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## Producing Liminal Legality

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# PRODUCING LIMINAL LEGALITY

JENNIFER M. CHACÓN<sup>†</sup>

## ABSTRACT

Inside and outside of the sphere of immigration law, liminal legal statuses are proliferating. These legal categories function simultaneously as a means to effectuate administrative resource conservation through community-oriented risk management strategies and as a form of “preservation through transformation” that enable governmental actors to reassert and maintain control over populations identified as risky in ways that do not trigger the rights-protective schemes that evolved both internationally and domestically in the mid-Twentieth Century. This Article uses the existing literature on liminal legal subjects as a starting point for understanding and critiquing the legal mechanisms that produce liminal legality.

Part I discusses the taxonomical features of liminal legality identified in studies focusing on the life experiences of marginalized noncitizens. These features include uncertainty about the scope of reprieve from banishment, a reliance on administrative grace to effectuate freedom from banishment, an obligation to pay one’s way to prevent that banishment, experiences of heightened monitoring by governmental actors, and a related vulnerability to control, exclusion, and abuse by private actors.

Part II tests the possibility of expanding notions of liminal legality outside of the iconic cases of noncitizens granted temporary reprieves from removal. This section expands the analysis first to other, more legally privileged noncitizens, then to citizens in immigrant communities, and finally to broader classes of citizens with relatively high rates of contact with law enforcement agents. This analysis highlights the commonalities of the legal structures that regulate and punish these diverse categories of individuals and communities that experience liminal legality.

Part III explores the potential benefits that transubstantive legal analysis focusing on liminal legality offers over more subject-specific frames like “cimmigration.” Framing legal analysis in terms of liminal

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legality could both check unjustifiable presumptions of immigration law exceptionality and foster the identification of the common regulatory practices that have generated a broader social normalization of liminal legality. Additionally, a focus on the legal production of liminal legality may, in fact, open up a path to return crimmigration scholarship to its deeper theoretical grounding in membership theory, thereby reinvigorating the discussion of the role that race, class, and place play in structuring governance strategies both at the border of criminal and immigration law and beyond it.

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#### INTRODUCTION

Recent sociological accounts focusing on immigrant communities have used the concept of liminal legality to describe the status of legally marginalized noncitizens. The term has its deeper scholarly roots in anthropological studies of the early Twentieth Century that focused on social ritual, including periods of liminality experienced by community members. The more recent sociological accounts focus on liminality as a temporally and socially uncertain transitional state of partial belonging that arises out of marginal legal status. In the existing scholarly accounts, the notion of liminal legality is used to describe individuals moving in and out of, and living on the edges of, legal immigration status. The term is understood in reference to the lived realities of these noncitizens, but much of the existing literature does not seek to identify with specificity the legal mechanisms that produce this liminal legality.

The legally imposed uncertainty captured by the concept of liminal legality has the potential to serve as a more generalizable rubric under

which to evaluate certain contemporary social and legal problems in regulation, policing, and punishment—one that can help illuminate comparisons across areas of substantive laws and among and between denizens with varying formal legal citizenship and immigration statuses. Centering experiences of liminal legality can help to illuminate some of the commonalities of individuals who live on the edge of banishment effectuated through combined civil and criminal enforcement mechanisms. The age-old punitive method of banishment is an increasingly common form of contemporary social control, and it is not limited to the sphere of immigration enforcement. The susceptibility of certain noncitizens to banishment in the form of deportation is mirrored by the exposure of other liminal populations to banishment in the form of spatial exclusion and susceptibility to incarceration. In both instances, the criminal justice system operates in tandem with civil systems of law to effectuate the expulsion of individuals deemed undesirable. Federal, state and local agents empowered to enforce the criminal law use fluid and mutually reinforcing civil and criminal law mechanisms to manage the movement of particular groups of citizens and noncitizens. Private actors also increase the reach of the state and further the punitive consequences of official decision-making. Focusing on regulated populations that experience liminal legality can therefore provide a fruitful analytical starting point for evaluating the causes and consequences of a broad array of contemporary governance strategies.

This Article uses the existing literature on liminal legal subjects as a starting point for developing an understanding of the legal mechanisms that produce liminal legality. This analysis highlights commonalities in governance strategies that affect liminal legal subjects across a range of formal immigration and citizenship statuses. Part I explores the taxonomical features of liminal legality, as evinced in studies focusing on the life experiences of marginalized noncitizens. Cecilia Menjívar's study of Salvadoran and Guatemalan immigrant communities in the United States provides a starting point for this analysis. The analysis then proceeds to a discussion of the term as applied to noncitizens eligible for deferred-action status under the broad executive relief programs announced by President Obama in 2012 and 2014. These cases—core cases of liminal legality—suggest some taxonomical features of liminal legality, including uncertainty about the scope of reprieve from banishment, a reliance on administrative grace to effectuate freedom from banishment, an obligation to pay one's way to prevent that banishment, experiences of heightened monitoring by governmental actors, and a related vulnerability to regulation, exclusion, and abuse by private actors.

Part II will explore the possibility of expanding notions of liminal legality to apply outside of the iconic cases. Section A looks to broader trends in immigration law to suggest that immigration policy as a whole—and not just immigration policy as experienced by immigrants

periodically eligible for temporary authorization—has reoriented itself to favor the creation of liminal legal states rather than offering expanded access to more fully incorporative legal statuses. Consequently, even individuals with lawful immigration status experience liminal legality. Neither lawful permanent resident status nor various forms of temporary legal status or legal presence offer protection from this experience of liminality. As Section B explains, however, the problem is even broader, insofar as citizens also experience these instabilities. As the criminal and civil immigration law systems provide mutually reinforcing backstops that allow for the continual sorting and expulsion of undesirable noncitizens, entire communities experience liminal legality, regardless of the citizenship status of individual members. Section C takes the analysis a step further, transporting the notion of liminal legality outside of the immigration sphere entirely. Section C explores the ways that criminal law interacts with other civil law systems to form complex, interlocking systems of legal regulations and practices that leave many marginalized denizens vulnerable to banishment. Liminal legality is thus not uniquely the domain of particular noncitizens, or even of immigrant communities. Core features of the experience are common across some groups of citizens and noncitizens. These commonalities illustrate the degree to which legal rights and benefits often hinge less on formal citizenship than existing analytical frameworks might suggest. This discussion further suggests that problems that the “cimmigration” framework might tempt us to view as limited to noncitizens are, in fact, pervasive in marginalized communities, regardless of formal immigration or citizenship status. Moreover, the purported turn away from severity in both the criminal and immigration law spheres promises to expand rather than contract the categories of individuals whose status might be characterized as legally liminal.

Part III identifies some of the potential discursive and practical benefits of using the concept of liminal legality to reframe discussions concerning certain contemporary trends in governance, particularly around questions of regulation and policing. First, this framing might allow for the development of richer and more nuanced accounts about the governance strategies involved in the creation and management of liminal legal subjects. Second, a more concretely conceptualized notion of liminal legality might serve as a focal point that can bring inward-looking discussions concerning immigration regulation, criminal justice, and other fields into more meaningful conversation with one another, incorporating the experiences of noncitizens into the fabric of criminal justice reform discussions and pushing the academic and social discourse surrounding noncitizens beyond the constrictive and potentially stigmatizing borders of “cimmigration.” Finally, and more tentatively, I suggest that a focus on the concept of liminal legality might also offer the basis for a theoretically coherent account of the rise of reform advocacy efforts that deemphasize formal legal citizenship as the focal point of rights discourse.

## I. LIMINAL LEGALITY

The notion of liminality in society emerged in anthropological analysis of communal social rituals offered by Victor Turner in the mid-century.<sup>1</sup> The related concept of liminal legality was introduced by sociologists much more recently in work focused on certain immigrant communities in the United States.<sup>2</sup> Although this concept of liminal legality has gained a foothold in sociological studies of immigrant communities,<sup>3</sup> scholars in the legal academy have not made much use of it, while scholars outside of the legal academy have used it in ways that suggest differing understandings of how the concept lines up against formal immigration and citizenship status.

The term, particularly in its present incarnation, offers a useful framework in which to situate and analyze legal developments affecting the millions of longtime denizens of the United States. This is true in the case of unauthorized migrants, certainly, but also in the cases of many others, including millions of formal legal citizens who face legal barriers

1. See *infra* notes 12–14 and accompanying text.

2. Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 999–1003 (2006); see also *infra* notes 6–9 and accompanying text. Anthropologist Leo R. Chavez has also used Turner's notion of liminality to describe undocumented immigrants in their crossing of the border. Leo R. Chavez, *Outside the Imagined Community: Undocumented Settlers and Experiences of Incorporation*, 18 AM. ETHNOLOGIST 257, 257–60 (1991). Menjivar's conceptualization is self-consciously more extensive. See Menjivar, *supra*, at 1007 n.8. Susan Bibler Coutin's related notion of "legal nonexistence" served as a precursor and central building block for Menjivar's "liminal legality." See Menjivar, *supra*, at 1007–08. Coutin describes "spaces of nonexistence" in this way:

[E]xistence itself has multiple dimensions. Individuals who are physically present and socially active in the United States can nonetheless lack legal status in this country. Conversely, individuals who are legally present in El Salvador and who have Salvadoran citizenship can be persecuted in ways that negate both their citizenship and their humanity. I refer to the domains occupied by such legal nonsubjects as spaces of nonexistence. Individuals enter such spaces not only when they cross international borders without authorization but also when they are involved in clandestine activities, when they are abducted and secretly assassinated by death squads, and when they hide to avoid being captured and tortured. Nonexistence, like existence, therefore takes multiple forms . . . . Nonexistence, however, is often incomplete . . . . In fact, there are multiple nonexistences and gradations of existence.

SUSAN BIBLER COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY 27 (2000). Coutin's notion of nonexistence as a state that exists in degrees, and her sense that it can obtain even when an individual is in her native land, are important insights that foreshadow the discussion of liminal legality herein.

3. For recent work using the term, see, for example, Leisy Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 L. & POL'Y 265, 266 (2015); Leisy J. Abrego & Cecilia Menjivar, *Immigrant Latina Mothers as Targets of Legal Violence*, 37 INT'L J. SOC. FAM. 9, 12–14 (2011); Leisy Abrego, *Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California*, 33 L. & SOC. INQUIRY 709, 714–15 (2008); Susan Bibler Coutin et al., *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97, 100, 115–16 (2014); Miranda Cady Hallett, *Temporary Protection, Enduring Contradiction: The Contested and Contradictory Meanings of Temporary Immigration Status*, 39 L. & SOC. INQUIRY 621, 621–26, 629, 635 (2014); Cecilia Menjivar & Susan Bibler Coutin, *Challenges of Recognition, Participation, and Representation for the Legally Liminal: A Comment*, in MIGRATION, GENDER AND SOCIAL JUSTICE: PERSPECTIVES ON HUMAN INSECURITY 325, 325–29 (Thanh-Dam Truong et al. eds., 2014); Menjivar, *supra* note 2, at 999–1002.

to gaining or regaining full citizenship<sup>4</sup> and who have only limited legal protections from intrusive and harsh forms of governmental and private monitoring, policing, detention, and punishment, including banishment.<sup>5</sup>

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4. Citizenship has many meanings, of course. Although much of the literature on liminal legal status focuses on those who lack permanent formal legal status, this work acknowledges the complexity of citizenship and effectively maps the ways in which liminal legal subjects can perform as citizens. *See, e.g.,* Abrego, *supra* note 3, at 714–15.

In his influential 1950 essay on the topic of citizenship, T.H. Marshall identified three different forms of citizenship, which he treated as linear and progressive: citizenship with regard to civil rights, citizenship with regard to political rights, and citizenship with regard to social rights. T. H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* 10–14 (1950). More recently, Linda Bosniak articulated a four-part typology: citizenship as formal legal status, citizenship as the enjoyment of a particular bundle of rights and benefits, citizenship as political participation, and citizenship as social and identity membership. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 18–20 (2006). Bosniak uses her typology to demonstrate the existence and social importance of the seemingly paradoxical “alien citizen” in the United States. *Id.* at 81–82. It is fairly easy to identify many formal legal citizens who lack some of the rights of full “citizenship” offered in either account. *Id.* at 37–40, 90–91. Like Bosniak, Luis Plascencia identifies different forms of citizenship. He theorizes that the terms “[c]itizen” and “citizenship” can be understood as terms divided into “three discursive fields: juridical uses, sociopolitical uses, and everyday uses.” LUIS F.B. PLASCENCIA, *DISENCHANTING CITIZENSHIP: MEXICAN MIGRANTS AND THE BOUNDARIES OF BELONGING* 5 (2012). But he issues the important cautionary reminder that these discursive fields are permeable. *See id.* They impact one another and are mutually constitutive. The fluidity within and among these discursive fields gives citizenship a certain openness that is less evident in Marshall and Bosniak’s accounts. Plascencia “suggest[s] that part of the power of the concept of citizenship can be attributed to its lack of clouture. Its very openness allows the state, interest groups, and individual actors to ground their actions on behalf of citizenship—a citizenship that is differentially defined and generates its historical variability.” *Id.* In this way, citizenship is salient and elusive. It matters, but its meaning is always up for grabs. I acknowledge the salience of formal legal distinctions created by citizenship laws, but here, I also suggest that the discursive openness identified in Plascencia’s work is vividly apparent in the legal liminality experienced by many citizens.

5. Banishment has no formal statutory definition and is not used as a term of art in immigration law. I use it here because I think it effectively captures what is happening when denizens are removed from their social and political communities. As a formal legal matter, “removal,” which encompasses both deportation and exclusion, is not punishment. As such, it has been distinguished from banishment. *See* *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime. It is not a banishment . . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend.”). At times, various members of the Court have described deportation as a banishment, however, and have acknowledged its punitive nature. *See, e.g.,* *Boutilier v. INS*, 387 U.S. 118, 132 (1967) (Douglas, J., dissenting) (“Deportation is the equivalent to banishment or exile. Though technically not criminal, it practically may be. The penalty is so severe that we have extended to the resident alien the protection of due process.” (citations omitted)). Quite recently, the Court acknowledged for the first time the punitive nature of deportation in a doctrinally significant way (albeit while continuing to classify deportation as a corrective civil remedy). *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010). For many reasons, the archaic classification of deportation as a corrective civil measure no longer squares with legal reality, if it ever did. *See, e.g.,* DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 92, 121–22, 125–26, 158 (2007) (noting that in the early twentieth century, the statute of limitations on deportation was eliminated and deportation increasingly came to be used as a form of punitive “post-entry social control” rather than a mere adjunct to the administrative entry screening process). Thus, “banishment,” although not a legal term of art, more adequately captures the punitive nature of return experienced by liminally legal populations and is unconstrained by technical distinctions between “admitted” noncitizens and “inadmissible” (but physically present) noncitizens. The term also appropriately signals the punitive design and purpose of the act of banishment. As I argue below, it also correctly signals the parallel functions served by immigration law, which operates in tandem with the criminal law to banish noncitizens from the legal borders of the

These individuals may, over time, gain full legal and political citizenship and concomitant social protections, but they do not have it now, and law reform efforts do not portend a near-term shift in that direction. The shared liminal legality of so many at this particular historic juncture is worthy of exploration. To begin such an exploration, this Part first provides an overview of prior uses of the term in the academic literature and then suggests some defining features of liminal legality.

#### A. Scholarly Origins

Contemporary notions of liminal legality first appeared in the scholarship of Cecilia Menjivar, in her work focusing on Salvadoran and Guatemalan immigrants in the United States.<sup>6</sup> Building on Susan Coutin's notion of the "spaces of nonexistence" inhabited by legally marginalized members of these immigrant communities, Menjivar catalogued the myriad ways that the legal regime governing the status of immigrants in these communities functioned to limit, structure, and transform not only their social interactions but also their perceptions of themselves and their modes of artistic expression.<sup>7</sup>

The particular communities that she studied presented ample opportunities for exploring these questions. In the United States, many citizens of El Salvador and Guatemala have moved in and out of lawful status over time.<sup>8</sup> Sometimes they have a status that offers them significant protections from removal, sometimes not. Menjivar noted that many people in these communities have lived in the United States for years, or even decades, without access to the same rights of individuals lawfully present on nonimmigrant or immigrant visas.<sup>9</sup> She labeled the legally uncertain space occupied by these noncitizens liminal legality.<sup>10</sup>

Notably, Menjivar posits the liminal legality of these individuals, not because they have a temporarily lawful status (although many of them do at various points in time), but because they and the members of their families and communities move in and out of status, between tenta-

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country, and the civil regulatory regimes that operate in tandem with the criminal justice system to banish "undesirables" from the boundaries of the community. See *infra* at Part II.C.

6. Menjivar, *supra* note 2, at 1000.

7. *Id.* at 999–1001.

8. *Id.* at 1000–01; see also Susan Bibler Coutin, *Place and Presence within Salvadoran Deportees' Narratives of Removal*, 20 CHILDHOOD 323, 323–25, 327 (2013); Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 L. & SOC. INQUIRY 569, 570 (2011).

9. Menjivar, *supra* note 2, at 1012–16.

10. *Id.* at 1000 ("Examinations of the effects of legal status on different spheres of life have concentrated on the differences between documented and undocumented status. I focus on the gray area between these legal categories, how this 'in-between' status or liminal legality shapes different spheres of life—the immigrant's immediate sphere of social networks and family, the community-level place of religious institutions in the immigrants' lives, and the broader domain of artistic expression."). For another recent *supra* discussion of Temporary Protected Status (TPS) recipients in a legally liminal state see Hallett, *supra* note 3, at 622.



tive lawfulness and more complete marginalization.<sup>11</sup> In other words, liminal legality captures the entire in-between existence of moving in and out of protective states of administrative grace.

Menjívar's conception of liminality draws on the work of anthropologist Victor Turner, who, in his classic work on ritual, identified the liminal individual as one who is "structurally . . . 'invisible'" because she is "at once no longer classified and not yet classified."<sup>12</sup> In his chapter on "Liminality and Communitas," Turner defines liminal individuals as "neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremon[y]."<sup>13</sup> Turner, for his part, had drawn on the work of Arnold van Gennep, who had conceptualized the liminal state as the second in a three-part stage in social rituals.<sup>14</sup>

In these classic formulations, liminality is an ambiguous, but not always an undesirable, metaphysical space. It is also a predictable one. To be liminal is to be outside of, but preparing to reenter, society. For van Gennep, Turner, and, to a certain extent, the sociologists who later adapted their work, liminality is not a space of permanent exclusion or a full marginalization, but rather, a temporary and potentially productive phase.<sup>15</sup> The present discussion accepts the premise that liminality is not inherently problematic, but emerging forms of liminal legality raise problems that are not inherent in classic notions of liminality.

Contemporary liminal legality is characterized first and foremost by its inherent legal uncertainty. Individuals' legal assurances against full marginalization lack definitive temporal scope and are generally extended as privileges, not rights.<sup>16</sup> The inherent fragility and the indefinite nature of the period(s) of administrative grace create instability in many aspects of the lives of liminal legal subjects. As Menjívar observes in the lives of the Salvadoran and Guatemalan immigrants that are the subject of her study, the need to constantly reapply for, and meet the requirements of, the protected statuses that they may be eligible to access:

[C]reates enormous anxiety, as each deadline accentuates these immigrants' precarious situation, which for many has gone on for over two decades. . . .

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11. See Menjívar, *supra* note 2, at 1016.

12. VICTOR TURNER, *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* 95–96 (1967).

13. VICTOR W. TURNER, *THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE* 95 (1969).

14. ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* 10–11 (1960). Van Gennep argued that social rituals involve passage through a period of separation, a liminal period, and a period of reasimilation. *Id.*

15. See, e.g., *id.* at 11. Perhaps there is an (undue?) optimism in using the label of liminality rather than marginalization to describe some the legal subjects discussed in this Article.

16. See Menjívar, *supra* note 2, at 1000–01.

. . . This uncertain status . . . permeates many aspects of the immigrants' lives and delimits their range of action in different spheres, from job market opportunities and housing, to family and kinship, from the place of the church in their lives and their various transnational activities, to artistic expressions.<sup>17</sup>

But the temporal and legal instability of their freedom from banishment at the hands of the state is not the only feature of liminal legality. Although Menjívar does not attempt to identify all of the features of liminal legality or to offer a comprehensive theory of what that transitional state might entail, certain key features emerge in her account and in the work of others who have studied the lives of people in communities with high concentrations of liminal legal subjects.<sup>18</sup> Reviewing her work, the work of other scholars contributing to and building on this concept, and the lived experience of the individuals categorized in previous scholarship as legally liminal, one can identify several notable features of liminal legality.

First, these populations are often obliged to pay their way to access statuses that formally stave off banishment. The temporary protected statuses to which the individuals in Menjívar's study might have access come at a price.<sup>19</sup> Second, these individuals are subject to heightened monitoring by governmental actors.<sup>20</sup> The eligibility requirements include the ability to document presence and residence, and the absence of disqualifying criminal or associational conduct.<sup>21</sup> Each time the applicant re-applies, this documentation is required, and a failure to reapply in a timely fashion is itself a disqualifying factor.<sup>22</sup>

The heightened governmental monitoring of this population also renders individuals with liminal legal status particularly vulnerable to the discretionary decision-making of public and private actors. The eligibility criteria for certain qualifying temporary statuses impose stringent requirements that do not apply to those with more stable forms of immi-

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17. *Id.* at 1000–01.

