Many thanks for reading this early draft. I would particularly appreciate feedback on how to develop Part II (p. 9-22), which argues that immigration enforcement encompasses far more than the act of deportation.

THE DEPORTATION DRAGNET

Eisha Jain*

Deportation dominates contemporary immigration enforcement debates. Yet it amounts to a fraction of the work that the immigration enforcement system actually does. Deportation is not synonymous with immigration enforcement; rather, it is merely the tip of a much larger enforcement pyramid. It operates in tandem with a host of related enforcement techniques, including arrest, detention, and family separation. While there are good reasons to focus on deportation, the deportation-dominant approach obscures the full reach of the immigration enforcement system and its parallels to other merged civil-criminal enforcement mechanisms. This, in turn, minimizes many harmful aspects of immigration enforcement and obscures important possibilities for reform.

This Article argues that deportation cannot be properly understood without attention to two intertwined enforcement mechanisms: first, the use of many “de facto” enforcement agents, such as employers and police, and second, the use of penal techniques, such as arrest and detention, in conjunction with the threat of deportation. These mechanisms create profound uncertainty about legal entitlements and the likelihood of removal. In employing these techniques, deportation has much in common with other quasi-criminal enforcement regimes that regulate entitlements in workplaces, housing, and in the context of policing. This Article explores the full reach of immigration enforcement and places it in context with other enforcement techniques that straddle the civil-criminal divide. It seeks to expand immigration scholarship beyond the two questions that tend to dominate the literature—namely, who should be removed and what procedures ought to effectuate removal decisions—and toward a third set of questions about how enforcement decisions reshape society at large. In particular, it argues that the current immigration enforcement structure

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creates underappreciated harm by restricting access to key legal institutions, such as the courts and the police, and that this dynamic impoverishes society at large, not just immigrants and their communities.

INTRODUCTION

Deportation dominates contemporary immigration enforcement debates. Yet it represents a fraction of the work that the immigration enforcement system actually does. The vast majority of the estimated eleven million unauthorized migrants who live in the United States will not be deported. Even at its enforcement peak in recent years, federal immigration authorities removed approximately three to four percent of the unauthorized migrant population in any given year.¹

There are good reasons for deportation’s dominance. Deportation can be experienced as a form of punishment. It is akin to a death sentence for those deported to countries with dangerous conditions. It unfolds in ways that are deeply enmeshed in criminal process, yet it does not trigger the safeguards of criminal procedure. An important body of immigration scholarship focuses on the high stakes of deportation, its enmeshed relationship to the criminal process, and its utterly inadequate procedural safeguards.²

There is much that is of value with focusing on removal itself. Nonetheless, the deportation-dominant approach risks understating the true reach of the immigration system. If focusing only on the act of deportation, one might think that immigration enforcement is not doing much work.³ In reality, however, deportation is just the tip of the pyramid. It operates in tandem with a host of other enforcement techniques, such as arrest, detention, and family separation.

¹ FY 2016 ICE Immigration Removals, U.S. Immigr. & Customs Enforcement, http://www.ice.gov/removal-statistics (showing that annual removals in the past 10 years ranged from approximately 235,000 to 400,000 removals per year). Without a massive expansion in immigration enforcement resources, this number is not likely to increase. See Part II.
² See Part I.
³ See, e.g., Joseph Tanfani, Atty. Gen. Sessions says lax immigration enforcement is enabling gangs like MS-13, L.A. TIMES (April 18, 2017) (describing immigration enforcement as lax for not engaging in sufficient deportation). Deportation under the Obama Administration, however, reached an all-time high. Thus, while the number deported is small relative to the overall number of people who are deportable, federal immigration enforcement officials still remove three to four hundred thousand migrants in any given year, many of whom have lived long-term in the United States.
This Article seeks to expand immigration scholarship and public policy discussions to center on the concept of deportability, rather than on the narrower act of deportation itself. Deportation, I argue, is merely one aspect of a much larger dragnet. The dragnet has two key enforcement features: first, the use of many “de facto” enforcement agents, such as employers and police, who exercise immigration enforcement authority but whose incentives deviate from those of federal immigration enforcement officials; and second, the use of penal techniques, such as arrest and detention, in conjunction with the threat of deportation.

Part II describes a range of immigration enforcement techniques – arrest, detention, family separation, and loss of work – and their consequences. These techniques create serious harm in their own right, not just as steps on the path toward deportation. They are imposed by a host of actors – police, employers, and others – not only by federal immigration enforcement officials. This diffuse enforcement structure leads to law enforcement tradeoffs. It suppresses the ability of undocumented workers and others to enforce important rights. As a formal matter, removable migrants are entitled to important legal protections. As workers, they are entitled to fair pay and safe working conditions. As tenants, they are protected against exploitative landlords. As community members, they are entitled to report crime and serve as witnesses. Yet because employers, police, and others routinely conduct immigration screening and trigger deportation, arrest, or other related consequences, they gain leverage relative to removable noncitizens. This, in turn, prevents removable migrants from asserting legal protections to which they are entitled.

In delegating enforcement discretion to a range of public and private actors, immigration enforcement has much in common with other low-level criminal enforcement techniques. Part III of this Article situates immigration alongside other enforcement mechanisms that alter power dynamics in workplaces, in homes, and in interactions with the police. Recognizing these parallels further illuminates the reach of the immigration enforcement

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5 Stephen Lee, *De Facto Immigration Courts*, 101 Cal. L. Rev. 553, 559-71 (2013) (conceptualizing prosecutors as “de facto immigration courts” because they exercise functional power over deportation by deciding whether to bring pleas that will trigger deportation); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 Stan. L. Rev. 1103, 1104–05 (2009) (conceptualizing private employers as “one particularly problematic set of immigration screeners” given that they check immigration status and have the ability to report undocumented workers who organize).
system. For one, removable noncitizens are not only subject to the deportation dragnet; they are also subject to a widespread criminal law dragnet. They must simultaneously navigate both the immigration enforcement system and other quasi-criminal law enforcement mechanisms. In addition, undocumented migrants live and work alongside others who lack the practical ability to engage in robust workplace advocacy or freely report crime. This, in turn, further erodes access to legal institutions for everyone, not just migrants. It makes it all the more likely that laws designed to protect workers or crime victims will go unenforced.

In particular, Part III argues that in workplaces, immigration enforcement has much in common with the penal techniques of probation and supervised release, which often require individuals to work as a condition of staying out of prison. As in the case of undocumented workers, this enforcement structure gives employers far more power relative to workers. In homes, millions of low-income tenants who live in homes governed by “nuisance” ordinances face the potential for eviction if 911 is called for any reason. This dynamic gives landlords more power relative to tenants, and it also suppresses the reporting of domestic violence and other crimes. In police interactions, those with outstanding warrants have powerful incentives to avoid the police, much like unauthorized migrants who fear arrest. They have incentives to engage in “system avoidance” by laying low or actively avoiding contact with the police.6

By situating immigration enforcement techniques – the full range of enforcement techniques – in context with other enforcement mechanisms, this Article seeks to highlight under-appreciated aspects of immigration enforcement and to open up new possibilities for reform. As Adam Cox and Eric Posner have noted, scholarly discussion of immigration enforcement tends to be dominated by the “first-order” question of who ought to be the subject of immigration enforcement,7 and the related question of what procedures ought to accompany removal decisions. Yet these questions – important as they are – reach only the tip of the deportation pyramid.8 Rather

8 In addition, even if robust procedures are implemented in removal proceedings, they may not achieve the desired results, particularly if Congress continues to underfund immigration courts. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554 (2004) (describing how funding stinginess creates docket
than focusing on removal procedure, a more promising avenue for reform is to evaluate how immigration enforcement decisions affect access to public institutions, such as the courts and the police. This Article argues that immigration enforcement techniques in effect prioritize immigration law over enforcement of employment law, domestic violence law and other criminal prosecutions. It further argues that these enforcement choices involve judgments of relative culpability, and that they ought to be decided through a public process of deliberation, rather than through hidden enforcement mechanisms that operate by restricting access to key institutions.

