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Jailhouse Immigration Screening

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ABSTRACT

Within the past decade, U.S. interior immigration enforcement has shifted away from the street and into the jailhouse. The rationale behind jailhouse screening is to target enforcement efforts on those who fall within federal removal priorities. This Article shows how a program undertaken with the stated aim of targeting immigration enforcement has had precisely the opposite effect: it has massively expanded the reach of immigration enforcement and created extended carceral treatment within the criminal justice system based on suspected immigration status. This approach, in turn, leads to removals that lack adequate process, are inaccurate, or that reflect underlying racial biases in criminal arrests. Jailhouse immigration screening resuscitates what is experienced as a punitive model of immigration enforcement but without the procedural protections that ought to accompany the criminal process. This approach imposes an enormous cost on racial minorities disproportionately subject to low-level arrest, and it cuts against immigration enforcement officials' stated aim of targeting immigration enforcement. By laying bare how jailhouse screening extends the impact of criminal arrest, undermines due process, and magnifies racial disparities, this Article makes the case for uncoupling

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immigration screening from the jailhouse altogether. Barring that approach, arrested individuals are entitled to greater front-end procedural protections, including neutral review of immigration detainers.

TABLE OF CONTENTS

INTRODUCTION

In recent years, interior immigration enforcement in the United States has undergone a radical transformation. Today, U.S. Immigration and Customs Enforcement ("ICE") picks up far more people from prisons and jails than from all other settings combined.[1]

1. In fiscal year 2018, the Department of Homeland Security ("DHS") reported a total of 158,581 administrative arrests, of which 40,536 occurred "at-large." U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2, 6 fig.3 (2018), https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf [https://perma.cc/RF3U-GX42]. Approximately three times as many people were arrested from a custodial criminal setting than from all other contexts—such as workplaces or street stops—combined. *Id.* at 5. These figures are likely underinclusive. According to ICE, in 2017 the number of at-large arrests increased by more than 10,000 from the prior year, primarily concentrated in sanctuary jurisdictions that would not comply with detainers, U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 6 (2017), https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [https://

Since 2013, every arrested individual in the United States has been subject to automatic immigration screening.[2] Through the Secure Communities program, immigration enforcement officials compare the fingerprints of every arrested individual against various Department of Homeland Security ("DHS") databases to check for removability.[3] Secure Communities is arguably the most important immigration legacy of the Obama administration.[4] It has spawned an enormous bureaucracy devoted to screening immigration status within the U.S. jailhouse.

The stated aim of jailhouse screening is to target immigration enforcement in accordance with high-level federal removal priorities. As Professors Adam Cox and Cristina Rodríguez detail, the President largely sets the agenda for removals from within the United States.[5] The Immigration and Nationality Act ("INA") renders a massive population—approximately eleven million noncitizens—"deportable at the option of the President."[6] At the same time, DHS removes less than 5 percent of the total undocumented population in any given

perma.cc/G2SV-CAGE], indicating that many of these "at-large" arrests were of people likely identified while in prison or jail.

2. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T (last updated Feb. 9, 2021), https://www.ice.gov/secure-communities [https://perma.cc/8PX8-87U6] (stating that the program was implemented nationwide on January 22, 2013). Secure Communities began a gradual roll-out process in limited jurisdictions starting in 2008. *Id.* By "arrest" this Article refers to those who undergo the process of custodial criminal arrest—meaning arrests where people are taken to the precinct, fingerprinted, and booked.

3. *Id.*; *see also* Expert Report of John Amaya at 5–7, Creedle v. Miami-Dade County, 349 F. Supp. 3d 1276 (S.D. Fla. 2018) (No. 1:17-cv-22477) [hereinafter Amaya Report] ("There is no single, unified database that underlies the issuance of detainers . . . [but rather] a patchwork of different systems maintained by different components of the Department of Homeland Security, including ICE, Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Service[s].").

4. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 137 (2015) [hereinafter Cox & Rodríguez, *Immigration Law Redux*] (describing Secure Communities as a "centerpiece" of the Obama administration's immigration enforcement strategy); *see also* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 87 (2013) (describing Secure Communities as integrating local police into federal immigration enforcement "on a scale never seen before in American history").

5. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009) [hereinafter Cox & Rodríguez, *The President and Immigration Law*].

6. *Id.*; Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Level Dips to Lowest Level in a Decade*, PEW RSCH. CTR. (Nov. 27, 2018), https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade [https://perma.cc/MB7G-AV3Q].

year.[7] The government presents jailhouse screening as a "simple and common-sense way to carry out ICE's enforcement priorities."[8] "[F]elons, not families," is how President Barack Obama described those priorities.[9] Jailhouse screening is thought to give immigration enforcement officials a way to gather information about arrested individuals and to use that information to implement removals in accordance with federal priorities. For instance, federal immigration officials can concentrate on noncitizens who pose "public safety and national security threats."[10] This approach, in turn, has the effect of shielding long-term noncitizens who do not fall within removal priorities from deportation.[11]

This Article shows how a program developed with the stated aim of targeting immigration enforcement has massively expanded its reach, magnified the socioracial disparities underlying criminal arrests, and ultimately created new systemic risks of removing longtime residents. Secure Communities has generated debates regarding the scope of executive power[12] and about immigration federalism,

7. *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2019*, U.S. DEP'T OF HOMELAND SEC. (Oct. 28, 2020), https://www.dhs.gov/immigration-statistics/yearbook/2019/table39 [https://perma.cc/RJ6H-L4WE]; *cf.* Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1464–65 (2019) (noting that interior immigration policies affect a population that is comprised predominantly of long-term residents).

8. *Secure Communities*, *supra* note 2.

9. Address to the Nation on Immigration Reform, 2014 DAILY COMP. PRES. DOC. 2 (Nov. 20, 2014), https://www.govinfo.gov/content/pkg/DCPD-201400877/pdf/DCPD-201400877.pdf [https://perma.cc/53YW-AQ2D]. Obama's language may have been intended to signal a focus on crime control, but its meaning is unclear, given that those convicted of felonies are of course also part of families. *See* Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 703 (2016) (criticizing the "'felons, not families' sound bite regarding deportation policy [as] reflect[ing] a simplistic, binary approach that renders invisible those who simultaneously occupy both categories").

10. *Secure Communities*, *supra* note 2.

11. *Remarks by the President to the Nation on Immigration*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Nov. 20, 2014, 8:01 PM), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://perma.cc/6CR8-HFL5] (describing the need, given the failure of comprehensive immigration reform, to provide a way for long-term unauthorized migrants to participate in American society without fear of deportation); *see also* Cox & Rodríguez, *Immigration Law Redux*, *supra* note 4, at 186 (describing an immigration agency memoranda for prosecutorial discretion under the Obama administration as making "a kind of political promise to shift the brunt of the enforcement system away from [immigration] status violators and toward more serious offenders," although the memoranda never promised immunity from enforcement for any group).

12. *See* Cox & Rodríguez, *Immigration Law Redux*, *supra* note 4, at 135–37 (describing Secure Communities as a legitimate example of executive power in immigration enforcement).

particularly through "sanctuary" or noncooperation policies.[13] But thus far, the legal institution of the jailhouse itself has received relatively little attention. This Article argues that we cannot understand the work that immigration screening is doing without recognizing its structural impact within the jailhouse itself.[14] Jailhouse screening is not functioning as a targeted model of immigration enforcement. Rather, it is functioning as a punitive model. It subjects jailed individuals to extended carceral treatment within the criminal justice system because of suspected civil immigration violations.

Conceptualizing jailhouse immigration screening as targeted misapprehends how the jailhouse expands the reach of immigration law. Before the rollout of Secure Communities, most residents would encounter immigration officials only if they traveled overseas. That world is gone. Today, one out of every three adults will be arrested by

13. Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 9 CHI.-KENT L. REV. 13, 14 (2016); Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 8–9 (2019) (arguing that "subfederal resistance movements like immigrant sanctuary [are] the 'old normal,' in sync with the customary relationship between the federal government and the neighborhood police department"); Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1214 (2019) (arguing that "current public and private sanctuaries are best understood as part of a broader system of legal resistance to the federal enforcement regime").

14. This Article contributes to a body of related scholarship that focuses on the impact of immigration enforcement on nonfederal criminal cases. *See, e.g.*, Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 245 (2016) [hereinafter Eagly, *Immigrant Protective Policies*] (discussing how "prosecutor offices, city police departments, and county sheriffs in four large counties in California: Alameda, Los Angeles, Santa Clara, and Ventura" treat immigration consequences of criminal arrests and convictions); *see also* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1755 (2013) (focusing on "[t]he particular crisis facing noncitizens arrested for petty offenses"); Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 744 (2015) (noting that criminal law intersects with immigration law "in ways that make noncitizens uniquely vulnerable to incarceration"); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 336–44 [hereinafter Chacón, *Whose Community Shield?*] (describing the impact of gang-based removals on domestic crime control); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1459 (2011) (highlighting the role that immigration status plays "at almost every stage of the criminal process"); Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555 (2013) (discussing how state and local prosecutors negotiate immigration consequences through plea bargaining).

the age of twenty-three;[15] the ratio is higher for Black and Latino men.[16] Immigration screening necessarily attaches to the engine of misdemeanor arrests, which constitute the vast majority of arrests in the United States every year.[17] Misdemeanors already give police enormous discretion to target common behavior that is too often detached from principles of moral culpability.[18] By relying on criminal arrest, immigration enforcement necessarily absorbs the selection biases underlying domestic policing decisions.

The targeted model obscures how jailhouse immigration screening magnifies the impact of a low-level criminal arrest. Contrary to the government's assumption that immigration enforcement occurs "behind the scenes" of an arrest,[19] jailhouse immigration screening has an immediate impact on the criminal justice process. It leads to the denial of bail or harsher plea proffers.[20] This approach undermines the significance of a seminal 1896 decision, *Wong Wing v. United States*,[21] which held that noncitizens cannot be punished for civil immigration violations.[22] *Wong Wing* involved formal punishment; the defendants

15. Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012).

16. One study found significantly higher arrest rates for Black and Latino men. Robert Brame, Shawn D. Bushway, Ray Paternoster & Michael G. Turner, *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014) (estimating, based on a limited sample size, that 49 percent of Black men and 44 percent of Latino men will be arrested by the age of twenty-three). Racial disparities in arrest rates have also been documented in particular contexts, such as marijuana arrests. *See, e.g.*, Benjamin Mueller, *Using Data To Make Sense of a Racial Disparity in NYC Marijuana Arrests*, N.Y. TIMES (May 13, 2018), https://www.nytimes.com/2018/05/13/insider/data-marijuana-arrests-racial-disparity.html [https://perma.cc/S6DD-52N9] ("In the first three months of [2018], 89 percent of the roughly 4,000 people arrested for marijuana possession in New York City were black or Hispanic.").

17. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012) [hereinafter Natapoff, *Misdemeanors*].

18. *See generally* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME (2018) (using original data on misdemeanor processes to offer a "bird's-eye view" of "a massive criminal institution that stops, arrests, fines, incarcerates, labels, and otherwise punishes millions of people for all sorts of reasons that are often tenuously connected to public safety").

19. *See* U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES TALKING POINTS 2 (2010) [hereinafter SECURE COMMUNITIES TALKING POINTS], https://www.ice.gov/doclib/foia/secure_communities/talkingpointsjanuary122010.pdf [https://perma.cc/4LZM-254J] (suggesting that implementation of the Secure Communities program would "require[] little to no change to . . . current [law enforcement] procedures").

20. *Infra* Part II.

21. Wong Wing v. United States, 163 U.S. 228 (1896).

22. *Id.* at 237–38.

had been ordered removed and sentenced to two months of hard labor before the deportation took place.[23] The U.S. Supreme Court upheld the deportation but dismissed the prison sentence because it had been imposed without due process.[24] The Court held that if the government sought to punish noncitizens, it could not do so through civil legal proceedings—it must instead do so through criminal law and provide defendants with the heightened protections that accompany criminal sanctions.[25] The opinion said nothing about pretrial detention, however. Jailhouse immigration screening exploits this gap; it permits jailed individuals to be subject to longer pretrial detention for suspected civil immigration violations. This approach has an effect that is akin to imposing criminal punishment. But because pretrial detention is not considered formal punishment, it is not governed by *Wong Wing*.

Even as immigration screening has moved to the jailhouse, it has not adopted procedural protections meant to guard against government overreach in the criminal law. Secure Communities operates by crosschecking fingerprints taken as part of the criminal booking process with various DHS fingerprint databases.[26] An immigration officer reviews the database comparisons and seeks to quickly send an immigration detainer to the local jail.[27] The detainer requests that the jail hold the arrested individual for two extra days so that immigration officials can assume custody.[28] No judicial process accompanies the issuance of immigration detainers.[29] The process for conducting immigration screening is systemically detached from probable cause determinations that any given individual is removable. There is no national database of citizens or noncitizens, and the

23. *Id.* at 233–34.

24. *Id.* at 237–38.

25. *See id.* at 238.

26. SECURE COMMUNITIES TALKING POINTS, *supra* note 19, at 1–2.

27. Amaya Report, *supra* note 3, at 6 ("Because the goal of Secure Communities is to prevent a suspected immigration law violator from bonding out or otherwise being released from local custody, the emphasis is on lodging detainers quickly.").

28. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETAINER—NOTICE OF ACTION [hereinafter IMMIGRATION DETAINER], https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf [https://perma.cc/QXB6-LWLE].

29. ICE detainers are accompanied only by administrative warrants. U.S. IMMIGR. & CUSTOMS ENF'T, POL. NO. 10074.2, ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS 2 (2017) [hereinafter ICE IMMIGRATION DETAINERS], https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf [https://perma.cc/WV6J-KD83].

government's removal process rests on databases that a federal court determined "often contain incomplete data, significant errors, or were not designed to provide information that would be used to determine a person's removability."[30]

Jailhouse screening magnifies the risk of removing residents from within the United States without adequate care for accuracy or procedural fairness, and it magnifies the selection biases of domestic policing. This approach undercuts immigration enforcement objectives. Immigration enforcement decisions build the polity in a number of ways, such as through decisions about unifying families, building a workforce, promoting assimilation, or providing humanitarian relief.[31] Jailhouse immigration screening is thought to channel enforcement discretion in a way that is more rule bound. But in effect, it magnifies the potential for government overreach in both immigration and criminal law. It obscures how domestic policing decisions set the agenda for immigration regulation and how immigration decisions affect the criminal justice process.

If jailhouse immigration screening magnifies the length of carceral treatment after a low-level arrest and creates new risks of detaining and expelling those who are not removal priorities, then it cannot be justified on the grounds of targeting enforcement. Immigration enforcement should uncouple from the criminal arrest process altogether. Barring that approach, jailhouse screening requires greater front-end procedural protections akin to those of criminal law. One particularly important change is to hold the government to its burden of proof in establishing probable cause for a detainer. Consistent with the Fourth Amendment, immigration detainer decisions should be subject to neutral magistrate review.

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30. Gonzalez v. ICE, 416 F. Supp. 3d 995, 1008 (C.D. Cal. 2019), *rev'd in part*, 975 F.3d 788 (9th Cir. 2020). The court determined that these databases "incorrectly identified visa overstays more than 42 percent of the time." *Id.* at 1010. The Ninth Circuit subsequently vacated the decision and remanded it for additional factfinding, given that the district court had not made findings of fact for each of the multiple databases at issue. *Gonzalez*, 975 F.3d at 797.