18. *See* sources cited *supra* note 3.

19. The application fee for Temporary Protected Status, the form of immigration relief that many of the individuals studied by Menjívar are able to access, is currently \$85, plus an additional \$380 for employment authorization. *See Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status> (last updated Sept. 3, 2015). Of course, not all noncitizens pay for status. Some experience a favorable exercise of discretion in the form of a closed case or a decision by USCIS not to initiate removal proceedings. In such cases, there is no formal price tag affixed to freedom from banishment. But even for many of these noncitizens, the lack of secure legal status generate costs in the form of depressed wages and lost earning opportunities. *See infra* note 73 (discussing the fiscal impact of undocumented immigration status) and note 223 (discussing wage effects of criminal convictions).

20. *See id.*

21. *Id.*

22. *Id.*

gration status,<sup>23</sup> which means that individuals' right to remain is tied more closely to discretionary law enforcement decisions about where to allocate policing resources and how to process low-level crimes and infractions. At the same time, the same individuals are also more exposed to exploitation, abuse, and manipulation by other private actors. Those out of status are particularly vulnerable to workplace exploitation, negative wage effects, and private discrimination,<sup>24</sup> but neither provisional legal statuses nor citizenship consistently offer a shield from such exploitation.<sup>25</sup>

### *B. Identifying Key Features: The Iconic Case*

In Menjivar's work, noncitizens in Salvadoran and Guatemalan communities in the United States, existing on the edge of banishment but situated in communities that sometimes (and variably) have access to various forms of formal legal status, constitute the relevant group of liminal legal subjects.<sup>26</sup> As a legal matter, the subjects of her study are directly analogous to a new and more expansive group of liminal legal subjects: communities of noncitizens potentially eligible for relief under the broad executive relief programs announced by the Obama Administration in June 2012 and November 2014. Some scholars have already described these communities as legally liminal.<sup>27</sup> This population, which is still squarely in the territory of iconic liminal legality, provides a useful focal point for amplifying the discussion of the features of liminal legal status preliminarily mapped out in Section A. Liminal legal status is not limited to this group of noncitizens or even to communities that include noncitizens more generally. But identifying key elements of liminal legality in this context is a useful step toward understanding how liminality is produced by law.

Several recent executive actions offer certain noncitizens temporary deportation relief without legal status. On June 15, 2012, Janet Napoli-

23. Compare *id.* (outlining the bars to TPS), with Immigration and Nationality Act (INA) § 237, 8 U.S.C. § 1227 (2015) (providing the less extensive exclusion and deportation provisions of the INA).

24. Menjivar, *supra* note 2, at 1009; see also JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 10–66 (2005) (discussing and providing examples of challenges faced by immigrant workers in the workplace); Josiah McC. Heyman, *State Effects on Labor Exploitation: The INS and Undocumented Immigrants at the Mexico–United States Border*, 18 *CRITIQUE ANTHROPOLOGY* 157, 157 (1998); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 *STAN. L. REV.* 1103, 1107 (2009); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 *U. CHI. LEGAL F.* 193, 195 (2007).

25. See, e.g., Abrego & Lakhani, *supra* note 3, at 274–75 (discussing the social and legal vulnerabilities of various groups of noncitizens lawfully present); David Bacon, *Be Our Guests*, *NATION* (Sept. 9, 2004), <http://www.thenation.com/article/be-our-guests> (discussing the vulnerabilities of noncitizens present on H2-A visas).

26. See Menjivar, *supra* note 2, at 999–1000.

27. See, e.g., Ryan Anderson, *Legality, Race, and Inequality: An Interview with Ruth Gomberg-Muñoz (Part II)*, *SAVAGE MINDS* (Feb. 5, 2015), <http://savageminds.org/2015/02/05/legality-race-and-inequality-an-interview-with-ruth-gomberg-munoz-part-ii/> (referring to DACA recipients as being held in a state of “liminal legality” with express reference to Menjivar's work).

tano announced the Deferred Action for Childhood Arrival (DACA) program.<sup>28</sup> Noncitizens 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 were eligible for deferred action.<sup>29</sup> A significant population moved out of the shadows<sup>30</sup> and into a new space of liminal legality. About 600,000 individuals moved from being undocumented to being “DACAdmented”<sup>31</sup> over the next two years.<sup>32</sup> DACA recipients obtained their access to this new legal space largely through their own political exertions. In so doing, they demonstrated levels of belonging, political participation, and social influence that are often thought to be limited to formal legal citizens.<sup>33</sup> They were able to capitalize on the protected space that *Plyler v. Doe*,<sup>34</sup> and later, legislation like California’s in-state tuition bill, A.B. 540,<sup>35</sup> had created for them. In this way, it is important to note that DACA recipients were really already liminal legal subjects before DACA was created. They had a quasi-protected status in schools and were low priorities for removal even before DACA created a new and somewhat more stable, but still liminal, legal status that they were able to access.

Continued advocacy by DACA recipients and their allies eventually succeeded in pressuring the administration to generate a plan to expand executive relief. On November 20, 2014, Department of Homeland Secu-

28. 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., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enf’t 1 (June 15, 2012) [hereinafter Napolitano Memorandum], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

29. *Id.*

30. As Geoffrey Heeren notes, “[C]oming out of the shadows’ is how immigrant advocates and Dreamers often characterize obtaining nonstatus. It is a way to claim some measure of dignity in a society that stigmatizes those without status as ‘illegals.’” Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1132 (2015).

31. The term DACA-mented is increasingly commonly used to distinguish deferred action recipients from populations with more formal legal immigration status. See, e.g., TOM K. WONG ET AL., UNDOCUMENTED NO MORE: A NATIONWIDE ANALYSIS OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, OR DACA, at 2 (2013), available at <https://cdn.americanprogress.org/wp-content/uploads/2013/09/DACAReportCC-2-1.pdf>.

32. Press Release, Migration Policy Inst., MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation Under Anticipated New Deferred Action Program (Nov. 19, 2014), available at <http://migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new> (noting that, as of the date of the report, 580,000 individuals had received relief under the program); see also WONG ET AL., *supra* note 31, at 1 (providing survey information regarding the impact of the program on recipients).

33. Linda Bosniak’s notion of alien citizenship seems apt here. See BOSNIAK, *supra* note 4, at 81–82.

34. 457 U.S. 202 (1982) (striking down a Texas statute requiring unauthorized immigration children to pay for or be denied public education from kindergarten through twelfth grade).

35. Act of Oct. 13, 2001, ch. 814, 2001 Cal. Legis. Serv. § 2 (West) (codified at CAL. EDUC. CODE § 68130.5 (West 2015)). A.B. 540 is the law that extended in-state tuition benefits to unauthorized immigrants attending California’s public institutions of higher learning. *Id.* For a discussion of the role the bill played in the political mobilization of undocumented youth, see Abrego, *supra* note 3, at 727–29.

rity Secretary Jeh Johnson issued a memorandum that could change significantly the lives of millions of people living within the borders of the United States,<sup>36</sup> including many individuals who were more marginalized than the original DACA recipients. Like Secretary Napolitano before him, Secretary Johnson addressed this memorandum, “intended to reflect new policies for the use of deferred action,” to the Director of U.S. Citizenship and Immigration Services, the Acting Director of U.S. Immigration and Customs Enforcement, and the Commissioner of U.S. Customs and Border Protection.<sup>37</sup> The memo offers guidance to these agencies as to appropriate uses of deferred action. The memo defines deferred action in this way:

Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual’s case for humanitarian reasons, administrative convenience, or in the interest of the Department’s overall enforcement mission. As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency’s discretion. Deferred action *does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States.* Nor can deferred action itself lead to a green card. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.<sup>38</sup>

Several large classes of noncitizens would be eligible for deferred action pursuant to the terms of the November memorandum.<sup>39</sup> These include individuals previously eligible for DACA.<sup>40</sup> The memo extends their initial grant of deferred action.<sup>41</sup> But it also includes individuals eligible for an expanded DACA (DACA+), as well as those who fall into a category that was first called Deferred Action for Parental Accountability, and now bears the title of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).<sup>42</sup>

In defining the category of noncitizens eligible for DACA+, the Johnson memo removed the age cap for “otherwise eligible immigrants who entered the United States by the requisite adjusted entry date [now January 1, 2010, rather than June 15, 2007] before the age of sixteen

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36. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec. to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. 1 (Nov. 20, 2014) [hereinafter Johnson Memorandum], available at <http://www.aila.org/infonet/dhs-exercising-prosecutorial-discretion>.

37. *Id.* at 1.

38. *Id.* at 2 (emphasis added).

39. *See id.* at 3.

40. *Id.* at 3–4.

41. *Id.*

42. *See id.*

(16), regardless of how old they were in June 2012 or are today.”<sup>43</sup> DAPA applies to individuals with children who are U.S. citizens or lawful permanent residents, provided those individuals “have continuously resided in the United States since before January 1, 2010,” are physically present on the memo date, and when applying, “have no lawful status,” “are not an enforcement priority” as identified in a separate memo issued the same day, and “present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.”<sup>44</sup> Notably, DAPA does not extend to the parents of DACA recipients who lack qualifying relationships to citizens or Legal Permanent Residents (LPRs).<sup>45</sup>

By some estimates, the number of DACA+ or DAPA-eligible noncitizens is approximately five million.<sup>46</sup> Qualifying noncitizens would be eligible not only for deferred removal but also for work authorization<sup>47</sup> and drivers licenses.<sup>48</sup> The fee for this relief would be \$465, and “[t]here will be no fee waivers and, like DACA, very limited fee exemptions.”<sup>49</sup> Interestingly, there are a significant number of minor variations in the DACA and DAPA eligibility criteria, particularly with regard to

43. *Id.* at 3–4.

44. *Id.* at 4.

45. The Office of Legal Counsel memorandum providing the legal rationale for the DACA and DAPA programs posits that such relief would exceed the scope of executive power. See The Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 38 Op. O.L.C. 2 (2014) [hereinafter OLC Memorandum], available at <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>. For a critique of this reasoning as internally inconsistent with the OLC’s own rationale in support of the other relief provisions, see, for example, *Immigration Law—Office of Legal Counsel Issues Opinion Endorsing President Obama’s Executive Order on Deferred Action for Parental Accountability—The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 OP. O.L.C. (Nov. 19, 2014), 128 HARV. L. REV. 2320, 2325 (2015).

46. See, e.g., Office of the Press Sec’y, *Fact Sheet: Immigration Accountability Executive Action*, WHITE HOUSE (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>; see also Press Release, Migration Policy Inst., *supra* note 32 (“MPI estimates the anticipated new deferred action program and expanded DACA initiative could benefit as many as 5.2 million people—nearly half of the 11.4 million unauthorized immigrants living in the United States . . .”).

47. Immigration and Nationality Act (INA) § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) (2015).

48. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109–13, § 202(c)(2)(B)(viii), 119 Stat. 231, 313 (2005). Several states have challenged the driver’s license provision in court, but to date, those challenges have been unsuccessful in preventing the issuance of drivers licenses to DACA recipients. THE PEW CHARITABLE TRUSTS, *DECIDING WHO DRIVES: STATE CHOICES SURROUNDING UNAUTHORIZED IMMIGRANTS AND DRIVER’S LICENSES* 8–9 (2015), available at <http://www.pewtrusts.org/~media/Assets/2015/08/Deciding-Who-Drives.pdf>.

49. Johnson Memorandum, *supra* note 36, at 5. In the DACA context, private organizations have engaged in fundraising efforts to assist in covering the application expenses for otherwise-qualified DACA applicants. See Jana Kasperkevic, *The High Cost of Being a Legal Immigrant in the US: \$465*, GUARDIAN (Jan. 8, 2014, 8:01 PM), <http://www.theguardian.com/money/2014/jan/08/undocumented-dreamers-immigration-daca-cost-fee>.

the kinds of criminal conduct and criminal records that will bar relief in each of these categories., and the DAPA criteria is stricter.<sup>50</sup>

The proposed DACA and DAPA programs are not the first efforts by the Executive Branch to provide relief to noncitizens who might otherwise be removed from the United States. Indeed, the Office of Legal Counsel memorandum outlining the legal basis for the DACA+ and DAPA programs<sup>51</sup> notes the long history of executive relief in the immigration context, including some statutorily designated forms of discretionary, temporary relief such as parole-in-place (PIP),<sup>52</sup> Temporary Protected Status (TPS),<sup>53</sup> and some non-statutorily based recurring forms of executive relief such as Deferred Enforced Departure (DED).<sup>54</sup> Temporary Protected Status was, of course, of central importance to the communities studied in Menjívar's account of liminal legality.<sup>55</sup> The new DACA recipients as well as the intended DAPA and DACA+ recipients thus fit neatly under the same legal rubric that framed prior accounts of liminal legality.

One important commonality between PIP, DED, TPS, DACA, and DAPA is that they are all temporary forms of relief that offer no formal legal immigration status, much less a path to citizenship. Like the TPS recipients studied by Menjívar, DACA (and eventually, perhaps, DAPA and DACA+) recipients receive a grant of protection that is time-limited.<sup>56</sup> As with TPS recipients, DACA recipients have to wait until

50. See, e.g., Immigrant Legal Res. Ctr. & Nat'l Immigration Project of the Nat'l Lawyers Guild, *Key Differences Between the DACA and DAPA Criminal and Enforcement-Related Bars*, MYGIDEON, [http://www.mygideon.org/@api/deki/files/68243/Criminal\\_Bars\\_to\\_DAPA\\_Handout.pdf](http://www.mygideon.org/@api/deki/files/68243/Criminal_Bars_to_DAPA_Handout.pdf) (last updated Jan. 27, 2015).

51. See OLC Memorandum, *supra* note 45, at 5, 12.

52. 8 U.S.C. § 1182(d)(5)(A) (temporary lawful presence available to noncitizens "for urgent humanitarian reasons or significant public benefit.").

53. 8 U.S.C. § 1254(a). TPS is a statutory grant that appears to replace a prior form of non-statutory executive relief known as extended voluntary departure. TPS is a form of temporary relief available to noncitizens whose home countries are suffering from "ongoing armed conflict," the fallout of environmental disasters like earthquakes and hurricanes, and other such conditions. *Id.* § 1254(b)(1). The application forms for DACA relief bear a good deal of resemblance to the TPS forms, although they also departed from these forms in ways that made it possible for DACA applicants to reveal less personal information than would have been required for a grant of TPS—presumably because DACA recipients were understandably concerned about providing information that might reveal the whereabouts of family members ineligible for the program. Compare USCIS Form I-821 (TPS application form) with USCIS I-821D (DACA application form).

54. OLC Memorandum, *supra* note 45, at 12 n.5. Deferred enforced departure (DED) "has no statutory basis," but is described in the USCIS, Adjudicator's Field Manual. *Id.* (quoting U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 38.2(a) (2014)) (internal quotation marks omitted). DED may be granted to nationals of appropriate foreign states and is justified as an exercise of "the President's constitutional powers to conduct foreign relations." *Id.* (quoting U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL § 38.2(a) (2014)) (internal quotation marks omitted). By way of example, it was granted to some Guatemalans and Salvadorans at the time that their 1990 grant of TPS status expired. Menjívar, *supra* note 2, at 1016. Their DED status expired in 1995. *Id.*

55. See Menjívar, *supra* note 2, at 1016.

56. See Johnson Memorandum, *supra* note 36, at 3.

very near the expiration date of their temporary protections to determine whether the Executive Branch plans to extend that date.<sup>57</sup> Only then do they have the opportunity to reapply.<sup>58</sup> Nor does the uncertainty end with renewal applications. In the Spring of 2015, over 11,000 DACA recipients who filed timely renewals actually experienced a temporary lapse in status, and the related problems of temporary unemployment and even job loss, because of processing delays.<sup>59</sup>

The temporal uncertainty of core legal protections stands at the center of the experience of liminal legality.<sup>60</sup> It is not the formal legal reprieve—be it TPS, DED, or DACA—that defined liminal legality. It is the existence on the edges of such relief, which sometimes comes into existence and sometimes does not. The temporal limits on available relief actually present potential recipients with valid questions about whether it is worth it to apply; many people eligible for relief like DACA indeed have not applied.<sup>61</sup> These non-applicants also exist in spaces of liminal legality, however. They are potentially eligible for temporary forms of deportation relief, but they do not have it. At the same time, their presumptive eligibility may offer them certain protections even in the absence of a grant of DACA because they are low enforcement priorities with long-term ties to the United States.<sup>62</sup> The fact that one need not ac-

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57. USCIS made the first renewal forms for DACA available in June 2014, which was only a few months before initial grants of DACA began to expire. See Patrick Taurel, *The DACA Renewal Process: Everything You Need to Know*, AMERICAN IMMIGRATION COUNCIL: IMMIGRATION IMPACT (June 5, 2014), <http://immigrationimpact.com/2014/06/05/the-daca-renewal-process-everything-you-need-to-know/> (“Today, U.S. Citizenship and Immigration Services (USCIS) announced the renewal process for hundreds of thousands of young noncitizens who received a grant of Deferred Action for Childhood Arrivals (DACA). . . . The renewal announcement comes not a moment too soon. Because DACA recipients are encouraged to request renewal between four to five months ahead of their expiration date to avoid a lapse, the earliest major wave of DACA recipients—who received their DACA grants in September and October of 2012—will need to act right away.”).

58. Cf. Menjivar, *supra* note 2, at 1016; Hallett, *supra* note 3, at 630.

59. David Noriega, *Thousands of Dreamers are Losing Their Work Permits*, BUZZFEED NEWS (Apr. 22, 2015), <http://www.buzzfeed.com/davidnoriega/thousands-shielded-from-deportation-losing-work-permits#.rdrVpVKAO>.

60. Ruben Andersson has argued that temporality is a tool wielded by states in their efforts to control unauthorized migration. Ruben Andersson, *Time and the Migrant Other: European Border Controls and the Temporal Economics of Illegality*, 116 AM. ANTHROPOLOGIST 795, 796 (2014). Making people wait is “an integral part of the exercise of power.” *Id.* at 802 (quoting HANS LUCHT, DARKNESS BEFORE DAYBREAK: AFRICAN MIGRANTS LIVING ON THE MARGINS IN SOUTHERN ITALY TODAY 73 (2012) (drawing on the work of Pierre Bourdieu)). See also Susan Bibler Coutin, *Being En Route*, 107 AM. ANTHROPOLOGIST 195, 196 (2005) (discussing illegality as “eras[ing] presence and suspend[ing] time”).

61. Press Release, Migration Policy Inst., *supra* note 32 (“Fifty-five percent of those who met the DACA criteria had applied for relief. Application costs, fear of self-identifying as unauthorized or potentially exposing other unauthorized relatives to government scrutiny and lack of information about the program and its temporary nature were among the barriers.”).

62. The announcement of DACA+ and DAPA was also made in the context of new enforcement priorities. Similar priorities theoretically have been in place for some time. See, e.g., Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel 1–5 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (identifying enforcement priorities); see also Memorandum from William J. Howard, Principal Legal Advisor to All OPLA Chief Counsel 3–4 (Oct. 24, 2005), available at



cess formal relief, or even intend to do so, illustrates the important points that legal liminality is variegated and maps imperfectly onto the categories of formal legal status.

The uncertainty of liminal legality as experienced by potential beneficiaries of deferred action was highlighted recently when Federal District Court Judge Hanen issued an emergency stay to prevent the rollout of DACA+ from being implemented on the planned February 18, 2015, start date.<sup>63</sup> Judge Hanen concluded that the state of Texas (which brought the suit along with twenty-five other states) had standing to challenge these executive actions, that the court had jurisdiction to hear the challenge, and that the DACA+ and DAPA programs should be temporarily enjoined on the grounds that the Obama Administration violated the notice and comment requirements of the Administrative Procedures Act in rolling out the programs.<sup>64</sup> Judge Hanen's legal reasoning on each of these questions is debatable.<sup>65</sup> However, one judge's ability to grind to

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<http://shusterman.com/pdf/prosecutorialdiscretionimmigration1005.pdf>; Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv. to Reg'l Dirs. et al. 5–8 (Nov. 17, 2000), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view>; Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement to All ICE Emps. 1–2 (June 30, 2010), available at <http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf>; Memorandum from Julie L. Myers, Assistant Sec'y, U.S. Immigration & Customs Enforcement for All Field Office Dirs. & All Special Agents in Charge I (Nov. 7, 2007), available at <http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07>; SHOBA SIVAPRASAD WADHIA, THE MORTON MEMO AND PROSECUTORIAL DISCRETION 3–6 (2011), available at [http://www.immigrationpolicy.org/sites/default/files/docs/Shoba\\_-\\_Prosecutorial\\_Discretion\\_072011\\_0.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_-_Prosecutorial_Discretion_072011_0.pdf).