This Article proceeds as follows. Part I summarizes the value of the deportation-centric approach to immigration enforcement. Part II discusses the deportation dragnet as reaching beyond deportation to include the possibility of arrest, detention, family separation and loss of work. It also shows how immigration enforcement decisions are perpetrated by a range of public and private actors who exercise de facto enforcement power. This, in turn, suppresses socially valuable behavior. Part III situates immigration enforcement alongside other mechanisms that restrict access to legal institutions in the context of workplaces, homes, and in police encounters. These dynamics create significant harm, even when formal enforcement action is never taken. Part IV argues that immigration enforcement decisions should be conceptualized not just in terms of their impact on noncitizens, but also, in terms of their impact on public institutions. It uses “sanctuary” jurisdictions as one model for how to reorient immigration enforcement to promote access to courts and the police.

I. THE DEPORTATION-DOMINANT APPROACH

Immigration expansionists and restrictionists alike often equate deportation with immigration enforcement. There are good reasons for this pressure, which in turn leads to a system of pleas rather than trials). A large body of scholarship in the context of misdemeanors likewise documents how criminal procedures either do not exist or do not work as intended. See, e.g., Alexandra Natapoff, *Gideon Skepticism*, 70 Wash. & Lee L. Rev. 1049 (2013) (the presence or absence of counsel is just one piece of a much larger puzzle of systemic dysfunction).

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focus. Deportation can function as an extraordinarily harsh penalty, one that the U.S. Supreme Court has characterized as resulting in “the loss of all that makes life worth living.”

Immigration scholars and advocates have emphasized deportation’s high stakes, its enmeshed relationship with the criminal process, and its lack of adequate procedures. This Part briefly summarizes the key contributions of the deportation-centric approach, before turning in Part II to how immigration enforcement is far broader than the act of removal.

The stakes are high because deportation can function as a form of punishment. It may be imposed without adequate consideration for the many ties that removable noncitizens have in the United States. In 1996, Congress vastly expanded the types of crimes that trigger mandatory deportation. Around the same time, Congress also removed a form of discretion that had previously enabled sentencing judges to halt deportation on equitable grounds. These statutory changes made many long-term lawful permanent residents subject to deportation on the basis of dated or minor criminal convictions.

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10 Bridges v. Wixon, 326 U.S. 135, 147 (1945) (“[D]eportation may result in the loss of all that makes life worth living.”) (internal quotation marks omitted); see also Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (“[Deportation] may result also in loss of both property and life; or of all that makes life worth living.”).

11 Brief for Amici Curiae Asian American Justice Center, Mexican American Legal Defense and Educational Fund, and Other Immigrants’ Rights Organizations in Support of Petitioner, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 1567358 (discussing long-term unauthorized residents who were deported after minor offenses).

12 See Nancy Morawetz, Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms, 113 Harv. L. Rev. 1936 (2000) (discussing how the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act “drastically changed the consequences of criminal convictions for lawful permanent residents.”) Padilla v. Kentucky, 559 U.S. 356, 361–62 (2010) (“This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was “consistently ... interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.”) The JRAD was abolished in 1990. For an argument for restoring the JRAD, see Jason Cade, Return of the JRAD, 90 N.Y.U. L. Rev. Online 36 (2015).

Beyond the act of deportation itself, immigration scholars have also shown how deportation decisions are deeply enmeshed with the criminal process. Immigrants cases now constitute the majority of federal criminal prosecutions, with deported noncitizens subject to both criminal prosecution and civil removal. The criminal and immigration enforcement systems are entwined at virtually every level, with immigration status affecting decisions such as arrest, plea bargaining, dismissals, bail, and disposition.

As Stephen Legomsky writes, the merger of immigration and criminal law has been “asymmetric” in its incorporation of criminal law enforcement norms but its rejection of its procedural constraints. Since deportation is categorized as civil, it does not trigger the protections of criminal procedure. There is no right to counsel at the government’s expense, and

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16 David Alan Sklansky, Crime, Immigration, and Ad Hoc Instrumentalism, 15 New Crim. L. Rev. 157, 158 (2012) (“Immigration cases now are not only the largest category of federal criminal prosecutions; they are a majority of federal criminal prosecutions.”); Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1281–82 (2010) (“Immigration, which now constitutes over half of the federal criminal workload, has eclipsed all other areas of federal prosecution. Noncitizens have become the face of federal prisons.”).


19 Fong Yue Ting v. United States, 149 U.S. 698, 728-30 (1893) (stating that deportation proceedings have “all the elements of a civil case” and are “in no proper sense a trial or sentence for a crime or offense”)

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

no right to proceedings in any particular venue.\textsuperscript{22} Those who appear in immigration court are typically unrepresented, including children.\textsuperscript{23} As the former President of the National Association of Immigration Judges put it, removal proceedings are an arena where “complex and high stakes matters … [are] adjudicated in a setting which most closely resembles traffic court.”\textsuperscript{24}

In a nod to the death penalty jurisprudence, a host of writers have conceptualized deportation as a “different” penalty.\textsuperscript{25} Just as the death penalty triggers heightened procedures as compared to other criminal cases, they argue, immigration should be treated as uniquely severe civil penalty and trigger heightened protections. This approach focuses on how deportation is experienced, rather than attaching significance to the label of civil versus criminal.

As one way to ameliorate the harshness of deportation, immigration scholars have evaluated how to expand procedural protections, including by promoting advice about immigration consequences of criminal convictions.\textsuperscript{26}

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\textsuperscript{22} Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990) (stating that aliens may obtain counsel at their own expense in removal proceedings). See also Jennifer Chacón, Privatized Immigration Enforcement, Harv. Civ. Rts. 4 (forthcoming).

\textsuperscript{23} Peter L. Markowitz, Deportation Is Different, 13 U. PA. J. CONST. L. 1299, 1301–02 (2011) (“instead the government can whisk immigrants away into detention thousands of miles away from their home where they lack access to the counsel, evidence, and witnesses they need to prevail in their removal proceeding”).

\textsuperscript{24} Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. PA. L. REV. 1, 7 (2015) (By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period from 2007 to 2012.”); Fernanda Santos, It’s Children Against Federal Lawyers in Immigration Court, N.Y. Times (August 20, 2016), available at https://www.nytimes.com/2016/08/21/us/in-immigration-court-children-must-serve-as-their-own-lawyers.html (Aug. 20, 2016) (noting that unlike in in criminal proceedings or child welfare proceedings, children are required to represent themselves in an adversarial proceeding against a government lawyer).


See, e.g., Ingrid V. Eagly, Gideon’s Migration, 122 YALE L.J. 2282, 2288 (2013) (identifying how immigration services are provided in the context of civil and criminal indigent immigration representation).
In a 2010 decision, the U.S. Supreme Court in *Padilla v. Kentucky* took a step toward expanding procedural protections by holding that the Sixth Amendment requires defense attorneys to advise defendants about the immigration consequences of guilty pleas.\(^{27}\)

In sum, the deportation-centric approach focuses on the act of removal itself. It emphasizes how deportation functions as a criminal penalty, including in ways that appear disproportionate and procedurally unfair.