31. Setting aside jailhouse immigration screening, one criticism of immigration law is that it fails to meet these objectives in a defensible way. *See, e.g.*, Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2322 (2019) (arguing that the U.S. "immigration system is pervasively organized around principles of family separation"); Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U. L. REV. 287, 295–301, 348–49 (2020) (discussing recent family separation policies and arguing that these policies are indefensible, given their impact on children). This Article makes an analogous argument by showing that jailhouse screening is not actually adhering to its stated, targeted-enforcement rationale.

The balance of this Article proceeds as follows: Part I explains the rise of jailhouse immigration screening and how it came to be viewed as a targeted approach to immigration enforcement. Part II focuses on the screening process within the jailhouse and explains how jailhouse screening creates extended carceral treatment and due process violations. Part III argues that jailhouse screening elevates carceral interests over immigration interests and resuscitates what is experienced as a punitive approach to immigration enforcement. This approach undermines immigration law objectives. Part IV argues for uncoupling immigration screening from the jailhouse and for establishing greater front-end procedural protections.

I. THE RISE OF JAILHOUSE IMMIGRATION SCREENING

The United States has the largest immigrant population in the world.[32] But approximately eleven million noncitizens have no lawful status within the United States.[33] Because Congress has rendered such a large proportion of the population removable, immigration enforcement officials necessarily exercise prosecutorial discretion. Jailhouse immigration screening has the stated aim of targeting enforcement efforts, with a particular focus on noncitizens with serious criminal convictions.

This Part shows how jailhouse immigration screening developed and came to be conceptualized as a targeted model of enforcement. It situates jailhouse screening in relation to two other enforcement approaches: race-based street stops and a crime-control model of enforcement. Jailhouse immigration screening avoids the appearance of racialized street stops, and it also allows the government to depict immigration enforcement as concentrating on "criminal aliens."

A. Race-Based Enforcement

The first U.S. immigration laws were expressly race based. White residents were presumed to be on the "inside" of immigration law, while Chinese immigrants—the first nonwhite population to immigrate voluntarily in large numbers—were not. The period of Chinese Exclusion established the plenary power doctrine that gives Congress largely unreviewable power to exclude noncitizens at the border. It also

32. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants [https://perma.cc/Y52Q-85AH].

33. *Id.*

established a body of constitutional procedures that apply in removal proceedings. In theory, these procedures were meant to ensure that Congress could not summarily expel those suspected of being removable from the United States.

With the passage of the Chinese Exclusion Act of 1882, the United States prohibited all Chinese immigration to the United States.[34] In a seminal decision, *Chae Chan Ping v. United States*,[35] the U.S. Supreme Court upheld the Chinese Exclusion Act on the grounds that federal immigration law was subject to unique, largely unreviewable deference by courts.[36] Subsequent laws sought to deport ethnically Chinese residents living in the United States. The Geary Act of 1892 provided that "any Chinese person or person of Chinese descent" found in the United States was subject to deportation "unless such person shall establish, by affirmative proof . . . his lawful right to remain in the United States."[37] All Chinese residents were required to obtain a "certificate of residence" from the local collector of internal revenue at the risk of deportation.[38] The law handed white residents the keys to enforcement: it created an exception for Chinese residents who could establish good cause for not obtaining a certificate and demonstrate "by at least one credible white witness" that they had been living in the United States before the passage of the Geary Act.[39] Only about 15 percent of the eligible Chinese population registered, leaving approximately eighty thousand people in the United States in violation of the law.[40]

The Court in *Fong Yue Ting v. United States*[41] upheld the Geary Act, reasoning that courts should defer to the "political departments" in matters of immigration law.[42] The majority stated that "it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the

34. Act of May 6, 1882, ch. 126, 22 Stat. 58, 59 (repealed 1943).

35. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

36. *Id.* at 609.

37. Act of May 5, 1892, ch. 60, 27 Stat 25, 25 (repealed 1943).

38. *Id.*

39. *Id.* at 26.

40. Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 17 (David A. Martin & Peter H. Schuck eds., 2005).

41. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

42. *Id.* at 731.

Constitution to the other departments of the government."[43] This deference in the immigration context is known as the "plenary power" doctrine.[44] Although the plenary power doctrine has weakened in key respects over time, Congress and the President continue to receive deference from courts when passing laws related to admission and removal.[45] For our purposes, what matters is that the political branches retain significant discretion to determine which noncitizens may be removed from inside the United States.

The Geary Act applied to every person of "Chinese descent,"[46] including those born in the United States. Part of the goal of Chinese Exclusion was to prevent the growth of second-generation Chinese families in the United States.[47] However, in *United States v. Wong Kim Ark*,[48] issued five years after *Fong Yue Ting*, the Court struck down this approach and held that the Fourteenth Amendment of the U.S. Constitution extended to all those born "within the jurisdiction" of the United States, regardless of the nationality of their parents.[49] Once courts recognized birthright citizenship, lawmakers could no longer expressly treat "Chinese descent" as synonymous with noncitizen status. This, in turn, led to a body of constitutional doctrine that regulated the procedures accompanying removal.

In the 1903 decision *Yamataya v. Fisher*,[50] the Court held that all those admitted to the United States are entitled to certain due process

43. *Id.* at 712. As Professors Cox and Rodríguez discuss, the Court did not explain whether the courts should defer to Congress or to the President, or what the balance of power between the political branches should be in immigration law. Cox & Rodríguez, *The President and Immigration Law*, *supra* note 5, at 472.

44. *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 581 (1889).

45. Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 59–60 (2015) (commenting on a "slow[] chipping away" of the plenary power doctrine in the Supreme Court's jurisprudence); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549, 551 n.23 (1990) (arguing that the plenary power doctrine has been undermined through statutory interpretation).

46. Act of May 5, 1892, ch. 60, 27 Stat 25, 25 (repealed 1943).

47. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 647 (2005) (explaining how legislators sought to restrict Chinese women from immigrating and forming families in the United States).

48. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

49. *Id.* at 687–88, 705.

50. Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86 (1903).

protections in removal proceedings.[51] In *Yamataya*, the Court permitted a Japanese national who had been admitted into the United States, but then detained on the grounds she was likely to become a public charge, to bring a habeas petition challenging her immigration detention.[52] The Court reiterated the plenary power doctrine as a matter of substance but held that the adequacy of the procedures used in removal proceedings would be subject to judicial review.[53]

The current statutory approach provides that those admitted into the United States are entitled to a removal hearing before an immigration judge, where the government must establish removability, including alienage, by clear and convincing evidence.[54] If ordered removed, an individual who claims U.S. citizenship is entitled to heightened procedural protections in the form of a review before a federal court of appeals.[55] The court of appeals reviews the record to determine whether the petitioner has raised a "genuine issue of material fact" about his nationality.[56] If so, the petitioner is entitled to a de novo factual review of U.S. citizenship claims by a district court.[57] If, however, the court of appeals determines "from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented," then it decides the nationality claim from the existing administrative record without referring it to a district court for review.[58]

Despite a constitutional and statutory approach meant to distinguish alienage from race, racial minorities perceived as foreign

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51. *Id.* at 101.

52. *Id.* at 87. For a discussion of immigration habeas, see, for example, Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 987–1020 (1998) and Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 495 (2006).

53. *See Yamataya*, 189 U.S. at 100–02.

54. 8 U.S.C. § 1229a(a)(1), (c)(3)(A) (2018); *see* Murphy v. INS, 54 F.3d 605, 608–10 (9th Cir. 1995) (discussing burdens of proof).

55. 8 U.S.C. § 1252(a)(5).

56. *Id.* § 1252(b)(4)(A), (b)(5).

57. *Id.* § 1252(b)(5)(B). The motion to reconsider must be filed within thirty days. *Id.* § 1229a(c)(6)(B). If there is a genuine issue of material fact about foreign nationality, a district court conducts a de novo review. *Id.* § 1252(b)(5)(B). If "the petitioner . . . introduce[s] sufficient evidence that he is a U.S. citizen, [the burden shifts] to the government to rebut by 'clear, unequivocal, and convincing' evidence." Mondaca-Vega v. Lynch, 808 F.3d 413, 417 (9th Cir. 2015) (quoting Chau v. INS, 247 F.3d 1026, 1029 n.5 (9th Cir. 2001)); *see also* Alexander v. Sessions, 263 F. Supp. 3d 740, 743–44 (D. Ariz. 2017) (discussing burdens of proof).

58. 8 U.S.C. § 1252(b) (5)(A), (b)(7)(B).

continued to face deportation risks because of inadequate process and pressures to stipulate to removability. As historian Mae Ngai discusses, the creation of a landed border patrol in the 1920s led to the systemic expulsion of U.S. citizens stereotyped as Mexican.[59] Mass removals continued through programs such as "Operation Wetback," and they reflected power disparities between the Border Patrol agents and farmworkers who had no practical ability to challenge the procedures leading to their removal.[60]

Racial proxies continue to play a role in street stops today. Immigration officers wield the statutory authority "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" within one hundred miles from the border.[61] This statutory authority is far-reaching, given that approximately "two-thirds of the United States' population"—or 200 million people—lives within the border zone.[62] In a 1976 decision, *United States v. Martinez-Fuerte*,[63] the Court held that immigration officers could engage in brief stops at a fixed checkpoint for any reason, including on the basis of race.[64] In the context of a roving immigration stop, immigration officers

59. MAE M. NGAI, IMPOSSIBLE SUBJECTS 60–64, 149–52 (William Chafe, Gary Gerstle, Linda Gordon & Julian Zelizer eds., 2004) (discussing a history of the creation of the Border Patrol and the concept of "illegal alien" as well as the lack of distinction between people who were legally or illegally in the United States from Mexico); *see also* Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 4 (2005) ("Approximately 60 percent of the persons of Mexican ancestry removed to Mexico in the 1930s were U.S. citizens, many of them children who were effectively deported to Mexico when their immigrant parents were sent there.").

60. *See* Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444, 1462–64 (2019) ("Teams of Border Patrol agents, buses, planes, and temporary processing stations implemented Operation Wetback" and they made "no real distinction . . . between immigrants and U.S. citizens of Mexican ancestry.").

61. 8 U.S.C. § 1357(a)(1), (a)(3) (providing these powers "within a reasonable distance from any external boundary of the United States"). "[R]easonable distance" from the border is not defined by statute, but regulations provide for it being one hundred miles from any port of entry. 8 C.F.R. § 287.1(a)(2) (2020). In the "border zone," immigration officers also have the authority "to board and search for aliens," including "any railway car, aircraft, conveyance, or vehicle" to check immigration status. 8 U.S.C. § 1357(a)(3).

62. *The Constitution in the 100-Mile Border Zone*, ACLU, https://www.aclu.org/other/constitution-100-mile-border-zone [https://perma.cc/NG6Z-KMFS] (providing a graphic depicting the border zone population).

63. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

64. *Id.* at 562–63, 566.

must have "reasonable suspicion" of unauthorized presence to engage in the stop, but race may play a role in forming reasonable suspicion.[65]

This approach persists, despite massive demographic changes since the 1970s. In 1976, the Court justified its approach partially on statistics that Mexican residents constituted 85 percent of the undocumented population.[66] Today, Mexican residents constitute less than 50 percent of the undocumented population,[67] and the U.S. population is far more racially diverse overall.[68] U.S. residents racially stereotyped as undocumented bear a disproportionate toll when it comes to stops conducted by federal immigration officers.[69] Part of the appeal of jailhouse screening is that it seems to shift away from racial proxies in the context of street stops.

Reducing street stops may also appear to lower enforcement costs. Street stops are overinclusive. In *Martinez-Fuerte*, checkpoint officials stopped 146,000 vehicles in an eight-day period and ultimately made 725 immigration arrests.[70] The jailhouse seems to offer a targeted approach in comparison to checkpoints, given that it does not depend on costly and intrusive status checks. Those who are never subject to criminal arrest never experience immigration screening.

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65. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 882–83, 886–87 (1975) (stating the "requirement of reasonable suspicion" and noting that race may be a factor in forming reasonable suspicion, but it may not be the sole factor).

66. *See Martinez-Fuerte*, 428 U.S. at 551 ("It is estimated that 85% of the illegal immigrants are from Mexico . . . .").

67. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *What We Know About Illegal Immigration from Mexico*, PEW RSCH. CTR. (June 28, 2019), https://www.pewresearch.org/fact-tank/2019/06/28/what-we-know-about-illegal-immigration-from-mexico [https://perma.cc/97XA-BGTQ].

68. William H. Frey, *The Nation Is Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS INST. (July 1, 2020), https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted [https://perma.cc/D4Q7-SRL7].

69. As Professors Devon Carbado and Cheryl Harris argue, "because Latino identity is deemed relevant to the question of whether a person is undocumented, all Latinos live under a condition of presumed illegality." Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1546 (2011).

70. *Martinez-Fuerte*, 428 U.S. at 554. The checkpoint at issue in *Martinez-Fuerte* screened all cars passing through and referred some for "secondary" inspection. *Id.* The Court cited statistics that "[d]uring an eight-day period in 1974 . . . roughly 146,000 vehicles passed through the checkpoint during 124 ⅙ hours of operation. Of these, 820 vehicles were referred to the secondary inspection area, where Border Patrol agents found 725 deportable aliens." *Id.*

B. Crime Control as Immigration Control

Beginning in the 1980s and accelerating in 1996, Congress vastly expanded the grounds for removing immigrants based on criminal convictions.[71] The crime-control model made criminal convictions relevant to deportation on a mass scale. Immigration law and criminal law had long been connected, but the new federal laws imposed mandatory immigration prosecution after a range of convictions.[72] The 1996 laws also required that noncitizens convicted of certain crimes be transferred to immigration detention immediately after serving their criminal sentences.[73] These legal changes made it possible for both misdemeanor and felony convictions to trigger deportation.[74]

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71. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, and 28 U.S.C.) (revising criminal penalties for when undocumented immigrants commit crimes in the United States); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 431–443, 110 Stat. 1214, 1273–81 (codified as amended in scattered sections of 8 U.S.C.) (providing procedural changes to removal of immigrants with criminal convictions). For an explanation of these changes and a criticism of them, see generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938–43 (2000), describing the impacts of the 1996 deportation laws. This Article highlights 1996 given the sweeping nature of those immigration enactments. But Congress had also enacted other changes in the 1980s, in 1990, and in 1994 that expanded the grounds for removal on the basis of a criminal conviction. For a discussion of the earlier changes, see Chacón, *Whose Community Shield?*, *supra* note 14, at 321–23; *see also* Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 182–85 (2018) (arguing that earlier racially-based immigration restrictions were also linked to crime control).

72. The first immigration laws were linked to crime control. Das, *supra* note 71, at 182–85. Congress banned those convicted of "crimes 'involving moral turpitude'" from entry in 1891. *Id.* at 179 (quoting Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084). Illegal entry became a crime in 1929. Act of Mar. 4, 1929, Pub. L. No. 70-1018, § 2, 45 Stat. 1551, 1551. For a discussion of the early connections between crime control and immigration control, see Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 71, 73 (2003).

73. Morawetz, *supra* note 71, at 1946.

74. *See, e.g.*, Carachuri-Rosendo v. Holder, 560 U.S. 563, 574 (2010) (involving a lawful permanent resident who faced deportation on the basis of two misdemeanor drug arrests—one for a small amount of marijuana, the other for possession of a single Xanax tablet—and holding that whether the second conviction counted as an "aggravated felony" for immigration purposes turned on whether the criminal prosecutor had charged the second offense as a recidivist drug possession offense); *see also* Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1209–10 (2016) [hereinafter Jain, *Prosecuting Collateral Consequences*] (describing how relatively low-level criminal convictions can trigger immigration consequences); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 484 (2007) (describing the "aggravated felony" as "a colossus").