Individuals who are not priorities for deportation are certainly not immune from deportation. See, e.g., Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437, 439–41 (2013) (discussing the deportation of purportedly low-priority noncitizens with attention to one particular case).

63. *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. Feb. 16, 2015).

64. *Id.* at 114–16, 193–95.

65. Texas's standing is based on the costs of issuing driver's licenses to DACA and DAPA recipients—a practice that is sanctioned for deferred action recipients by the REAL ID Act of 2005. Pub. L. No. 109–13, div. B, tit. 2, § 202, 119 Stat. 231, 312–13 (2005). The DACA and DAPA program do not create this obligation requirement on the states although each grant of deferred action triggers it. Even if Texas has standing *and* a court decides that the question is justiciable, the APA notice and comment requirements may be inapposite here. The requirement does not apply to “general statements of policy.” 5 U.S.C. § 553(b)(3)(A) (2015). The Administration argues that the announced expansion of deferred action is merely a statement of enforcement priorities that cede to USCIS agents the ability to make individual case determinations in implementation. As such, it appears to fall comfortably within the exception to notice and comment rulemaking, although such questions are legally vexing in any administrative context, and certainly no less so in immigration. See Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 570–71, 588 (2012); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004). Discretion is a key element that distinguishes a legislative rule from a policy statement. Family, *supra*, at 577–78.

While opponents of the program point to the low number of individuals actually denied DACA status to support the argument that such discretion does not exist, more than 10% of applicants have been denied DACA. As of February 2015, the government reported that “six percent of adjudicated DACA requests have been denied, in addition to the six percent that were initially rejected when filed.” Attachments to Appellants' Emergency Motion for Stay Pending Appeal at 32,

a halt a process meant to lift the constant threat of expulsion faced by millions of people in one fell swoop illustrates the extreme contingency of liminal status.<sup>66</sup>

As this Article goes to press, the Fifth Circuit had recently affirmed Judge Hanen's order,<sup>67</sup> and did so in a way that once again illustrates how widespread liminal legality is among noncitizens in the United States. The Fifth Circuit agreed that the Obama Administration has the discretionary authority to decline to deport a subset of unauthorized migrants.<sup>68</sup> But the Court found that the Administration exceeded its authority in providing what the Fifth Circuit characterized as the status of "lawful presence" to some noncitizens. In the court's view, this status could not be granted absent notice-and-comment rulemaking.<sup>69</sup> To bolster its characterization of deferred action as a status, the court focused on the DHS Secretary's planned grant of work authorization to DACA+ and DAPA recipients.<sup>70</sup> Yet the authority for providing work authorization for deferred action recipients stretches back decades, and flows directly from statutory provisions and notice-and-comment rules.<sup>71</sup> The Fifth Circuit's broad reasoning thus would potentially invalidate the work authorization of thousands of noncitizens—including current DACA recipients and other beneficiaries of humanitarian deferred action status—who have received work authorization pursuant to the provision that the Fifth Circuit found unlawful. In this way, the Fifth Circuit's decision again highlights the legal precariousness experienced by many categories of noncitizens.

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Texas v. United States, 787 F.3d 733 (5th Cir. 2015) (No. 15–40238). Moreover, some potentially qualified noncitizens are not applying for relief at all because immigration service providers have identified elements of their records that could warrant unfavorable exercises of discretion, such as imputed gang affiliation. *See, e.g.*, Catholic Charities, DACA Pre-Screening Pre-Registration Form, <http://www.catholiccharitiesoregon.org/Pre-Screening%20Intake%20Form.pdf> (last visited Oct. 12, 2015). One widely-used DACA screening form asks potential applicants to reveal whether or not they "have any tattoos." *Id.* The fact that organizations bent on optimizing DACA and DAPA enrollment are screening out potentially eligible applicants because of concerns about discretionary denials suggests that there is a real element of enforcement discretion in the administrative screening of deferred action applicants.

66. Juliet Stumpf and Stephen Manning theorize that the creation of DACA and DAPA, and other innovations in immigration regulation indeed represent a kind of "liminal law." Stephen Manning & Juliet Stumpf, *Rethinking the "Law" in Immigration Law* (unpublished preliminary draft) (on file with the author). Here, I do not argue, as they do, that there are categories of administrative guidance documents or other administrative and legislative practices that constitute a distinctly liminal category of law. But my arguments also are not incompatible with their claim.

67. Texas v. United States, No. 15–40238, 2015 WL 6873190, at \*1 (5th Cir. Nov. 25, 2015). The Obama Administration has announced its plan to appeal the decision to the Supreme Court, so the litigation continues. Michael D. Shear, *Obama to Appeal Immigration Ruling to Supreme Court*, N.Y. TIMES, Nov. 10, 2015, [http://www.nytimes.com/2015/11/11/us/politics/supreme-court-immigration-obama.html?\\_r=0](http://www.nytimes.com/2015/11/11/us/politics/supreme-court-immigration-obama.html?_r=0).

68. Texas, 2015 WL 6873190, at \*16–18.

69. *Id.* at \*18–19.

70. *Id.* at \*24.

71. *Id.* at \*48–50 (King, J., dissenting).

Should DACA+ and DAPA ultimately move forward, hundreds of thousands—perhaps even millions—of DACA and DAPA recipients will join the ranks of the temporarily sanctioned sojourner. They will move further from the more marginal spaces occupied by unauthorized migrants who are “enforcement priorities” and further still from the long-time residents of this country who have already been banished.<sup>72</sup> They will be marked, like existing DACA recipients and TPS recipients past and present, as a part of the larger world of liminal legal subjects that scholars like Menjívar have begun to map, and notwithstanding their access to a non-status protection, they will continue to experience all of the accompanying instabilities of liminal legality.

They will also experience significant benefits, of course. The temporary legal reprieve that DACA and DAPA offer will bring with it life-altering improvements for those who have lived in the United States for years without formal legal authorization. The negative effects of undocumented status are extensively documented.<sup>73</sup> Unsurprisingly, the available data suggests that even at this early stage of the program, receiving DACA has greatly improved the lives of DACA recipients.<sup>74</sup> DACAmented individuals experience a wage bump and better educational outcomes.<sup>75</sup> At the anecdotal level, they also report improvements in their subjective feelings of security and well-being.<sup>76</sup> Thus, it is a space of some sort of inclusion, with some opportunity for positive transformations for the individual in their relations with other denizens and the state.<sup>77</sup>

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72. See *infra* Part III.A (discussing recent enforcement trends).

73. See, e.g., DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 118–26 (2002) (documenting the negative effect of undocumented status on wages); Heyman, *supra* note 24, at 157–58 (documenting the negative effect of undocumented status on wages).

74. ROBERTO G. GONZALES & VERONICA TERRIQUEZ, HOW DACA IS IMPACTING THE LIVES OF THOSE WHO ARE NOW DACAMENTED: PRELIMINARY FINDINGS FROM THE NATIONAL UNDACAMENTED RESEARCH PROJECT (2013), available at <http://www.immigrationpolicy.org/just-facts/how-daca-impacting-lives-those-who-are-now-dacamented>; WONG ET AL., *supra* note 31, at 10; see also Caitlin Patler & Jorge Cabrera, *From Undocumented to DACAmended: Benefits and Limitations of the Deferred Action for Childhood Arrivals (DACA) Program, Three Years Following its Announcement*, RES. & POL’Y BRIEFUCLA Inst. for Research on Labor and Emp’t, May 2015, at 5, available at [http://www.irlle.ucla.edu/publications/documents/ResearchBrief27Patler\\_000.pdf](http://www.irlle.ucla.edu/publications/documents/ResearchBrief27Patler_000.pdf).

75. GONZALES & TERRIQUEZ, *supra* note 74; see also WONG ET AL., *supra* note 31, at 27; Patler & Cabrera, *supra* note 74.

76. The Televisa foundation enlisted several DACA recipients to create autobiographical videos promoting the DACA program to the estimated 500,000 noncitizens who are eligible for DACA but have not yet applied. *Think About It*, THINKABOUTIT.US, <http://thinkaboutit.us/> (last visited Apr. 5, 2015).

77. This is consonant with Menjívar’s findings, and with the prior uses of the notion of liminality as a social state, that the period of liminality can be a productive state. See *supra* notes 9–12 and accompanying text.

Nevertheless, there are social and legal costs to living in a state of liminal legality.<sup>78</sup> Identifying those costs helps to further illustrate some of the key features of liminal legal status. First, there are the literal costs. Individuals existing in states of liminal legality have access to a slightly greater degree of legal protection from expulsion, but they have to pay for it. Like TPS, the DACA, DACA+, and DAPA programs require (or would require) recipients to pay recurring fees associated with moving from an unprotected (but often untargeted) group<sup>79</sup> to a group with a more formal protection from banishment that still falls well short of a privileged legal status. As previously noted, the fee for DACA is a non-waivable \$495, and it is payable with each application for temporary relief. For some, this presents a very real obstacle to greater legal stability.<sup>80</sup> The requirement that individuals threatened with banishment pay a monetary price for the very basic right to be free from this banishment is a recurring feature of liminal legality.<sup>81</sup>

Second, liminal legal status exposes individuals to both governmental caprice and private exploitation. Because of the stringent<sup>82</sup> and somewhat ambiguous<sup>83</sup> eligibility limitations of the DACA and DAPA program, even those who gain this (non)status are more vulnerable than other long-time lawful residents subject to narrower deportation grounds. This group of noncitizens is particularly vulnerable to discretionary decisions by law enforcement agents at all levels of government. Decisions by state and local law enforcement to prioritize immigration-related en-

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78. Geoffrey Heeren skillfully illustrates the complex realities of the DACA program. Heeren, *supra* note 30, at 1174–77. Heeren argues that the grant of nonstatus paradoxically bestows dignity and legitimacy on its recipients, even as it orchestrates their heightened surveillance. *See id.*

79. I should stress again, of course, that many people who fit the DACA and DAPA profile have been deported over the years. To suggest that they are low-priority is not to suggest that they are immune from deportation. *See, e.g.,* Hing, *supra* note 62, at 501. Indeed, the very randomness of their potential selection adds to the stress of liminal existence.

80. Kasperkevic, *supra* note 49 (“Cost has been one of the top reasons why people eligible for DACA delay their application, says Sarah Hooker, policy analyst at Migration Policy Institute. The \$465 application fee, while minuscule to most middle-class Americans, has played a large role in preventing young undocumented immigrants from applying for work permits.”).

81. *See* sources cited *supra* note 73; *cf.* Menjivar, *supra* note 2, at 1025–27 (noting the financial concerns generated by liminal legality).

82. To succeed, the DACA applicant must establish that she has not been “convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do[es] not otherwise pose a threat to national security or public safety.” *Deferred Action for Childhood Arrivals*, U.S. DEPARTMENT OF HOMELAND SECURITY, <http://www.dhs.gov/deferred-action-childhood-arrivals> (last published date July 17, 2015). Immigration service providers advise potential applicants that the criminal bar of three non-significant misdemeanors exclude minor traffic violations, but also caution that any purported gang activity or participation in criminal activity can serve as a bar to DACA on public safety grounds, even in the absence of a criminal record. *See, e.g., Understanding the Criminal Bars to the Deferred Action for Childhood Arrivals*, IMMIGRANT LEGAL RESOURCE CENTER, [http://www.ilrc.org/files/documents/ilrc-2012-daca\\_chart\\_1.pdf](http://www.ilrc.org/files/documents/ilrc-2012-daca_chart_1.pdf) (last visited Apr. 6, 2015).

83. Service providers note that the individual’s total history is relevant to the determination. Matters like juvenile and expunged convictions can affect DACA determinations, as can even loose indicia of gang affiliation. *See, e.g., Understanding the Criminal Bars to the Deferred Action for Childhood Arrivals*, *supra* note 82.

forcement efforts carried out under a different name,<sup>84</sup> decisions by state legislatures to criminalize noncitizens through expansive criminal provisions,<sup>85</sup> and even the decision to concentrate greater policing resources for “crime suppression sweeps” in immigrant-dense neighborhoods<sup>86</sup> are particularly problematic for individuals with deferred action status. Because the eligibility criteria for DACA is more exacting than the deportation grounds that cover long-time lawful residents,<sup>87</sup> DACA recipients remain quite vulnerable to banishment.

This leaves them more vulnerable to private actors as well. Employers are one obvious example—they can exploit status vulnerabilities to suppress wages, discourage organizing, and skirt workplace regulations for their noncitizen workers.<sup>88</sup> But there are other examples. Notably, noncitizens are heavily reliant on private legal service providers when it comes to getting their information about potential legal relief. Consequently, private organizations indirectly define eligibility for relief through the dissemination of eligibility criteria and through their own screening exercises.<sup>89</sup> Moreover, private organizations play a significant

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84. See, e.g., Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1760–66 (2011) (analyzing Arizona’s enforcement of its “self-smuggling” prohibitions in the period preceding the enactment of S.B. 1070); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1847–49 (2011); see also Jennifer M. Chacón, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1643–45 (2010) (noting that some states enacted anti-trafficking laws in contexts that suggested their likely primary use as immigration enforcement tools).

85. Federal District Court Judge Susan Bolton recently struck down on preemption grounds the anti-smuggling provision that was the focus of Ingrid Eagly’s study. See *United States v. Arizona*, No. CV-10-01413-PHX-SRB (D. Ariz. Nov. 7, 2014), available at <http://d355brb9zkkbdsd.cloudfront.net/wp-content/uploads/2014/11/2014-11-10-ArizSmugglingRuling.pdf> (order on partial judgment on the pleadings). But there are many ways states can play the immigration enforcement game. To take another example, for several years Maricopa County officials used an Arizona provision that criminalizes “identity theft”—even where the identity is fictitious—for the purpose of prosecuting noncitizens unauthorized to work in the state. That practice was also recently preliminarily enjoined. *Puente Arizona v. Arpaio*, 76 F. Supp. 3d 833, 860–61 (D. Ariz. Jan. 5, 2015) (prohibiting Maricopa County Attorney Bill Montgomery and Sheriff Joe Arpaio from enforcing two identity theft statutes to the extent the laws address actions committed with the intent to obtain employment). Imposing criminal penalties for driving without a license and/or insurance is one of the easiest ways to criminalize noncitizens in states that prohibit the grant of such licenses to noncitizens. Kevin R. Johnson, *Driver’s Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 215–16 (2004).

86. See, e.g., *Melendres v. Arpaio*, 695 F.3d 990, 994 (9th Cir. 2012) (quoting Plaintiffs’ arguments) (internal quotation marks omitted).

87. The DACA bars are considerably broader than the criminal deportation and exclusion grounds of the Immigration and Nationality Act. Compare Napolitano Memorandum, *supra* note 28, at 1, with Immigration and Nationality Act § 237(2), 8 U.S.C. § 1227(2) (2015). The INA provisions contain no deportation provision for three non-significant misdemeanors unless one or more of those offenses is also an aggravated felony or crime involving moral turpitude. 8 U.S.C. § 1227(2)(A).

88. See, e.g., GORDON, *supra* note 24, at 46–49; Lee, *supra* note 24, at 1141; Wishnie, *supra* note 24, at 195.

89. See, e.g., Catholic Charities, *supra* note 65. This issue is also at the heart of ongoing studies that I have pursued with a research team funded by the Russell Sage Foundation. For a discussion of that research, see *Navigating Liminal Legalities along Pathways to Citizenship: Immigrant Vulnerability and the Role of Mediating Institutions*, RUSSELL SAGE FOUND.,

role in reshaping eligibility criteria at the administrative level. “Stakeholders” including immigrants’ rights organizations, chambers of commerce, and restrictionist organizations play a role in how criteria are defined, and although private lobbying is an element in any lawmaking process, private power is more immediately felt in the shaping of the eligibility criteria because it is so fluid relative to the process for reform of comparable legislative or formal administrative rules.<sup>90</sup>

Ultimately, individuals with liminal legal status are often in the position of asking for inclusion in the form of an administrative act of grace,<sup>91</sup> rather than asking an adjudicator to enforce a right.<sup>92</sup> There is no appeal outside of an administrative agency for a denial of DACA. The shifting criteria is entirely defined and applied within the agency. Administrative agents make determinations about status “via a calculation that remains almost entirely hidden but for the traces it leaves in statements about the value of particular kinds of proof for establishing those statuses.”<sup>93</sup> Courts exempt themselves from weighing in on these determinations, either as a matter of formal legal practice,<sup>94</sup> or through the exercise of an all-encompassing deference that in fact shields administrative policies and decision making from any real review.<sup>95</sup>

In sum, liminal legal status is unstable. Legal protections emerge and recede, and basic protection from banishment is often bought and sold. Basic liberties—freedom of movement, family unification, freedom from detention<sup>96</sup>—are bestowed as an act of grace, not of right. Individuals are particularly vulnerable to governmental error and whim, and their basic freedoms are often contingent on the actions and decisions of a host of private actors. Liminal legal status obviously affects the lived experience of its bearers. In the case of Salvadorans and Guatemalans who

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<http://www.russellsage.org/awarded-project/navigating-liminal-legalities-along-pathways-to-citizenship-immigrant-vulnerability-> (last visited Oct. 12, 2015).

90. See Family, *supra* note 65, at 570–71 (discussing the benefits of formal process); see also Manning & Stumpf, *supra* note 66 (discussing this downside of “liminal law”).

91. See Chae Chan Ping v. United States, 130 U.S. 581, 596–98 (1889); Coutin et al., *supra* note 3, at 99–100; Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU L. REV. 1563, 1580–81.

92. The positioning of noncitizens as supplicants seeking immigration status as an act of administrative grace rather than a claim of right is widely acknowledged. See, e.g., Linda Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, 16 CRITICAL REV. INT’L SOC. & POL. PHIL. 344, 355 (2013); Coutin et al., *supra* note 3, at 99–100; Tirres, *supra* note 91, at 1580; cf. Jennifer Chacón, *Feminists at the Border*, 91 DENV. U. L. REV. 85, 107 (2013) (discussing how the structure of the immigration law disproportionately positions women in this supplicant position).

93. Coutin et al., *supra* note 3, at 100.

94. *Id.*

95. Coutin, Richland, and Fortin focus on the plenary powers doctrine, and thus center the experience of noncitizens and indigenous populations in their account, but the highly deferential review that courts apply to administrative decision-making in contexts such as policing, sentencing and prison administration effectively places many more citizens and denizens in the same legally tenuous position as that experienced by noncitizens and indigenous populations in the context of the plenary powers doctrine. See *infra* Part IV.A–B.

96. All of these rights are tied to the right to remain granted by programs like DACA and DAPA.

have moved in and out of various protected statuses over the last decade, the personal and social consequences of liminal legality are explored in detail in the scholarly literature.<sup>97</sup> New studies are now giving similar attention to documenting the social experiences of individuals in the liminal legal statuses created by the DACA program,<sup>98</sup> and comparable work will undoubtedly be done for DAPA recipients should the DAPA program move forward.

The foregoing discussion of iconic cases of liminal legality focused—as does the existing literature—on the experiences of noncitizens who lack stable legal status in the United States. But the frame of liminal legality is also useful to understanding how legal residents and citizens are rendered vulnerable by law. The next section explores how civil and criminal laws operate in tandem to produce liminal legality among citizens as well as noncitizens.

## II. LIMINAL LEGALITY AT THE CIVIL-CRIMINAL BORDER

Previous accounts of liminal legality have focused on noncitizens on the edges of formal legal immigration status. But even in the realm of immigration law, noncitizens are not the only people whose lives are shaped by liminal legality. Many denizens of the United States, including citizens, experience the effects of liminal legality, often as a direct result of governance strategies designed to regulate, monitor, and (where possible) banish its liminal legal subjects. The growing role of criminal justice actors in the enforcement of civil immigration laws has played an important role in generating the rise in liminal legality among residents of immigrant communities. Some immigrant communities are now more heavily policed and more likely to come into contact with the criminal justice system as a result of changing enforcement priorities. Their vulnerabilities are often viewed as unique insofar as they exist at the intersection of criminal and immigration law. But in fact, the interplay of criminal and civil regulatory regimes that they experience is not at all uncommon; the liminal legality they experience has much in common with—and indeed shapes and is shaped by—the experiences of other heavily policed and socially marginalized communities. This Section therefore begins with an analysis of the production of liminality in immigration communities regardless of the formal legal status of community

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97. See Menjivar, *supra* note 2, at 1000; see also Susan Bibler Coutin, *In the Breach: Citizenship and Its Approximations*, 20 IND. J. GLOBAL LEGAL STUD. 109, 111–13 (2013); Susan B. Coutin, *Denationalization, Inclusion, and Exclusion: Negotiating the Boundaries of Belonging*, 7 IND. J. GLOBAL LEGAL STUD. 585, 585–91 (2000).