II. THE DEPORTATION DRAGNET

Immigration enforcement encompasses far more than the act of deportation. Even at the height of immigration enforcement efforts in recent years, the United States invested resources sufficient to deport approximately three to four percent of the potentially removable population.\(^{28}\) Without a “massive” expansion of enforcement resources, the vast majority of unauthorized migrants will never actually be deported.\(^{29}\) Treating deportation as the paradigmatic example of immigration enforcement is too narrow. It risks minimizing the true reach of the immigration system. It also risks minimizing the impact of many harms that fall short of deportation: arrest, detention, family separation, and loss of work. These penalties are imposed by a host of different actors – not just federal immigration enforcement officials – who exercise “functional” immigration enforcement power.

The immigration enforcement dragnet alters power dynamics in important ways. It reorders relationships; it places employers, police, and other immigration enforcement agents in positions of power relative to unauthorized migrants. The balance of this Part discusses the reach of the

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28 FY 2016 ICE Immigration Removals, U.S. Immigr. & Customs Enforcement, http://www.ice.gov/removal-statistics (showing that annual removals in the past 10 years ranged from approximately 235,000 to 400,000 removals per year); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge As Immigration Judge*, 51 EMORY L.J. 1131, 1132 (2002) (noting that “[i]n the current system, most noncitizens who are removable because of their criminal convictions are never removed.”)
29 Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1831 (2011) (“A massive and sustained commitment of resources would be necessary—though probably not sufficient—to apprehend the . . . 11.2 million unauthorized migrants who could be apprehended and placed in civil removal proceedings.”)
immigration system, including the impact of immigration enforcement techniques other than deportation itself.

A. Deportation as the Tip of an Enforcement Pyramid

Those formally removed in any given year represent the tip of the immigration enforcement pyramid. The bottom encompasses those who are potentially removable, including unauthorized migrants, as well as those with various temporary forms of legal immigration status. Although immigration debates frequently depict a sharp delineation between “lawful” and “unlawful” migrants, immigration status is not fixed, and “can more accurately be understood as existing along a spectrum.”

Some of those currently without legal status exist in what David Martin has described as “twilight” legal statuses, where they may be eligible for legal status in the future. The key characteristic of those at the bottom of the deportation pyramid is awareness of deportability, as well as uncertainty about the likelihood of deportation.

At the top of the pyramid, the federal government places a relatively small percentage of the removable population in formal proceedings that culminate in deportation. At the bottom of the pyramid, a host of actors – civil and criminal, public and private – exercise the power to trigger deportation and other related harms. These enforcement mechanisms have a profound impact on society at large, particularly given that the vast majority of the unauthorized population remains in the United States long-term. According to research by the Pew Hispanic Center, in 2014, “unauthorized immigrant adults had lived in the U.S. for a median of 13.6 years – meaning that half had been in the country at least that long.”

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31 David A. Martin, Migration Poly Inst., Twilight Statutes: A Closer Examination of the Unauthorized Population 1 (2005) (describing how certain categories of immigrants may have claims to obtain lawful permanent resident status, such as temporary protected status). See also Jeffrey S. Passel & D’Vera Cohn, Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009, at 10 (Sept. 20, 2016) (estimating that as of 2014 approximately 10 percent of the unauthorized population had been granted temporary protection from deportation either under the 2012 Deferred Action for Childhood Arrivals program or as a result of Temporary Protected Status).

32 Anil Kalhan, Immigration Surveillance, 74 Md. L. Rev. 1, 7–8 (2014) (“At the bottom of the deportation pyramid, awareness of deportability “transform[s] a regime of immigration control, operating primarily upon noncitizens at the border, into part of a more expansive regime of migration and mobility surveillance, operating without geographic bounds upon citizens and noncitizens alike.”)

33 Jeffrey S. Passel & D’Vera Cohn, Overall Number of U.S. Unauthorized Immigrants...
unauthorized residents, “fully 78% had lived in the U.S. for 10 years or more as of 2014, and only 7% had been in the U.S. for less than five years.”

Unsurprisingly, many form ties with local communities and with U.S. citizens over time. For removable noncitizens, their families, and others with whom they form close associational ties, awareness of the possibility of deportation – not just actual act of deportation – plays a key role in affecting daily decision-making.

B. Enforcement Techniques: Arrest, Detention, Family Separation, Loss of Work

A host of enforcement techniques other than deportation operate at the bottom of the immigration enforcement pyramid. Enforcement mechanisms include arrest, detention, family separation, and loss of work. These techniques work in tandem with deportation. In a relatively small subset of cases, the possibility of prolonged detention or other harm may lead deportable migrants to “voluntary” removal. In many other cases, these enforcement techniques create powerful incentives for removable noncitizens to lay low and avoid drawing the attention of enforcement officials.

Arrest

Arrest is a crucial aspect of immigration enforcement. Arrests – either by civil immigration officials or by criminal law enforcement agents – matter because they may trigger the process of deportation, and because they create harm in their own right.

Every custodial criminal arrest now triggers immigration screening. Since 2013, the Secure Communities program has operated as a nationwide information-sharing arrangement between local police, the FBI, and the Department of Homeland Security (DHS). When an arrested individual is booked, his fingerprints are taken and shared with DHS, which then cross-checks the fingerprints against a separate immigration-related fingerprint


34 Id. at 7.

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

36 Although immigration arrests are civil in nature, for practical purposes, the experience of arrest by ICE may be experienced in exactly the same way as arrest by police. Immigration arrests, however, do not trigger the full protections of criminal procedure. Evidence that is unlawfully obtained, for instance, may be used in removal proceedings. INS v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984).
database and screens for unauthorized presence. Any arrest, regardless of the charge, and regardless of whether it is dismissed, can thus trigger deportation.

In addition, some local police departments also directly engage immigration enforcement through joint initiatives like the 287(g) program, which deputizes police officers as immigration enforcement agents. Federal criminal law also reaches a range of conduct related to immigration, such as by prohibiting the use of false documents to obtain work, misdemeanor illegal entry, and felony illegal entry following deportation. States have also passed criminal laws relating to immigration.

Even when it does not trigger deportation or lead to a criminal conviction, arrest as a means of immigration enforcement imposes other harm, particularly for those who have committed no offenses unrelated to immigration. It imposes dignitary harm through the process of being handcuffed, transported, fingerprinted, photographed, questioned, and detained. It can impose a financial cost, through arrest fees, booking fees,

40 Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act, commonly known as S.B. 1070, is one well-known recent example. In Arizona v. United States, the U.S. Supreme Court struck down several provisions of the law, including a provision that gave local police officers the ability to conduct warrantless arrests of anyone “the officer has probable cause to believe… has committed any public offense that makes the person removable.” For a detailed discussion of S.B. 1070, see Kerry Abrams, Plenary Power Preemption, 99 VA. L. REV. 601, 626-34 (2013).
41 See, e.g., Josh Bowers, Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of A "Pointless Indignity", 66 STAN. L. REV. 987, 989 (2014) (discussing the dignitary harm imposed by arrest); Rachel A. Harmon, Why Arrest?, 115 MICH. L. REV. 307, 314-15 (2016) (observing that arrested individuals are “questioned about their home address, birth place, and medical and psychological conditions. They are likely to be photographed and fingerprinted, and to have their clothing and personal property taken. They will often be subjected to a strip search.”)
and possible vehicle impoundment fees. Arrest in the immigration context also creates a well-documented risk of racial profiling, with “appearance of Mexican ancestry” used a proxy for immigration status in the context of “border” stops that can reach up to 100 miles within the United States.