The crime-control model is premised on the theory that criminal convictions should be a determining factor in removal.[75] In 1996, Congress vastly expanded the grounds for deporting noncitizens on the basis of criminal convictions.[76] In addition, after 1990, sentencing judges could no longer issue a binding recommendation against removal known as "a judicial recommendation against deportation."[77] Criminal convictions became a linchpin in determining deportability.

Linking immigration removal decisions to criminal convictions raises troubling questions about adequate process within the criminal justice system. Because of ubiquitous plea bargaining in the criminal justice system, some noncitizens plead guilty to criminal offenses without understanding the immigration consequences of those guilty pleas. In a 2010 decision, *Padilla v. Kentucky*,[78] the U.S. Supreme Court recognized how "[o]ur law has enmeshed criminal convictions and the penalty of deportation" and observed that it was "'most difficult' to divorce the penalty from the conviction in the deportation context."[79] *Padilla* held that, under the Sixth Amendment, defense lawyers have an obligation to advise defendants if their guilty pleas will trigger mandatory deportation.[80] The Court determined that a lawful permanent resident who had lived in the United States for over forty years was denied effective assistance of counsel by not being informed that his guilty plea would result in deportation.[81]

Padilla represented a significant shift both in recognizing how deportation can function as a punishment and in the importance of defense counsel in plea bargaining. As Judge Stephanos Bibas notes, it was "the Court's first case to treat plea bargaining as a subject worthy of constitutional regulation in its own right and on its own terms."[82] *Padilla* moved away from the formal labels of civil and criminal and

75. *See* David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 178–79 (2012) (discussing an eighty-fold increase in noncitizens removed each year because of criminal convictions from 1981 to 2005).

76. Morawetz, *supra* note 71, at 1938–43.

77. *See* Padilla v. Kentucky, 559 U.S. 356, 361–63 (2010) (discussing "JRAD," or "judicial recommendation against deportation").

78. Padilla v. Kentucky, 559 U.S. 356 (2010).

79. *Id.* at 365–66 (quoting United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)).

80. *Id.* at 374.

81. *Id.* at 359, 368, 374.

82. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1120 (2011).

instead focused on how defendants experience deportation.[83] The Court recognized that deportation can matter more to a defendant than the formal criminal sentence, and consequently it requires additional procedural protections under the Sixth Amendment.[84] Defense attorneys must now ascertain the immigration status of a criminal defendant, research the immigration consequences that stem from a plea agreement, and advise defendants if the plea will trigger mandatory deportation. This Sixth Amendment obligation takes place in the criminal justice system—well before any removal proceedings are initiated.

C. The Targeted-Enforcement Model

Jailhouse immigration screening incorporates the crime-control model by relying on the process of criminal arrest to identify noncitizens for removal. This approach, in theory, has a number of potential benefits: it lowers the costs of screening, takes immigration screening off the street, and permits immigration officials to screen a large universe of arrested individuals and to make enforcement decisions that appear to reflect federal enforcement priorities.[85]

Jailhouse immigration screening also offers a way to avoid the appearance of racial bias. Unlike street stops, jailhouse immigration screening can be presented as race neutral. Everyone in the jail has their immigration status checked; immigration officials do not pick and choose who is subject to screening.[86] Jailhouse screening also avoids deputizing police officers as immigration officers. Police officers are supposed to go about their normal arrest activities; they are not supposed to target those suspected of lacking immigration status.

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83. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700, 703 (2002) (asserting that deportation "can operate as a secret sentence" and arguing for plea bargaining that is informed about the collateral consequences of criminal convictions).

84. *See Padilla*, 559 U.S. at 361–64 (noting the importance of the prior procedural protection of a "judicial recommendation against deportation" and discussing how the elimination of this protection emphasized how integral deportation is to criminal penalties).

85. *See, e.g.*, Cox & Rodríguez, *Immigration Law Redux*, *supra* note 4, at 189 (describing the potential of Secure Communities "to make decisions about removal both more consistent and more responsive to federal priorities").

86. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015) (describing how the process of criminal arrest is used akin to an auditing tool, with everyone in the jailhouse subject to screening).

Jailhouse screening relies largely on fingerprint comparisons rather than interviews.[87] Street stops depend on a brief period of questioning. Immigration officers have no authority to prolong the stop or to take fingerprints absent probable cause. By contrast, government officials have broad authority to gather identity information from those already in criminal custody. In *Maryland v. King*,[88] the U.S. Supreme Court held that the government is entitled to collect DNA swabs from anyone in criminal custody for a serious offense in order to gather identity information.[89] And states have long had a practice of routinely obtaining fingerprint information from those in criminal custody.[90] Jailhouse immigration screening uses information obtained during the criminal booking process to make removal decisions.

Secure Communities began to be implemented in 2008.[91] The Obama administration made it a cornerstone of its immigration enforcement approach.[92] By 2013, it had been implemented nationwide.[93] For an eighteen-month period toward the end of the Obama administration, Secure Communities was discontinued and jailhouse screening was renamed the Priority Enforcement Program.[94] The name change was meant to further signal the aim of targeting enforcement efforts.[95] Immigration officers were instructed to focus on

87. Cox & Miles, *supra* note 4, at 94 (noting that "Secure Communities relies on a fundamentally different—and much less labor-intensive—approach" than enforcement methods that depend on individual interviews).

88. Maryland v. King, 569 U.S. 435 (2013).

89. *Id.* at 440 (the opinion does not define "serious" offense, but it does restrict DNA swabs to those arrested for "serious offenses").

90. *Id.* at 458–59.

91. For a discussion of the rollout process, see Cox & Miles, *supra* note 4, at 96–103.

92. *See supra* note 4 and accompanying text.

93. *Secure Communities*, *supra* note 2.

94. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, et al., Secure Communities (Nov. 20, 2014) [hereinafter Secure Communities Memorandum], https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [https://perma.cc/43XD-Y3UJ]; *see also* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) [hereinafter Detention and Removal Priorities Memorandum], https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/L8VD-8W2D] (establishing new detention priorities effective January 5, 2015).

95. *See* Secure Communities Memorandum, *supra* note 94, at 1 (acknowledging that the Secure Community program's "very name has become a symbol for general hostility toward the enforcement of our immigration laws").

specified priorities, including those convicted of certain felonies and violent crimes; recent unauthorized entrants or visa overstays; and those with multiple immigration violations.[96] These priorities also signaled that the federal government was not handing immigration control responsibility to state and local police officers, as some proponents of more robust immigration enforcement have sought to do.[97] Rather, jailhouse screening was presented as a way of harnessing the criminal arrest process while not handing police officers the ability to make immigration arrests.[98] The Trump administration ended the Priority Enforcement Program and reinstituted the name "Secure Communities," but continued to describe it as a way of "directing its enforcement resources to those aliens posing the greatest risk to the safety and security of the United States."[99]

In terms of the mechanics of the screening process, fingerprints and biographic information from arrested individuals are cross-checked against databases maintained by DHS.[100] Then, an automated program generates an Immigration Alien Response ("IAR") form that indicates the basis for suspecting removability.[101] An immigration officer ultimately reviews the IAR form and sends a detainer request to the local jail if the officer determines that the targeted individual is removable.[102] The current detainer is a one-page checkbox form.[103] It advises the local law enforcement agency that an immigration officer

96. Detention and Removal Priorities Memorandum, *supra* note 94, at 3–4.

97. The most notable proponent of this argument is politician Kris Kobach, who has argued that state and local police have the inherent authority to make immigration arrests. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALA. L. REV. 179, 181 (2005).

98. For a discussion of racial profiling risks inherent in giving police officers immigration enforcement powers, see Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1254, 1272–73 (2018).

99. U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 12 (2019), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/FX95-43J8]; Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8801 (Jan. 30, 2017).

100. *Secure Communities*, *supra* note 2.

101. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) SECURE COMMUNITIES (SC) STANDARD OPERATING PROCEDURES (SOP) 3–5, https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf [https://perma.cc/2N93-LFW8].

102. 8 C.F.R. § 287.7(a)(1) (2020).

103. IMMIGRATION DETAINER, *supra* note 28.

has probable cause to believe that the detainee is removable.[104] The immigration officer checks one of four options to indicate the basis of removability: a prior removal order; ongoing removal proceedings; "biometric confirmation" of the alien's identity; or statements and/or other reliable evidence that affirmatively indicate removability.[105] The detainer requests that the local law enforcement agency retain custody of the arrested individual for an additional forty-eight hours after he would otherwise be released so that immigration enforcement officials may assume custody.[106]

Compliance with immigration detainers is not mandatory.[107] But even when localities elect not to comply with detainers, the verification process takes place. Approximately 70 percent of the arrests ICE makes in the interior of the United States now result from detainers lodged against those in criminal custody.[108] Secure Communities allows the government to issue detainers to far more people than before. In fiscal year 2005, before Secure Communities, ICE issued six hundred detainers per month; by the end of fiscal year 2011, three years after Secure Communities began to be implemented, ICE issued more than twenty-six thousand detainers per month.[109]

In sum, jailhouse immigration screening has been perceived as targeted because it focuses on gathering identifying information in the jailhouse and using that information to make removal decisions that fit executive branch priorities. This approach affects only those subject to criminal arrest, does not depend on individual stops or interviews, and permits the Executive to establish high-level priorities for removal.

II. THE IMPACT OF JAILHOUSE IMMIGRATION SCREENING

The targeted-enforcement model rests on two assumptions: first, jailhouse immigration screening does not affect the criminal process, and second, jailhouse immigration screening provides an accurate way

104. *Id.*

105. *Id.*; Gonzalez v. ICE, 416 F. Supp. 3d 995, 1003 (C.D. Cal. 2019), *rev'd in part*, 975 F.3d 788 (9th Cir. 2020).

106. IMMIGRATION DETAINER, *supra* note 28.

107. Galarza v. Szalczyk, 745 F.3d 634, 640, 643 (3d Cir. 2014) (observing that "no U.S. Court of Appeals has ever described ICE detainers as anything but requests" and discussing that if detainers were to be construed as mandatory, that would pose constitutional problems).

108. News Release, U.S. Immigr. & Customs Enf't, Local ICE Director Discusses Sanctuary Policy Impact on Public Safety (Sept. 26, 2019), https://www.ice.gov/news/releases/local-ice-director-discusses-sanctuary-policy-impact-public-safety [https://perma.cc/AG2A-XMZD].

109. *Gonzalez*, 975 F.3d at 799.

to determine who should be subject to immigration arrest. Both of these assumptions fail. Jailhouse screening has an immediate impact on the criminal justice process. It leads to extended carceral treatment, such as the denial of bail and more punitive plea bargains. Second, the screening process oversimplifies immigration status determinations and ties them to faulty database comparisons. This approach leads to detainers that are systemically unsupported by probable cause. In addition, jailhouse screening targets a vulnerable population that is particularly poorly situated to explain their status or contest detainers. All of these factors can create new risks of removing residents who are not legally removable, much less removal priorities.

Florida resident Pete Brown's experience illustrates how jailhouse screening creates the risk of extended carceral treatment and error.[110] As one of approximately 4.4 million adults subject to probation or parole in the United States, Brown was required to submit to regular drug screenings.[111] He turned himself in after a screening showed low-level marijuana use.[112] After he was booked into jail for his probation violation, an immigration detainer was lodged against him.[113] The detainer had an immediate consequence for the criminal justice process; it meant that, rather than being released, Brown would spend the next three weeks in jail pending his criminal court appearance.[114] Brown explained to jailhouse officials that he was a U.S. citizen, but he had no opportunity to contest the detainer while in criminal custody.[115] When he eventually appeared in court, the judge ordered his release and reinstated the probation, thus terminating his criminal court case.[116] Only then was he formally transferred to immigration custody

110. Complaint ¶ 8, Brown v. Ramsay, 4:18-cv-10279, 2019 WL 8128928 (S.D. Fla. Dec. 3, 2018), 2018 WL 6340578 [hereinafter *Brown* Complaint].

111. *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 292, 301, 316, 325 (2016) (discussing common requirements of probation); LAURA M. MARUSCHAK & TODD D. MINTON, BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2017-18, at 2 (2020), https://www.bjs.gov/content/pub/pdf/cpus1718.pdf [https://perma.cc/7WEE-FL8S] (noting that there were 3,540,000 persons on probation and 878,000 persons on parole in 2018).

112. *Brown* Complaint, *supra* note 110, ¶ 18.

113. *Id.* ¶ 20.

114. *Id.* ¶ 46.

115. *Id.* ¶¶ 2–3.

116. *Id.* ¶ 41.

and given the chance to contest the detainer with an immigration officer.[117]

Brown's case shows how jailhouse immigration screening has a profound effect on the criminal process. First, the immigration screening process disproportionately affects those arrested for misdemeanors, not felonies. It also imports the selection biases of criminal law. The criminalization of marijuana in particular disproportionately affects racial minorities.[118] In New York City alone, in recent years, Black and Latino defendants have constituted almost 90 percent of misdemeanor marijuana possession cases.[119] Second, the immigration screening process makes the criminal process harsher. In Brown's case, the detainer meant immediate extended criminal detention. As a formal matter, however, the detainer only came into effect at the conclusion of the criminal case. It had a hidden effect on the criminal process.

In Brown's case, the detainer was not actually supported by probable cause—but Brown had no effective ability to challenge the detainer, even though he had friends outside the jail who were willing to help him access documentation to prove his citizenship status.[120] During his time in jail, the detainer marked him as a removable Jamaican national.[121] The detainer denoted a particular legal status, similar to a criminal warrant—and even though it had an immediate effect on Brown, there was no way for Brown to challenge that marker while in criminal detention. Brown's experience could also have come out differently. Had Brown been more vulnerable—had he not continued to contest his immigration status determination after his transfer to immigration custody—he could have been deported.

This Part details three features of jailhouse screening—front-end carceral treatment, Fourth Amendment violations, and a focus on a

117. *Id.* ¶ 42.

118. ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 17–20 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf [https://perma.cc/WA39-6UZA].

119. Benjamin Mueller, Robert Gebeloff & Sahil Chinoy, *Surest Way To Face Marijuana Charges in New York: Be Black or Hispanic*, N.Y. TIMES (May 13, 2018), https://www.nytimes.com/2018/05/13/nyregion/marijuana-arrests-nyc-race.html [https://perma.cc/PZ6J-L43D]; Mueller, *supra* note 16 ("In the first three months of [2018], 89 percent of the roughly 4,000 people arrested for marijuana possession in New York City were black or Hispanic.").

120. *Brown* Complaint, *supra* note 110, ¶ 57. He called the DHS hotline, but eventually gave up because the wait times were too long for him to remain on hold. *Id.* ¶¶ 34–36.

121. *Id.* ¶ 16.

vulnerable population—and it explains how they belie the targeted-enforcement model.

A. Front-End Carceral Treatment

Jailhouse immigration screening is premised on the assumption that immigration and criminal law are two distinct systems that both happen to operate in the same space. As Professor Ingrid Eagly argues, immigration law and criminal law are assumed to be "institutionally autonomous."[122] The underlying theory is that the government can rely on criminal arrests to identify noncitizens for potential removal without influencing the criminal justice process. Yet in practice, front-end immigration screening decisions have cascading and immediate consequences in the criminal justice system, such as the denial of bail and harsher plea offers.

