 299 F. Supp. 3d 976, 986 (N.D. Ill. 2018) (discussing federal officers conducting sting operations in Chicago as "adopt[ing] a narrative tinged with racial overtones"); *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (noting "tension" in New York City over stop-and-frisks that primarily affected certain racial minorities); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 175 (2015) (discussing the systemic impact of stop-and-frisk, including "[t]he fact that racial

Finally, given that police are far from the only agents that act as immigration enforcers, sanctuary policies in criminal justice can only do so much. Rose Villazor and Pratheepan Gulasekaram discuss a more holistic approach of a “sanctuary network” where different entities—local governments, universities, schools, police, or employers—work together to coordinate and apply sanctuary policies.²⁰⁸ Taking this approach offers one potential, albeit imperfect, mechanism for reducing some of the undesired costs of immigration enforcement.

C. *Evaluating the Costs of Enforcement*

The current structure of immigration enforcement reflects the assumption that delegating enforcement discretion to public and private actors lowers the costs of enforcement. This assumption, however, may not hold true if the hidden costs of enforcement are also taken into account. In the low-level criminal law enforcement context, an important and growing body of work evaluates the full costs of seemingly minor contact with the criminal justice system, and it argues for a broader recognition of these difficult-to-quantify costs in criminal law enforcement decisions. This Section draws on misdemeanor reform as a model for assessing hidden costs relating to enforcement, including costs to private actors and to society at large.

To be clear, cost–benefit analysis is of course not the only factor that drives enforcement choices. Immigration enforcement choices should be guided by the substantive question of who ought to be recognized as a member. Immigration scholarship thus unsurprisingly tends to focus on membership theory.²⁰⁹ Immigration scholar Hiroshi Motomura employs the concept of “immigration as affiliation” to develop the argument that immigration law ought to recognize long-standing membership ties.²¹⁰ In the context of “Dreamers,” Motomura writes that undocumented migrants are “already part of American society in many ways” given that they typically “arrived at a young age and in the distant past . . . [and have] had little or no contact with their parents’ countries of origin.”²¹¹ This theory of membership is grounded in a recognition of associational ties. Those who are here long-term, who arrive as children, and who make important contributions to U.S. communities deserve to be put on a path to citizenship.

minorities in cities disproportionately encounter police in both constitutional and unconstitutional contexts fuels those minorities’ perceptions of the illegitimacy of the police”).

²⁰⁸ Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1214, 1217 (2019).

²⁰⁹ See, e.g., Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1214 (2014) (“Immigration law is fundamentally about membership in a political state.”).

²¹⁰ Motomura, *Making Legal*, *supra* note 138, at 1131.

²¹¹ *Id.*

Membership theory provides one argument for immigration reform—specifically, a legalization program to recognize the status of certain undocumented migrants. A conceptually distinct argument, but one that leads to the same conclusion, relates to recognizing the full costs of enforcement. To the extent interior immigration enforcement has been driven by cost–benefit analysis, it should at minimum take into account the full costs of enforcement.

In the misdemeanor context, both substantive arguments about the proper scope of criminalization as well as a recognition of the full costs of enforcement have played a role in reform. Consider marijuana decriminalization: one substantive argument is that adult marijuana use, like adult alcohol use, is not the proper subject for criminal law enforcement. Yet another argument is that seemingly low-cost enforcement efforts actually carry steep hidden costs.²¹² In a variety of contexts—marijuana reform, bail reform, and misdemeanor reform—some who might otherwise support criminalization have supported decriminalization in light of evidence that the full costs of low-level enforcement are too high.²¹³ Similarly, recognizing the full costs of immigration enforcement is an important consideration when evaluating whether interior immigration enforcement actually meets its objectives. The costs of immigration enforcement are difficult to quantify, but they reach well beyond just the costs of deportation. My aim here is to illuminate certain systemic costs and to set the stage for further work that considers these and other costs.

One set of costs are the social costs relating to enforcement. System avoidance is pernicious because it can be far-reaching and long-lasting. The concern is not only that individuals who are subject to enforcement are unwilling to report crimes when victimized. Rather, disengagement with socially valuable institutions can go much deeper, and it can harm communities as a whole.²¹⁴

²¹² See, e.g., Douglas A. Berman, *Leveraging Marijuana Reform to Enhance Expungement Practices*, 30 FED. SENT'G R. 305, 306-08 (2018) (summarizing a history of marijuana reform efforts, including reforms driven by research showing that marijuana criminalization disproportionately harmed African American communities and carried significant collateral consequences).