98. See, e.g., GONZALES & TERRIQUEZ, *supra* note 74 (“We find that the DACA recipients we surveyed experienced a pronounced increase in economic opportunities, such as getting a new job, opening their first bank account, and obtaining their first credit card. . . . Overall, our research indicates that although DACA opens up some economic opportunities for young aspiring Americans, it does not address the constant threat of deportation still facing those closest to them, including mothers, fathers, and siblings.”).

members and then extends the analysis to communities rendered liminal through their interactions with the criminal justice system. Significantly, many individuals experience overlapping forms of liminality because of their race, their geographic location and their immigration status. Their intersectional vulnerabilities compound the destabilizing effects of each form of liminality.<sup>99</sup>

#### A. Immigration Law and the Production of Liminality

As a result of relatively recent changes to immigration law and law enforcement patterns, many individuals with lawful status, including LPRs, have been forced into increasingly liminal spaces.<sup>100</sup> Specific legal changes have operated to decrease the stability of the legal status of LPRs. Once treated as citizens in waiting, over the past two decades, lawful permanent residents have become increasingly vulnerable to deportation due to Congress's creation of expansive (and retroactive) removal provisions.<sup>101</sup> Registration requirements and the monitoring of lawful residents have also been on the rise. Thus, even as some unauthorized migrants access more stable (albeit still liminal) status, noncitizens with lawful status increasingly experience that status as legally liminal.

In her study of unauthorized Brazilian youth in the Northeastern United States, Kara Cebulko found “that Brazilian young adults [in her study] recognize[d] a hierarchy with four distinct categories of legal membership in which the documents and rights conferred from one status to another—undocumented to liminal legality to LPR to citizen— increase while the threat of deportability decreases.”<sup>102</sup> These young adults' comments on the immigration laws illustrate an awareness of the broad range of existing legal statuses and the absence of a true legal/illegal binary, but they also tellingly oversimplify the incredibly complex and sometimes unpredictable ways that formal legal status maps onto an individual's actual ability to avoid banishment. As a general matter, lawful permanent resident status is not sufficiently stable or perma-

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99. Indeed, individuals who experience the most debilitating intersectional disadvantages are at the center of Yolanda Vázquez's analysis of an emergent “crimmigration system” in the United States. See generally Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599 (2015).

100. See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

101. *Id.* at 98.

102. Kara Cebulko, *Documented, Undocumented and Liminality Legal: Legal Status During the Transition to Adulthood for 1.5-Generation Brazilian Immigrants*, 55 SOC. Q. 143, 145 (2014). Cebulko notes that for these young adults, it was “not just liminal legality that challenges the illegal–legal binary. LPRs, often considered as authorized migrants, experience insecurity because of their deportability, highlighting the precariousness of their legality.” *Id.* LPR status certainly unsettles the legal/illegal binary, but I would argue further that LPR status is itself liminal, particularly in the post-1996 legal framework. See discussion *infra* Parts III.A, III.B.



ment to provide freedom from deportation; indeed, the Brazilian young adults of Cebulko's study were aware of and noted that fact.<sup>103</sup>

Cebulko's typology therefore requires further refinement because LPRs experience differing degrees of stability within that status. Some LPRs—for example, those who live in heavily policed, restrictionist jurisdictions and who have old criminal convictions that might appear to render them deportable—may experience greater liminality and a greater likelihood of banishment than an unauthorized noncitizen who is a low priority for removal and lives in a more immigrant-friendly jurisdiction. This suggests that LPR status must be treated as categorically liminal. The particular degree of vulnerability experienced by LPRs will vary depending on their legal histories, their places of residence, their economic statuses, their religion and their phenotypes, among other factors, but those are highly individualized inquiries that do not correspond neatly to formal legal status. Individuals with liminal legal status may be more or less secure at various moments in time, and different liminal legal subjects may be more or less secure relative to other members of the population. Any attempt to situate liminality as a midway point between formal legality and formal illegality thus requires a distortion of both the actual mechanics of law and the lived experience of many liminal legal subjects with varying formal legal statuses.

Notably, Congressional proposals to legalize the immigration status of certain unauthorized migrants would rely upon and expand the liminal legality of lawful residents. Some proposals would eliminate the possibility of citizenship completely, evincing a preference for permanent liminality.<sup>104</sup> But even the viable proposals with a path to citizenship require extensive periods of legal residence before legalized noncitizens would even become eligible for lawful permanent resident status. The Senate's 2013 reform bill, for example, would require most noncitizens present without authorization to accumulate about ten years of blue card status before gaining lawful permanent resident status.<sup>105</sup> From there, it will usually be another three to five years until naturalization.<sup>106</sup> For a population that, by definition, already will have survived several years of post-entry screening,<sup>107</sup> this would be an unprecedented period of liminal legality prior to citizenship in the United States.

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103. Cebulko, *supra* note 102.

104. This strategy has been promoted by presidential hopeful Jeb Bush, among others. JEB BUSH & CLINT BOLICK, *IMMIGRATION WARS: FORGING AN AMERICAN SOLUTION* 42–44 (2013).

105. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2212 (2013).

106. Immigration and Nationality Act §§ 316(a)(1), 319(a), 8 U.S.C. §§ 1427(a)(1), 1430(a) (2015).

107. Cf. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811–13 (2007) (observing the value of such post-entry screening and arguing that immigration law as currently structured essentially relies on this, rather than on effective front-end exclusion).

Thus, even as the creation of legally liminal spaces can generate protective reprieves from legal marginalization, they also can be constructed in ways that forestall, complicate, or obviate more complete integration measures. The trend in immigration law over the past three decades has favored the expansion of liminal legal status at the expense of more integrative and secure legal statuses for noncitizens on the path to citizenship.<sup>108</sup> Indeed, in its more recent decisions, the Supreme Court has acknowledged that the bestowal of federal administrative grace is a central feature of the operation of contemporary immigration law.<sup>109</sup> These trends in law have been compounded by trends in law enforcement, because even as the path to citizenship has become more drawn out and more perilous, enforcement efforts that target immigrant communities have been on the rise.

Liminal legality thus characterizes the lives of many noncitizens with various forms of legal status or presence. The experience of liminality is, for example, quite notable among noncitizens who fall under the growing umbrella of temporary humanitarian forms of legal authorization. In a recent survey of 108 noncitizens with lawful immigration status ranging from immigrant visas administered pursuant to the Violence Against Women Act to more temporary forms of relief like U visas, TPS, and asylum-seeker status, sociologists Leisy Abrego and Sarah Lakhani found that noncitizens with lawful status “remain vulnerable to blocked mobility, persistent fear of deportation, and instability, confusion and self-blame.”<sup>110</sup> Immigrants who are authorized to remain in these kinds of legal statuses are often treated as if they are undocumented, both because most people—including governmental actors—are unaware of the existence, let alone the nature, of these forms of relief, and because anti-immigrant hostility is unbounded by law.<sup>111</sup> The “nebulous character of liminal, humanitarian legal categories in a broader inhospitable context may create difficulties when immigrants seek to convert their status into tangible resources by signaling their legality to social intermediaries who dispense benefits and control opportunities.”<sup>112</sup> Abrego and Lakhani conclude that “in the current political context, the harsh consequences of

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108. See MOTOMURA, *supra* note 100, at 5–6; Heeren, *supra* note 30, at 1133–45.

109. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2505–07 (2012) (finding section 6 of Arizona’s S.B. 1070 unconstitutional because it undercut the federal administrative discretion needed to implement federal immigration laws). Adam Cox argues that the *Arizona* decision “elevate[s] prosecutorial decisions by executive branch officials to the status of law for purposes of preemption analysis.” Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 54. *Padilla v. Kentucky*, 559 U.S. 356 (2010), also implicitly validates this exercise of administrative grace with its acknowledgment of the propriety of bargaining over immigration consequences in criminal cases. In this way, the *Padilla* court acknowledges the reality recently described by Jason Cade: “Back-end adjudicators are reduced to a much-diminished role in immigration courts. Thus, equity enters the deportation system, if at all, primarily through enforcement discretion.” Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 683 (2015).

110. Abrego & Lakhani, *supra* note 3, at 265.

111. See *id.* at 265–66.

112. *Id.* at 269.

dehumanizing immigrants affect not only undocumented immigrants but also those whose presence is legally approved.”<sup>113</sup>

In fact, the spillover effects can be even more pronounced—the current climate of immigration policing affects whole communities, regardless of immigration status. Unfortunately, even as legal uncertainty has become a more pervasive feature of immigrant life, enforcement efforts that target immigrant communities have been on the rise. This, in turn, brings a broader ambit of both noncitizens and citizens into situations of legal precarity.

### *B. Immigration Enforcement and the Production of Liminality*

Throughout U.S. history, and no less so now, concerns about supposed threats to the national character posed by immigration of people “different” from native residents along axes of race, culture, and religion have helped to drive waves of exclusionary immigration laws and enforcement practices.<sup>114</sup> Such policies wax and wane.

Beginning in the early 1990s, the United States experienced a revival of restrictionist political sentiment that helped to drive election outcomes and shape policies at the federal,<sup>115</sup> state,<sup>116</sup> and local<sup>117</sup> levels.

113. *Id.* at 287.

114. See generally KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 152–54 (2004) (charting this history of exclusions on various grounds); KANSTROOM, *supra* note 5, at 91 (charting this history of exclusions on various grounds); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 641 (2005) (analyzing the 1875 Page Act as an exclusionary law motivated by racial concerns); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 28–29 (1998); Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 590–91 (discussing anti-semitism in immigration policy during the World War II era); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 409–10 (2005).

115. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–32, § 432, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105; Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135; Secure Fence Act of 2006, Pub. L. No. 109–367, 120 Stat. 2638.

116. See, e.g., Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 632–34 (1995) (discussing the political dynamics giving rise to California’s restrictionist Proposition 187); S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1431 (2012) (discussing the political factors that generate subfederal immigration laws).

117. See, e.g., Hazleton, Pa., Ordinance 2006–13 (Aug. 15, 2006), available at <https://www.aclu.org/hazleton-pa-ordinance-no-2006-13>; Farmers Branch, Tex., Ordinance 2952 (Jan. 22, 2008). Both laws have been struck down on preemption grounds. *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 857 (N.D. Tex. 2010) (ruling that federal law preempted Farmers Branch Ordinance 2952), *aff’d*, 675 F.3d 802 (5th Cir. 2012), *aff’d on reh’g en banc*, 726 F.3d 524 (5th Cir. 2013); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007) (holding that federal law preempted Hazleton’s rental ordinance against undocumented immigrants), *aff’d in part, rev’d in part*, 724 F.3d 297 (3d Cir. 2013); see also Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 10–11 (2007); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1126–27 (2009); Rose Cuison Villazor, *“Sanctuary Cities” and Local Citizenship*, 37 FORDHAM URB. L.J. 573, 575–76 (2010).

While the restrictionist impulse was not uniform,<sup>118</sup> exclusionary efforts targeting immigrants outweighed inclusive, integrationist efforts. Attempts to legalize longtime residents lacking legal status failed repeatedly,<sup>119</sup> but funding for immigration enforcement rose steadily and significantly.<sup>120</sup> Ironically, having campaigned on multilingual promises of immigration reform, President Barack Obama has become the “Deporter-in-Chief,”<sup>121</sup> presiding over the late-stage rise of “a formidable immigration enforcement machine[.]”<sup>122</sup> and the greatest number of deportations in the nation’s history.<sup>123</sup> Building upon and amplifying the policies of the Clinton and second Bush administrations, the Obama administration has pursued expansive and aggressive enforcement policies both at the border and in the interior of the country.<sup>124</sup>

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118. See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 567 (2008) (discussing integrationist efforts). After 2012, the tide seemed to turn away from enforcement-related measures in favor of more integrationist approaches as the subfederal level. See, e.g., ANN MORSE ET AL., NAT’L CONFERENCE OF STATE LEGISLATURES, 2013 IMMIGRATION REPORT, available at <http://www.ncsl.org/research/immigration/2013-immigration-report.aspx#4>.

119. See Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/> (discussing the failures of immigration reform in recent years, including failed comprehensive immigration reform (CIR) bills in 2005, 2006, and 2007, and mentioning the failure-prone Dream Act); see also Muzaffar Chishti & Faye Hipsman, *U.S. Immigration Reform Didn’t Happen in 2013; Will 2014 Be the Year?*, MIGRATION POL’Y INST. (Jan. 9, 2014), <http://www.migrationpolicy.org/article/us-immigration-reform-didnt-happen-2013-will-2014-be-year> (discussing failure of the 2013 CIR bill); Elise Foley, *DREAM Act Vote Fails in Senate*, HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/2010/12/18/dream-act-vote-senate\\_n\\_798631.html](http://www.huffingtonpost.com/2010/12/18/dream-act-vote-senate_n_798631.html) (discussing the failure of the DREAM Act in 2011 and previous failures).

120. Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 647–48 (2012).

121. Eyder Peralta, *National Council of La Raza Dubs Obama ‘Deporter-In-Chief,’* NPR (Mar. 4, 2014, 6:30 PM), <http://www.npr.org/blogs/thetwo-way/2014/03/04/285907255/national-council-of-la-raza-dubs-obama-deporter-in-chief> (quoting National Council of La Raza President Janet Murguía) (internal quotation marks omitted).

122. DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 12 (2013), available at [http://carnegie.org/fileadmin/Media/Image\\_Galleries/immigration\\_enforcement\\_in\\_us\\_MPI\\_report.pdf](http://carnegie.org/fileadmin/Media/Image_Galleries/immigration_enforcement_in_us_MPI_report.pdf).

123. *Id.* at 7–8. There is some dispute over this honor, with critics who favor a more restrictionist immigration policy pointing out that the bulk of these formal removals occur at the border, while enforcement in the interior is declining when compared to the policies of the late Bush II presidency. See Caitlin Dickson, *Is Obama Really the Deporter-in-Chief? Yes and No.*, DAILY BEAST (Apr. 30, 2014), <http://www.thedailybeast.com/articles/2014/04/30/is-obama-really-the-deporter-in-chief-yes-and-no.html>.

124. Border efforts, both genuine and optical, still substantially outweigh interior enforcement efforts. See Dickson, *supra* note 123. Indeed, just about the only thing the U.S. Congress can seem to agree on is that you can never have enough boots on the ground on the U.S.-Mexico border. In 1993, there were around 4,000 border patrol agents in the US. See, e.g., U.S. Customs & Border Prot., *Border Patrol Agent Staffing by Fiscal Year*, CBP.GOV, [http://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Staffing%20FY1992-FY2014_0.pdf) (last updated Sept. 20, 2014). Now, there are more than 20,000, almost all of whom are assigned to the Southwestern border region. *Id.* The failed comprehensive immigration reform bill passed by the Senate in 2013 would have further increased this number. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 1102 (2013).

Congress has enabled these practices. Unlike almost every other line in the budget, spending on immigration enforcement seems to know few constraints. In a 2013 report on immigration enforcement in the United States Migration Policy Institute (MPI) found that:

Spending for the federal government's two main immigration enforcement agencies—US Customs and Border Protection (CBP) and US Immigration and Customs Enforcement (ICE)—and its primary enforcement technology initiative, the US Visitor and Immigrant Status Indicator Technology (US-VISIT) program, surpassed \$17.9 billion in fiscal year (FY) 2012. This amount is nearly 15 times the spending level of the US Immigration and Naturalization Service (INS) when IRCA was enacted [in 1986]. In the ensuing 26 years, the nation has spent an estimated \$186.8 billion (\$219.1 billion if adjusted to 2012 dollars) on immigration enforcement by INS and its successor agencies CBP and ICE, and the US-VISITS program.<sup>125</sup>

The MPI report only takes into account federal spending here, and then, only spending by DHS.<sup>126</sup> These figures do not account for the costs of formal criminal prosecutions for immigration offenses, which are at historic highs.<sup>127</sup> Nor do they account for the increasing role of state and local law enforcement in immigration enforcement, some of which is driven by states,<sup>128</sup> and some by the federal government.<sup>129</sup> The flow of resources into enforcement shows little sign of abatement.

As an outgrowth of this spending, formal removals are at historically high levels.<sup>130</sup> About 80% of these removals are taking place at the border.<sup>131</sup> The remainder—about 80,000 a year—come from the interior and involve longtime residents, including longtime lawful permanent residents who are being removed either because they lack legal authorization to remain or because they have violated the terms of their stay, usually as a result of a minor criminal conviction.<sup>132</sup>

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125. MEISSNER ET AL., *supra* note 122, at 3–4.

126. *Id.* at 4 n.4.

127. *Id.* at 93; Chacón, *supra* note 120, at 635–36.

128. See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.B. 56, 2011 Reg. Sess. (Ala.); H.B. 87, 151st Gen. Assemb., 2011–12 Reg. Sess. (Ga. 2011); S.B. 20, 119<sup>th</sup> Gen. Assemb., 1st Reg. Sess. (S.C. 2011). These laws were largely enjoined on preemption grounds in the period leading up to and following the Supreme Court's decision in *Arizona v. United States*. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012); *United States v. Alabama*, 691 F.3d 1269, 1280 (11th Cir. 2012).

129. See discussion *infra* Part IV.B.

130. MEISSNER ET AL., *supra* note 122, at 7.

131. *Id.*

132. See *id.* at 134–35. Since 1996, the laws of the US have expanded to require the removal and permanent return of individuals who have committed a long list of crimes, including relatively minor offenses, that the Congress has classified as “aggravated felonies,” in addition to the usual removals for CIMTs, and other violations or unauthorized presence. See *id.* at 7. Removals for unauthorized presence also trigger ten year bars in the case of anyone whose unauthorized presence extends longer than a year. Immigration and Nationality Act § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (2015). Although the composition of the deported population is ever-shifting, official

Reliance on detention has risen, too. The United States government now detains well over 400,000 noncitizens each year, some for extended periods of time, in public and private facilities around the country.<sup>133</sup> Throughout this period, various criminal justice actors have played an increasing, and increasingly contested, role in immigration enforcement efforts.<sup>134</sup>

If the goal of all of this enforcement activity is preventing unauthorized migration,<sup>135</sup> the effectiveness of all this activity is debatable. Interestingly, these changes are coming at a time when numbers of unauthorized entries into the United States are at historic lows. The number of

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records demonstrate that the vast majority of noncitizens removed to date for criminal offenses are removed for traffic violations and similarly minor offenses. See TANYA MARIA GOLASH-BOZA, *DEPORTED: POLICING IMMIGRANTS, DISPOSABLE LABOR AND GLOBAL CAPITALISM* 143 (2015).

133. César Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L.J. 869, 869–70 (2014); see also Philip L. Torrey, *Immigration Detention's Unfounded Mandate*, 15-04 IMMIGR. BRIEFINGS 1, 5–9 (2015) (discussing the practice and politics of the “bed mandate” and charting the steep rise in the numbers of noncitizens in immigration detention).

134. Many of the discussions about the role of state and local law enforcement in immigration policing take place in the context of debates over “immigration federalism.” Hiroshi Motomura is credited with coining the term. Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (advocating a federal prerogative in immigration policy in tandem with a rejection of immigration exceptionalism with regard to individual rights). Some scholars and policymakers have advocated a greater role for state and local police in the enforcement of federal immigration laws. See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 183 (2006); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 460–61 (1999). Others have expressed concerns that, at least at present, subfederal officials lack the necessary institutional competency, legal authority, or necessary oversight mechanism to fairly and constitutionally enforce immigration law. Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1607 (2010) [hereinafter Chacón, *A Diversion*] (contesting the sufficiency of the legal incentive structure to check excesses in policing of immigrant communities); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 986–87 (2004); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1115 (2004). Speaking to the question of subfederal immigration policing, the U.S. Supreme Court ruled out some forms of participation in the case of *Arizona v. United States*, 132 S. Ct. 2492 (2012), but that case also leaves open a broad swath legal terrain for potential state and local immigration enforcement activities on the ground. Jennifer M. Chacón, *Policing Immigration After Arizona*, 3 WAKE FOREST J.L. & POL’Y 231, 231–32 (2013); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 581–82 (2012); Eagly, *supra* note 84, at 1750–52.

135. Of course, there are many goals to this kind of policy. Border buildups serve a political messaging function. See Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147, 158–61 (2012). The growth in the relevant federal agencies—much like the growth in corrections—is also a source of middle class jobs. And just as African-American women have benefitted from the proliferation of correction spending, see James Forman, Jr., *The Black Poor, Black Elites, and America's Prisons*, 32 CARDOZO L. REV. 791, 798 (2011), the growth in immigration enforcement agencies has redounded to the benefit of Latinos seeking solid middle class positions with government benefits. See, e.g., Paulette Chu Minitier, *A Border Agent (and Immigrant) Defies Stereotypes*, USA TODAY, May 7, 2007, at 21A (noting that in 2007, CBP “agency spokesman Mario Martinez says at least 6,700 of the country's 12,800 Border Patrol agents identify themselves as Hispanic”). This is not to suggest that the individuals who have benefitted from this federal spending might not have benefitted more from comparable federal spending in other sectors like infrastructure development or education. But it does serve as a reminder of the complexities involved in assessing the “benefits” of federal programs like these.

individuals crossing the southern border without authorization is down significantly;<sup>136</sup> they have not been this low since the 1970s.<sup>137</sup> In the meantime, the size of the unauthorized population in the United States has remained stagnant for several years.<sup>138</sup> Net unauthorized migration is currently negative.<sup>139</sup> According to the Pew Hispanic Center, the estimated number of unauthorized migrants in the United States peaked around 2006–2007 at about 12 million and has since fallen to about 11.2 million, where it has been holding steady for some time.<sup>140</sup>

If border enforcement is playing some kind of a role in reshaping entry patterns,<sup>141</sup> though, enforcement has thus far not generated the “at-

136. Robert Warren & Donald Kerwin, *Beyond DAPA and DACA: Revisiting Legislative Reform in Light of Long-Term Trends in Unauthorized Immigration to the United States*, 3 J. ON MIGRATION & HUM. SECURITY 80, 92–93 (2015).