Some local law enforcement agencies appropriate immigration detainers as formal "markers" that affect how they process criminal cases. Sociologists have conceptualized the mark of a criminal record as a form of "public credentialing."[123] The mark of a prior criminal conviction, for instance, leads to systemically harsher plea bargains for recidivists.[124] Immigration detainers also serve as markers that formally affect dispositions and bail. They impose enormous costs on arrested individuals who have not been convicted of any crime.

Pretrial detainees held in federal detention are entitled to release under the Bail Reform Act unless a judicial officer determines that no conditions of release "would reasonably assure the appearance of the defendant and the safety of the community."[125] Immigration status is

122. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1286 (2010) (defining "institutional autonomy" as the view "that the immigration and criminal systems operate as independent institutions with distinct adjudicatory models, sanctioning regimes, and actors—reinforcing the 'criminal-civil' divide" (emphasis omitted)).

123. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 643–44 (2014); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 939 (2003).

124. *See generally* Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. (forthcoming May 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3582065 [https://perma.cc/GHN8-C8MJ] (describing and criticizing recidivist sentencing enhancements).

125. United States v. Diaz-Hernandez, 943 F.3d 1196, 1198 (9th Cir. 2019); *see also* United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1174 (D. Or. 2012) (explaining that "persons who are not citizens must be treated under the BRA like all other persons charged with an offense").

not a listed factor for court consideration, but it may be taken into account in evaluating flight risk.[126]

In contrast to federal law, some states do formally take immigration status into account in setting bail.[127] But even when state law does not expressly take into account alienage, courts may view immigration status—and specifically, the presence of an immigration detainer—as relevant to flight risk. One state court made the unusual decision to revoke the initial bail after the defendant had already posted it, and to increase it by fourfold, based on the presence of an immigration detainer.[128] The increased bail was upheld even though the criminal prosecutor had been aware of the defendant's undocumented status when the initial bail amount was set.[129] In upholding the bail increase, the court stated, without any supporting authority, that the "filing of a detainer signifies ICE's commitment to remove an alien" and "sets in motion the entire removal process," which in turn, creates the risk that the defendant would "avoid prosecution and possible punishment" by being deported to his country of origin.[130] The court incorrectly equated the filing of a detainer with the commencement of a removal proceeding.[131] The presence of the civil immigration detainer had a dispositive effect on pretrial release in the criminal case.

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126. *Diaz-Hernandez*, 943 F.3d at 1198 (stating that "immigration status is not a listed factor" in the Bail Reform Act but that "[a]lienage may be taken into account" in evaluating flight risk (quoting United States v. Santos-Flores, 794 F.3d 1088, 1090 (9th Cir. 2015))).

127. *See, e.g.*, ARIZ. CONST. art. II, § 22(A)(4) (denying bail for "serious felony offenses" for those who lack authorized immigration status); Hernandez v. State, 669 S.E.2d 434, 435 (Ga. Ct. App. 2008) (upholding prohibitively high bail in part because of evidence that the defendant was not lawfully in the country); Chin, *supra* note 14, at 1423–24 & nn.24–37 (explaining how "[m]any jurisdictions consider a defendant's alienage in setting bail" and collecting cases and statutes).

128. State v. Fajardo-Santos, 973 A.2d 933, 935–36 (N.J. 2009).

129. *Id.*

130. *Id.* at 939–40 (upholding a fourfold increase in bail after the defendant had an immigration detainer lodged, based on the court's determination that the detainer increased flight risk).

131. In this case, the defendant had in fact been taken into immigration custody and removal proceedings had been commenced. *Id.* at 935. But the court based its decision on the presence of the detainer itself. For courts taking a different approach and recognizing a distinction between issuing a detainer and commencing removal proceedings, see, for example, *Diaz-Hernandez*, 943 F.3d at 1199 (holding in a federal case that "detention of a 'criminal defendant pending trial . . . and detention of a removable alien pursuant to the [Immigration and Nationality Act] are separate functions that serve separate purposes and are performed by different authorities'" and holding that a trial court "addressing whether pre-trial detention is appropriate under the Bail Reform Act, may not speculate as to what may or may not happen in the future to the defendant under a different statutory and regulatory regime" (quoting United States v. Vasquez-Benitez, 919 F.3d 546, 552 (D.C. Cir. 2019))) and United States v. Xulam, 84 F.3d 441, 441 n.1 (D.C. Cir.

Criminal law enforcement officials in certain jurisdictions take immigration status into account while making discretionary decisions about pretrial release, charging, and plea bargaining. In a 2011 study, Eagly demonstrated the pronounced effect immigration status determinations have on how criminal cases proceed in Harris County, Texas and Maricopa County, Arizona—two of the largest jurisdictions for Secure Communities removals.[132] In Harris County, a pretrial services official described an immigration detainer as "the end of the line for a personal bond release," depending on the offense charged.[133] For felonies, heightened bond amounts were based "solely" on apparent immigration status "regardless of the severity of the felony charge or other characteristics of the defendant."[134] As Eagly documented, defense attorneys in Harris County "uniformly agree[d] that the possibility of getting probation or other nonincarceration dispositions for a client with questionable immigration status is 'basically zero.'"[135] In Maricopa County, "immigration status can be considered in making individualized bail assessments" and is also a factor in plea agreements.[136] Prosecutors bring charges and secure plea agreements for noncitizens in a way that maximizes the likelihood of removal.[137]

The presence of an immigration detainer can also have an immediate impact on whether a suspected noncitizen is eligible for noncarceral dispositions, such as community service. Luis Hernandez was arrested in New York and charged with public lewdness, a misdemeanor.[138] At the arraignment, the prosecutor recommended that Hernandez be released and complete three days of community service for his disposition. The judge responded: "You can't ask for community service. He has an [Immigration and Customs Enforcement ("ICE")] detainer."[139] The prosecutor then requested five days of jail

1996) ("The fact that a detainer has been lodged does not mean appellant necessarily will be taken into custody by the INS if released by this Court.").

132. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1131–35 (2013) [hereinafter Eagly, *Criminal Justice*].

133. *Id.* at 1175 n.202 (quoting a Harris County Pretrial Services official).

134. *Id.* at 1174–75.

135. *Id.* at 1176 (quoting Mark Hochglaube, Trial Chief, Harris County Public Defender's Office).

136. *Id.* at 1184, 1187–88.

137. *Id.* at 1188.

138. Hernandez v. United States, 939 F.3d 191, 196 (2d Cir. 2019).

139. *Id.* at 197.

and, given the ICE detainer, that bail be set at a nominal amount of one dollar so Hernandez could accrue "time credit towards any eventual sentence he might . . . receiv[e]."[140] Hernandez informed multiple officials in the jail, including "a social worker, two corrections officers, and a doctor, that he was a U.S. citizen," but "[e]ach staff member told Hernandez that he or she could not help him."[141] After four days in detention, immigration officials canceled the detainer—apparently realizing it had been issued without basis—which then triggered a customary practice of permitting the one-dollar bail to be automatically paid.[142] As the Second Circuit determined, "but for the detainer, Hernandez would have been released" and sentenced to community service; he would not have received any jail time.[143] His detention was "not for his failure to post bail but because of the detainer."[144]

Hernandez's experience is in keeping with other research and caselaw showing how detainers bar arrested individuals from pretrial release, probation, work release, therapeutic drug programs, or other diversion programs that would otherwise have been made available.[145] Criminal prosecutors may deny diversion for a number of reasons, including because of the belief that diversion programs with limited capacity should be reserved for people who will rejoin their communities, rather than those who will be deported. A criminal

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 208.

144. *Id.*

145. *See* C.F.C. v. Miami-Dade County, 349 F. Supp. 3d 1236, 1246 (S.D. Fla. 2018) ("Because of the detainer, [plaintiff] was 'not placed in a diversion program' at his arraignment and remained in the County's custody for over a month awaiting trial because he was not eligible for pretrial release."); Mercado v. Dallas County, 229 F. Supp. 3d 501, 518–19 (N.D. Tex. 2017) (stating that the complaint plausibly alleges that "Dallas County had a widespread and widely known practice of refusing to release on bond pretrial detainees with immigration holds"), *abrogated on other grounds by* City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018); Chin, *supra* note 14, at 1430 nn.69–71 (collecting cases that take into account unauthorized status for probation, work release, and drug treatment determinations); N.Y.C. BAR ASS'N, IMMIGRATION DETAINERS NEED NOT BAR ACCESS TO JAIL DIVERSION PROGRAMS 1 (2009), https://www.nycbar.org/pdf/report/NYCBA_Immigration%20Detainers_Report_Final.pdf [https://perma.cc/BD8K-CHYS] ("Many criminal court judges, prosecutors, defense attorneys, and service providers assume that an immigration detainer effectively disqualifies an otherwise eligible immigrant defendant from participating in . . . jail diversion programs."); *see also* Cade, *supra* note 14, at 1790–91 (noting that many misdemeanor defendants cannot afford bail and immigrants are often subjected to higher bail requirements because they are seen as "flight risk[s]").

prosecutor who denies access to a diversion she would otherwise recommend, however, may not convey that reasoning to the arrested individual. Criminal prosecutors are not obligated to explain the potential menu of options for disposing of a particular charge. Defendants who experience worse plea outcomes because of immigration detainers may be unaware of how the detainer affected the plea bargain.

Even when the local law enforcement agency does not incorporate immigration detainers into pretrial release determinations, the detainer itself can play a role in how defendants choose to proceed. Arrested individuals who believe they will be transferred to immigration detention after posting a criminal court bond have good reason to remain in criminal custody. Time spent in immigration detention will not be credited to time served when the criminal case is ultimately resolved. That same time, however, will be credited if it is served in criminal detention. Defendants may thus perceive that they are better off not posting bond and remaining in criminal custody until the criminal court has disposed of the charges.[146] Defendants make these decisions in a world of incomplete information about whether or not a detainer will actually result in immigration detention.

The majority of those subject to detainers will not actually be picked up and removed by immigration officials. At a federal trial in May 2019, DHS officials testified that ICE elects not to follow up on approximately 80 percent of the jailhouse detainers it issues.[147] It is troubling enough that immigration status determinations lead to extended jail time and then release, as they did in the cases of Brown and Hernandez. But in some cases, the extended jailtime also creates pressures for arrested individuals to stipulate to their own removal so as to be released from custody.

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146. *See* Eagly, *Criminal Justice*, *supra* note 132, at 1149 n.86 (discussing why a defendant with an immigration detainer may elect not to post bond); *see also* LENA GRABER & AMY SCHNITZER, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, THE BAIL REFORM ACT AND RELEASE FROM CRIMINAL AND IMMIGRATION CUSTODY FOR FEDERAL CRIMINAL DEFENDANTS 1 (2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2013_Jun_federal-bail.pdf [https://perma.cc/PW7D-G9JB] (observing that "some noncitizens [with detainers lodged against them] do not seek bail because they fear . . . a transfer" to immigration detention and arguing that this perception is often not valid because "noncitizen defendants should in many cases be able to win release").

147. Cross-Appellant/Appellees' Principal & Response Brief at 10, Gonzalez v. ICE, 975 F.3d 788 (9th Cir. 2020) (Nos. 20-55175, 20-55252), 2020 WL 3316911, at *10 [hereinafter *Gonzalez* Brief].

In 2009, political scientist Jacqueline Stevens conducted a rare interview with a U.S. citizen who had been deported and then had returned to the United States.[148] Mario Guerrero stipulated to his own removal after a criminal conviction for robbery and was then deported to Mexico.[149] He was twice apprehended at the border and charged with felony unlawful reentry.[150] The charges were eventually dropped after his federal defender investigated his citizenship status for the first time.[151] In explaining why he had stipulated to removal, Guerrero explained that he was told:

> "You fight deportation or you sign the paper. If you don't sign, you might spend a year here." All I wanted to do is get out because I already spent a year. I signed the paper and I got out. They told me I was giving up my rights but nothing was for sure. I could spend another year in jail or get out.[152]

Guerrero's experience shows how the threat of detention can lead to deportations that do not accurately reflect legal status. In both criminal law and immigration law, the threat of ongoing detention creates incentives to take quick pleas. Defendants operating with limited information may make the rational judgment to "sign the paper" to get out of detention.

Once noncitizens are identified in the jailhouse, they systemically lack access to immigration adjudication. Today, a large proportion of those removed from the United States never appear before an immigration judge.[153] Judicial review of expedited removal orders is

148. Stevens conducted interviews with Mario Guerrero and his sister. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 678 (2011).

149. *Id.* at 678–79.

150. *Id.* at 679, 681. After his first unlawful reentry arrest, Guerrero was convicted and sentenced to seven years and five months in federal prison. *Id.* at 679–80. After serving his sentence, he was released at the border and told to walk across the bridge to Mexico. *Id.* at 681. A year and a half later, he tried to return to the United States where he was apprehended and again charged with illegal reentry. *Id*.

151. *Id.* at 681.

152. *Id.* at 679 n.320; *see also* Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 2005 (2013) (discussing Guerrero's case).

153. Administrative procedures such as "expedited removal," or "reinstatement of removal" permit removals without a hearing. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 181 (2017) ("[C]ritiques of immigration adjudication are incomplete and understated because they have failed to account for the following reality: the vast majority of persons ordered removed never step foot inside a courtroom."); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 2

highly limited,[154] and those who accept "voluntary departure" do not have an immigration hearing prior to removal. Formal removal proceedings may also be denied to noncitizens without legal permanent resident status who have been convicted of an "aggravated felony."[155] There are few safeguards to ensure that those removed are legally removable, much less removal priorities.

B. Detainers that Lack Probable Cause

The targeted-enforcement theory presupposes that the screening process identifies those who are removable. It treats checking immigration status as akin to the process of checking for an outstanding warrant. But immigration detainers differ from criminal warrants in key respects. Immigration officials are taken at their word that they have probable cause because no judicial process accompanies the issuance of a detainer. The result is that detainers issued en masse in the jailhouse may be unsupported by probable cause.

Checking for immigration status is not like using a fingerprint comparison to check for prior criminal history or an outstanding criminal arrest warrant, given that there is no national database of citizens.[156] The use of databases to issue immigration detainers oversimplifies immigration status determinations. The sole purpose of a warrant is to "mark" an arrested individual and to permit law enforcement agencies to track her prior contacts with the criminal justice system over time.[157] Immigration status, on the other hand, is

(2014) ("In 2013, the majority of people deported never saw a courtroom or immigration judge. Instead, the Department of Homeland Security quickly removed them via programs termed 'expedited removals', 'administrative removals', and 'reinstatement of removal orders.'").

154. Those subject to expedited removal include noncitizens arriving at the border and noncitizens who enter the country without inspection and are unable to demonstrate they have been physically present in the country for two years. 8 U.S.C. § 1225(b)(1)(A) (2018). The U.S. Supreme Court held that Congress may constitutionally limit judicial review of expedited removal orders in habeas corpus proceedings. DHS v. Thuraissigiam, 140 S. Ct. 1959, 1963–64 (2020). For a discussion of immigration habeas, see generally Neuman, *supra* note 52.

155. 8 U.S.C. § 1228(b) (providing that the attorney general may develop truncated removal procedures for such noncitizens).

156. Gonzalez v. ICE, 416 F. Supp. 3d 995, 1011 (C.D. Cal. 2019) ("[T]here is no national database of all U.S.-born citizens . . . . Similarly, ICE has never had access to any database of derivative or acquired citizens, because none exists." (citation omitted)), *rev'd in part*, 975 F.3d 788 (9th Cir. 2020).