²¹³ For a discussion of misdemeanor decriminalization, as well as a discussion of the distinction between decriminalization and full legalization, see generally Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015). For a discussion of the hidden costs of bail, see Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1405-06 (2017), which develops a “taxonomy of the major costs and benefits of pre-trial detention,” including “private costs to defendants, such as the loss of liberty and the loss of future earnings, as well as externalities imposed on families and members of the community.”

²¹⁴ See Bell, *supra* note 199, at 2086-87 (arguing that even when communities are willing to obey the police, there are hidden costs to communities from policing decisions).

In the misdemeanor context, recent research shows that low-level policing practices exert a social cost in promoting segregation. In particular, the perception that African Americans are disproportionately likely to be arrested for low-level violations in predominantly white spaces plays a role in perpetrating residential segregation.²¹⁵ Low-level policing practices in New York and Ferguson had a disproportionate impact on racial minorities who “were out of place: people who had crossed racial boundaries and entered places where other races or ethnicities were the dominant presence.”²¹⁶ Minorities, in turn, report avoiding places where they perceive a disproportionate risk of being stopped.²¹⁷

While this is an area ripe for further research, recent studies show a similar effect by immigration enforcement in promoting patterns of residential segregation.²¹⁸ A recent study in Dallas, Texas, found that undocumented families perceived primarily Latino neighborhoods as desirable due to the perception that Latinos could better “blend in” and avoid detection.²¹⁹ Perceptions about immigration enforcement also led to reluctance to venture to unknown neighborhoods, and this reluctance extended to U.S. citizen children.²²⁰

Interior immigration enforcement can also diminish the potential for integration and access to education. This trend is particularly significant for children. A rising proportion of U.S. school children live in mixed immigration–status families. Approximately 3,900,000 students enrolled in public and private school in grades kindergarten through twelve—or slightly over seven percent of the total enrolled student population—have at least one undocumented parent.²²¹ The vast majority of these students—3.2 million—

²¹⁵ Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 119 (2017) (drawing on data from Ferguson to show how “[p]olicing helps to lock people in place both spatially and economically”); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2402 (2017) (discussing how policing of minority communities can create and reinforce “social and racial stratification”).

²¹⁶ Fagan & Ash, *supra* note 215, at 123.

²¹⁷ See Bell, *supra* note 199, at 2095 (describing one individual’s avoidance of a West Baltimore mall due to several hostile encounters with police).

²¹⁸ Asad L. Asad & Eva Rosen, *Hiding Within Racial Hierarchies: How Undocumented Immigrants Make Residential Decisions in an American City*, J. ETHNIC & MIGRATION STUD. 1, 2 (2018), <https://doi.org/10.1080/1369183X.2018.1532787> (offering an interview-based account to “show how [undocumented] families perceive certain neighborhoods to be ‘off-limits,’ not only because of financial constraints, explicit legal impediments to their tenure, or individual racial preferences, but also because they perceive them as untenable for households who hope to avoid punitive contact with law enforcement”).

²¹⁹ *Id.* at 2.

²²⁰ *Id.* at 11.

²²¹ Jeffrey S. Passel & D’Vera Cohn, *Children of Unauthorized Immigrants Represent Rising Share of K-12 Students*, PEW RES. CTR. (Nov. 17, 2016), <http://www.pewresearch.org/fact->

are U.S. citizens.²²² Thus, immigration enforcement policies that chill undocumented parents from venturing into different neighborhoods can play a lasting role in diminishing integration and access to education.

Interior immigration enforcement also creates significant trauma. This is particularly acute for children who experience separation. Immigration enforcement decisions should take into account the long-term public health consequences of trauma or stress relating to enforcement.²²³

System avoidance also chills contact with valuable institutions. This goes beyond disengagement with the police. It may also diminish contact with institutions like hospitals and banks.²²⁴ A recent empirical study of the impact of Secure Communities suggests similar spillover effects of immigration enforcement on Hispanic-headed U.S. citizen families, finding that U.S. citizens were less likely to apply for certain public benefits if they had family members who were undocumented and lived in an area where they perceived high levels of immigration enforcement activity.²²⁵ Some enforcement actions deter students from attending school after high profile enforcement actions.²²⁶ Students who do attend school may become withdrawn from administrators and teachers if they are aware that information shared with school personnel may be shared with ICE.²²⁷

Private actors and localities also bear costs related to enforcement. Some localities oppose undertaking immigration enforcement responsibilities

tank/2016/11/17/children-of-unauthorized-immigrants-represent-rising-share-of-k-12-students/ [https://perma.cc/HEC4-J9HQ].