These dynamics create lasting harm to immigrant communities, not just arrested individuals. They create mistrust and may lead to a reluctance on the part of immigrants to cooperate with law enforcement by serving as witnesses and reporting crime.

**Detention**

Beyond arrest, detention is a key feature of immigration enforcement, one that for some, “represents a deprivation as severe as removal itself.” Immigration detention is categorized as civil; unlike criminal detention, it is not intended to be punitive. It is instead intended to prevent flight risk. In practice, it is indistinguishable from criminal detention, with immigrant detainees at times housed in the same prisons and jails as prisoners.

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43 United States v. Brignoni-Ponce, 422 U.S. 873, 874 (1975) (holding that “appearance of Mexican ancestry” provides sufficient basis for a roving border patrol stop); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543, 1545–46 (2011) (discussing how police use race as a proxy for citizenship in arrests because “Latino identity is deemed relevant to the question of whether a person is undocumented”); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. Chi. L. Rev. 87, 89 (2013) (empirical study of the rollout of Secure Communities finding that “early activation in the program correlates strongly with whether a county has a large Hispanic population” as opposed to crime control).

46 Indeed, citing a shortage of bed space, ICE recently announced plans to transfer over a thousand detainees to federal prison. Eli Rosenberg, *So Many Immigrants are Being Arrested that ICE is Going to Transfer 1,600 to Federal Prisons*, Wash. Post (June 7, 2018), available at [https://www.washingtonpost.com/news/post-nation/wp/2018/06/07/so-many-immigrants-are-being-arrested-that-ice-is-going-to-transfer-1600-to-federal-prisons/?utm_term=.8b6caa17934e; See also César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 Cal. L. Rev. 1449, 1451 (2015) (“Whether characterized as a matter of civil or criminal law, and whether carried out by federal, state, or local officials, every type of immigration law enforcement shares a common central feature: imprisonment.”); César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. Rev. 1346, 1349 (2014); Dora Schriro, a former
Detention affects far more than those deported. In the past thirty years, immigrant detention has vastly expanded. Many detainees are held under prolonged and “mandatory” detention. The use of immigration detention continues to increase rapidly. ICE now reports an average daily detained population of close to 38,000, and the Trump Administration recently sought to increase funding to support an average daily population of 48,000 adults.

The threat of prolonged detention – either immigration detention or criminal detention – can lead some detainees to choose “voluntary” removal. For instance, after a 2008 immigration raid in Postville, Iowa, it took only four days before 270 workers signed “‘exploding’ plea agreements, entered binding felony guilty pleas in court, and received criminal sentences.” The workers agreed to pleas in part because they were aware that they would otherwise face continued detention. Indeed, “some workers [spoke] up, asking for immediate deportation instead of the insistence on incarceration.” As Juliet Stumpf has discussed, from the perspective of the workers, the process associated with deportation – arrest, detention, prosecution – functioned as a form of punishment. In resolving their cases rapidly, some of the removed workers entered into “stipulated removal orders” where they agreed to voluntary removal, as well as to waive “any and all immigration claims in the criminal plea,” including potential claims to asylum or to remain lawfully by seeking a visa for victims of trafficking.

director of the Office of Detention Policy and Planning, stated, “Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways.” Dora Schriro, Immigration Detention Overview and Recommendations 4 (2009).

47 Alina Das, Immigration Detention: Information Gaps and Institutional Barriers to Reform, 80 U. CHI. L. REV. 137, 137–38 (2013) (documenting the increase in detention over time.)

48 Alina Das, Immigration Detention: Information Gaps and Institutional Barriers to Reform, 80 U. CHI. L. REV. 137, 140 (2013) (noting that some detainees are held for years pending removal proceedings or the execution of a removal order, and those held under “mandatory” detention lack the right to an individualized bond hearing regarding their flight risk).


51 Juliet Stumpf, The Process is the Punishment in Crimmigration Law at 59

52 Id.


54 Id. Victims of Criminal Activity: U Nonimmigrant Status.
Family Separation

Family relationships play a central role in immigration law. The existence of family ties in the United States constitutes part of the “pull” factor of immigration.\(^{55}\) Similarly, the threat of being separated from family plays an important role in immigration enforcement. Unauthorized or “mixed” immigration status families with minor children in particular report being keenly aware of the possibility of separation.\(^{56}\)

As in the criminal context, any arrest, including a minor one, can trigger family separation. Immigration-related arrests, however, create heightened susceptibility to family separation, and they also magnify the likelihood that children will be left without adequate supervision. For one, in the criminal context, arrest typically occurs individually. By contrast, interior immigration enforcement has periodically occurred on a mass scale, with workplace raids that round up and apprehend hundreds of suspected unauthorized workers at a time. This, in turn, magnifies the likelihood of prolonged family separation. When police make arrests, they are supposed to follow protocols designed to ensure that minor children are provided with social services support.\(^{57}\) Similar protocols are commonly not followed in workplace raids, given factors such as language barriers and the possibility that arrested workers may be transported and detained in remote facilities.

A lawsuit challenging a factory raid in Massachusetts over a decade ago remains salient in illustrating these dynamics. ICE agents arrested over

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\(^{55}\) See, e.g., Kerry Abrams & R. Kent Piacenti, Immigration's Family Values, 100 VA. L. REV. 629, 630 (2014) (“The vast majority of immigrants who acquire permanent residency each year do so based on family ties.”).


\(^{57}\) See Eisha Jain, Arrests As Regulation, 67 STAN. L. REV. 809, 841-42, fn 70-74 (2015) (citing and discussing protocols that police departments take to notify social services in order to care for minor children after a custodial parent’s arrest).
300 employees, placed them in custody for civil immigration violations, and transported them to detention in Texas. The workers alleged that child welfare agencies were not given sufficient notice of the raid, which left minor children without adult supervision. Recent raids have taken place on an even larger scale and have exhibited similar dynamics. Immigration advocates have documented prolonged family separation, with mass arrest and detention leaving children of workers “stranded at daycare centers and with babysitters,” landlords, or relatives.

Family separation is typically depicted as a collateral or “third party” harm. According to this view, family separation is not intended as a means of deterrence or punishment in itself. Instead, it is presented as an ancillary, undesirable, and inevitable aspect of the enforcement process. That is no longer the case. The Trump administration expressly appropriated family separation as a means of deterrence. During a six-week period in April and May 2018, the Department of Homeland Security released data that it separated nearly 2,000 children from their parents. The numbers are unprecedented in recent history. By way of comparison, during a spike in unlawful entry during the summer of 2013, when Border Patrol apprehended over six thousand families, less than 500 were transferred to ICE custody for