137. *Id.* at 87. The drop in Mexican migration is a key factor here. Much of this has been attributed to increasing economic opportunities in Mexico and declining economic opportunities in the U.S. *Id.* at 100. But this trend has been accompanied by a numerically smaller but still significant rise in apprehensions of women and children migrating from the Northern Triangle countries of Central America—Guatemala, Honduras and El Salvador—pointing to the important role that push factors in home countries play in shaping migration. *Id.* at 96.

138. *Id.* at 83

139. *Id.* These statistics raise important questions about what it would take to demonstrate a secure border to those politicians who continue to demagogue around the need for such “security.”

140. Paul Taylor et al., *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW RESEARCH CENTER (Dec. 1, 2011), <http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/>; see also Warren & Kerwin, *supra* note 136, at 83; *Growth in Unauthorized Immigration Has Leveled Off*, PEW RESEARCH CENTER (Sept. 3, 2014), <http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/ph-2014-09-03-immigration-01/>.

It is difficult to assess with any certainty the strength of the causal connection between recent enforcement efforts and migration flow. Longitudinal surveys suggest that migration flows do not fluctuate in direct relationship to enforcement policies and are more heavily influenced by economic conditions. MASSEY ET AL., *supra* note 73, at 7–9; Wayne A. Cornelius, *Controlling “Unwanted” Immigration: Lessons from the United States, 1993–2004*, 31 J. ETHNIC & MIGRATION STUD. 775, 790 (2005); Wayne A. Cornelius, *Impacts of Border Enforcement on Unauthorized Mexican Migration to the United States*, BORDER BATTLES (Sept. 26, 2006), <http://borderbattles.ssrc.org/Cornelius/>. On the other hand, the most recent leveling off and decline in the unauthorized population can be traced to trends that predate the Great Recession. Warren & Kerwin, *supra* note 136, at 90. This suggests that the state of the domestic economy may be just one factor in the change. Improving economic conditions in Mexico are another oft-cited reason for the decline in the unauthorized migrant population from Mexico in particular. *See id.* (noting that Mexicans constituted nearly 70% of unauthorized migrant arrivals throughout the 1980s and 1990s, but now constitute only about 33% of those arrivals). Similarly, the recent rise in entrants from the Northern Triangle countries of Central America are largely attributable to deteriorating conditions in those countries rather than any events in the United States. *See id.* at 96. Ultimately, it is quite difficult to disaggregate the precise effects of these internal and external developments on migration flows.

141. The federal government’s border enforcement strategy has largely ended circular patterns of migration to the United States, thereby changing not only the places of entry of border crossers (hence the notable rise of border deaths), but also the nature of work (from seasonal to permanent, with an ensuing quest for year-round work); place of settlement (from traditional receiving states like Texas, California and New York to states throughout the Midwest and Southeast); the demographics of the migrant flow (with more crossings for family unification purposes); and a shift in the unauthorized population from predominantly migrants who entered without inspection to predominantly visa overstayers, a significant portion of whom are from outside of Mexico and Central America. Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT’L L. & POL’Y 121, 125, 164 (2001); see also Warren & Kerwin, *supra* note 136, at 94.

trition”<sup>142</sup> of settled immigrant populations. Perhaps this is because so many unauthorized residents have lived in the United States for so long.<sup>143</sup>

Indeed, notwithstanding the fact that they bear the brunt of increasingly draconian enforcement efforts, many unauthorized migrants feel themselves to be citizens, even if they lack any formal legal status.<sup>144</sup> This is what prompted undocumented youth in the United States to organize for political change with sit-ins, anti-deportation campaigns orchestrated through social media, the mobilization of the undocu-bus, and the proud proclamation of *sin papeles sin miedo*—without papers and unafraid. Far from spurring attrition, the crackdown on long-settled residents without legal status consolidated political mobilizations by individuals with no citizenship and (some would argue) no claim of right to participate in the political process. This mobilization, in turn, was largely responsible for the creation of the significant new temporarily protective immigration statuses previously discussed.<sup>145</sup> In other words, the enforcement strategies that increased the legal vulnerabilities of certain immigrant populations also gave rise to the political forces that ultimately generated their increased protection. Immigration enforcement programs and deferred action programs are opposite sides of the same coin: both are governance strategies aimed at liminal legal subjects, but enforcement pushes toward marginalization while deferred action pushes toward inclusion.<sup>146</sup>

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142. Kris Kobach initially applied the phrase “attrition through enforcement” to the context of immigration policing. Kris W. Kobach, *Attrition through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155, 157 (2008). The preamble to Arizona’s S.B. 1070 explicitly expressed the achievement of enforcement by attrition as a goal of the statute. ARIZ. REV. STAT. ANN. §§ 13-1509(A), 13-2928(C), 13-3883(A)(5), *invalidated* by *Arizona v. United States* 132 S. Ct. 2492 (2012). Immigration attorney Hans Meyer characterizes the resulting enforcement policies as a “war of attrition,” and notes the many costs of this war. Hans Meyer, Remarks at the *Denver University Law Review* Immigration Symposium (Feb. 2, 2015), available at <http://du-denverlaw.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=93a85392-078a-414e-84bd-5607b4fb08d3>. The notion of attrition through enforcement also spawned a related discourse concerning the desirability of enacting policies that prompt noncitizens to “self-deport.” Mitt Romney used the phrase in his 2012 presidential campaign, Michael Barbaro, *On Air and Before Audiences, Romney Makes Push for Hispanic Vote*, N.Y. TIMES, Sept. 20, 2012, at A15, and that term made another recent appearance in Judge Hanen’s opinion in *Texas v. United States*, 86 F. Supp. 3d 591, 634–35 (S.D. Tex. 2015).

143. Taylor et al., *supra* note 140 (“Nearly two-thirds of the 10.2 million unauthorized adult immigrants in the United States have lived in this country for at least 10 years and nearly half are parents of minor children . . .”).

144. See Abrego, *supra* note 3, at 729–31; GONZALES & TERRIQUEZ, *supra* note 74; Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405, 1407–08 (2015) (reviewing HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2014)); Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 51–53, 57 (2013).

145. WALTER J. NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* 30 (2013).

146. At the same time, the inclusive dimensions of the deferred action program arguably undercut, at least for a time, political mobilization efforts aimed at more comprehensive legalization policies, even as they fail to achieve full incorporation.



But the massive and unprecedented enforcement activities—the militarized border,<sup>147</sup> the high-profile raids of homes and workplaces,<sup>148</sup> the anti-immigrant bravado of certain state and local actors,<sup>149</sup> and the resulting churn of migrants through criminal courts, prisons, detentions centers, and deportation proceedings—have increased the legal liminality of many individuals living in immigrant communities, not just those without legal status. Increased border policing, interior workplace raids, and warrantless home entries by federal immigration officials and state and local police officers have not just affected unauthorized migrants, or even just their families, but entire communities where noncitizens live and work.<sup>150</sup>

In the realm of immigration enforcement, individuals can be, and are, profiled based on ethnicity and national origin. It is a long-established constitutional principle that race is a permissible factor in federal immigration policing and that federal officials can rely primarily on racial markers to make policing decisions in the immigration context.<sup>151</sup> Indeed, the most recent Department of Justice guidelines on racial profiling expressly exclude immigration policing from their ambit.<sup>152</sup> Thus, when it comes to immigrant communities, formal legal guarantees of equal protection and general guidelines against racial profiling are thin in their protective scope against state and local actors purportedly engaged in ordinary policing activities. These policing activities can be combined with and converted into immigration enforcement activities, and when they are, the traditional protections that might otherwise have inhered in the criminal process are not triggered.<sup>153</sup>

147. PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* 94 (2d ed. 2009); Gulasekaram, *supra* note 135, at 147; Hing, *supra* note 141, at 129, 161.

148. See Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 143–44 (2009).

149. Governor Jan Brewer and Sheriff Joe Arpaio are two easy examples. See, e.g., Fernanda Santos, *In Arizona, Confusion on Ruling on Migrants*, N.Y. TIMES, June 26, 2012, at A12; cf. Fernanda Santos, *An Added Mission for Arizona Sheriff's Immigration Posse: School Patrols*, N.Y. TIMES, Jan. 17, 2013, at A14. The federal government has no shortage, either. Representative Steve King's statement that most unauthorized migrants are drug smugglers, which explains their "calves the size of cantaloupes" is a case in point. Todd Beamon & John Bachman, *Rep. Steve King Slams Norquist over Attacks on Immigration*, NEWSMAX (Jul. 18, 2013, 5:59 PM), <http://www.newsmax.com/Newsfront/king-norquist-attacks-immigration/2013/07/18/id/515882/#ixzz2ZVT2GoP5> (quoting Representative Steve King).

150. See, e.g., AJAY CHAUDRY ET AL., *FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT* 41–65 (2010), available at [http://www.urban.org/uploadedpdf/412020\\_FacingOurFuture\\_final.pdf](http://www.urban.org/uploadedpdf/412020_FacingOurFuture_final.pdf) (documenting the negative impact of immigration detention on the children of detainees).

151. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884–85 (1975). The case seems dated and problematic to the modern reader, but the DOJ continues to rely upon it in litigating equal protection and fourth amendment claims, so its continued significance is clear.

152. U.S. DEPT OF JUSTICE, *GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY* 2 (2014), available at <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

153. Chacón, *A Diversion*, *supra* note 134, at 1602–06, 1620–22.

The Second Circuit's recent opinion in *Maldonado v. Holder*,<sup>154</sup> concluding that national origin profiling by local police did not constitute an egregious violation of the Fourth Amendment, both highlighted and amplified the problem.<sup>155</sup> In that case, the Second Circuit reasoned that national origin profiling is a central and accepted component of immigration enforcement.<sup>156</sup> The court concluded that there is no legal remedy for such profiling even if the actors who engaged in the initial profiling were not legally sanctioned to enforce immigration law at all.<sup>157</sup>

The consequences of such profiling, of course, are felt not only in "sweatshops, forced brothels, and other settings in which illegal aliens are exploited and threatened—and much worse,"<sup>158</sup> but also in neighborhoods across the country with large immigrant populations unpopular with the political establishment. Official investigations by the U.S. Department of Justice in jurisdictions as disparate as East Haven, Connecticut,<sup>159</sup> Alamance County, North Carolina,<sup>160</sup> and Maricopa County, Arizona,<sup>161</sup> describe immigrant communities living in fear of the police and rampant racial profiling of Latinos as a standard element of policing practices as local police prioritized immigration enforcement goals.<sup>162</sup> In this way, efforts to target legally liminal immigrants ultimately moves

154. 763 F.3d 155 (2d Cir. 2014).

155. *See id.* at 162–63. The case involved noncitizens who were identified as day laborers and seized by state and local officials who then turned the noncitizens over to ICE. The plaintiffs alleged an "egregious violation" of the Fourth Amendment—the standard that is required for suppression in removal proceedings under *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). *Id.* at 158–59 (quoting *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006)). The court found that reliance on national origin was an essential part of immigration policing, and swept under the rubric of national origin the markers of ethnicity at issue in the case. *Id.* at 162–63.

156. *See id.* at 162–63, 166–67.

157. *See id.* at 163.

158. *Id.* at 162.

159. Letter from Thomas A. Perez, Asst. Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Hon. Joseph A. Maturo, Jr., Mayor of E. Haven, Conn. 1–2 (Dec. 19, 2011) [hereinafter Perez, Conn. Letter], available at [http://www.justice.gov/crt/about/spl/documents/easthaven\\_findletter\\_12-19-11.pdf](http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf) (finding the East Haven Police Department (EHPD) "engages in discriminatory policing against Latinos, including but not limited to targeting Latinos for discriminatory traffic enforcement, treating Latino drivers more harshly than non-Latino drivers after a traffic stop, and intentionally and woefully facility to design and implement internal systems of control that would identify, track, and prevent such misconduct").

160. Letter from Thomas A. Perez, Asst. Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Clyde B. Albright, Cnty. Att'y, Alamance Cnty., N.C. & Chuck Kitchen, Att'y, Turrentine Law Firm 1–2 (Sept. 18, 2012) [hereinafter Perez, Alamance Letter], available at <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf> (finding that "ASCO – through the actions of its deputies, supervisors, and command staff—unlawfully targets, stops, detains, and arrests Latinos").

161. Letter from Thomas A. Perez, Asst. Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Bill Montgomery, Cnty. Att'y, Maricopa Cnty., Ariz. 1–2 (Dec. 15, 2011) [hereinafter Perez, Ariz. Letter], available at [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf) (finding that the Maricopa County Sheriff's Office (MCSO), "through the actions of its deputies, supervisory staff, and command staff, engages in racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos; and unlawfully retaliates against individuals who complain about or criticize MCSO's policies or practices").

162. *See* Perez, Alamance Letter, *supra* note 160; Perez, Ariz. Letter, *supra* note 161; Perez, Conn. Letter, *supra* note 159.

more members of targeted minority groups, including many citizens, into the criminal justice system, thereby marginalizing or completely banishing them through means other than deportation. The criminal law enforcement system and the immigration law enforcement system, even when not formally intertwined, generate mutually reinforcing enforcement efforts that focus on disfavored minority groups.<sup>163</sup> But, as the next subsection will relate, these developments are not limited to the sphere of “cimmigration.”

### C. Legal Liminality at the Blurred Civil-Criminal Border

For the past two decades, the criminal and immigration enforcement systems have been on parallel tracks of rising severity.<sup>164</sup> The similar and sometimes interrelated developments in these areas of law initially gave rise to the growth of a fairly extensive literature—one of which is increasingly referred to as a “cimmigration” literature.<sup>165</sup> This literature

163. See GOLASH-BOZA, *supra* note 132; see also Vázquez, *supra* note 99, at 647–49. Federal enforcement may suffer from the same blindspots. Adam B. Cox and Thomas J. Miles have found evidence to support the conclusion that the speed of the rollout of the federal Secure Communities program to particular jurisdictions correlated more closely to the size of the Hispanic population than to the size of the jurisdiction’s noncitizen population or the degree to which a given jurisdiction was characterized as a high crime area. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 88 (2013). Cox and Miles note that these findings accord with Bernard Harcourt’s notion that seemingly rational models of policing “can often obscure the ways in which seemingly neutral rules can in practice concentrate the burdens of law enforcement on minority communities.” *Id.* at 133.

164. The severity turn in the criminal justice system has a longer trajectory, dating back to the 1970s, which has been documented in numerous scholarly accounts. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 54–58 (2010); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 14–15 (2001); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY*, 195–98 (2009); Mary Louise Frampton et al., *Introduction*, in *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* 1–2 (Mary Louise Frampton et al. eds., 2008); David Garland, *Epilogue*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 179–81 (David Garland ed., 2001); Tracey L. Meares, *Mass Incarceration: Who Pays the Price for Criminal Offending?*, 3 *CRIMINOLOGY & PUB. POL’Y* 295, 295 (2004).

Immigration severity manifests as early as the late 1980s with the expansion of the aggravated felony category of deportability to further the goals of the war on drugs. See Jeff Yates et al., *A War on Drugs or a War on Immigrants? Expanding the Definition of “Drug Trafficking” in Determining Aggravated Felon Status for Noncitizens*, 64 *MD. L. REV.* 875, 884–86 (2005); Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 *WM. & MARY L. REV.* 163, 173 (2008). But 1996 marks the true turning point in immigration law. See *infra* Part III.A.

165. Some of the foundational literature predates the cimmigration label, and emerged in the period following Congress’s legislative enactments, beginning in the late 1980s, but really taking off after 1996, as Congress first gradually and then quite suddenly expanded the scope and consequences of criminal grounds of deportation and exclusion while simultaneously reducing procedural protections and avenues for discretionary relief. This literature maps the increasingly punitive nature of immigration law, the criminalization of immigration violations, and the proliferating immigration consequences of criminal convictions. See, e.g., KANSTROOM, *supra* note 5, at 13; Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 *ST. MARY’S L.J.* 833, 838–43 (1997); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 *N.C. J. INT’L L. & COM. REG.* 639, 651–52 (2004); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 *HARV. L. REV.* 1889, 1890–91 (2000); Stephen H. Legomsky, *Reforming the Criteria for the Exclu-*

sion and the Deportation of Alien Criminal Offenders, 12 DEF. ALIEN 64, 64–65 (1989); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 671–72 (1997); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–85 (2005); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 99 (1998); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 305–06 (2000); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1132 (2002); Wishnie, *supra* note 134, at 1084–85; Victor C. Romero, Note, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 1001–02 (1992).

A second wave of scholarship examined procedural connections and emerging parallel logics in criminal and immigration law enforcement. *See, e.g.*, BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 140–41 (2006); Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1083 (2008); Chacón, *A Diversion*, *supra* note 134, at 1564–65; Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1831 (2007) [hereinafter Chacón, *Unsecured Borders*]; Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member"*, 2007 U. CHI. LEGAL F. 317, 321–23; Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1147–48 (2008); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 289 (2008); Morawetz, *supra* note 164, at 166–67; Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 369–73 (2006). Stumpf's article is the source of the crimmigration label, which I discuss further below. *See* Part IV.B.

More recent scholarship has continued to refine and elaborate on the systemic and particularized connections and the more general parallels between these two enforcement systems. *See, e.g.*, HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 57–61 (2014); Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1754–55 (2013); Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 21, 25 (2010); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253–55 (2011); Cox & Miles, *supra* note 163, at 87–88; Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1129–31 (2013); Eagly, *supra* note 84, at 1816–17; Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1349–51 (2010); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1459 (2013); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. (forthcoming 2015) (manuscript at 114–15); Mary Holper, *Confronting Cops in Immigration Courts*, 23 WM. & MARY BILL RTS. J. 675, 675–76 (2015); Kevin R. Johnson, Essay, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007 (2010); Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1107–09 (2013) [hereinafter Kalhan, *Immigration Policing*]; Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1462–64 (2011); Christopher N. Lasch, *"Crimmigration" and the Right to Counsel at the Border Between Civil and Criminal Proceedings*, 99 IOWA L. REV. 2131, 2132–34 (2014); Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 WAKE FOREST J. L. & POLY 281, 313–30 (2013) [hereinafter Lasch, *Detainer Enforcement*]; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471–72 (2007); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107–09 (2012); Motomura, *supra* note 84, at 1821–22; Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901, 901–03 (2011); Vázquez, *supra* note 99, at 640–45.

A subset of this literature has also explored the linkages between national security law and discourse and immigration law. *See, e.g.*, Muneer I. Ahmad, *Guantanamo is Here: The Military Commissions Act and Noncitizen Vulnerability*, 2007 U. CHI. LEGAL F. 1, 1–2; Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 297–98 (2002); Chacón, *Unsecured Borders*, *supra* note 165, at 1830–31; Nora V. Demleitner, *Immigration Threats and Rewards:*

posits that the criminal law and immigration law regime operate in tandem in ways that make noncitizens uniquely vulnerable to incarceration (including in immigration detention) and exclusion. It explores both substantive connections between the criminal and immigration enforcement systems and the convergence of logics in the criminal and immigration law spheres. While it has been quite important in sussing out the interconnections of nominally unrelated enforcement systems and the discourse that fuels them, the “cimmigration” framework may at times also obscure the important point that the legal vulnerabilities produced by the interaction of civil and criminal legal mechanisms in heavily policed communities are not unique to noncitizens. Outside of the bounds of any “cimmigration” system, the criminal justice system evinces such trends. The interaction of civil and criminal legal regimes in the production of liminal legality is acutely evident far beyond the bounds of immigration enforcement, and the marginalizing effects of this civil-criminal interplay are ironically aggravated by the efforts of policymakers at the state and federal level to bring down the incredibly high human and financial costs of incarceration.

The United States, the world leader in imprisoning its residents,<sup>166</sup> appears to be rethinking its heavy reliance on incarceration as the solution to its social problems.<sup>167</sup> Budgets are an important driver of these reforms. Although the federal government can print money to enforce its laws, states have to include criminal justice costs in their balanced budgets, and these groaning budgets have pushed state officials to do things that would have been unheard of fifteen years ago. This includes reducing the severity of some offenses and decriminalizing others.<sup>168</sup> Marijuana has been a particularly popular focal point for the decriminalization efforts, but states are also experimenting with the decriminalization of other offenses, including crimes like driving with a suspended license, disturbing the peace, petty theft, and other regulatory offenses that used

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*Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1059–60 (2002); Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice’s 2003 Guidelines*, 50 LOY. L. REV. 67, 69 (2004); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 850–52 (2003); Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 161–62 (2005).