157. *See* Kohler-Hausmann, *supra* note 123, at 644 (discussing how arrests "mark" individuals; the marking process "classifies subjects based on the statuses they have achieved through their contact with the police and courts").

necessarily fluid—it is designed to change over time. The databases that immigration enforcement officials use do not reliably track changes in immigration status. Nor is there any good way to track immigration status under the complicated immigration statutory framework. Unlike notations about prior criminal histories or outstanding criminal warrants, immigration status determinations can be complex, both factually and legally.

A recent class action, *Gonzalez v. ICE*,[158] brought by U.S. citizen Geraldo Gonzalez,[159] reveals how immigration databases lead to the risk of systemic Fourth Amendment violations. Gonzalez was arrested by the Los Angeles Police Department in December 2012, and an erroneous immigration detainer was lodged against him after a fingerprint database comparison.[160] Gonzalez filed a class action challenging the practice of issuing detainers that are based solely on electronic database checks.[161]

After a trial where evidence of the sufficiency of the databases was introduced, the U.S. District Court for the Central District of California in May 2019 concluded that the "databases on which ICE relies for information on citizenship and immigration status often contain incomplete data, significant errors, or were not designed to provide information that would be used to determine a person's removability."[162] The *Gonzalez* court held that the databases "reflect a person's immigration status at a particular point in time, but [they] fail to reliably show how or whether that status has changed over time."[163] In September 2020, the Ninth Circuit vacated and remanded to the district court for further review on the grounds that the district court's ruling was based on a review of six of the databases used by DHS, but it needed to make factual findings about all of the databases.[164]

Errors in the databases used by DHS are compounded when criminal law enforcement agencies rely on detainers for decisions about pretrial release or pleas. Part of the problem with relying on databases is that immigration status is not a bright-line delineation. It

158. Gonzalez v. ICE, 975 F.3d 788 (9th Cir. 2020).
159. *Id.* at 797.
160. *Id.*
161. *Id.* at 797, 800–01.
162. Gonzalez v. ICE, 416 F. Supp. 3d 995, 1008 (C.D. Cal. 2019).
163. *Id.* at 1018.
164. *Gonzalez*, 975 F.3d at 823.

can "occupy a gray area between lawful and unlawful."[165] Immigration scholar David Martin coined the term "twilight" immigration status to convey how immigration status changes over time.[166] Annual quotas create backlogs of people unable to adjust their status in any given year—but some of those present without authorization will eventually obtain immigration status through family relationships with sponsoring U.S. citizens and lawful permanent residents.[167] Eagly similarly describes immigration status as existing along an alienage "spectrum,"[168] with some who lack unauthorized status able to gain legal status at a later point in time.[169] A record of a certain type of immigration status at one moment in time does not indicate immigration status at a later date.[170]

Some who enter unlawfully subsequently normalize their immigration status, such as through executive or statutory mechanisms of relief. For instance, parole in place permits active-duty members of the U.S. armed forces to sponsor certain relatives for lawful immigration status in the United States.[171] Unauthorized residents who are eligible for parole in place may adjust their status to become lawful

165. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 52 (2014).

166. DAVID A. MARTIN, MIGRATION POL'Y INST., TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION 1 (2005), https://www.migrationpolicy.org/sites/default/files/publications/MPI_PB_6.05.pdf [https://perma.cc/TS8E-T4W9] (describing how certain categories of those without formal legal status have claims to obtain lawful permanent resident status, such as through temporary protected status, and estimating that 1–1.5 million people who lack authorized immigration status may be able eventually to adjust their immigration status through family relationships).

167. *Id.* at 2.

168. Eagly, *Criminal Justice*, *supra* note 132, at 1137 (arguing that immigration status should be understood as a "spectrum" rather than as distinct categories of lawful or unlawful).

169. In addition to relationships with sponsoring family members, some noncitizens may benefit from immigration legislation that normalizes immigration status. For instance, the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, provided for amnesty for over two million unauthorized migrants. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 847–48 (2007) ("The United States has periodically regularized the status of many of the undocumented noncitizens living in the country through amnesties or other mechanisms.").

170. For instance, naturalization is available to lawful permanent residents who have resided in the United States for a minimum of five years, who meet other statutory criteria, such as demonstrating English proficiency, a knowledge of U.S. history and government, and who take an oath of allegiance to the United States. 8 U.S.C. §§ 1421–1423 (2018).

171. 8 U.S.C. § 1182(d)(5)(A) (providing for "parole" for humanitarian reasons); *Discretionary Options for Military Members, Enlistees and Their Families*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 30, 2019), https://www.uscis.gov/military/discretionary-options-military-members-enlistees-and-their-families [https://perma.cc/7VP8-JGXY].

permanent residents and then may eventually become U.S. citizens. An accurate record of unlawful entry may not reflect legal removability.

Immigration status determinations may require a detailed knowledge of facts and governing law.[172] Even citizenship status determinations can be complex. Citizenship status can be obtained in three ways: through birth on U.S. soil,[173] through the process of naturalization,[174] and through birth to a U.S. citizen parent overseas.[175] Additionally, eligible children born abroad obtain "derivative citizenship" when their parents naturalize.[176] Derivative citizenship status is not "obtained only by virtue of official recognition in the form of a certificate."[177] Since those who derive citizenship do not apply for citizenship themselves, they may be unaware of their own status.[178] For citizens born overseas, proving citizenship may require various documents, such as their own birth certificate, their parents' divorce certificate, or a parent's certificate of naturalization.[179] Even if there was a good way to track immigration status over time, the databases DHS relies on are not designed to track those changes. Evidence produced in the 2019 *Gonzalez* trial showed that immigration officials do not regularly update the databases to reflect changes in immigration

172. *See, e.g.*, 8 U.S.C. § 1401 (listing categories of people considered citizens at birth).

173. U.S. CONST. amend. XIV, § 1.

174. 8 U.S.C. § 1427.

175. *Id.* § 1401. The statutory restrictions on obtaining birthright citizenship via a parental relationship will be discussed further in Part III.

176. *Id.* § 1431(a) (providing for derivative citizenship).

177. United States v. Smith-Baltiher, 424 F.3d 913, 917 (9th Cir. 2005) (rejecting the government's argument "that derivative citizenship is not automatically acquired at birth but must be applied for, and that it is obtained only by virtue of official recognition in the form of a certificate").

178. Conversely, some people with a U.S. citizen parent grow up believing they are U.S. citizens, only to find out when removal proceedings are initiated that they are not, in fact, U.S. citizens. *See* Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 312, 314 (2014) (explaining how interior enforcement fails to capture derivative citizenship claims).

179. Chau v. INS, 247 F.3d 1026, 1028 (9th Cir. 2001) (discussing proof of citizenship where petitioner was able to establish that his father was a U.S. soldier who had been stationed in Vietnam, but could not establish the identity of the soldier); Rosenbloom, *supra* note 152, at 1968 ("Citizenship claims based on descent often require would-be citizens to prove not only their parents' or grandparents' places of birth, but also that the relatives spent the requisite amount of time in the United States to convey citizenship to a child."); Andy East, *U.S. Citizen Jailed in Immigration Status Mistake*, TEX. TRIB. (Feb. 27, 2016, 6:00 AM), https://www.texastribune.org/2016/02/27/us-citizen-held-immigration-question [https://perma.cc/TJ9S-63L3] (discussing how a citizen born overseas offered various forms of documentation to establish his citizenship status).

status.[180] The database comparisons treat immigration status as though it can be reduced to a bright-line determination, which leads to overbroad detainer determinations that are not actually supported by probable cause.

Perhaps reliance on the databases could be justified if the database screening process was just one step in a larger, more reliable process. But that is not the case. Immigration arrest decisions contain far fewer safeguards against error than similar decisions in criminal law. Each immigration detainer is accompanied by an administrative warrant showing that there is probable cause that the target is removable.[181] Unlike criminal warrants, no judicial process accompanies administrative warrants.[182]

Other safeguards against error in criminal law do not apply in immigration law. Suppose a local police officer stops someone suspected of unlawfully carrying a firearm and runs a criminal background check. The background check shows that the stopped individual has a prior felony conviction. The officer now has probable cause to arrest the individual on the charge of being a felon in possession of a firearm—a felony in most jurisdictions.[183] If it turns out

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180. Gonzalez v. ICE, 416 F. Supp. 3d 995, 1008 (C.D. Cal. 2019), *rev'd in part*, 975 F.3d 788 (9th Cir. 2020). As a former deputy chief of staff for ICE explained in an expert report:

> DHS databases contain many errors, missing information, and inconsistent information. The information in the databases is only as reliable as the accuracy of the information being entered and the accuracy of its entry into the system. There are many sources of human error . . . . One issue is the entry of foreign names . . . . Another issue is misspellings. For example, "Gonzalez" could be entered as "Gonzales."

Amaya Report, *supra* note 3, at 14–15; *see also* Margaret Hu, *Biometric ID Cybersurveillance*, 88 IND. L.J. 1475, 1540 (2013) (discussing how biometric identification can be vulnerable to errors).

181. ICE IMMIGRATION DETAINERS, *supra* note 29, at 2.

182. In its initial rollout, Secure Communities issued detainers that dispensed with the probable cause requirement and issued detainers solely on the grounds "that an 'investigation has been initiated' into [the detained individual's] immigration status." Moreno v. Napolitano, 213 F. Supp. 3d 999, 1002 (N.D. Ill. 2016) (quoting Moreno v. Napolitano, No. 11 C 5452, 2014 WL 4911938, at *9 (N.D. Ill. Sept. 30, 2014)). The government changed the detainer process to require a probable cause determination after a federal court found the practice unconstitutional. *Id.* at 1009; Miranda-Olivares v. Clackmas County, No. 3:12–cv–02317–ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (finding a Fourth Amendment violation where county relied on an ICE detainer that did not provide probable cause regarding removability). In a 2017 enforcement policy memorandum, ICE described the policy of issuing civil administrative warrants with detainers as a reaction to the *Moreno v. Napolitano* opinion. ICE IMMIGRATION DETAINERS, *supra* note 29, at 2 n.2.

183. A felony is commonly defined as an offense that is punishable by more than one year in prison. *Felony*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining felony as "[a] serious crime usu. punishable by imprisonment for more than one year or by death"). The facts in this

that the database was wrong—the suspect had never been convicted of a felony—the arrest was still lawful because it was supported by probable cause at the time of arrest. However, after the officer makes the arrest, other legal constraints play a role in safeguarding against error. The arrested individual is entitled to a hearing before a neutral magistrate—not before a prosecutor or anyone else from a law enforcement agency.[184] The judge's job is to review the facts of the arrest, make an independent probable cause determination, set bail, and appoint an attorney at no cost to the defendant if the defendant is indigent.[185] The prosecutor also exercises discretion and makes an independent determination about whether to bring charges.[186] The defense attorney should review the facts of the arrest, meet with the defendant, and argue for the defendant's release. These constraints are intended to evaluate whether the arrest was actually supported by probable cause.

These constraints too often fall short in fulfilling their purpose in the criminal justice system. But none of these protections even apply for probable cause determinations in the case of immigration arrests.[187] Suppose an officer checks a U.S. citizen's immigration status, and a database erroneously shows that the individual has a prior removal order. Again, the database was wrong, and the arrested individual is actually a U.S. citizen. In the immigration case, there is no neutral magistrate review of the administrative warrant accompanying the immigration detainer. There is no right to appointed counsel if the defendant cannot afford one.[188] And as in Brown's case,[189] the target of the detainer may not even have access to an immigration officer to

hypothetical come from *Rothgery v. Gillespie County*, 554 U.S. 191, 195 (2008), where the arrested individual was charged with a felony because the arresting officer used an incorrect database to determine that he was a felon in possession of a firearm.

184. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

185. *See* Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

186. *See, e.g.*, Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1250 (2020) (discussing how "progressive prosecutors" exercise charging discretion); Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1184–92 (2020) (analyzing how prosecutorial charging practices contribute to the overwhelming caseloads for indigent defense lawyers).

187. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (characterizing deportation as "a purely civil action" that does not trigger criminal procedure safeguards); Legomsky, *supra* note 74, at 511–15 (discussing the courts' "depiction of deportation as 'civil' and not punitive").

188. *See* 8 U.S.C. § 1362 (2018) (providing the privilege of representation by counsel, but only "at no expense to the Government").

189. *See supra* notes 110–17 and accompanying text.

speak with about the error until being formally transferred to immigration custody—which could occur well after any decisions about bail or plea bargaining have taken place in the criminal case.

There is relatively little data on how often DHS database errors result in inaccurate detention. DHS recently acknowledged that it lifted 6 percent of the immigration detainers issued in greater Los Angeles after determining that "the individuals were either U.S. citizens or otherwise not subject to removal."[190] This error rate is likely underinclusive because it only tracks errors that DHS itself has acknowledged, and because "sanctuary" policies adopted in Los Angeles limit compliance with ICE detainers.[191] Other recent studies have also found systemic error. In Miami-Dade County, a hub of immigration enforcement, an investigation by the American Civil Liberties Union found that from February 2017 to February 2019, ICE ultimately canceled approximately 20 percent of the detainer requests because of evidence that the targets were not legally removable.[192] It is only possible to conceptualize jailhouse screening as targeted by ignoring systemic inaccuracies and the toll they take on the detained population.

C. Front-End Selection

Jailhouse immigration screening focuses on a population that is particularly poorly situated to advocate on their own behalf to surface

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190. Gonzalez v. ICE, 416 F. Supp. 3d 995, 1011 (C.D. Cal. 2019), *rev'd in part*, 975 F.3d 788 (9th Cir. 2020). The court explained that:

> Data produced by ICE during the period of May 2015 to February 2016 reveals that of the 12,797 detainers issued during that time frame, 771 were lifted because the individuals were either U.S. citizens or otherwise not subject to removal . . . . Of those 771 detainers lifted, 42 explicitly provide that the detainer was lifted because the individual was a U.S. citizen.

Id. (citations omitted).

191. News Release, U.S. Immigr. & Customs Enf't, Local ICE Director Discusses Sanctuary Policy Impact on Public Safety (Sept. 26, 2019), https://www.ice.gov/news/releases/local-ice-director-discusses-sanctuary-policy-impact-public-safety [https://perma.cc/CH9A-7E52] (stating that local law enforcement effectuated only five hundred out of eleven thousand detainers lodged in Los Angeles County in 2019).

192. ACLU FLA., CITIZENS ON HOLD: A LOOK AT ICE'S FLAWED DETAINER SYSTEM IN MIAMI-DADE COUNTY 2–3 (2019), https://www.aclufl.org/sites/default/files/field_documents/aclufl_report_-_citizens_on_hold_-_a_look_at_ices_flawed_detainer_system_in_miami-dade_county.pdf [https://perma.cc/28QE-UBW8] (citing data from Miami-Dade County "show[ing] that between February 2017 and February 2019, ICE sent the jail 420 detainer requests for people listed as U.S. citizens, only to later cancel 83 of those requests—evidently because the agency determined, after the fact, that its targets were in fact U.S. citizens").

errors. Once arrested individuals are subject to criminal custody, factors such as poverty, isolation, lack of access to immigration papers, and mental illness affect the removal process.

Travis Murphy, described as "homeless, uneducated, and illiterate," by the federal court that reviewed his case, was convicted of drug trafficking charges.[193] Immigration officials interviewed him, determined that he was a Jamaican national, and served him with a notice to appear at a removal hearing.[194] Like most people in removal proceedings, Murphy appeared pro se.[195] He had difficulty communicating; large portions of his testimony were "indiscernible."[196] He denied being of Jamaican nationality and stated that he had been homeless in the United States for much of his life.[197] During the removal hearing, the government produced no authenticated evidence that he was born in Jamaica, which meant that it was unable to meet its burden of proof.[198] The jailed population is particularly likely to consist of individuals who have no ready access to documentation, like Murphy. Unlike Murphy, those deported without ever appearing at an immigration removal proceeding have no practical ability to hold the government to its burden of proof.