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58 Aguilar v. U.S. Immigration & Customs Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 6 (1st Cir. 2007).
59 Id.
60 See, e.g., Raquel Aldana, Of Katz and "Aliens": Privacy Expectations and the Immigration Raids, 41 U.C. DAVIS L. REV. 1081, 1093 (2008) (describing a raid on six Swift & Co. meatpacking plants, where “ICE arrested 1,282 workers on immigration violations and some existing criminal warrants. Most workers arrested were placed in immigration removal proceedings. About 240 workers were charged criminally.”)
61 See, e.g., Samantha Schmidt, ‘Utter Chaos’: ICE arrests 114 workers in immigration raid at Ohio gardening company, Wash. Post (June 6, 2018) (mass raid carried out by 200 federal immigration officials that resulted in 144 arrests); Maria Sacchetti, ICE raids meatpacking plant in rural Tennessee: 91 immigrants arrested, Wash. Post (April 6, 2018); Elizabeth Oglesby, U.S. Communities can suffer long-term consequences after immigration raids, (June 18, 2018).
62 Darryl K. Brown, Third-Party Interests in Criminal Law, 80 TEX. L. REV. 1383 (2002) (describing “third party interests” in criminal law and offering the interests of families of a criminal defendant as an example of a “collateral consequence visited upon others when an offender is punished”).
64 Michael Scherer & Josh Dawsey, Trump cites as negotiating tool his policy of separating immigrant children from their parents Wash. Post (June 15, 2018).
any purpose.\textsuperscript{65} The 2018 family separations involved more than just those apprehended during the course of unlawful entry. They also included asylum seekers who entered lawfully by appearing at a port of entry and who articulated a credible fear of persecution.\textsuperscript{66} While the recent family separations have operated on the border, they have feedback effects on the interior as well. They make potentially removable noncitizens even more attuned to the risk of both separation and detention.

\textit{Loss of Work}

Loss of work appears minor when compared to enforcement techniques such as detention. Yet because work constitutes a significant “pull” factor for unauthorized migrants, loss of work itself may be perceived as a significant penalty. The majority of the 11 million unauthorized migrants who are present in the United States work, despite federal prohibitions on employment.\textsuperscript{67} They are concentrated in low-wage industries, such as service occupations, construction, and production jobs.\textsuperscript{68} For workers who migrate with the intention of seeking jobs to support family overseas, loss of work itself is a significant harm, one that they will go to significant measures to avoid.

\textit{C. Multiple Enforcers, Uncertainty, and Enforcement Tradeoffs}

Just as deportation is only one aspect of immigration enforcement, the federal immigration bureaucracy is only one of many institutions that effectuates immigration enforcement decisions. Various public and private

\textsuperscript{65} Declaration of Ronald Vitiello, Flores v. Lynch, (August 6, 2015).

\textsuperscript{66} Karoun Demirjian, \textit{GOP, Democrats are outraged but at odds over ending family separation at the border}, Wash. Post. (June 17, 2018) (quoting Republican Senator Susan Collins as noting “numerous credible media accounts showing that” parents who appear at a legal port of entry and claim asylum are being separated from their children); Miriam Jordan, \textit{Family Separation at Border May Be Subject to Constitutional Challenge, Judge Rules}, N.Y. Times (June 6, 2018) (discussing the case of an asylum seeker who appeared at port of entry and was forcibly separated from her seven year old daughter, who was placed in separate detention facility, for a period of four months); Joel Rose, \textit{Doctors Concerned About ‘Irreparable Harm’ to Separated Migrant Children}, N.P.R. (June 15, 2018).

\textsuperscript{67} Stephen Lee, \textit{Monitoring Immigration Enforcement}, 53 ARIZ. L. REV. 1089, 1090 (2011) (noting an estimated 8 million of the 11 million migrants who are present in the United States without authorization work, even though employers are prohibited from hiring them)

actors, such as police, employers, and housing providers, play a key role in enforcing immigration law.\textsuperscript{69}

Proponents of this approach, the most prominent of which is Kris Kobach, argue that the use of multiple enforcement agents provide a cost-effective way of conducting interior immigration enforcement. While border enforcement tends to receive the lion’s share of attention, a significant percentage of the removable population enters lawfully and then remains without authorization.\textsuperscript{70} Kobach has described state and local police as “force multipliers” necessary to conduct interior immigration screening. They also operate in a cost-effective way, given that they are not on the federal payroll.\textsuperscript{71}

The force-multiplier rationale overlooks many hidden costs of using multiple enforcement agents. First, the incentives of key public and private actors who exercise \textit{de facto} immigration enforcement authority do not align with the stated aims of federal immigration enforcement officials. This, in turn, creates the potential for coercion, such as when private employers hire undocumented workers and selectively threaten to report those who seek to organize for labor protections. Second, some enforcement initiatives, such as various local anti-immigrant ordinances, change the behavior of key enforcement actors. They either mandate or reward racial profiling, such as by requiring landlords to screen for undocumented immigration status on the basis of Mexican appearance. Third, even when \textit{de facto} immigration enforcers adhere to federal immigration enforcement priorities and avoid

\textsuperscript{69} Huyen Pham, \textit{The Private Enforcement of Immigration Laws}, 96 GEO. L. J. 777 (2008) (discussing private immigration enforcement responsibilities to employers, transportation providers, and landlords).

\textsuperscript{70} Up to sixty percent of the unauthorized population enters lawfully but remains without authorization. [cite] Pratheepan Gulasekaram, \textit{Why A Wall?}, 2 UC IRVINE L. REV. 147 (2012) (summarizing the arguments against a border wall, namely, that fortification is at best “costly and ineffectual in accomplishing its stated goals; at worst, … it causes significant death without any deterrence”); Anil Kalhan, \textit{The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement}, 41 U.C. DAVIS L. REV. 1137, 1157 (2008) (summarizing rationales behind interior enforcement).

discriminatory enforcement, the use of multiple agents contributes to creating profound uncertainty about how immigration enforcement actually takes place. Migrants are keenly aware of the possibility of arrest, detention, or family separation, but they have limited information about how those harms may be triggered. The use of multiple enforcers in effect creates an immigration enforcement panopticon. It creates incentives for unauthorized migrants to lay low and avoid drawing attention to themselves. This, in turn, chills a range of socially useful behavior, including the enforcement of laws unrelated to immigration. The balance of this Part discusses these dynamics.

First, the use of multiple enforcement agents means that as a practical level, immigration enforcement is carried out by agents who owe no fidelity to the stated goals of federal immigration enforcement officials. As Stephen Lee has discussed, de facto immigration enforcers such as employers exercise functional enforcement authority, given that federal law requires them to check immigration status. The goal is to reduce the “pull” factor of work and to deter undocumented workers from seeking work without authorization.72 Employers, however, have incentives to hire unauthorized workers, underpay them, and strategically threaten immigration enforcement if undocumented workers seek to organize.73 As Lee has explained, employers who take this approach make the calculation that the economic benefits are worth the (unlikely) risk of being sanctioned for hiring unauthorized workers.74

For undocumented workers, the threat of retaliatory reporting is ever-present. As a formal matter, unauthorized workers are entitled to protection under the Fair Labor Standards Act and the Occupational Safety and Health Act.75 As a practical matter, unauthorized workers routinely waive these protections. Employer enforcement changes the balance of power between employer and employee. It gives employers more leverage relative to workers. Workers in practice lack the ability to take advantage of their substantive rights.76

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73 For a discussion of these dynamics in detail, see, e.g., Stephen Lee, Private Immigration Screening in the Workplace, 61 STAN. L. REV. 1103 (2009).
74 Id.
76 Stephen Lee, Screening for Solidarity, 80 U. CHI. L. REV. 225, 227 (2013) (discussing how, in theory at least, legal protections permit “unauthorized migrants may hold bad-actor employers liable for harms incurred during the course of work they were not authorized to undertake in the first place”); Stephen Lee, Policing Wage Theft in the Day Labor Market, 4 UC IRVINE L. REV. 655, 656 (2014).
Notably, this dynamic reaches well beyond exploitative employers. Workers who perceive a risk to reporting dangerous working conditions are unlikely to do so, even if the employer is unaware of the condition and would correct it if notified. Employer enforcement raises the stakes of every workplace interaction, and it does so in a way that has the effect of chilling valuable communication between employers and employees.