166. See sources cited *supra* note 164.

167. I should note that imprisonment is still a central and bloated component of criminal justice throughout the United States. See, e.g., *U.S. Prison Population Declines for Third Consecutive Year*, SENTENCING PROJECT (Dec. 19, 2013), [http://sentencingproject.org/detail/news.cfm?news\\_id=1720](http://sentencingproject.org/detail/news.cfm?news_id=1720) (noting that the prison population has declined for 3 years in a row, but at “[a]t its 2012 rate of decline, it would take until 2101, or 88 years, for the U.S. prison population to return to its 1980 level”).

168. See, e.g., *State Spending for Corrections: Long-Term Trends and Recent Criminal Justice Policy Reforms*, NAT’L ASS’N OF ST. BUDGET OFFICERS 5 (Sept. 11, 2013), <http://www.nasbo.org/sites/default/files/pdf/State%20Spending%20for%20Corrections.pdf> (noting the fiscal pressures driving state-level criminal justice reform).

to carry jail time.<sup>169</sup> California, one of the nation's leaders in incarceration, is also potentially leading the way out of the penal expansion with its realignment efforts.<sup>170</sup>

At the federal level, the arbitrary crack-cocaine sentencing disparity that once punished crack possession at a rate of 100 times of that of cocaine possession has been reduced to the slightly less inexplicable rate of 18-to-1.<sup>171</sup> Former Attorney General Holder issued explicit guidance to U.S. Attorneys to exercise their discretion in favor of more lenient charges in cases involving of low-level drug crimes.<sup>172</sup> In the face of these and other changes, prison populations have shrunk for four years in a row, and some states are even closing prisons.<sup>173</sup> As Alexandra Natapoff writes, "Scholars and commentators say hopeful things like 'there seems good reason to hope the war on crime may soon wind down,' 'mass incarceration has come to an end,' 'the war on drugs is over,' and the U.S. has become 'a more benevolent nation.'"<sup>174</sup>

It might be easy to lose sight of the less encouraging aspects of these developments, but it is important to catalogue them. First, an awful lot of people are still in prisons and jails.<sup>175</sup> These individuals are denied any expectation of privacy vis-à-vis the state,<sup>176</sup> experience unparalleled limits on human intimacy,<sup>177</sup> and are subjected to high rates of documented

169. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1058 (2015).

170. Joan Petersilia & Jessica Greenlick Snyder, *Looking Past the Hype: 10 Questions Everyone Should Ask About California's Prison Realignment*, 5 CAL. J. POL. & POL'Y 266, 267 (2013) (noting that realignment has the potential to substantially reduce incarceration rates without a negative effect on crime rates, but also noting that implementation might not achieve either or both of those lofty goals).

171. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 125 Stat. 2372, 2372 (codified as amended in scattered sections of 26 U.S.C.). It is not entirely clear why 18-to-1 is "fair," but it is less unfair than it used to be.

172. *Holder Calls for New Approach to Prosecuting Low-Level Drug Crimes*, PBS NEWSHOUR (Aug. 12, 2013, 6:02 PM), <http://www.pbs.org/newshour/videos/#51054>. Interestingly, this non-prosecution policy did not excite the cries of unconstitutionality that accompanied the parallel exercise of prosecutorial discretion in the immigration context.

173. Natapoff, *supra* note 169, at 1105.

174. *Id.* at 1106 (footnotes omitted) (quoting Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1025 (2010)); E.J. Dionne Jr., *A More Benevolent Nation?*, WASH. POST, Nov. 17, 2013, [https://www.washingtonpost.com/opinions/ej-dionne-a-more-benevolent-nation/2013/11/17/36fc99aa-4e46-11e3-9890-a1e0997fb0c0\\_story.html](https://www.washingtonpost.com/opinions/ej-dionne-a-more-benevolent-nation/2013/11/17/36fc99aa-4e46-11e3-9890-a1e0997fb0c0_story.html); Nick Gillespie, *The War on Drugs is Over (If Obama Wants It)*, DAILY BEAST (Oct. 30, 2013, 5:45 AM), <http://www.thedailybeast.com/articles/2013/10/30/the-drug-war-is-over-if-obama-wants-it.html>; Michael Santos, *Mass Incarceration as a Public Policy*, HUFFINGTON POST (Apr. 24, 2012, 11:36 AM), [http://www.huffingtonpost.com/michael-santos/mass-incarceration-as-a-p\\_b\\_1447564.html](http://www.huffingtonpost.com/michael-santos/mass-incarceration-as-a-p_b_1447564.html).

175. In 2012 there were 1,570,397 in state and federal prison. *U.S. Prison Population Declines for Third Consecutive Year*, *supra* note 167.

176. See *Hudson v. Palmer*, 468 U.S. 517, 530 (1984).

177. Keramet Reiter, *The Pelican Bay Hunger Strike: Resistance within the Structural Constraints of a US Supermax Prison*, 113 S. ATLANTIC Q. 579, 579-80 (2014); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CAL. L. REV. 1309, 1317-19 (2011); Michael Montgomery, *Does 22 ½ Hours Alone in an 8-by-10 Cell Every Day Amount to*

sexual, physical, and emotional abuse.<sup>178</sup> Citizens in prison are also denied the right to vote in almost every state.<sup>179</sup> These individuals subsist in a legal zone that is devoid of many of the rights and protections available to those who have not been convicted.<sup>180</sup> Their status is not liminal; these individuals have been banished, at least for a time.

Second, and of central importance to this analysis, many decarceration schemes generate the expansion of liminal legal statuses to individuals who might not be incarcerated but who are also not free of the reach of the criminal justice system. Criminal justice may be entering an Eliasian moment, insofar as a growing number of people have begun to express distaste for the nation's heavy reliance on incarceration.<sup>181</sup> At the same time, however, the resulting decarceration efforts rely on softer and more pervasive touches by government actors and private agents. Around the core group of individuals who have been relegated to the nation's prisons, there is a growing group of people who are neither in prison nor fully free of its punitive and rights-limiting grasp. Like the noncitizen slipping between undocumented and membership statuses, these individuals have strangely indeterminate legal rights. They are regulated by civil law regimes backed by the threat—but lacking the procedural protections—of criminal punishment. They must often pay to avoid banishment. They are nominally free but subject to unusually high levels of state monitoring and control. They are frequently limited in the exercise of their citizenship rights, and they are vulnerable to capricious exercises of discretionary authority and private discrimination and retaliation. Although they are not identically situated to those with DACA and DAPA status, they too experience a form of liminal legality.

As a result, the turn away from penal severity has not resulted in a notable contraction of the criminal justice system. Although the number of people in prisons is down,<sup>182</sup>

[T]he penal apparatus is quietly *expanding*. While state prison populations declined in 2012, jail populations went up. Supervisory programs like diversion, privatized probation, community supervision

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*Torture?*, CENTER FOR INVESTIGATIVE REPORTING (Feb. 25, 2013), <http://cironline.org/reports/does-22-12-hours-alone-8-10-cell-every-day-amount-torture-4225>.

178. The U.S. Department of Justice National Former Prisoner Survey found that 10% of inmates experienced sexual abuse in prison. ALLEN J. BECK & CANDACE JOHNSON, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, at 8 (2008), available at [http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z\\_Personal/Huus/svrfsp08%5B1%5D.pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/Huus/svrfsp08%5B1%5D.pdf).

179. *Felony Disenfranchisement*, SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=133> (last visited Mar. 22, 2015).

180. See, e.g., *Hudson*, 468 U.S. at 535 (finding that a prisoner has no right to privacy in his prison cell). Prisoners are constitutionally protected from cruel and unusual punishment in prison, but the bar is high, and courts give broad deference to prison officials in the administration of prison facilities. *Turner v. Safley*, 482 U.S. 78, 84–86 (1987).

181. JONATHAN SIMON, MASS INCARCERATION ON TRIAL 155–60 (2014).

182. *U.S. Prison Population Declines for Third Consecutive Year*, *supra* note 167.

and GPS monitoring are growth industries . . . Defendants are on the hook for an increasing array of fines and fees that can require years to pay.<sup>183</sup>

The modern criminal justice system also relies upon an “increasingly intrusive system of surveillance, social stratification, and behavioral controls,” including video cameras, crime records databases, immigration violator databases, DNA databases, sex offender registries, and other amalgamations of data.<sup>184</sup> The effects of this pervasive and intrusive monitoring extend well beyond individual defendants, reshaping lives at the level of communities.<sup>185</sup>

At the same time, there are few formal checks on many of the growing intrusions into the lives of citizens in heavily policed communities. Concerns about the inadequacies of the Fourth Amendment as a check on governmental surveillance are common<sup>186</sup> and are beginning to stir renewed interest among some justices of the Supreme Court.<sup>187</sup> But governmental intrusions into spaces of informational privacy are far more concerning when they operate in tandem with other exercises of governmental control.<sup>188</sup> Ironically, the checks on governmental power are often quite thin even when governmental intrusions are at their greatest. Government actors are increasingly relying on civil and administrative law tools—backstopped by the criminal justice system—to maintain social order. But just as criminal procedural protections are inapplicable in the civil realm of immigration law, those same protections also do not extend to other civil law regimes like parole, trespass laws, and civil gang injunctions. Unsurprisingly, these are the tools that federal, state, and local governmental actors are increasingly using to regulate community members. This shift toward practices that supplement criminal punishments with more flexible regulatory regimes generates a new set of liminal legal subjects.

Individuals on parole experience this problem firsthand and provide perhaps the clearest example of liminal legality at the edges of the criminal justice system.<sup>189</sup> Parole is often framed as “a defendant-friendly in-

183. Natapoff, *supra* note 169, at 1106–07 (emphasis added) (footnote omitted).

184. *Id.* at 1056.

185. Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 889–90 (2014); Natapoff, *supra* note 169, at 1103.

186. David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1087–88 (2014).

187. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2484–85 (2014); *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

188. Sklansky, *supra* note 186, at 1103, 1118 (exploring other forms of governmental intrusions).

189. David Sklansky has already noted the parallels between the interplay of immigration and criminal law and the use of parole. He writes:

For the large and growing population of parolees, parole supervision functions as a parallel enforcement track, with lower procedural hurdles but a set of available sanctions that often (although far from always) will be less severe than the sanctions that would be trig-



stitution”; it purportedly reduces prison time and aids offender reintegration in the community.<sup>190</sup> Certainly, it is an improvement over incarceration in many respects; but it also generates liminal legality. Like their counterparts in the immigration world, parolees must pay for the protections that the status can offer.<sup>191</sup> Parolees also live on the razor’s edge of banishment, with little to no judicial process to stand between freedom and prison. Parolees arrested on probable cause of parole violations can be detained for up to three months pending a violations hearing and can be reincarcerated for such offenses on a preponderance of the evidence standard.

“[E]ven if the parolee is only accused of a technical violation—for instance, failing to attend meetings with a parole supervisor—he or she can be subject to a longer term of incarceration than he was initially sentenced to serve. . . . [Including] beyond the maximum sentence allowed for the initial crime.<sup>192</sup>

The wide net supposedly designed to allow more individuals to escape incarceration ultimately results in more, not less, prison time for some subset of those released.

The effects of these policies are not limited to individuals subject to reincarceration. Because individuals on parole have little or no reasonable expectation of privacy,<sup>193</sup> their homes can be searched in the absence of a warrant, probable cause, or reasonable suspicion—a fact that under-

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gered by a new criminal conviction. That is to say that parole serves the same function with respect to parolees that immigration law serves for noncitizens: a separate enforcement track that low-level officials can elect to pursue, in lieu of normal criminal enforcement, when it appears convenient.

David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157, 207 (2012).

190. Jacobi et al., *supra* note 185, at 889–90.

191. Many criminal justice systems require parolees to pay “supervision fees” associated with the costs of their freedom. See Paul Peterson, *Supervision Fees: State Policies and Practice*, 76 *FED. PROBATION* 40, 40 (2012). For some examples of such fees, see, e.g., *Cost of Supervision*, IDAHO DEPARTMENT OF CORRECTIONS, [http://www.idoc.idaho.gov/content/probation\\_and\\_parole/offender\\_resources/cost\\_of\\_supervision](http://www.idoc.idaho.gov/content/probation_and_parole/offender_resources/cost_of_supervision) (last visited Mar. 9, 2015) (“Any person under Idaho Department of Correction probation or parole supervision shall be required to contribute not more than seventy-five dollars (\$75.00) per month as determined by the Board of Correction. The IDOC currently assesses a monthly fee of sixty dollars (\$60.00) per month.”); *Fees*, WASH. COUNTY COMMUNITY CORRECTIONS, <http://www.co.washington.or.us/CommunityCorrections/fees/> (last visited Mar. 9, 2015) (describing Washington County, Oregon supervision fees set at \$35 per month); *Frequently Asked Questions About Community Resources*, WIS. DEPARTMENT OF CORRECTIONS, <http://doc.wi.gov/community-resources/faq> (last visited Mar. 9, 2015) (discussing, inter alia, supervision fees for probationers in Wisconsin); *Monitored Misdemeanor Program Fee Payments*, MULTNOMAH COUNTY, <https://multco.us/dcj-adult/mmp/monitored-misdemeanor-program-fee-payments> (last visited Mar. 9, 2015) (detailing monitoring fees in Multnomah County, Oregon); *Probation and Parole Fee Payment System*, ARK. COMMUNITY CORRECTION, <https://www.ark.org/dcc/pmt/index.php> (last visited Mar. 9, 2015) (describing Arkansas Community Corrections supervision fees allowed for up to \$2000). This list is far from exclusive.

192. Jacobi et al., *supra* note 185, at 891.

193. See *Samson v. California*, 547 U.S. 843, 847 (2006).

mines the privacy of any individual living with a parolee.<sup>194</sup> Indeed, parole affects entire neighborhoods. One study of New York City found that “not only do police stop more individuals in high parole density neighborhoods, but . . . they then conduct significantly more searches and arrests in those neighborhoods. The rates of frisks, however, are lower in parolee-dense neighborhoods . . . .”<sup>195</sup> The authors read these numbers to suggest that it is not just parolees who are being targeted for full searches in the absence of justifying criminal suspicion, but non-parolees in the neighborhood as well.<sup>196</sup> In other words, entire neighborhoods in parolee-dense areas are policed differently.<sup>197</sup> Parole is transformed into a “mechanism for the infectious degradation of community rights.”<sup>198</sup> In this regard, it is not only parolees who exist in a liminal legal space; the rights of entire communities surrounding parolees experience the effects of liminal legality as well.

Because of racial disparities in the criminal justice system, African Americans are overrepresented among parolees relative to their presence in the general population, which means that the communities marked for this type of policing are disproportionately African-American communities.<sup>199</sup> The Supreme Court’s decisions in cases like *Atwater v. Lago Vista*,<sup>200</sup> which allows for warrantless arrests for minor offenses that carry no jail time,<sup>201</sup> and *Heien v. North Carolina*,<sup>202</sup> which upholds the validity of arrests based on the arresting officers’ mistaken understanding of the law,<sup>203</sup> increase the likelihood of arrests in these more heavily policed areas while simultaneously decreasing the availability of remedies for errors in arrests.

As a result of doctrinal developments that emerged during the war on drugs era, arrests, in turn, often seem to be a virtual black hole of procedural rights. In escalating situations, police are allowed to use deadly force to effectuate an arrest, even if the underlying conduct does not warrant incarceration, much less death.<sup>204</sup> Arrests allow officials to conduct dehumanizing and demeaning searches, including strip searches, as part of standard booking procedures, and there is no redress for the resulting violations of bodily integrity and dignity, even if these arrests are made

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194. Jacobi et al., *supra* note 185, at 891.

195. *Id.* at 893.

196. *Id.* at 893–94.

197. *Id.*

198. *Id.* at 894.

199. *Id.* at 892.

200. 532 U.S. 318 (2001).

201. *Id.* at 354.

202. 135 S. Ct. 530 (2014).

203. *Id.* at 536.

204. Indeed, this is precisely the sequence of events that led to the deaths of Eric Garner and Michael Brown in the Fall of 2014. See Ian Ayres & Daniel Markovits, *Enforce the Law - Without Force*, WASH. POST, Dec. 25, 2014, at A25 (describing the encounters and suggesting changes to the “rules of engagement” governing arrest).

in error.<sup>205</sup> The more permissive stop, search, and arrest doctrines governing parolees can therefore create highly intrusive policing effects for everyone in parole-dense communities, not just parolees. The communal rights degradations generated by this interplay of criminal and civil/administrative regulatory regimes are very like those experienced in immigrant communities subjected to heightened immigration policing.<sup>206</sup>

Nor are parolees the only liminal legal subjects existing on the edges of the criminal justice system. State and local actors throughout the United States have demonstrated a creative ability to pair criminal justice system mechanisms with novel civil law tools to regulate and limit the movement of their residents in ways that actually mimic deportation. “Increasing swaths of urban space are delimited as zones of exclusion from which the undesirable are banned. The uniformed police are marshaled to enforce and often delineate these boundaries; they use their powers to monitor and arrest in an attempt to clear the streets of those considered unsightly or ‘disorderly.’”<sup>207</sup>

City officials rely on a hybrid combination of civil and criminal law to achieve these banishments. In their study of policing practices in Seattle, Katherine Beckett and Steve Herbert noted the proliferation of civil law mechanisms that are used in conjunction with the criminal law to keep individuals deemed undesirable out of certain physical spaces. One such mechanism is a “Stay Out of Drug Areas (SODA) order[,]” which can be “imposed by judges as a condition of a sentence” but “may also be issued by probation or community corrections officers as part of community supervision.”<sup>208</sup> These orders require individuals to stay out of certain designated areas. Another combined civil-criminal law mechanism for enforcing spatial exclusion is the trespass admonishment. Municipalities encourage property owners to authorize law enforcement to determine who can be on their property. So empowered, law enforcement can admonish people to remain off of the affected property and can be punished with criminal law sanctions for their failure to comply.<sup>209</sup> Trespass admonishment has become a pervasive and intrusive means of enforcing spatial exclusion in public housing areas across the country.<sup>210</sup> Still another mechanism is the “off limits” order, which is imposed as a

205. *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012). Individuals identified as arrestable in databases, whether accurately or mistakenly, are indefinitely relegated to liminal legal state. When their record triggers an arrest, there are no formal legal protections from intrusive arrest procedures, even in hindsight. *Id.*

206. See discussion *supra* Part II.B.

207. KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 8 (2010).

208. *Id.* at 4.

209. *Id.* at 7.

210. *Id.* at 8.

condition of supervised release and which requires individuals to stay out of certain, specified areas.<sup>211</sup> As Beckett and Herbert have explained,

Many U.S. cities now deploy other new social control tools that involve spatial exclusion and, like the innovations just described, fuse civil and criminal law. These include gang injunctions, juvenile curfews, and “no contact orders.” Civil gang injunctions, widely used by such California cities as Los Angeles, mobilize the civil power of the injunction to address what is typically thought of as a crime problem . . . . As is the case with trespass exclusions, a violation of these civil orders is a criminal offense.<sup>212</sup>

Those who are subject to these exclusionary practices are separated from family members and can lose access to important treatment and employment opportunities.<sup>213</sup> Indeed, the life-altering consequences of civil exclusions prompted Professors Beckett and Herbert to characterize the experience as one of banishment.

Individuals in diversionary programs also experience liminal legality as a result of their legal regulation at the border of civil and criminal legal regimes. For example, as jurisdictions decriminalize certain conduct, some people are able to escape imprisonment by paying fines. Because these fines can play a key role in funding the workings of municipal government, there are perverse incentives on police officers to seek out opportunities to gather them, even when such efforts themselves are not supported by law.<sup>214</sup> Moreover, the payment of a fine does not exempt the payee from a host of punitive mechanisms that follow from their putative criminality. These same individuals may experience private denials of housing, credit, and jobs that flow from their marked records, generating enduring forms of liminality.<sup>215</sup>

The diversionary processes to which they submit can also render some individuals quite vulnerable to a host of private actors. Private ac-

211. *Id.* at 9.

212. *Id.* at 9 (footnotes omitted).

213. *See id.* at 4–7.

214. For outrageous—but surely not isolated—examples of this practice, see, for example, U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015) [hereinafter FERGUSON REPORT], available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) (“[Ferguson municipal] court practices exacerbate the harm of Ferguson’s unconstitutional police practices. They impose a particular hardship upon Ferguson’s most vulnerable residents, especially upon those living in or near poverty. Minor offenses can generate crippling debts, result in jail time because of an inability to pay, and result in the loss of a driver’s license, employment, or housing.”) The report also provided detailed examples of police officers giving citations for conduct that was not, in fact, a violation of any law. *Id.* at 22. Racial animus has been an important, driving force in this unconstitutional conduct. *Id.* at 4.