Those in jail also face pronounced difficulty obtaining documentation. Immigration status is a legal status—it is not an evidentiary determination of guilt or innocence. For the minority of U.S. citizens who own passports and have them readily available, documenting immigration status may pose no problems.[199] But for those in jail, even making a phone call to try to obtain documentation may be out of reach. A 2019 survey found rates as high as twenty-four dollars per minute for a call, with median ranges from six to fourteen

193. Murphy v. INS, 54 F.3d 605, 607 (9th Cir. 1995).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 610, 612.

199. As of 2020, approximately 43 percent of U.S. citizens owned passports. *See Reports and Statistics*, U.S. DEP'T OF STATE (2020), https://travel.state.gov/content/travel/en/about-us/reports-and-statistics.html [https://perma.cc/842E-N3RW] (reporting that there were 143,116,663 valid U.S. passports in circulation in 2020); *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock [https://perma.cc/T7NQ-T9QF] (reporting the U.S. population was approximately 330.7 million at the end of 2020).

dollars per minute.[200] Obtaining immigration paperwork itself is not cost free. Small dollar amounts—such as twenty-five dollars for a birth certificate—can be cost prohibitive for the poor.[201] The administrative challenges of gathering paperwork from criminal custody may be prohibitively high.

Seeking to establish citizenship or lawful immigration status is particularly difficult for those who experience mental illness. Pedro Guzman, a U.S. citizen with a long history of mental illness, was deported to Mexico after spending approximately a month in jail on charges of trespassing in a junkyard.[202] His family only learned of his deportation after the fact.[203] According to his family, Guzman did not display outward signs of a mental disability, but he was suspicious of strangers and could not read or write.[204] Guzman was located three months after his deportation, after he made his way by foot over one hundred miles to the U.S.–Mexico border.[205]

North Carolinian Mark Lyttle was arrested for a misdemeanor assault while receiving treatment in a psychiatric hospital.[206] A prison official who apparently thought he looked Mexican filled out "Mexico" as his place of birth.[207] (Lyttle's family was from Puerto Rico.)[208] That notation prompted an interview with two ICE agents who took Lyttle into custody and interrogated him without a witness present.[209] The immigration agents concluded that "Mark Daniel Lyttle was an alias,"

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200. Press Release, Peter Wagner & Alexi Jones, Prison Pol'y Initiative, State of Phone Justice: Local Jails, State Prisons, & Phone Providers (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html [https://perma.cc/6ZTA-WCD8] (providing a national survey of telephone call rates from state prisons and jails).

201. Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 808 (2015) ("Even costs that may seem minor to some, such as $135 for a passport, or $25 for a birth certificate or marriage license, may be prohibitive for the indigent.").

202. Sam Quinones, *Family of Deported Man Sues the U.S.*, L.A. TIMES (June 12, 2007, 12:00 AM), https://www.latimes.com/archives/la-xpm-2007-jun-12-me-deport12-story.html [https://perma.cc/27Z3-4XVJ].

203. *Id.*

204. *Id.*

205. Randal C. Archibold, *Deported in Error, Missing and Months Later Home*, N.Y. TIMES (Aug. 8, 2007), https://www.nytimes.com/2007/08/08/us/08border.html [https://perma.cc/YHB7-HELB].

206. Lyttle v. United States, 867 F. Supp. 2d 1256, 1269 (M.D. Ga. 2012).

207. Complaint ¶ 31, Lyttle v. United States, 4:10-cv-142 (E.D.N.C. Oct. 13, 2010) [hereinafter *Lyttle* Complaint]. The form also listed his race as "Oriental." *Id.*

208. *Lyttle*, 867 F. Supp. 2d at 1269.

209. *Id.*

and that Lyttle was in fact a citizen of Mexico who had unlawfully entered the United States at age three.[210] Lyttle had never completed high school and was functionally illiterate.[211] Nonetheless, immigration officers required him to sign a document stipulating that "Lyttle" was not his actual name and that he was born in Mexico.[212]

As a statutory matter, Lyttle was not entitled to an attorney at government expense, nor was he entitled to a mental competency proceeding at the time he was placed in immigration detention. No one contacted his family to allow them to provide evidence on his behalf.[213] He was transferred to immigration custody and detained for fifty-one days before being flown to the border, where he was forced to walk to Mexico with three dollars in his pocket.[214] Lyttle spoke no Spanish and had no identification.[215] He spent 125 days wandering through Mexico and Central America before making his way to a U.S. Embassy in Guatemala.[216] Eventually, embassy officials investigated his citizenship status and arranged for his return to the United States.[217]

As immigration screening has shifted to prisons and jails, it has resulted in disproportionate immigration screening of those who experience disability. According to the Bureau of Justice Statistics, 14 percent of state and federal prisoners and 26 percent of jail inmates meet the threshold for "serious psychological distress," as compared to 5 percent of the general population.[218] The proportion is even higher for general mental illnesses.[219] The targeted model assumes that those being screened are selected because they have engaged in conduct that is blameworthy. But these statistics reveal that criminal arrests systemically target those who may lack the ability to comport their

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210. *Id.*

211. *Id.* He was also bipolar and had spent much of his life receiving psychiatric treatment. *Id.*

212. *Id.* at 1272.

213. *Lyttle* Complaint, *supra* note 207, ¶ 56.

214. *Lyttle*, 867 F. Supp. 2d at 1266.

215. *Id.*

216. *Id.*

217. *Id.*

218. *BJS Finds That Inmates Have a Higher Rate of Serious Psychological Distress than the General U.S. Population*, U.S. BUREAU OF JUST. STAT. (June 22, 2017, 10:00 AM), https://www.bjs.gov/content/pub/press/imhprpji1112pr.cfm [https://perma.cc/WCN5-6BWA].

219. Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 463 (2018) (noting that "56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates suffer from mental health issues").

conduct with criminal law. Relying on criminal arrest as a filter for immigration screening necessarily means that immigration screening targets some of the most vulnerable members of our society—due to factors such as poverty and disability—and it imposes screening in an isolated setting where there are few safeguards against error.

III. A PUNITIVE MODEL OF IMMIGRATION CONTROL

The rationale for engaging in jailhouse screening is a convergence of interests in immigration and criminal law; the stated aim of federal immigration officials is to use information gathered in the jailhouse to identify those who should be prioritized for deportation after they have finished serving their sentence. But what jailhouse screening reveals is how carceral interests subsume the government's interest in building the polity. It is not possible for immigration screening to rely on criminal arrest without also reproducing the racial and class-based disparities underlying those arrests. As a result, policing decisions broker membership in the polity, rather than core immigration considerations about actual legal status, ties to the United States, and length of residence in the United States. This Part argues that jailhouse immigration screening resuscitates a punitive approach to immigration enforcement, and it argues that this approach undermines core aims of immigration law.

A. Magnifying the Socioracial Biases of Criminal Arrest

When immigration enforcement is linked to the process of criminal arrest, it overwhelmingly screens a population arrested for low-level offenses. At a rate of thirteen million cases filed per year, misdemeanor arrests outnumber felony arrests by a ratio of four to one.[220] While there is no single misdemeanor system, and arrest practices vary across jurisdictions, a significant number of misdemeanor arrests are for quality-of-life offenses. As Professor Alexandra Natapoff observes, offenses such as loitering or disorderly conduct "don't even look much like crimes."[221] Criminal arrest

220. Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 975 (2020) ("There are approximately thirteen million misdemeanor cases filed each year, representing more than three-quarters of all criminal cases.").

221. NATAPOFF, *supra* note 18, at 3 (emphasis omitted) (noting that "[i]n twenty-five states, speeding is a misdemeanor," and that the category of "quality-of-life offenses" includes behaviors such as "[l]oitering, spitting, [and] disorderly conduct").

practices for common, broadly defined behaviors systemically reflect factors other than culpability, such as poverty, mental illness, and race.[222]

In well-documented cases, domestic police engage in racial profiling for purposes of immigration enforcement. The Maricopa County Sheriff's Office engaged in an "office-wide policy and practice to detain and arrest [Latino persons] believed to be within the United States without authorization, even when no state charges could be brought against such persons."[223] In Maricopa, racial profiling was programmatic behavior by the police—it was part of an organized strategy of law enforcement to target those suspected of lacking lawful immigration status.[224] This policing behavior, the targeted drivers contended, was partially a product of police responding to "racially charged citizen requests."[225] By relying on criminal arrest as a screening device, immigration officials incorporate all of the race- and class-based selection biases underlying criminal arrest.[226]

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222. *Id.* at 10 (highlighting the U.S. criminal justice system's "ignominious history of punishing the poor" and people of color).

223. Melendres v. Arpaio, No. CV-07-2513-PHX-GMS, 2016 WL 2783715, at *2 (D. Ariz. May 13, 2016); Melendres v. Arpaio, 695 F.3d 990, 1000–02 (9th Cir. 2012) (upholding preliminary injunction preventing the Maricopa County Sheriff's Office from detaining Latino motorists "based solely on reasonable suspicion or knowledge that a person was unlawfully present in the United States").

224. *Cf.* Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 165 (2015) (explaining that many young men of color do not experience police stops as "one-off investigative incident[s]" but rather as repetitive encounters based on high volume stops).

225. *Melendres*, 695 F.3d at 995 ("Plaintiffs . . . contend[ed] that undisputed evidence established that the Defendants racially profiled Latinos when conducting their crime-suppression sweeps in response to racially charged citizen requests."). For an additional discussion of immigrants racially profiled as criminals, see Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 199–200 (2019) (describing how, after an influx of Somali immigrants to the largely white township of the town of Faribault, Minnesota, police officials attributed increased crime reports to cultural clashes with new Somali residents, as opposed to actual crime).

226. Floyd v. City of New York, 959 F. Supp. 2d 540, 572–73 (S.D.N.Y. 2013) (summarizing the most "uncontested statistics" that 80 percent of an estimated 4.4 million *Terry* stops were of racial minorities); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 769 (2018) (providing data of "highly consistent and persistent patterns" of "large and persistent racial disparity in arrest rates across most offense types"); *see also* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1494 (2016) (describing how calls to the police for public order offenses like loitering increased during a period of racial integration and gentrification); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 46–47 (2009) (discussing the "perceived racial borders" enforced by police when "law-abiding minorities entering predominantly white neighborhoods

Jailhouse screening builds upon a criminal enforcement system that reflects power disparities between vulnerable residents and the police. The criminal arrest process systematically permits police to target people who are perceived as undesirable and who lack the ability to contest criminal arrest. To give one troubling example, in 2010, a federal court determined that New York City police officers had arrested hundreds of homeless individuals on a defunct panhandling law.[227] Police officers had relied on "cheat sheets" to figure out how they could arrest a population they perceived as undesirable.[228] Decades after the panhandling law was struck down, those cheat sheets remained in circulation and were used for arrest.[229] The police defined the law in practice, regardless of the actual law on the books.

Although criminal law is supposed to offer the most robust protections against government overreach, the process in misdemeanor courts systemically fails to provide access to adjudication and to hold the government to its burden of proof.[230] In Professor Malcolm Feeley's now-classic study of misdemeanor courts, in not a single one of the 1,640 misdemeanor cases sampled did the defendant receive a trial.[231] This approach continues today in misdemeanor courts around the country.[232] The misdemeanor process ends in a plea bargain

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are frequently stopped and questioned as to the reason for their presence in the neighborhood"); Ben Poston & Cindy Chang, *LAPD Searches Blacks and Latinos More. But They're Less Likely To Have Contraband than Whites*, L.A. TIMES (Oct. 8, 2019, 3:52 PM), https://www.latimes.com/local/lanow/la-me-lapd-searches-20190605-story.html [https://perma.cc/BM4T-W8CX] (noting that "Blacks and Latinos were more than three times as likely as whites to be removed from the vehicle and twice as likely to either be handcuffed or detained at the curb" by police officers as compared to white drivers).

227. Casale v. Kelly, 710 F. Supp. 2d 347, 352, 354 (S.D.N.Y. 2010).

228. *Id.* at 356–57 (explaining how police officers systematized unlawful arrests by carrying "cheat sheets" that explained how they could paper their decisions to arrest homeless individuals).

229. *Id.* at 357 (noting that an investigation by the city of New York, prompted by a class action lawsuit, found "nearly 1,400 cheat sheets containing the void laws").

230. Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 956–60 (2018) (discussing delays in misdemeanor processing and watered-down procedural protections that compromise the efficacy of criminal procedure); Natapoff, *Misdemeanors*, *supra* note 17, at 1358–59.

231. MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 9–11 (1979).

232. Natapoff, *Misdemeanors*, *supra* note 17, at 1329 (explaining that "little has changed since Feeley's study").

or a dismissal, but rarely in adjudication.[233] Defendants often have to endure lengthy delays and repeated court dates if they seek their day in court.[234] The process of arrest and confinement is not labeled as punishment, but from the perspective of the arrested individual, it is experienced as punishment.[235]

Jailhouse immigration screening does not trigger formal punishment—no one is sentenced to serve a prison term for civil immigration violations—but it has a pronounced punitive effect. In some respects, jailhouse immigration screening resuscitates an approach that is actually worse than the law at issue in *Wong Wing*.[236] In *Wong Wing*, the Court held that a noncitizen could not be sentenced to imprisonment for violating civil immigration laws.[237] If Congress chose to punish civil immigration violations, it had to do so through the criminal law.[238] The Court assumed that noncitizens would have access to an adjudicatory process.[239] But in the jailhouse, targeted individuals too often have access to none. The targets of jailhouse immigration screening are merely suspected of being removable; they have not been adjudicated removable. They are merely suspected of committing crime; they have not yet been convicted of anything. Jailhouse

233. Besiki L. Kutateladze & Victoria Z. Lawson, *Is a Plea Really a Bargain? An Analysis of Plea and Trial Dispositions in New York City*, 64 CRIME & DELINQ. 856, 869 (2018) (finding that more than half of New York misdemeanor cases were disposed by plea agreements, and almost an additional quarter were dismissed).

234. Kohler-Hausmann, *supra* note 123, at 611 (explaining that in New York misdemeanor cases, "[a]mong those cases that continued past arraignment, the mean age of the docket at disposition . . . ha[d] ranged from 85.1 to 112.7 days over the past ten years").

235. *See generally* NATAPOFF, *supra* note 18 (conceptualizing the misdemeanor system as imposing "punishment without crime"). *See* Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOCIO. 351, 351 (2013). For important studies of misdemeanors, see generally FEELEY, *supra* note 231 (describing a degrading process of being subjected to procedural hassle in misdemeanor court) and ISSA KOHLER-HAUSMANN, MISDEMEANORLAND (2019). Both Feeley and Professor Issa Kohler-Hausmann employ the concept of a "managerial" system that manages defendants through contact with the criminal justice system. FEELEY, *supra* note 231, at 7–11; KOHLER-HAUSMANN, *supra*, at 4–5.

236. Wong Wing v. United States, 163 U.S. 228, 233–34 (1896).

237. *Id.* at 237. The defendants had been ordered deported, and had been sentenced to hard labor before their deportation was effectuated. *Id.* at 235.

238. *Id.* ("But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.").

239. *See id.* at 236–37 ("It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.").

screening permits race-based biases about criminal culpability to drive the immigration enforcement system but conceals the work that race-based selection is doing. By assuming that people deserve to be screened because they are in the jailhouse, we ignore factors other than criminal culpability that lead to their being arrested.