In the employment context, these harms may be an unintended byproduct of a federal immigration enforcement structure that makes employees “private” immigration screeners. Yet in other contexts, such as with local “anti-immigrant” ordinances, legal rules appear designed to mandate or incentivize discriminatory conduct. Anti-immigrant ordinances in recent years have “[made] it illegal for undocumented immigrants to loiter in public spaces, occupy housing, procure employment, or conduct business transactions.” A number of localities have passed ordinances that require landlords to participate in the process of checking immigration status and to deny housing to those who appear to be undocumented. Thus, a second cost to using multiple enforcers is that it may promote racial profiling, including in ways that violate the Fair Housing Act and other anti-discrimination law. In some cases, this dynamic may be intentional. In other cases, it may be in advertent, with de facto enforcement agents unaware of how to check immigration status in a way that is not overbroad.

A third cost is that these techniques create profound uncertainty about the reach of enforcement. Precisely because immigration enforcement is outsourced to so many agents, enforcement decisions are sloppy. They can

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77 Id.

80 Huyen Pham raises this point in the context of transportation providers who have been required by some local anti-immigrant ordinances to check immigration status. Huyen Pham, The Private Enforcement of Immigration Laws, 96 GEO. L. J. 777 (2008).
be inaccurate, such as when they sweep in those who are not removable.\textsuperscript{81} They can be unlawful, such as when suspected unauthorized migrants are detained in violation of the Fourth Amendment.\textsuperscript{82} Immigration enforcement officials may also offer little or no information about discretionary enforcement choices.\textsuperscript{83} This makes enforcement decisions appear arbitrary. It can create profound anxiety and uncertainty about the reach of enforcement. This, in turn, chills a host of socially useful behavior. For instance, an important body of empirical work examines how undocumented migrants report engaging in “system avoidance,” where they avoid interactions with officials that they perceive as immigration enforcers. For instance, some undocumented migrants report not taking children – including U.S. citizens – to health care providers, because they fear that either the children or parents may be reported to immigration enforcement officials.\textsuperscript{84}

Finally, these dynamics create enforcement tradeoffs. The deportation dragnet does not take place in a vacuum; when unauthorized migrants choose to avoid the police, that results in the underenforcement of other laws unrelated to immigration.\textsuperscript{85} Prosecution of crimes such as wage theft and domestic violence depend on victims coming forward and serving as witnesses. When migrants are not willing to reach out to the police, they

\textsuperscript{81} Aguilar v. U.S. Immigration & Customs Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 6 (1st Cir. 2007) (in a raid that took more than 300 employees into custody for civil immigration violations, “[t]he ICE agents cast a wide net and paid little attention to the detainees' individual or family circumstances, . . . [and subsequently] releas[ed] dozens of employees determined either to be minors or to be legally residing in the United States.”); Amy B. Wang, Two Americans were detained by a Border Patrol agent after he heard them speaking Spanish, Wash. Post. (May 21, 2018).


\textsuperscript{83} Maria Sacchetti, ICE raids meatpacking plant in rural Tennessee; 91 immigrants arrested, Wash. Post (April 6, 2018) (explaining that in a recent workplace raid in Tennessee, federal immigration enforcement officials arrested ninety-seven immigrants on single day, then released thirty-two without explanation).


\textsuperscript{85} Orde F. Kitttrie, Federalism, Deportation, and Crime Victims Afraid to Call the Police, 91 Iowa L. Rev. 1449, 1461 (2006) (discussing how the threat of deportation may prevent noncitizens from reporting crime).
become targets for criminal activity. This dynamic also harms communities, by leading to the underenforcement of laws that local police and prosecutors deem to be law enforcement priorities.

III. PARALLELS BETWEEN IMMIGRATION AND OTHER ENFORCEMENT MECHANISMS

The deportation dragnet operates in tandem with an even wider criminal law dragnet. Immigration scholars have recognized how immigration enforcement is deeply intertwined with federal criminal law enforcement. But they have thus far not placed immigration enforcement in context with criminal enforcement regimes that regulate low-level crime. This oversight is surprising, given the many parallels between immigration enforcement and other quasi-criminal regulatory techniques. This Part situates immigration enforcement in the context of selected low-level criminal enforcement regimes that operate in workplaces, in homes, and in street encounters with police.

Examining these regimes together is important. For one, undocumented migrants who are subject to the deportation dragnet are simultaneously subject to other enforcement dragnets as well. Low-income tenants, for instance, may be vulnerable to the threat of eviction because of their immigration status, as well as because of overbroad enforcement techniques unrelated to immigration. They simultaneously navigate both the immigration enforcement system and various other quasi-criminal law enforcement mechanisms at once.

In addition, undocumented migrants live and work alongside many others who lack the practical ability engage in robust workplace advocacy or freely report crime. Perhaps the deportation dragnet would not matter much in practice if other workers or community members stepped in and reported crime or exploitative employers on their behalf. Yet many other communities experience a similar chilling effect in terms of their access to police and to the courts, though for different reasons. This, in turn, further erodes access to legal institutions for everyone, not just migrants.

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87 This oversight perhaps stems from a broader tendency to focus on federal criminal prosecution and federal criminal prosecution, as opposed to misdemeanors, as the paradigmatic example of criminal law enforcement. See Alexandra Natapoff, Misdemeanors, 85. S. Cal. L. Rev., 1313 (2012).
This Part examines three non-immigration enforcement mechanisms that bear structural similarities to the deportation dragnet. Specifically, it focuses on probationers who are subject to work requirements as a condition of avoiding jail; tenants who live in housing regulated by “nuisance” ordinances, where they can be subject to eviction on the basis of calls to the police; and those with outstanding criminal justice debt, who have powerful incentives to avoid the police. There are of course important ways in which each of these examples differ from each other and from immigration enforcement. My argument is not that these regimes are all alike, but rather that they share a similar enforcement structure. At the level of substantive law, each regime operates very differently. But on a structural level, similarities emerge: in each instance, multiple public and private agents – police, employers, and landlords – wield *de facto* enforcement discretion. They have the ability to trigger serious harm, even if it is not the most serious harm of incarceration or deportation. This dynamic reorders power dynamics in far-reaching ways. Like removable migrants, groups like probationers and tenants experience substantial uncertainty about the scope of their legal entitlements, and they face practical barriers to exercising their rights. These dynamics operate to further erode the ability of legal institutions to promote safe workplaces and to facilitate the reporting of crime such as domestic violence.

This Part describes how quasi-criminal enforcement mechanisms operate outside the context of deportation. My goal is to offer a snapshot of selected enforcement mechanisms that parallel the deportation dragnet. Part IV then turns to how these dynamics combine to restrict access legal institutions such as the police and the courts.

*A. Employment*

Undocumented migrants are not the only ones who waive substantive legal protections in the workplace out of a fear of triggering a serious sanction. Parents who owe child support, as well as an estimated 5 million people who are on probation or parole, risk prison time if they fail to meet work requirements.88 Employers frequently work with probation officers to ensure compliance with work requirements. As in the immigration context, this dynamic creates powerful incentives for workers to avoid workplace advocacy.