215. *See* Natapoff, *supra* note 169, at 1107 (“The collateral consequences of even a minor conviction—from employment restrictions to housing, education and immigration—have become a new and burdensome form of restraint and stigma.”).

tors engage in the collection of unpaid fines.<sup>216</sup> Private actors also often assess success in diversionary programs like drug treatment programs.<sup>217</sup> And the state backs these private actors by holding out the threat of the ultimate sanction of prison, even as the path to prison is strewn with fewer procedural protections when compared to the traditional criminal process.<sup>218</sup> The resulting system visits its most severe consequences on economically disadvantaged members of racial minority groups. Law enforcement officers can willfully target African Americans and other racial minority groups with these practices—and they have done so.<sup>219</sup> Moreover, even where no overt racism is at work, the practices can have disproportionately harsh effects on minorities because whites are more likely to be able to pay, and program managers are more likely to deem whites to have succeeded in diversionary programs than their non-white counterparts.<sup>220</sup> This means that racially disparate outcomes in new, alternative sentencing schemes may be baked into the mix.<sup>221</sup>

As in the case of the iconic liminal legal subjects, the role of private actors is again important not just in shaping and implementing these new regulatory mechanisms but also in extending them.<sup>222</sup> Issa Kohler-Hausmann's analysis of misdemeanor courts in New York shows that criminal defendants will often plead to low level misdemeanors rather than deal with the harassment of the multiple appearances that are required to contest a criminal charge,<sup>223</sup> just as immigrants with tenuous legal statuses will sometimes take unfavorable pleas to escape the governmental monitoring associated with pretrial detention.<sup>224</sup> Those individuals attempt to escape a process that is a punishment by pleading to offenses that do not carry jail time.<sup>225</sup> But once a plea is entered, individuals continue to face a range of collateral consequences, quite often privately imposed, and they are also treated differently if they are brought back into contact with the process again while still marked as a misdemeanant in their temporary records.<sup>226</sup> These liminal legal subjects are

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216. *Id.* at 1085.

217. *Id.* at 1087.

218. *Id.* at 1095–96.

219. FERGUSON REPORT, *supra* note 214, at 4.

220. *See* Natapoff, *supra* note 169, at 1096–97.

221. *See id.*

222. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 662 (2014); *see also* MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 171–72 (1992).

223. Kohler-Hausmann, *supra* note 222, at 666.

224. Cade, *supra* note 165, at 1776 (“Noncitizens placed under immigration detainers at booking, or who fear ICE contact in pretrial detention, have a tremendous incentive to plead guilty as quickly as possible in misdemeanor court, even to charges that trigger the possibility of additional immigration consequences, and even if they are innocent or have been subject to unlawful police practices.”)

225. *Cf.* FEELEY, *supra* note 222, at 30.

226. Kohler-Hausmann, *supra* note 222, at 668–69; *see also* DEVAH PAGER, *MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 144–47 (2007) (finding that crimi-

therefore particularly vulnerable to punishments, formal and informal, by public and private actors.<sup>227</sup>

In short, contemporary governance strategies to expand social control while simultaneously decreasing penal severity sometimes lead to more diffuse, less visible, and less accountable forms of punishment. These strategies generate new classes of individuals who now exist in a fraught space of liminal legality.

#### *D. Concluding Thoughts on the Production of Liminality*

The discussion above is not meant to exhaustively catalogue the class of liminal legal subjects, but rather, to demonstrate that the concept might be useful, not only for understanding the experiences of certain unauthorized or temporarily authorized migrants, but lawful permanent residents and citizens as well. The denizen on the edge of the criminal justice system has many shared characteristics with noncitizens given temporary reprieve from removal and with the citizens who are policed more heavily because they bear the visible markers of race or ethnicity that correlate to other forms of liminal legal status. Many individuals experience overlapping vulnerabilities due to the combination of their race, religion, class and immigration status.<sup>228</sup>

But even if shared features of liminal legality can be identified, and even if one accepts that citizens and noncitizens alike experience forms of liminal legality, what, if anything, can we learn from focusing attention on the liminal legal subject?

### III. LEARNING FROM LIMINAL LEGALITY

In this final Part, I discuss some of the potential discursive and practical benefits of using the concept of liminal legality to frame discussions concerning governance choices in regulation and policing. While the treatment is not comprehensive, this Part does sketch out some of the ways that a focus on liminal legality can benefit and deepen legal academic discourse. First, such a focus might generate more nuanced accounts about the governance strategies involved in the creation and management of liminal legal subjects. Second, an analytical framework constructed around a shared concept of liminal legality might serve as means of bringing inward-looking discussions concerning immigration regulation, criminal justice, and other fields into more meaningful conversation with one another. Finally, and much more tentatively, I suggest that a focus on the concept of liminal legality might also offer the basis for a

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nal records have a significant effect on an individual's employment prospects, and that the effect is significantly more pronounced for African American men).

227. Kohler-Hausmann, *supra* note 222, at 670; Natapoff, *supra* note 169, at 1089–90.

228. See generally GOLASH-BOZA, *supra* note 132, at 16–19; Vázquez, *supra* note 99, at 654–56.

theoretically coherent account of contemporary reform advocacy efforts that deemphasize the rights of formal legal citizenship as the focal point of rights discourse.

*A. Liminal Legal Subjects and "The State"*

Scholars who have closely studied the lived experience of those with liminal legality have provided a rich account of the impact of such status on the lives of its bearers. Those accounts can be very helpful to anyone seeking to understand the individual and community-level consequences of particular governance strategies. But these accounts could also be used as the starting point for deeper exploration of how state power operates in the production and regulation of liminal legality.

Sociological accounts theorize that the creation of liminal legal categories "brings to the fore the continued power of the nation-state."<sup>229</sup> In this framing, the state's role in generating liminal legal status for noncitizens is just one part of a broader trend toward greater consolidation of state power vis-à-vis would-be entrants—and would-be citizens—through tightened access to entry and to citizenship.<sup>230</sup> At a time when the cross-border movement is more possible, and more common, than ever before, states find new ways to assert their power through tightened barriers to entry and more tightly controlled access to both citizenship and the benefits that citizenship bestows.<sup>231</sup> Simply put, the existing scholarship on liminal legality posits that through the creation of liminal legal subjects, the state is strengthened vis-à-vis its subjects.

By concretizing how liminal legality relates to law and legal status, scholars might begin to offer more detailed and nuanced accounts about how liminal legality is produced by and shapes governance. Among other things, this will require a disaggregation of state actors. Different governmental actors are empowered and disempowered in the governance of individuals with liminal legal statuses, and the transformative effect on state actors is both more complex and more profound than a mere strengthening of state power vis-à-vis noncitizens. Understanding these dynamics is far more difficult than an analysis that presumes the existence of a monolithic state responsible for governing its diverse popula-

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229. Menjivar, *supra* note 2, at 1004.

230. See, e.g., Irene Bloemraad, *Who Claims Dual Citizenship? The Limits of Postnationalism, the Possibilities of Transnationalism, and the Persistence of Traditional Citizenship*, 38 INT'L MIGRATION REV. 389, 389–90 (2004); see also MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 165, at 98 (noting that the passage of immigration-related legislation in 1996 has increased the vulnerability of lawful permanent residents and hardened what had previously been a softer citizen-resident line). But see Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 900 (2013) (arguing that "[f]ew important rights hinge on citizenship status").

231. See, e.g., Menjivar, *supra* note 2, at 999–1002.

tions.<sup>232</sup> Using affected liminal populations as the starting point for analyses of governance strategies allows for more accurate accounts of how various governing bodies share power among themselves in the regulation of particular populations.

One can look to the creation of the DACA and DAPA programs as one example of how this focus aids in the analysis of regulations aimed at liminal legal subjects. When evaluating the DACA and DAPA programs, many scholars and commentators have argued that the federal Executive Branch is strengthened (or perhaps even aggrandized) not only, or even primarily, as against its liminal legal subjects, but also as against the federal Legislature and state governments.<sup>233</sup> In this narrative, executive agencies exercise power that exceeds that delegated by Congress's enforcement scheme and that is denied to both Immigration Judges housed within the Department of Justice and Article III courts. This aggrandizement happens at the expense of the diminished federal legislature and judiciary, but also at the expense of states, since the states bear some of the burdens of implementing the program.<sup>234</sup> Such a story of executive empowerment could be told about many of the rising liminal classes, and the entire subject could be chalked up to insufficient checks on executive power with the rise of the administrative state.

On the other hand, the experience of liminal legal subjects that were the focus of the DACA and DAPA programs expose the inadequacy of this account. These programs formalize (or would formalize, in the case of DAPA) exercises of prosecutorial discretion expressly and impliedly delegated by Congress to the Executive branch in an area where the Executive actually has quite expansive powers.<sup>235</sup> In fact, the aggrandizement of USCIS at the expense of other political actors is not the best account of the DACA and DAPA programs at all. This is quite evident when one focuses not on the content of the OLC memo that provides the legal justification for the programs, or on the statements of various officials in support of the program, but rather, on the liminal legal subjects who dwell within the potential protective scope of DACA and DAPA. Shifting the focus in that direction immediately begs the important question of why the programs were needed at all. After all, these liminal legal

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232. Accordingly, some sociologists are already beginning to explore the different roles of the multiplicity of state actors engaged in the production and maintenance of liminal legality. See, e.g., Abrego & Lakhani, *supra* note 3, at 274–77.

233. This is the essence of the lawsuits challenging the program that were filed by twenty-six states and also by certain members of Congress. See *Texas v. United States*, 86 F. Supp. 3d 591, 613–18 (S.D. Tex. 2015).

234. *Id.* at 22–23.

235. On the power of the Executive under current immigration law, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458 (2009).



subjects were not priorities for removal.<sup>236</sup> Why not just continue to leave them alone?

Focusing on the experiences of liminal legal subjects in the lead-up to the program rollout provides the answer. It was well known in immigrant communities and among immigrant-serving organizations that, although elected officials repeatedly set enforcement priorities in the immigration sphere,<sup>237</sup> those efforts were often undercut by low-level federal officials and, at times, by state and local law enforcement. Throughout the country, noncitizens who apparently fit into the low enforcement priority categories were being picked up by ICE or funneled to ICE by state and local officials and then placed in removal proceedings.

Against this backdrop, DACA and DAPA can be properly understood not as tools designed to disempower Congress but as programs designed to operate as a check on an “insurrection”<sup>238</sup> by lower-level ICE agents who had repeatedly declined to fall in line with the commands of elected officials.<sup>239</sup> These programs constitute an effort to reestablish democratic control over a recalcitrant police force with tremendous power over the lives of liminal legal populations.

Furthermore, the programs reasserted federal enforcement priorities in a way that supplanted some lower-level public and private immigration sorting by actors who might otherwise be able to exploit the particular legal vulnerabilities of removable noncitizens. The development of a program that triggered statutory driver’s license authorization<sup>240</sup> and employment authorization<sup>241</sup> made no change to the existing legal framework. It did, however, empower liminal legal subjects vis-à-vis local police officers who might use driving violations as a means of reordering federal immigration enforcement priorities<sup>242</sup> and private employers who

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236. See *supra* notes 61–62 and accompanying text (discussing the Morton memo in particular and the historical expansion of enforcement priorities more generally).

237. See *supra* note 62 (cataloguing the various enforcement priority memos issued over the last twenty years).

238. Ahilan Arulanantham, *The President’s Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014, 5:00 PM), <http://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html> (“Although you will not find it discussed either in the administration’s public statements or in its OLC memo, the new administrative relief program arises out of a historical context of defiance – some would say insurrection – by ICE enforcement agents and attorneys who essentially refused to implement prior directives on prosecutorial priorities.”).

239. *Id.*; see also *Crane v. Johnson*, 783 F.3d 244, 248–49, 255 (5th Cir. 2015) (dismissing a lawsuit by ICE agents and several state officials challenging the Obama administration’s DACA program).

240. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109–13, § 202(c)(2)(B), 119 Stat. 231 (2005).

241. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 274A, 100 Stat. 3359.

242. There is evidence that some jurisdictions targeted immigrant neighborhoods for heightened surveillance and traffic stops and that unauthorized immigrants’ lack of driver’s licenses left individuals vulnerable to criminal consequences and left communities vulnerable to enforcement efforts explicitly premised on national origin discrimination.

might otherwise exploit the vulnerabilities of unauthorized members of the workforce.<sup>243</sup>

Examining the program through the lens of its effects on liminal legal communities also reveals the extent to which executive choices are still heavily constrained by federalism in this context. Individual exercises of discretion by state and local law enforcement agents take on outsized significance in the shaping of immigration law on the ground,<sup>244</sup> even as the program aims to quell such discretionary excesses on the part of line ICE agents. Within this framework, private actors also gain new forms of power in shaping the contours of eligibility for discretionary relief, both by providing input that shapes the administrative rules that govern discretionary relief and by performing a screening function in determining which individual applicants seeking access to temporary legal status are actually worthy of relief.<sup>245</sup> Pervasive anti-immigrant messages by both public and private actors can also affect state actors at all levels of government in ways that effectively obliterate the protections purportedly provided by federal law. In this way, anti-immigrant rhetoric sometimes has a greater effect on how noncitizens experience the law than does the complex and convoluted federal regulatory system that controls their formal legal status.<sup>246</sup>

The same sorts of complexities might be teased out when examining the legal mechanisms that affect the governance of other liminal populations.<sup>247</sup> The effects of liminal legality on the power of the state, and the role of the state in creating and controlling liminal legal subjects, requires much more fleshing out. Identifying liminal legal populations and using their experiences as the starting point for such analyses can illuminate features of governmental power distributions that get lost in accounts that ignore lived experience.

### *B. Liminal Legal Subjects Outside of "Exceptional" Immigration Law*

Broadening the concept of liminal legality also provides a way to avoid unproductive treatment of the field of immigration law as an exceptional domain with little relevance outside of its limited sphere. Immigration law is often treated as standing uniquely outside of the realm of constitutional review<sup>248</sup> and, therefore, incomparable with other sub-

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243. See *Juarez v. Nw. Mut. Life Ins. Co.*, 69 F. Supp. 3d 364, 365–66 (S.D.N.Y. 2014) (applying IRCA's antidiscrimination protections to noncitizens seeking work with DACA-related EADs); see also discussion *supra* note 73 (discussing evidence of employer exploitation of unauthorized workers).

244. *Motomura*, *supra* note 84, at 1821–22.

245. See *id.*

246. See *Abrego & Lakhani*, *supra* note 3, at 277.

247. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 5–6 (2013) (critiquing the intragovernmental distribution of power in the criminal justice system).

248. For an early articulation of the notion of immigration exceptionalism, see generally *Motomura*, *supra* note 134, at 1363.

stantive areas of law. While claims of exceptionalism have a doctrinal basis, the exceptionality is often less than meets the eye.<sup>249</sup> Illuminating the shared liminal legality of groups both within and outside of various enforcement systems can lead to a better understanding of the common experiences of certain noncitizens and citizens. It pushes against the reflective notion that the rights deprivations experienced by noncitizens are a simple and direct result of their formal citizenship status. Citizens and noncitizens experience declining legal protections in the wake of the expansion of immigration enforcement, and citizens and noncitizens are affected by similar transformations in the criminal justice system. Sometimes the rights deprivations operate in complimentary ways on populations situated at the intersection of the system, but sometimes the results are more subtle. Less protective Fourth Amendment law in the area of immigration policing has frequently migrated into the core of constitutional doctrine without regard to the citizenship status of the policed populations, to take just one example.<sup>250</sup> Similarly, governmental reliance on the interplay of civil and criminal punitive mechanisms as a means of effectuating social control is not limited to a crimmigration system.

At academic institutions from the lowlands of Leiden in the Netherlands<sup>251</sup> to the Mile High City in the Rocky Mountains<sup>252</sup> and beyond,<sup>253</sup>

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249. There is not really a consensus on the extent to which immigration law actually is constitutionally exceptional. Compare Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 257 (2000), with Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289, 290–92 (2000), and Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Powers Doctrine?*, 14 GEO. IMMIGR. L.J. 307, 307 (2000).

250. See Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L. J. 129, 145 (2010); see also Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1547–50 (2011).

251. Leiden University hosted a Crimmigration conference in October 2014.

252. The University of Denver's Sturm College of Law hosted a Crimmigration symposium in February 2015.

253. Numerous law schools now offer courses that are explicitly styled as crimmigration courses, including Harvard Law School. See, e.g., *Crimmigration: The Intersection of Criminal Law and Immigration Law*, HARV. L. SCH., <http://hls.harvard.edu/academics/curriculum/catalog/index.html?o=67538> (last visited Mar. 7, 2015) (course description); *Crimmigration: The Intersection of Immigration and Criminal Law and Procedure*, U. CINCINNATI C.L., <http://law.uc.edu/sites/default/files/CrimmigrationsyllabusF2014-rev-8-8-14-Vazquez.pdf> (last visited Mar. 7, 2015) (course description); *Crimmigration*, U. HOUS. L. CENTER, [http://www.law.uh.edu/schedule/class\\_information.asp?cid=12623](http://www.law.uh.edu/schedule/class_information.asp?cid=12623) (last visited Mar. 7, 2015) (course description); *Crimmigration Legal Theory and Practice: Strategies and Solutions for Non-citizens Charged With Crimes*, U. MD. SCH. L., [https://www.law.umaryland.edu/academics/program/curriculum/catalog/course\\_details.html?coursem=549T](https://www.law.umaryland.edu/academics/program/curriculum/catalog/course_details.html?coursem=549T) (last visited Mar. 7, 2015) (course description). This is not an exhaustive list. Indeed, the Society of American Law Teachers recently offered a panel on the topic of teaching crimmigration law. See Society of American Law Teachers, *Legal Education in a Time of Change: Challenges & Opportunities*, SALT LAW 12–13 (2014), available at <https://www.saltlaw.org/wp-content/uploads/2014/10/2014-SALT-Teaching-Conference-and-SALT-LatCrit-FDW-Program-OCT-9-11.pdf>. Many other institutions have classes that focus on issues of the criminalization of civil immigration proceedings or on the topic of non-citizens in the criminal justice system, although they do not adopt the crimmigration label.

the umbrella concept of crimmigration has been used to organize a wide-ranging academic discourse dedicated to exploring domestic and international developments at the intersection of criminal and immigration law. This framing has advantages as well as disadvantages.

On the positive side, the crimmigration rubric has been useful for thinking about the specific moments of procedural intersection between the criminal and immigration enforcement systems. These moments occur frequently because the immigration system and the criminal justice system actually intersect in a number of significant ways. A pipeline connects the criminal justice system and the removal system. The criminal justice system has become an important entry point for removal, particularly with the rollout of the Secure Communities program, which required state and local law enforcement to check arrestee data against a federal immigration database.<sup>254</sup> Although that particular program has been rolled back in recent months, it has not been eliminated.<sup>255</sup> The government will continue to use this screening function in a limited way through the so-called Priority Enforcement Program (PEP) and many criminal arrestees will continue to be funneled into the removal system in this way.<sup>256</sup> The long-standing Criminal Alien Program (CAP) continues to ensure immigration screening in prisons and jails.<sup>257</sup> Despite questions about their legality,<sup>258</sup> the federal government also continues to issue, and some jurisdictions continue to honor, immigration detainers to hold persons of interest to immigration officials beyond the time required to process their state criminal matters.<sup>259</sup> All of these programs generate far-

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254. Dep't of Homeland Sec., *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/secure-communities> (last visited Mar. 7, 2015). For a discussion of critiques of the program, see *infra* note 265.

255. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al., 2 (Nov. 20, 2014) [hereinafter Johnson Memorandum II] [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) (directing ICE to continue to screen state and local arrests, but to "only seek transfer of the alien" from state and local custody when that noncitizen fits one of DHS's high priority categories for removal).

The rollback of the Secure Communities may narrow the size of the arrest-to-deportation pipeline, the continuation of arrest screening through ICE's Priority Enforcement Program (PEP) ensures the continued flow of some noncitizen from arrest to deportation. Immigrants' rights organizations have taken to calling the new program PEP-Comm, to draw attention to its continuities with the more expansive S-Comm program. See, e.g., Press Release, California Immigrant Policy Center, Civil Rights Orgs Celebrate the End of S-Comm, Caution Against the Replacement "PEP-Comm" Program (Nov. 21, 2014), available at <http://www.caimmigrant.org/groups-celebrate-s-comm-end/>.

256. Johnson Memorandum II, *supra* note 255, at 1-3.

257. *Criminal Alien Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/criminal-alien-program> (last visited Mar. 13, 2015).

258. Lasch, *Detainer Enforcement*, *supra* note 165, at 283-84; CHRISTOPHER LASCH, IMMIGR. POL'Y CENTER, THE FAULTY LEGAL ARGUMENTS BEHIND IMMIGRATION DETAINERS 2, 4-7 (2013), available at [http://www.immigrationpolicy.org/sites/default/files/docs/lasch\\_on\\_detainers.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/lasch_on_detainers.pdf); see also *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at \*4-11 (D. Or. Apr. 11, 2014) (finding holds executed pursuant to an ICE request lacked basis in law and constituted a Fourth Amendment unreasonable seizure).

259. See Tim Henderson, *More Jurisdictions Defying Feds on Deporting Immigrants*, PEW CHARITABLE TR. (Oct. 31, 2014), <http://www.pewtrusts.org/en/research-and>

reaching practical and procedural connections between the criminal and immigration systems.