This approach comes at an enormous cost to overpoliced racial minorities. Commentators have at times invoked the language of citizenship and immigration law to convey the harm caused by race-based policing.[240] In her dissent in *Utah v. Strieff*,[241] Justice Sonia Sotomayor put it this way: "[U]nlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name . . . . When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens."[242] Justice Sotomayor dissented from the majority's decision holding that evidence discovered in an unjustified police stop is still admissible.[243] By invoking the language of immigration law, Justice Sotomayor conveyed how racialized police stops and arrests shape an entire community's relationship with the government. Justice Sotomayor concluded that the majority opinion "implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[244]

Justice Sotomayor's concern was with how overbroad police stops can compromise freedom of movement and individual liberty. Professor Monica Bell makes a similar point, arguing that a large body of cross-disciplinary research "suggests that [poor people of color] often see themselves as essentially stateless—unprotected by the law and its enforcers and marginal to the project of making American society."[245] Overpoliced communities receive a message of "profound

240. *See, e.g.*, Paul Butler, *Walking While Black; Encounters with the Police on My Street; Points of View*, NAT'L L.J., Nov. 1997 (analogizing a police stop in the author's neighborhood to a demand to show a pass card in apartheid South Africa); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 955–57 (2002) (describing the author's own experience of being subject to racial profiling by police).

241. Utah v. Strieff, 136 S. Ct. 2056 (2016).

242. *Id.* at 2069 (Sotomayor, J., dissenting).

243. *Id.* at 2064 (majority opinion).

244. *Id.* at 2070–71 (Sotomayor, J., dissenting).

245. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2017); *see also* I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 655 (2018) (arguing that the Court's policing jurisprudence conveys that a

estrangement" where "large swaths of American society . . . see themselves as anomic, subject only to the brute force of the state while excluded from its protection."[246]

At a time when there is growing questioning of how police surveil and control racial minorities within the United States, it is crucial to recognize how jailhouse immigration screening magnifies the already-degrading experience of low-level arrests. Jailhouse immigration screening signals to overpoliced communities that the government rightfully engages in surveillance, and that those subject to criminal arrest should be viewed as potentially worthy of expulsion from the country. Jailhouse screening, combined with inadequate procedure, quite literally risks creating "second-class" citizens, regardless of their actual citizenship status or ties to the polity.

B. Undermining Immigration Law Objectives

Jailhouse screening ultimately undercuts the ability of immigration enforcement officials to adhere to a targeted-enforcement approach. The targeted approach rests on the premise that removal decisions should not only be legally justified, but that they should also reflect the reasoned exercise of prosecutorial discretion. Jailhouse screening, however, systemically opens the door to enforcement against those who are not legally removable as well as those who do not fall within stated removal priorities. Recognizing how jailhouse screening creates risks of targeting those meant to be on the "inside" of immigration law offers a way to recognize deeper structural problems with government overreach in the context of immigration enforcement.

To employ political theorist Michael Walzer's influential analogy, immigration law operates akin to an admissions policy in a university or a membership club.[247] Immigration law delineates those who are on

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"good citizen" ought to be willing to surrender constitutional rights and submit to police searches and questioning).

246. Bell, *supra* note 245, at 2057.

247. MICHAEL WALZER, SPHERES OF JUSTICE 36–42 (1983) (developing an analogy between immigration admission policies and neighborhoods, clubs, families, and universities); David Miller, *Immigration: The Case for Limits*, *in* CONTEMPORARY DEBATES IN APPLIED ETHICS 363, 368–72 (Andrew I. Cohen & Christopher Heath Wellman eds., 2d ed. 2014) (analyzing Walzer's analogy of immigration law as admission to a membership club).

the "inside" of the community and those who are not,[248] and it also dictates the terms of admission. The rationale is to create a bounded national community with a particular character. The laws that determine admissions, status changes, and removal construct the parameters of membership in the United States. Deportation is not the aim of immigration law itself, but is one tool the government uses to effectuate membership decisions. Immigration laws can simultaneously serve any number of ends—building a workforce or uniting families, for instance—but the decision to deport should be justified by substantive, procedural, and equitable considerations.

Deportation should accurately reflect immigration and citizenship status determinations; any legitimate immigration enforcement system must be able to recognize its own members. Adequate procedure plays a gatekeeping role in distinguishing those who are legally removable from those who are not. As Professor Rachel Rosenbloom notes, in *Kwock Jan Fat v. White*,[249] issued during the period of Chinese Exclusion, the U.S. Supreme Court articulated its own version of the Blackstone principle for immigration cases: "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."[250] Courts have recognized that immigration officials should be "just as zealous in making sure that U.S. citizens were not unlawfully removed from the United States as they were in making sure that illegal immigrants were excluded."[251]

Just as criminal prosecutions should reflect an interest in "doing justice," ICE arrests and prosecutions should also reflect a commitment to building the polity by recognizing membership claims. Undocumented activists, drawing on earlier civil rights movements, have argued that deportations are wrongful in a normative sense—despite being accurate and supported by adequate evidence—when

248. Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1062–65 (1994) (discussing the "inside" and "outside" distinction in immigration reflecting "the terms in which the judiciary has justified its immigration law exceptionalism over the past century" and arguing that the distinction is deeply problematic).

249. Kwock Jan Fat v. White, 253 U.S. 454 (1920).

250. *Id.* at 464; Rosenbloom, *supra* note 152, at 1990. The Blackstone formulation is typically described as: "better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (Oxford, Clarendon Press 1763).

251. Rivera v. Ashcroft, 394 F.3d 1129, 1134 (9th Cir. 2005).

they fail to recognize longstanding ties to the United States.[252] Some have publicly declared their undocumented status and challenged the government to deport them.[253] This "radical form of transparency" seeks to force the government to articulate why deportation serves a stated immigration law objective.[254] The aim is to show that the problem is not with those who lack lawful immigration status, but with an immigration law that fails to recognize their ties to the polity or permits them to normalize their status.[255] The government lacks the moral authority to engage in deportation, even if it claims the legal authority to do so.

Jailhouse screening has been conceptualized by immigration officials as making the process of removal more transparent. This approach is designed to make removal decisions that better reflect underlying equitable commitments. When Secure Communities was renamed the Priority Enforcement Program, Obama administration officials identified the goal of promoting "public confidence in our enforcement activities."[256] In theory, if we can see who the executive prioritizes for removal, we can evaluate whether removals actually fit those priorities. This approach, in principle, permits the public to mobilize the political process to seek outcomes that are fairer and more just. But because jailhouse screening is dependent on the criminal arrest process, it is not achieving the aim of channeling discretion in a transparent manner. Instead, it risks systemic enforcement against those who have compelling claims to remain.

For a noncitizen, the significance of deportation depends in part on the noncitizen's ties to the United States and the stakes involved in removal. As the Court recognized in *Padilla*, deportation can function as a punishment for longtime noncitizens,[257] depending on factors such

252. For a discussion of movement lawyering and immigration reform efforts, see Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1495–1506 (2017) and Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 628 (2020).

253. Jose Antonio Vargas, *Why I Turned Myself in to DHS*, POLITICO MAG. (Sept. 8, 2014), https://www.politico.com/magazine/story/2014/09/obamas-deferred-action-on-deportations-110737 [https://perma.cc/48EF-TZW5].

254. *Id.*

255. Professor Hiroshi Motomura has argued for "adopting a view of immigration as transition" and to recognize "new immigrants as Americans in waiting." Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 367 (2012).

256. Detention and Removal Priorities Memorandum, *supra* note 94, at 1.

257. Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

as length of presence in the United States and ties to their country of origin. For too many noncitizens, deportation lacks any principles of proportionality and fails to recognize underlying ties and contributions to the polity.[258]

For a citizen, deportation is the legal equivalent of a wrongful conviction; it is a form of criminal punishment—namely, banishment. A body of constitutional law limits Congress's ability to strip citizenship through civil proceedings.[259] In *Trop v. Dulles*,[260] the Court held that Congress had no authority to strip citizenship from a U.S. soldier who was convicted of a single day's desertion during wartime.[261] The Court determined that denaturalization constituted cruel and unusual punishment under the Eighth Amendment on the facts of the case.[262] Five years later, in *Kennedy v. Mendoza-Martinez*,[263] the Court likewise held that denationalization following an act of military desertion constituted punishment, and could only be imposed if the defendant was offered the full range of constitutional safeguards that accompany the criminal justice process.[264]

The Court has articulated a number of rationales for limiting Congress's ability to strip citizenship. From the perspective of political contract theory, citizenship status can be conceptualized as a preconstitutional political contract between individuals and their government: "This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its

258. *See generally* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009) (arguing that deportation lacks a proportionality principle).

259. Naturalized citizens may have their citizenship status stripped away only if the government can establish that citizenship was obtained by fraud. 18 U.S.C. § 1425 (2018) (prohibiting the "[p]rocurement of citizenship or naturalization unlawfully"); 8 U.S.C. § 1451(e) (2018) (providing for denaturalization when a citizen has been convicted of knowing procurement of naturalization by fraud). The government has the burden of proving fraud in the acquisition of citizenship, and "the facts and the law should be construed as far as is reasonably possible in favor of the citizen." Schneiderman v. United States, 320 U.S. 118, 122 (1943). For a critique of civil denaturalization procedures as being too lax, see generally Cassandra Burke Robertson & Irina D. Manta, *(Un)civil Denaturalization*, 94 N.Y.U. L. REV. 402, 402, 452–61 (2019) (arguing "that stripping Americans of citizenship through the route of civil litigation . . . violates substantive and procedural due process").

260. Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion).

261. *Id.* at 92.

262. *Id.* at 86.

263. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

264. *Id.* at 165.

existence."[265] In *Afroyim v. Rusk*,[266] the Court put it this way: The "citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship."[267]

One rationale for curtailing Congress's ability to strip citizenship is to minimize the risk of uncertainty about whether a citizen's conduct might result in deportation. Justice William Brennan's concurrence in *Mendoza-Martinez* argued that stripping citizenship from those who engage in egregious misconduct could also open the door to potentially removing citizens who refuse "to pay taxes, to do jury duty, to testify, to vote."[268] Similarly, in *Trop*, Chief Justice Earl Warren's plurality opinion stated that "[c]itizenship is not a license that expires upon misbehavior . . . citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be."[269]

This body of constitutional doctrine is also intended to protect the most vulnerable citizens from having their status stripped away and to guard individuals from the risk of government overreach. In *Afroyim*, the Court held that Congress has no authority to "forcibl[y] destr[oy] . . . citizenship" status, and it held that "the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race."[270]

Constitutional doctrine is thus deeply protective of citizens who are recognized as on the "inside" of immigration law. If the "country is its citizenry," then immigration enforcement procedures that subject vulnerable residents to extended carceral treatment reveal a core failure of immigration administration. If jailhouse immigration screening creates the risk of detaining citizens, then there is little reason to believe that it does a good job of "targeting" enforcement in

265. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). *Perez v. Brownell* was overturned by *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967), and Chief Justice Earl Warren's dissenting opinion in *Perez* formed the basis for the majority opinion in *Afroyim*.

266. Afroyim v. Rusk, 387 U.S. 253 (1967).

267. *Id.* at 268.

268. *Mendoza-Martinez*, 372 U.S. at 196 (Brennan, J., concurring).

269. Trop v. Dulles, 356 U.S. 86, 92–93 (1958) (plurality opinion).

270. *Afroyim*, 387 U.S. at 268.

a way that takes into account substantive, procedural, and equitable claims of noncitizens to remain in the country.

In the context of jailhouse immigration screening, there is already evidence that removals fail to comport with articulated federal enforcement priorities. Many of those removed after the rollout of Secure Communities did not fall into any stated removal priorities.[271] But more fundamentally, the absence of procedural protections within the jailhouse creates reason to doubt whether the category of "criminal alien" has meaning—whether it actually reflects underlying criminal culpability or legal removability. Jailhouse screening magnifies the potential for government overreach already inherent in domestic policing and extends it to decisions about removal. Put differently, in service of policing a boundary between members and nonmembers, jailhouse screening shifts that boundary in a way that excludes overpoliced racial minorities most likely to be stereotyped as undocumented.[272] Immigration enforcement decisions reflect domestic policing practices rather than the removal priorities articulated by the federal government.

IV. UNCOUPLING IMMIGRATION ENFORCEMENT FROM THE JAILHOUSE

This Part turns to reform. Without a major change in either arrest practices or immigration law, it is not possible to conduct immigration screening in the jailhouse without importing carceral interests into immigration enforcement. If jailhouse immigration screening does not actually succeed at targeting immigration enforcement—if it instead imposes additional jailtime and creates new risks of removing those who are not legally removable, much less removal priorities—then it should be discontinued. This Part argues for ending jailhouse immigration screening and explains why other commonly proposed changes, such as modifying detainers or employing "sanctuary" policies, will not remedy the defects of jailhouse immigration screening. If jailhouse screening persists, it should be accompanied by

271. *See* Cox & Rodríguez, *Immigration Law Redux*, *supra* note 4, at 188–91 (showing how the Morton Memos did not initially increase removals that fell within federal priorities and explaining that the discrepancy may have been due to "an enforcement-oriented and results-driven institutional culture" amongst immigration agents).

272. *Cf.* Asad L. Asad, *Latinos' Deportation Fears by Citizenship and Legal Status, 2007–2018*, 117 PROC. NAT'L ACAD. SCIS. 8836, 8836–37 (2020) (finding that the deportation fears of Latino U.S. citizens increased during the Trump administration, due to growing awareness of the deportation policy after the 2016 election).

front-end procedural protections that more closely resemble those of criminal procedure. Improved procedures are no substitute for uncoupling from the jailhouse altogether; they will do little to address racial biases underlying arrest decisions or the risk of heightened detention based on suspected immigration status. But they represent an improvement from the current approach because they offer a way to hold the government to its burden of proof. One particularly important change is to adopt neutral review of immigration detainers.

A. Uncoupling Immigration Screening from the Process of Criminal Arrest

Immigration officials cannot rely on criminal arrest as a front-end screening device without fundamentally altering how immigration enforcement unfolds. Without a significant change in either the size of the undocumented population or in policing practices, criminal arrest should not be used for immigration screening. Common policy proposals that fall short of uncoupling immigration screening from criminal arrests will do little to address a process that permits front-end detention based on suspected immigration status. They will not alter the mechanics of underlying arrest decisions or the front-end influence of immigration detainers on the criminal justice process.

One reform proposal is to end the use of the current immigration detainers and to reinstate "notification only" immigration detainers.[273] The Obama administration adopted this approach when it replaced Secure Communities with the Priority Enforcement Program.[274] A "notification only" detainer does not request that the jail hold the detained individual for any additional time.[275] It instead requests that the immigration officials be notified prior to the arrested individual's release from criminal custody. This approach, however, does nothing to prevent bail denial or to limit the adverse impact that detainers have

273. Testimony presented during the *Gonzalez* trial indicated that DHS switched from notification only detainers to the current detainers that request two days additional jailtime in 1997. *Gonzalez* Brief, *supra* note 147, at 7–8. DHS switched back to notification only detainers between 2015–2017, and then reinstated the detainers that seek two days additional detention. *Id.* at 8.

274. *See* Detention and Removal Priorities Memorandum, *supra* note 94, at 6 (establishing priorities effective January 5, 2015).