Work requirements are a common condition of probation.\textsuperscript{89} Some states also compel parents to work if they owe child support.\textsuperscript{90} The rationale for work requirements has evolved over time. In the child support context, work requirements are imposed to try to deter parents from shirking their support obligations. In the probation context, work requirements were “initially conceived as a way to reintegrate offenders into the community through a close interpersonal relationship between [the enforcement] agent and offender.”\textsuperscript{91} The theory was that work itself – even when court-ordered and enforced with the threat of prison – would serve a rehabilitative function. As Jonathan Simon and Malcolm Feeley have observed, this rationale evolved to a “managerial” one, with supervision of work requirements used as a “monitoring technique” designed to “detect high rates of technical violations” and lead to further discipline.\textsuperscript{92}

Both probation officers and employers monitor compliance with work requirements. Probation officers have the ability to make unannounced inspections in the homes and workplaces.\textsuperscript{93} They have the ability to interview employers to assess compliance. Employers in some cases also operate like probation officers themselves, and they report directly to courts. A judge in a Syracuse drug court put it this way: “Your employer is now on a team of people who are reporting to me. When he calls me up and tells me that you are late, or that you’re not there, I’m going to send the cops out to arrest you.”\textsuperscript{94} Both the worker and the employer are aware that the employer has the ability to trigger a serious penalty. The system essentially “deputizes” the employer as a probation officer.\textsuperscript{95}

\textsuperscript{90} United States v. Ballek, 170 F.3d 871, 874 (9th Cir. 1999) (“We conclude that child-support awards fall within that narrow class of obligations that may be enforced by means of imprisonment without violating the constitutional prohibition against slavery.”)
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 301.
\textsuperscript{94} James L. Nolan, Jr., \textit{Therapeutic Adjudication}, 39 SOCIETY 29, 32 (2002).
\textsuperscript{95} NOAH ZATZ, ET. AL., \textit{GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT}, 12 (March 2016) available at https://www.labor.ucla.edu/publication/get-to-work-or-go-to-jail; Noah D. Zatz, \textit{A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond}, 39 SEATTLE U. L. REV. 927, 930 (2016) (explaining how child support enforcement effectively creates requirements that debtors work or risk criminal sanctions).
Those subject to work requirements thus have powerful incentives not to report dangerous working conditions, out of a fear of retaliatory termination or because employers can trigger parole revocation by providing an adverse report. As stated in a report by the UCLA Labor Center, the workers are aware that they must “get to work or go to jail.”96 The vast majority of affected workers are low-income, with typical earnings of less than $1,000 per month. That makes the threat of jail time – even if for a relatively short time – especially serious. It can trigger a cycle of punishment, lost work, and homelessness. The threat of jail time is not an idle one: an estimated 9,000 people are currently incarcerated for violating work requirements, and 32,000 are incarcerated for violating a requirement to pay down a debt.97

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

B. Housing

Immigration scholars have been keenly attuned to how local anti-immigrant ordinances, such as the famous Hazelton, Pennsylvania ordinance, restrict access to housing.98 They have not, however, considered how quasi-criminal enforcement techniques also affect access to private housing, separate and apart from immigration enforcement. This subsection discusses

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97 Id.
one particularly pervasive example of the nuisance ordinance, which grants landlords and police significant control over tenants in private housing.

Nuisance ordinances are designed to be a cost-effective means of removing tenants who cause disturbances in rental homes. As in the case of anti-immigrant ordinances, they give landlords significant ability to intrude into the private living arrangements of tenants, which, in turn, can lead to various forms of unlawful discrimination. Nuisance ordinances offer one example of how undocumented migrants navigate multiple enforcement regimes at the same time; even as they experience overt discrimination on the basis of immigration status, they may also experience other forms of unrelated discrimination. Nuisance enforcement also further reveal hidden costs to the “force-multiplier” phenomenon.

Approximately 2000 nuisance ordinances exist in the United States. They have received scant attention by legal scholars, but they represent an important legal intervention. Found in areas that experience high levels of police activity, the ordinances permit, or in some cases require, landlords to evict tenants after calls to the police. If multiple 911 calls are placed about a particular residence in a certain window of time, the landlord will receive a letter from the police indicating that the subject property is a “nuisance” that must be “abated,” including by eviction. The particulars of the ordinances vary by jurisdiction: some localities send nuisance abatement letters after three or more 911 police calls in a thirty-day window, while others require only two or more calls within a one year window. Depending on the locality, police have broad discretion to categorize conduct as a nuisance. For instance, some ordinances include “crime free” provisions.


100 In contrast to the dozens of articles on immigration-criminal law enforcement, I am only aware of a handful of law review articles that discuss nuisance ordinances. See Sarah Swan, Home Rules, 64 DUKE L.J. 823 (2015); Salim Katach, A Tenant's Procedural Due Process Right in Chronic Nuisance Ordinance Jurisdictions, 43 HOFSTRA L. REV. 875 (2015); Amanda K. Gavin, Chronic Nuisance Ordinances: Turning Victims of Domestic Violence into "Nuisances" in the Eyes of Municipalities, 119 PENN. ST. L. REV. 257 (2014).


102 Id. At 122 (discussing Milwaukee); Gretchen Arnold & Megan Slusser, Silencing Women’s Voices: Property Laws & Battered Women, Law & Social Inquiry 2-3 (2015) (noting that the St. Louis, Missouri ordinance required landlords to abate a nuisance after 2 calls to 911 in a one-year period).
which either require or permit evictions if a tenant or guest “allegedly engages in criminal activity on or near the property, regardless of whether the resident was a victim.” Others are broadly worded to permit eviction on the basis of offenses such as littering and excessive noise. Landlords risk penalties – “fines, property forfeiture, or even incarceration,” if they do not “abate the nuisance,” such as by evicting problem tenants.

As with immigration enforcement techniques, nuisance enforcement is designed as a “force multiplier.” Landlords are expected to deal with the nuisance precisely because it does not merit police resources. It is intended as a cost-effective way of dealing with low-level offenses. Yet downgrading the offense creates high stakes for tenants, who have much to lose by eviction. In expensive cities, tenants face extraordinary difficulty in finding affordable housing. To put it mildly, it is a landlord’s market. Over eleven million families spend over half their income on housing, and some spend up to eighty percent of their income on housing. Evicted tenants face the possibility that they may be unable to find alternative housing and become homeless. This is a particularly salient concern for families with children, who have more difficulty finding affordable housing than adults without children. Moving itself is also expensive, particularly for those with little

105 Desmond & Valdez, at 122.
106 Desmond & Valdez, at 120.
109 Pam Fessler, Welcome to Rent Court, Where Tenants Can Face a Tenuous Fate, N.P.R. (March 28, 2016).
110 Id.
111 Matthew Desmond & Carl Gershenson, Who gets evicted? Assessing individual, neighborhood, & network factors Social Science Research 1, 11-12 (2016), available at https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.ssr_.2016.pdf (empirical study finding evidence of discrimination the basis of family status and theorizing that landlords may have an interest in “replacing larger households with smaller ones, or families with childless tenants [b]ecause children can cause added stress on property, disturb neighbors, and attract unwanted scrutiny by child welfare agents or law enforcement.
disposable income. For all these reasons, tenants have powerful incentives to avoid triggering potential nuisance enforcement, even when it comes at a significant personal price.