The outputs of the criminal justice system are also taken into account in the substantive application of immigration law. The Immigration and Nationality Act (INA) imposes significant immigration consequences on a broad range of criminal convictions and activity, including for conduct associated with extremely minor criminal offenses.<sup>260</sup> The Supreme Court has recognized the reality of this interplay<sup>261</sup> and has concluded that to even be effective in the criminal justice system, advocates for noncitizens in criminal courts must be aware of their client's immigration status and advise them of the clear immigration consequences of their criminal offenses.<sup>262</sup>

By looking at the particular spaces of intersection between criminal and immigration law, scholars working at that intersection have paved the way for important policy interventions that have sometimes mitigated the most problematic manifestations of the systemic interplay of these two bodies of law. For example, scholars working at the criminal and immigration law intersection have developed successful challenges to the widespread, and unlawful, reliance by states and localities on federally-

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analysis/blogs/stateline/2014/10/31/more-jurisdictions-defying-feds-on-deporting-immigrants (noting that, as of the date of the report, half of all noncitizens live in jurisdictions that declined to honor ICE detainers).

260. See Immigration and Nationality Act §§ 212(a)(2), 236(c), 8 U.S.C. §§ 1182(a)(2), 1226(c) (2015) (setting forth broad grounds for expulsion or exclusion on grounds of criminal violations and drug-related conduct); HING, *supra* note 165, at 4–7 (describing cases of sympathetic noncitizens removed under expansive removal provisions); JOHNSON, *supra* note 114, at 7–8, 111–12, 114–15 (describing the transformation of the immigration laws and their sweeping effects); KANSTROOM, *supra* note 5, at 14–15, 243–46 (describing the expansive removal provisions and their harsh effects); Hing, *supra* note 62, at 497–98 (discussing cases where noncitizens were removed because of minor criminal infractions); Morawetz, *supra* note 164, at 166–67 (noting the harsh effects of the nation's drug removal provisions).

261. *Padilla v. Kentucky*, 559 U.S. 356, 363–64 (2010). In *Padilla*, Justice Stevens wrote for the majority:

Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance.

These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

*Id.* (citations omitted).

262. *Id.* at 368–69, 374. For discussions concerning the specific meaning and content of *Padilla*'s requirements, see, for example, César Cuauhtémoc García Hernández, *Criminal Defense after Padilla v. Kentucky*, 26 GEO. IMMIGR. L.J. 475, 487–88 (2012); Christopher N. Lasch, *Redress in State Postconviction Proceedings for Ineffective Crimmigration Counsel*, 63 DEPAUL L. REV. 959, 971–75 (2014); Yolanda Vázquez, *Realizing Padilla's Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 34 FORDHAM URB. L.J. 169, 172–73, 187–92 (2011).

issued immigration detainers as the justification for holding noncitizens past the period warranted under state law.<sup>263</sup> The Supreme Court's decision to require counsel to advise noncitizens of the clear immigration consequences of criminal convictions flows directly out of this work as well.<sup>264</sup> And scholarship and advocacy interrogating the efficacy and fairness of the Secure Communities program were essential to effectuating the November 2014 rollback of the program.<sup>265</sup> Ultimately, the sustained and particularized analyses of specific interactions between the criminal and immigration law systems have been transformative on the ground.

On the other hand, there are downsides to the crimmigration framework, too. First, it is often asked to support more weight than it should bear. The assumption of the existence of an emerging crimmigration system suggests both more novelty and more coherence in the interplay of criminal and immigration law than actually exists. Some of the most severe outcomes that arise at the intersection of the criminal and immigration system arise not because the systems work together but because they operate in ignorance of one another. With much of the emerging literature on the criminal-immigration law nexus focusing (understandably) on points of convergence, it is worth remembering that both theoretically and practically the immigration and criminal law systems also retain their distinctive logics and domains.

It is true, for example, that different federal, state, and local government actors can leverage one system when the other does not seem likely to give the actor the result she seeks in a particular case and that the interplay between these systems can be potent.<sup>266</sup> But it is also the case that some of the most egregious harms wrought by criminal justice actors in immigration courts are imposed inadvertently. They are caused

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263. For examples of scholarly challenges to the legality of detainers, see, for example, Lasch, *Detainer Enforcement*, *supra* note 165, at 291, 293–94, 313. For a successful challenge see, for example, *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*4–11 (D. Or. Apr. 11, 2014). The *Miranda-Olivares* case generated a cascade of jurisdictions unwilling to enforce detainers. Andrea Castillo, *Washington, Colorado Counties Join Oregon in No Longer Complying with Immigration Detainers*, OREGONIAN (May 1, 2014), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/05/washington\\_colorado\\_counties\\_j.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/05/washington_colorado_counties_j.html) (“At least four counties in Washington state and four in Colorado have joined a growing number of jurisdictions in Oregon that stopped holding undocumented immigrants in jail for the sole purpose of deportation.”).

264. *Padilla*, 559 U.S. at 367 (citing numerous scholars in concluding that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation”).

265. Influential criticisms included Cox & Miles, *supra* note 163, at 132–35; AARTI KOHLI ET AL., THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1–4, 13 (2011), available at [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf); Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 969–70 (2014).

266. See, e.g., Chacón, *A Diversion*, *supra* note 134, at 1567–69, 1615–20; Eagly, *Prosecuting Immigration*, *supra* note 165, at 1285–86, 1339; Sklansky, *supra* note 189, at 163–64, 201–02.

by judges and juries who sentenced LPR defendants for crimes that later became deportable offenses under immigration law, but are not deportable offenses at the time of sentencing. Or lawyers who structured plea agreements around existing law without the superhuman ability to forecast shifting interpretations of immigration law. Or lawyers who structured bad pleas because they simply didn't understand immigration law at all. Or beat officers who conducted domestic violence arrests to secure a temporary peace without recognizing (and even without wanting) the deportation screening that the arrest could trigger. Or a school official who calls the police to mediate a school fight without understanding the immigration consequences such a call might have for an undocumented student or his family—both now, and in terms of future eligibility for relief—should intervening officials decide that there is a gang element to the activities.<sup>267</sup>

In daily practice, governmental actors at all levels may seek to avoid immigration consequences or facilitate them, but they will often undertake their specific actions in the realm of criminal justice with an imperfect understanding of how they will affect immigration proceedings. Indeed, at the formal level, Congress and the courts have done a great deal of work to keep the criminal justice system out of immigration courts at critical junctures. While at one time the criminal sentencing court had the potential to play an active role in deportation decisions through the issuance of a Judicial Recommendation Against Deportation (JRAD), that power was eliminated by Congress in 1990.<sup>268</sup> The criminal sentencing judge now has no role in preventing the deportation of noncitizens placed in removal proceedings for criminal convictions. Similarly, much of the evidence available to criminal courts in the plea bargaining process are deliberately (and largely for good reason) screened out of immigration proceedings by the categorical and modified categorical approaches that courts apply in determining the immigration consequences of certain kinds of criminal offenses.<sup>269</sup>

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267. For this last point, see Jennifer M. Chacón, *Students and the Deportation Machine* at 13 (unpublished manuscript) (on file with author).

268. *Padilla v. Kentucky*, 559 U.S. 356, 363 (2010). The JRAD was always controversial and never very systematically implemented, but it did have certain advantages, including allowing the judge with the broadest understanding of the criminal conduct at issue and the equities at issue to make a determination on the extent to which the individual's conduct warranted the application of immigration consequences. *Id.*; see also Taylor & Wright, *supra* note 165, at 1143–44 (discussing the sentencing judge's discretion to deport or not deport an offender).

269. For applications of the doctrine in immigration cases, see *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–87 (2013); *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580–82 (2010); *Nijhawan v. Holder*, 557 U.S. 29, 35–38, 41 (2009); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007); *Lopez v. Gonzales*, 549 U.S. 47, 50–52, 58, 60 (2006); *Leocal v. Ashcroft*, 543 U.S. 1, 4–7 (2004). For justifications, see Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1705–07, 1746–58 (2011) (arguing in support of the categorical approach on historical and policy grounds); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR.

Suggestions of a coherent crimmigration system thus run the risk of oversimplifying the nature of the relationship between the criminal and immigration law systems. It may also lead to inadvertent overstatement about the novelty of the systemic interplay at stake; in fact, when it comes to reliance on criminal law actors to effectuate immigration enforcement goals, historical roots run deep.<sup>270</sup> At the same time, in focusing attention on the evolution of a new system, the crimmigration framework may skew attention away from the commonalities that the criminal-immigration law interactions have with other criminal-civil law interplay. Just as overstated notions of immigration exceptionalism can skew attention away from systemic legal developments that affect citizens, crimmigration scholarship may at times perpetuate a notion that no other populations are regulated in quite the same way as individuals caught in the intersection of the criminal justice and immigration enforcement systems.

As the foregoing analysis suggests, liminal legal statuses are not borne solely by noncitizens. Inside and outside the immigration sphere, the proliferation of liminal legal statuses functions simultaneously as a means of effectuating administrative resource conservation through community-oriented risk-management strategies<sup>271</sup> and as a form of “preservation through transformation,”<sup>272</sup> allowing governmental actors to reassert and maintain shifting forms of control over racialized and otherwise marginalized populations identified as high risk in ways that do not trigger the rights-protective schemes that evolved in the post-war era in both domestic and international law. “Crimmigration” serves as a shorthand explanation of how this occurs in the area of immigration law, but it is not always an accurate shorthand explanation. In conjuring up the notion of a system designed to manage a discrete class of alien law-

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L.J. 257, 264–65, 299–300 (2012) (arguing in support of the categorical approach on historical and policy grounds).

270. Rachel E. Rosenblum, *Policing Sex, Policing Immigrants: What Crimmigration’s Past Can Tell Us about It’s Present and Future*, 104 CAL. L. REV. 101, 102, 104 (forthcoming 2016); see also FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL* 120–21 (rev. ed. 2006) (discussing the leading role played by local officials in the so-called “repatriation” of Mexicans and Mexican-Americans to Mexico in the 1930s); JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954*, at 191 (1980) (discussing the important, and sometimes overly-aggressive, participation of California state and local officials in implementing the infamous immigration enforcement sweep of the 1950s).

271. For analyses that identify the risk-assessment theories undergirding the approaches, see, for example, JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 4–6 (2009) (discussing the shifting perspective of the American society from “governing crime” to “governing through crime”); Kohler-Hausmann, *supra* note 222, at 616–17 (analyzing the process of misdemeanor adjudication in New York criminal courts as one that marks and monitors its subjects as potential risks); Mark Noferi & Robert Koulisch, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 48–50 (2015) (critiquing ICE’s risk assessment tools for immigration detention and noting accompanying danger of the expansive reliance on risk assessment logics to justify more extensive and widespread monitoring of noncitizens).

272. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996) (internal quotation marks omitted).



breakers, it may also be a stigmatizing one. Framing the discourse around liminal legality could operate to check unjustifiable presumptions of immigration law exceptionality and encourage efforts to identify the common regulatory methods that have generated a transubstantive normalization of liminality.<sup>273</sup> Shifting the focus to liminal legality may, in fact, open up a path to return crimmigration scholarship to its deeper theoretical grounding in membership theory,<sup>274</sup> thereby reinvigorating the discussion of the role that race, religion, class, and place play in structuring governance strategies at the border of criminal and immigration law.<sup>275</sup>

### C. Liminal Legality and Lawyering for Change

Finally, and relatedly, a more robust understanding of the features of liminal legality might allow for the development of new accounts of the social change strategies geared toward generating greater legal protection and increased stability in the lives of liminal legal subjects. Activists seeking to expand the rights of noncitizens in the United States have long worked against the backdrop of skeletal, formal constitutional protections.<sup>276</sup> In this context, rights protection has required leveraging doctrines designed to protect other populations or institutional interests,<sup>277</sup> as well as engagement in political acts that assert previously unacknowl-

273. For work in this vein, see, e.g., Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 844–46 (2015); Kalhan, *Immigration Policing*, *supra* note 165, at 1162–64; Sklansky, *supra* note 189, at 219–23.

274. Stumpf, *supra* note 165, at 376. In her article, Stumpf uses the phrase “criminalization of immigration law” and “crimmigration” interchangeably, and uses both to describe the “merger” or “convergence” of criminal and immigration law. *See id.* She offers an account of a “crimmigration” merger that has evolved “on three fronts: (1) the substance of immigration law and criminal law increasingly overlaps, (2) immigration enforcement has come to resemble criminal law enforcement, and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure.” *Id.* at 381. After charting these developments, Stumpf offers membership theory as an explanatory basis for understanding why these systems increasingly appear similar in their justifications and procedural mechanisms. *See id.* at 376.

275. For a recent critique of crimmigration scholarship as insufficiently focused on questions of race, see Kevin R. Johnson, *Race-Based Law Enforcement: The Racially Disparate Impacts of Crimmigration Law*, (forthcoming) (on file with author). For a defense of use of the crimmigration framework specifically because it facilitates a focus on governance strategies deliberately and differentially aimed at Latinos in the United States see Vázquez, *supra* note 99, at 609–11; García Hernández, *Creating Crimmigration*, *supra* note 165, at 1459. I agree with these authors about the racialized effects of the interplay of immigration and criminal law strategies. But with my discussion here, I hope to show why I think those developments are not simply an analogue to the phenomenon of mass incarceration in African American communities. The governance strategies are, in important ways, the same legal strategies.

276. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 13–15, 52 (1996).

277. *See* MOTOMURA, *supra* note 165, at 7–8, 114–15, 117–18, 132–35, 138–41 (explaining the ways that preemption claims, equal protection claims of citizens, and procedural due process claims have all operated as means of effectuating the legal rights of noncitizens, including the undocumented); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560–65 (1990) (discussing the role of “phantom norms” in generating rights protective developments in immigration caselaw, notwithstanding the plenary powers doctrine).

edged rights into existence.<sup>278</sup> Advocacy in the areas of national security and immigration regulation have indeed transformed legal doctrine that is generally viewed as rights-restrictive into vehicles for increased individual rights vis-à-vis federal legislative and executive administrative agencies.<sup>279</sup> Lessons from this area likely have broader application for liminal legal populations.

When you start from the premise that the political branches have an all but absolute right to expel noncitizens and that broad deference is due to prison administrators, it should probably go without saying that there is no right for a noncitizen to be free of immigration screening in a jail; and yet community activism at one time ended the screening of Rikers inmates by ICE officials previously housed on the premises.<sup>280</sup> More broadly, such activism resulted in the narrowing of the Secure Communities program.<sup>281</sup> Similarly, under a constitutional doctrine that affords virtually no substantive effect to time spent in the country when determining the right to remain, it is impossible to locate a right for unauthorized migrant youth to remain in the United States on the basis of their time here and their good character. Yet, community activism changed the legal structure to afford a version of this protection, and continued activism may well transform that more liminal status into something more protective and permanent.

While a good deal of immigrants' rights activism focuses on the vindication of formal legal rights,<sup>282</sup> rights still often have to be willed into existence through concerted legal activism that focuses on appeals to

278. Peter L. Markowitz, Remarks at the Denver University Law Review CrImmigration Symposium (Feb. 2, 2015), available at <http://du-denverlaw.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=93a85392-078a-414e-84bd-5607b4fb08d3>.

279. See, e.g., Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 882–84 (2015) (arguing that litigants and courts have used the *Mathews v. Eldridge* test to generate judicial due process protections in immigration and national security cases, which have traditionally been unyielding to individual interests); see also Peter H. Schuck, *Kleindeinst v. Mandel: Plenary Power v. the Professors*, in IMMIGRATION STORIES (Peter H. Schuck & David A. Martin eds., 2005) (discussing the role of litigants in turning the seemingly unprotective *Kleindeinst v. Mandel* requirement for a “facially legitimate and bona fide reason” to justify the imposing certain exclusion bars to noncitizens into a meaningful, substantive check on ideological exclusion).

280. *This Valentine's Day, Celebrate the Best Breakup Ever: ICE out of Rikers*, IMMIGRANT DEF. PROJECT (Feb. 13, 2015), <http://immigrantdefenseproject.org/valentines-day-celebrate-best-breakup-ever-ice-rikers>.

281. See *supra* notes 263–65, 292 and accompanying text.

282. See *R.I.L.–R v. Johnson*, 80 F. Supp. 3d 164, 170–73, 189–91 (D.D.C. 2015) (granting a preliminary injunction against denying bond on national security grounds for Central American migrants); Complaint at 2, 5, 21–24, 26, *Chacon v. E. Haven Police Dep't*, No. 3:10-CV-1692-JBA (D. Conn. Oct. 26, 2010) (D. Conn. Oct. 26, 2010) (alleging a 42 U.S.C. § 1983 cause of action for damages, the parties eventually settled on July 17, 2014); *Mora v. Arpaio*, No. CV-09-1719-PHX-DGC, 2009 WL 3488718, at \*1–2 (D. Ariz. Oct. 28, 2009) (holding that plaintiffs could proceed with a 42 U.S.C. § 1983 damage claim); see also MOTOMURA, *supra* note 165, at 46–47, 56–57 (chronicling these legal strategies).

fairness rather than on formal legality.<sup>283</sup> To secure these rights, entire communities actively work to reconstitute themselves in ways that insulate them from unwanted interventions. This is reflected not just in the ongoing, and somewhat successful, efforts to narrow the scope of the Secure Communities program and jail screening programs but also in movements opposing gang injunction programs, “prostitution free zones,” and other initiatives that might otherwise increase policing in liminal communities.<sup>284</sup> The rights-protective strategies at issue here identify particular policies and practices that exacerbate the vulnerabilities of liminal legal populations and work to change them by developing new markers of community belonging<sup>285</sup> and by privileging accounts of community need that incorporate the voices of liminal legal subjects.

### CONCLUSION

Although it is not possible to create a full map of the world of liminal legality in one short piece, this Article identifies salient and recurring features of liminal legality, describes various sites where liminal legality is produced, and suggests some possible benefits to using an expansive

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283. There are formal legal frameworks that anchor these claims, of course. Sometimes these are rooted in the Constitution. See MOTOMURA, *supra* note 165, at 7, 64–65, 134–35, 141–42 (discussing federalism, procedural due process, and the constitutional rights of citizens). International law norms serves as another important source of this rights-claiming, notwithstanding the lack of coherent “architecture” around the rights of noncitizens. See, e.g., T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance Without Architecture*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 467, 471–75, 479 (Ryszard Cholewinski, et al. eds., 2007).

284. See, e.g., Dean Spade, *The Only Way to End Racialized Gender Violence in Prison Is to End Prisons: A Response to Russell Robinson’s “Masculinity as Prison”*, 3 CAL. L. REV. CIRCUIT 184, 193–95 (2012) (internal quotation marks omitted) (citing to progressive decriminalization and policing-containment strategies and organizations, and arguing that these “organizations and projects understand the significant dangers queer, trans, and gender non-conforming people face at the hands of law enforcement and seek to offer material relief by helping people survive these systems, dismantling the pathways to criminalization that entangle vulnerable people, and creating alternative ways for people to get their needs met given that the criminal punishment system promises safety but never delivers”). The Black Lives Matter movement is the most visible contemporary national movement that explicitly seeks to address these structural issues, and it has done so by privileging the experiences and centering the rights of the most marginalized and most legally liminal members of the community. See BLACK LIVES MATTER, <http://blacklivesmatter.com> (last visited Dec. 3, 2015) (“Black Lives Matter affirms the lives of Black queer and trans folks, disabled folks, Black-undocumented folks, folks with records, women and all Black lives along the gender spectrum. It centers those that have been marginalized within Black liberation movements. It is a tactic to (re)build the Black liberation movement.”)

285. The adoption of municipal ID cards to facilitate the integration of noncitizens who lack other legal forms of identification is one such strategy. Michael J. Wishnie, Remarks at the Denver University Law Review CrImmigration Symposium (Feb. 2, 2015), available at <http://du-denverlaw.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=93a85392-078a-414e-84bd-5607b4fb08d3>; see also Thomas MacMillan, *Elm City ID Card Turns 5*, NEW HAVEN INDEP., July 23, 2012, [http://www.newhavenindependent.org/index.php/archives/entry/id\\_card\\_anniversary/](http://www.newhavenindependent.org/index.php/archives/entry/id_card_anniversary/) (“Five years and 10,000 cards later, doomsday predictions have long fizzled out, leaving a stronger community along with a new challenge—keeping the card useful and relevant, rather than largely symbolic for most of its bearers.”). On the challenges of keeping these programs vibrant, see Brian Charles, *Many Unaware of New Haven’s Elm City ID Program, Critics Say*, NEW HAVEN REGISTER, Sept. 21, 2014, <http://www.nhregister.com/general-news/20140921/many-unaware-of-new-havens-elm-city-id-program-critics-say>.

conception of liminal legality to assess the social and legal developments that both exacerbate and mediate its destabilizing effects. Many community organizers are already ahead of scholars in recognizing the generative potential of organizing around analogous and complimentary experiences of legal liminality. To identify law reform projects that can help advance social justice goals, legal scholars should also think creatively and trans-substantively about the legal sites that produce liminal legality.