²²² See *id.* (“The vast majority of students with at least one unauthorized immigrant parent—3.2 million, or 5.9% of total enrollment in 2014—were U.S.-born children and thus U.S. citizens at birth.”).

²²³ Villazor, *supra* note 104, at 45 (describing how the fear of deportation has a powerful impact on youth whose parents are deportable).

²²⁴ Brayne, *supra* note 14, at 368.

²²⁵ Marcella Alsan & Crystal Yang, *Fear and the Safety Net: Evidence from Secure Communities* ii (Nat’l Bureau of Econ. Research, Working Paper No. 24731, 2018), <https://www.nber.org/papers/w24731> [https://perma.cc/G9K6-R7S9] (finding “significant declines in SNAP and ACA enrollment”).

²²⁶ Catherine E. Shoichet, *Ice Raided a Meatpacking Plant. More than 500 Kids Missed School the Next Day.*, CNN (Apr. 12, 2018), <https://www.cnn.com/2018/04/12/us/tennessee-immigration-raid-schools-impact/index.html> [https://perma.cc/G5NK-HSU8] (reporting that five percent of a school district’s student population did not come to school the day after a workplace raid during which ICE arrested ninety-seven immigrants).

²²⁷ See *Combating Gang Violence on Long Island: Shutting Down the MS Pipeline: Hearing Before the Subcomm. on Counterterrorism & Intelligence of the H. Comm. on Homeland Sec.*, 115th Cong. 10–12 (2017) (statement of Angel Melendez, ICE Homeland Security Investigations Special Agent-in-Charge, N.Y.) (describing Operation Matador as a way to disrupt gang recruitment of youth); Hannah Dreier, *How a Crackdown on MS-13 Caught Up Innocent High School Students*, N.Y. TIMES (Dec. 27, 2018), <https://www.nytimes.com/2018/12/27/magazine/ms13-deportation-ice.html> [https://perma.cc/CKS9-ZWWZ] (describing Operation Matador’s operation in high schools).

because of the additional costs it imposes on localities.²²⁸ Some localities oppose undertaking immigration enforcement responsibilities because of the additional cost imposed.²²⁹ In addition to discrete financial costs, there are also less tangible financial costs within workplaces. Regardless of how any particular employer exercises immigration enforcement discretion, undocumented migrants have reason to view employers as surveilling institutions and to avoid engaging in activity that draws their attention. To the extent interior immigration enforcement is based on deterrence theory, it should take into account the full costs of these enforcement policies and evaluate whether the benefits are worth the costs.

CONCLUSION

Immigration enforcement in the interior is often conceptualized as a question of how to find and deport undocumented migrants. Yet it is also about regulating a large population of long-term undocumented migrants, including in ways that have a powerful impact on their families, communities, and on access to key legal institutions. These decisions reshape power dynamics in far-reaching ways. In the past two decades, immigration enforcement has rapidly expanded and delegated enforcement discretion to a host of different actors, including both public and private enforcement agents, without fully appreciating the impact of this approach.

Insights from low-level criminal enforcement show that this type of enforcement delegation can be costly: it can create law enforcement tradeoffs and lead to system avoidance. While this approach increases the number of actors who can detect undocumented migrants, it also creates hidden costs. Attention to the parallels between low-level criminal law enforcement and immigration enforcement offers a way to begin recognizing and evaluating the full costs of interior immigration enforcement—costs that may be rendered invisible by a focus on deportation alone.

²²⁸ Lasch et al., *supra* note 194, at 1755-56 (citing as an example “the 2011 Cook County Ordinance, which created an absolute requirement that the sheriff decline any detainer request in the absence of a written agreement with federal officials guaranteeing reimbursement of the costs of compliance”).

²²⁹ Kagan, *supra* note 58, at 127 (“[I]n 2014 several federal district courts . . . found that local police would be liable for civil rights violations if they heeded ICE detainer requests by keeping noncitizens in custody when a citizen in the same situation would be released.”).

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