Nuisance enforcement alters power dynamics between tenants, the police, and landlords in far-reaching ways. Tenants are entitled to police protection, but nuisance enforcement creates an incentive not to report crime. It has a demonstrable chilling effect on the reporting and prosecution of domestic violence. Some domestic violence victims make the rational decision to forgo police protection in order to avoid eviction. Lakisha Briggs, for instance, chose not to call 911 after being assaulted in her home, because her landlord warned her that one additional call to 911 would result in her eviction. This example is not an isolated one. An empirical study by Matthew Desmond and Nicol Valdez in Milwaukee over a two-year period found that domestic violence calls disproportionately triggered nuisance abatement. Nuisance enforcement also encourages landlords to interfere with private living arrangements, with some landlords directly informing tenants not to call 911 except in “life-threatening” situations or informing them to oust bad boyfriends who cause domestic disturbances.

Absent the ordinance, a landlord would play no legitimate role in regulating when a tenant might call the police. The landlord would also need to demonstrate some type of lease violation if she wanted to evict a tenant for domestic disturbances. Nuisance enforcement, however, eases the path to eviction. It allows landlords to avoid establishing in landlord-tenant court that there is a basis for the eviction. Thus, the ordinances place landlords in a position of power relative to tenants. Landlords may use that power in a way

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113 Desmond & Valdez at 132 (quoting a landlord as informing tenants “You can’t be calling the police because your boyfriend hit you again. They’re not your big babysitter. It happened last week, and you threw him out. But then you let him back in, and it happens again and again. Either learn from the first experience or, you know, leave. Don’t take him back and get hit because you tell him, I don’t know, ‘I don’t want to sleep with you.’). Other landlords reported explicitly informing tenants that they would begin eviction proceedings if the tenants called the police in “non-life threatening” situations.)
114 Id. at 131.
115 For a discussion of the process of eviction, see, e.g., Pam Fessler, Welcome to Rent Court, Where Tenants Can Face a Tenuous Fate, N.P.R. (March 28, 2016).
that deters people from seeking police protection. These dynamics unfold against a backdrop of legal regulation where tenants are often practically unable to assert their legal rights, given understaffed housing courts and lack of access to counsel in housing court.

Like anti-immigrant ordinances, nuisance ordinances also facilitate unlawful discrimination. Desmond and Valdez found that “properties located in black neighborhoods were more likely to receive nuisance citations for domestic violence” even after controlling for relevant factors, such as the overall presence of domestic violence calls. “All else being equal, a property located in an 80 percent black neighborhood . . . was over 3.5 times more likely to receive a nuisance citation” than other properties.116

In sum, the nuisance enforcement context has important structural parallels to certain aspects of the deportation dragnet. It operates by appropriating private landlords as enforcement agents. It creates uncertainty on the part of tenants about the scope of their rights, and it chills socially desirable behavior, such as crime-reporting. These dynamics can operate in tandem with immigration enforcement, with undocumented tenants simultaneously navigating multiple opaque enforcement systems.

C. Police Encounters

In addition to undocumented migrants, a number of other populations have strong incentives to avoid contact with the police. Probationers, for instance, face the possibility of probation revocation for minor law enforcement encounters, such as speeding or a parking ticket – or even a mere complaint about a potential legal violation.117 Similarly, those who owe criminal justice debt also have powerful incentives to avoid the police. Despite the constitutional prohibition on “debtor’s prisons,” debtors frequently experience punishment as the result of their inability to pay debt.118 This dynamic unfolds in two ways. First, the criminal process is

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116 Desmond & Valdez, supra note 99 at 121.
117 Fiona Doherty, Obey All Laws and Be Good: Probation and the Meaning of Recidivism, 104 Geo. L.J. 291, 301 (2016)
used to punish failure to pay certain types of debt, such as child support and penal debt. Second, those who owe child support and penal debt—broadly defined as “debt stemming from civil and criminal penalties and fines, prosecution costs, court fees, usage fees, and interest,”—find that unlike many other categories of debt, these debts are not dischargeable in bankruptcy court.119 Thus, debtors have greatly restricted remedies if they are unable to pay.

For debtors, these dynamics magnify greatly the stakes of arrest. Unpaid debt triggers a downward spiral. It may trigger arrest warrants, which can lead to jail time or suspension of a driver’s license, which in turn can lead to loss of work and additional debt.120 The cycle then repeats itself.

This is the pattern that unfolded for Walter L. Scott, who was shot in the back and killed when he fled from police in 2015. Scott fled after he was pulled over for a broken taillight; he was not involved in any criminal activity. Scott did, however, have good reason to avoid arrest. Scott’s child support debt had previously led to an outstanding criminal warrant. He had lost what he described as the “best job [he] ever had” when he was jailed for two weeks for unpaid child support.121 His awareness of the possibility of being jailed again due to the debt may have led him to flee from the police, which in turn, led to police officer’s decision to use deadly force. His case is not an anomaly. According to a recent report, “[i]n major cities, 5% of all fathers are incarcerated for falling behind on child support.”122

A number of jurisdictions impose escalating penalties, including revocation of drivers’ licenses, for failure to pay fines and fees.123 In some


122 NOAH ZATZ ET. AL., GET TO WORK OR GO TO JAIL 2 (2016).

jurisdictions, suspended license cases alone constitute thirty percent of the low-level criminal court docket. The prospect of losing a driver’s license – particularly in areas inaccessible by public transportation – can have a devastating impact on one’s ability to work.

Just as deportation is merely the tip of the enforcement pyramid in the immigration context, incarceration is merely the tip of the enforcement pyramid in the criminal law context. As Sasha Natapoff has discussed, low-level criminal enforcement techniques and their related harms – arrest, fines, fees, jail time – each trigger harm in their own right, even if a formal prison sentence is never imposed.

On a systemic level, these techniques combine in ways that have a profound and deeply harmful impact on access to legal institutions. Both criminal law scholarship and immigration law scholarship tend to focus on the tip of the enforcement pyramids – incarceration and deportation, respectively. Yet the base of both pyramids interact in important and underappreciated ways. Both systems create an enforcement dragnet, one that is imposed by many different enforcement agents, and that can operate to change power dynamics in hidden and far-reaching ways.

IV. RECOGNIZING THE REACH OF IMMIGRATION ENFORCEMENT

This Part remains to be written. In it, I plan to make the following argument: Immigration enforcement decisions have an important impact on society at large, not just undocumented migrants and others who are removed. They reshape access to important public institutions, such as the courts and the police. Healthy public institutions depend on witnesses to come forward to report crime, to report civil workplace violations, and to be willing to serve as witnesses when contacted by the police. Immigration enforcement, as it is currently structured, cuts off the ability of noncitizens to participate in key institutions – and this oversight is all the more significant because so many other enforcement mechanisms similarly restrict access.

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I argue that there is a legitimate role for immigration enforcement, just as there is a legitimate role for enforcing outstanding child support obligations or for keeping dangerous tenants from disturbing their neighbors. These are rational enforcement goals. At times, however, robust enforcement of each of these goals may not be possible: law enforcement agencies may have to choose whether to prioritize immigration enforcement over the enforcement of wage and hour laws. These are judgments related to relative culpability. If key institutions choose not to enforce wage and hour laws in favor of enforcing immigration, then those judgments ought to be made publicly: police and prosecutors should openly articulate their intention not to enforce these laws, and voters should have the opportunity to decide what types of enforcement actions they support. Instead, the current system takes a default approach of hindering the ability of undocumented migrants to access institutions and enforce their rights.

Immigration reform should address these dynamics directly. The so-called “sanctuary” movement – better understood as an immigrant protective movement – offers one model. In certain localities, police and prosecutors have been vocal in identifying how immigration enforcement is problematic not only because it imposes disproportionate harm on migrant communities, but also because it compromises their ability to meet their stated law enforcement objectives.