275. Garcia v. Taylor, 40 F.3d 299, 304 (9th Cir. 1994) (stating that an immigration detainer is not a request that a warden "hold a petitioner"); Campillo v. Sullivan, 853 F.2d 593, 594 (8th Cir. 1988) (noting that a detainer is "for notification purposes only").

on the criminal plea–bargaining process. "Notification only" detainers still cede significant discretion to the police to set the agenda for immigration enforcement.

"Sanctuary" or "immigrant protective" policies will also not address the defects in jailhouse immigration screening. "Sanctuary" is an umbrella term for a body of distinct practices that may include noncooperation with immigration detainers.[276] These policies, while significant on the local level, are not a solution for a program with a national scope. Noncooperation policies create some additional costs for the federal government in conducting immigration screening in certain jails, but those costs will likely lead the government to shift resources to other jurisdictions that comply with detainers. In addition, localities have significant discretion in how they rely on detainers. Some "sanctuary" jurisdictions have adopted selective noncooperation policies, with local law enforcement complying with detainers if the defendant is charged with a felony or with a violent crime.[277] The approach still gives local law enforcement agencies the power to use immigration detainers as markers when it serves their own institutional objectives. Sanctuary is not tantamount to ending jailhouse screening.

Shifting to criminal convictions rather than criminal arrests has the potential to reduce the impact of immigration screening in the jailhouse, but much depends on how the approach is implemented. As of January 2021, the Biden administration revoked the Trump administration's immigration enforcement memoranda and announced a review of civil immigration enforcement priorities.[278] The Biden administration may take an approach that resembles the Obama administration's decision to end Secure Communities and replace it

276. *See, e.g.*, Barbara E. Armacost, *"Sanctuary" Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1199, 1205 (observing that the modern sanctuary movement differs in important ways from its namesake in the church-led sanctuary movement of the 1980s); Eagly, *Immigrant Protective Policies*, *supra* note 14, at 300–01, 301 n.303 (discussing sanctuary policies); Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities*,*"* 59 B.C. L. REV. 1703, 1736–52 (2018) (outlining several different categories of sanctuary policy).

277. Eagly, *Immigrant Protective Policies*, *supra* note 14, at 301 & n.304 (explaining that sanctuary policies may include exceptions that permit the reporting of individuals charged with felonies).

278. Memorandum from David Pekoske, Acting Sec'y, U.S. Dep't of Homeland Sec., to Troy Miller, Senior Off. Performing the Duties of the Comm'r, U.S. Customs & Border Prot., et al., Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/37KN-JSYE].

with the Priority Enforcement Program.[279] The Obama administration's decision to relaunch jailhouse screening in the form of the Priority Enforcement Program was driven in part by the perception that the program compromised local law enforcement relationships with immigrant communities. When ending Secure Communities, then-DHS Secretary Jeh Johnson stated "Secure Communities remains in my view a valid and important law enforcement objective, but a fresh start and a new program are necessary," given evidence that the program created mistrust between immigrant communities and local law enforcement agencies that ultimately refused to comply with immigration detainers.[280] An approach akin to the Priority Enforcement Program would shift to prioritizing enforcement against those with certain convictions, rather than on the basis of arrests as a general matter. Assuming line immigration officers exercise discretion in how detainers are issued in the first place,[281] this approach may reduce the reach of the program. But if immigration officers issue detainers broadly at the time of arrest, then detainers will still create extended carceral treatment within the criminal justice system, regardless of whether immigration officials ultimately pursue removal.

Even if a conviction-based approach reduces the reach of detainers, it continues to hand local law enforcement officials the power to manipulate criminal charges to maximize the likelihood of deportation. Prosecutors often wield considerable discretion in how they charge particular offenses, including with respect to collateral consequences such as deportation.[282] Maricopa County, for instance, one of the largest jurisdictions for removals in the United States, has a well-documented policy of seeking to maximize the likelihood of deportation for noncitizens.[283] Prosecutors describe this as a "no amnesty" approach, one that views deportation as a goal of the prosecution.[284] Prosecutors who are aware of immigration status, and

279. *See* Secure Communities Memorandum, *supra* note 94 (ending Secure Communities).

280. *Id.* at 1.

281. As Cox and Rodríguez have noted, the Obama administration encountered pronounced challenges in ensuring that line-level immigration agents adhered to federal priorities. Cox & Rodríguez, *Immigration Law Redux*, *supra* note 4, at 162, 190–91 (discussing how in an enforcement-driven culture, line agents may not adhere to executive enforcement priorities); *see also* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 170–73 (2020).

282. Jain, *Prosecuting Collateral Consequences*, *supra* note 74, at 1215–26 (discussing prosecutorial discretion and collateral consequences).

283. Eagly, *Criminal Justice*, *supra* note 132, at 1188.

284. *Id.*

who have the discretion to bring multiple criminal charges, either misdemeanors or felonies, may well choose to pursue felony convictions with the aim of securing deportation as a tangible prosecutorial goal. In other words, reliance on criminal convictions instead of arrests can incentivize criminal prosecutors to pursue convictions they would not otherwise pursue.

Ultimately, linking immigration screening to the massive world of low-level criminal arrests creates a significant expansion in impact of a criminal arrest. Immigration removal decisions have a fundamentally different aim than the criminal justice system. If immigration law is about who belongs in the United States, it should not be coupled to a system designed to punish, particularly given the enormous toll the criminal justice system already exacts from communities of color. Criminal arrests do not offer any insight into key questions for immigration law, such as the nature and extent of any given individual's ties to the polity. Immigration enforcement should uncouple from the jailhouse altogether.

B. Front-End Procedural Protections

If immigration screening in the jailhouse persists, it should be accompanied by more robust front-end procedural protections. In particular, to be consistent with the Fourth Amendment, detainers should be accompanied by a neutral probable cause determination.

As a threshold matter, a local law enforcement agency must have probable cause before it can subject anyone to arrest. Constitutional criminal procedure governs the front-end rights of those accused of crimes. A 1975 decision, *Gerstein v. Pugh*,[285] emphasized why criminal custody decisions may not be left to an individual officer's discretion. It discussed the importance of a neutral and detached magistrate who reviews probable cause determinations.[286] The goal is to "safeguard citizens from rash and unreasonable interferences with privacy."[287] The standard acknowledges room for mistakes on the part of law enforcement but provides that mistakes must be "reasonable" and emphasizes that a single law enforcement officer's judgment should be reviewed by an independent magistrate.[288]

285. Gerstein v. Pugh, 420 U.S. 103 (1975).

286. *Id.* at 112.

287. *Id.* (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

288. *Id.*

It is well established that whenever an individual's detention is extended solely on the basis of an immigration detainer, that constitutes a new arrest. This new arrest, in turn, must be supported by probable cause.[289] The absence of meaningful front-end procedure creates a systemic risk that arrests are not actually supported by probable cause. In *City of El Cenizo v. Texas*,[290] the Fifth Circuit cited the "collective-knowledge doctrine" as providing a sufficient basis for a local law enforcement arrest pursuant to an immigration detainer, at least in the case where state law provided authority for such an arrest.[291] The collective knowledge doctrine provides that "an officer initiating the stop or conducting the search need not have personal knowledge of the evidence that gave rise to the reasonable suspicion or probable cause, so long as he is acting at the request of those who have the necessary information."[292] The Fifth Circuit relied on the collective knowledge doctrine, in part, to strike down a facial challenge to a Texas law that barred local law enforcement agencies from refusing to cooperate with ICE detainers.[293]

In applying the collective-knowledge doctrine, the Fifth Circuit assumed that a *criminal* law enforcement agency may rely on a federal *civil* law enforcement determination. But there are important differences between the civil and criminal contexts. Within a criminal law enforcement agency, officers have overlapping legal authority and expertise. A police officer who relies on information gathered by another police officer has the ability to make a threshold determination whether the information provided by the other officer, if correct, would establish probable cause. And both police officers have the independent authority to make a criminal arrest. But local law

289. Alcocer v. Mills, 906 F.3d 944, 953 (11th Cir. 2018) (determining that the Fourth Amendment applied where "the facts reflect that [the arrested individual] continued to be detained after satisfying the bond requirements, solely because of suspicion that she might be illegally present in the United States"); Morales v. Chadbourne, 793 F.3d 208, 216–17 (1st Cir. 2015) (holding that it is "beyond debate" that immigration officers "would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status").

290. City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018).

291. *Id.* at 187–88. In *City of El Cenizo*, the plaintiffs cited to *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1157–58 (Mass. 2017), which held that state officials could only carry out civil immigration detainers if state law provided the authority to do so. *City of El Cenizo*, 890 F.3d at 188. The Fifth Circuit distinguished *Lunn* on the grounds that state authority in Texas did provide this authority. *Id.* at 188.

292. *City of El Cenizo*, 890 F.3d at 187.

293. *Id.*

enforcement officials who rely on immigration detainers have no independent authority to make civil immigration arrests.[294] Nor do they have training in immigration law. A local law enforcement officer who relies solely on a civil immigration officer's assessment of probable cause is necessarily blind to some degree as to its basis. If it turns out that the immigration officer was wrong, then the criminal law enforcement agency has effected an arrest without probable cause.

The Fifth Circuit drew a distinction between "blind obedience" to the detainer and cooperation with detainers. The court held that in cases where an arrested individual furnished identity evidence that negated the information in the detainer, the local law enforcement agency would have no obligation to honor the detainer. The court observed, "it is difficult to imagine what facts other than valid forms of identification would *conclusively* negate ICE's probable cause determination."[295] The court's approach, however, raises more questions than it answers. Jailed individuals do not approach with passports in hand. And there is no obligation for U.S. residents as a general matter to carry identification. The court's approach assumes an underlying process for checking documentation and comparing it against detainers, but it does not explain what that process is or why it would be sufficient.

In *Hernandez v. United States*,[296] the Second Circuit held that the collective knowledge doctrine had no applicability where the immigration detainer was not, in fact, supported by probable cause.[297] There, the jailed individual was a U.S. citizen who was held pursuant to a detainer issued for an individual with a different name.[298] The court held that "the name discrepancy alone is arguably enough to vitiate probable cause."[299] In addition, the jailed individual had informed multiple law enforcement officials of his U.S. citizenship status, all of

294. Arizona v. United States, 567 U.S. 387, 410 (2012) ("Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances.").

295. *City of El Cenizo*, 890 F.3d at 189.

296. Hernandez v. United States, 939 F.3d 191 (2d Cir. 2019).

297. *Id.* at 209 ("There can be no collective knowledge, however, if the initiating officer lacked probable cause—*i.e.*, in that event no other officer can rely on the information of the initiating officer.").

298. The jailed individual was Luis Hernandez; the detainer was issued for "Hernandez-Martinez, Luis Enrique." *Id.* at 197.

299. *Id.* at 208.

whom refused to help. The court held that given the underlying name discrepancy, and given that the jailed individual's status could have been "verified with minimal effort," the local law enforcement agency engaged in a detention without probable cause.[300] The approach in *Hernandez* assumes that jailhouse officials exercise their own judgment and do not blindly honor detainers, but it does not indicate how these officials should evaluate detainers.

Where detainers trigger immediate consequences within the criminal justice system, the burden to come forward and dispute those immigration detainers should not rest on detained individuals themselves. This approach is backward. It is the law enforcement agency's burden to establish probable cause for the arrest. And it is particularly problematic to put the burden of coming forward and disputing detainers on arrested individuals who are uniquely isolated, who have no ready access to documentation, and who have no readily apparent procedure to dispute the confinement.

Immigration detainers implicate the core concerns with government overreach that were at issue in *Gerstein.* There, the Court held that once detained, an arrested individual's "need for a neutral determination of probable cause increases significantly," given the serious costs that arise from pretrial confinement.[301] The Court held that "[w]hen the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty."[302] The Ninth Circuit in *Gonzalez* held that *Gerstein* applies to immigration arrests and remanded the case to the district court for further proceedings.[303] Neutral review of detainers is particularly important with jailhouse immigration screening, given the wide-ranging impact detainers have within the jail and the systemic risk of front-end detention imposed without probable cause.

In determining whether probable cause has been established, a core question is whether the process of immigration screening via biometric comparison itself meets the probable cause threshold. In 2019, the district court in *Gonzalez* determined that ICE had violated

300. *Id.*

301. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.").

302. *Id.*

303. Gonzalez v. ICE, 975 F.3d 788, 798 (9th Cir. 2020).

the Fourth Amendment "by relying on an unreliable set of databases to make probable cause determinations" and held that the databases contained "fatal" flaws, including that they were outdated and incomplete.[304] The Ninth Circuit subsequently vacated and remanded the decision for additional fact finding, given that the district court had not issued findings of fact regarding the reliability of each of the sixteen databases used.[305] One problem with database comparisons as the sole basis for issuing detainers—particularly in the absence of neutral review—is that law enforcement agencies have no way to validate whether the comparisons are accurate. This creates a systemic risk that jailed individuals will be denied pretrial release or subjected to harsher criminal justice outcomes without meaningful protection against government overreach.

Beyond databases, interviews conducted in criminal custody also raise questions about probable cause determinations. DHS releases little information about how the interview process unfolds.[306] The case of U.S citizen Davino Watson, who spent three-and-a-half years in immigration detention trying to establish his citizenship,[307] reveals how front-end procedural protections might reduce the impact of inaccurate detainers. Watson was transferred to ICE custody after completing a felony criminal sentence.[308] During his first interview with ICE, he explained his U.S. citizenship status.[309] He also provided contact information for family members who could corroborate his claims.[310] Had ICE officials checked his criminal court records, they would have found that his presentence report stated that Watson was

304. Gonzalez v. ICE, 416 F. Supp. 3d 995, 1018 (C.D. Cal. 2019), *rev'd in part*, 975 F.3d 788 (9th Cir. 2020).

305. *Gonzalez*, 975 F.3d at 821 ("These categorical findings, however, suffer from a key shortcoming: the district court did not make reliability findings for *all* the databases on which ICE relies."). The district court analyzed six databases in detail, but did not make findings about whether those databases were representative of errors in all the databases. *Id.*

306. WILLIAM A. KANDEL, CONG. RSCH. SERV., R44627, INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS 10 n.38 (2016), https://fas.org/sgp/crs/homesec/R44627.pdf [https://perma.cc/G4JA-96ZN] ("A person who enters without inspection and has had no previous contact with DHS often can only be identified as an unauthorized alien based on an interview with an experienced immigration officer.").

307. Watson v. United States, 865 F.3d 123, 126 (2d Cir. 2017). The court aptly stated that "[i]t is arresting and disturbing that an American citizen was detained for years in immigration proceedings while facing deportation." *Id.* at 127.

308. *Id.* at 128.

309. *Id.* at 127.

310. *Id.* at 127–28.

a U.S. citizen and contained information for his family members.[311] But no one contacted his family or checked his criminal court records.[312] Though Watson's detention resulted in part from his requesting delays in immigration adjudication to try to secure counsel, adequate front-end procedures could have avoided his prolonged detention in the first place.[313]

Access to counsel and neutral review of probable cause determinations have the potential to safeguard a process that closely resembles criminal punishment in its effect. If immigration screening occurs in criminal custody, its front-end safeguards should more closely resemble those of criminal procedure. Local law enforcement agencies that carry out detainer requests should only do so after an independent determination that there is probable cause for an arrest.

Expanded access to counsel at the time that an immigration detainer is lodged could also help surface errors more quickly. In the criminal justice system, indigent defense lawyers may lack immigration expertise. Once residents are placed in removal proceedings, they have no right to counsel at the government's expense.[314] A recent empirical study by Professors Ingrid Eagly and Steven Shafer found that looking at "individual removal cases decided on the merits . . . only 37% of immigrants had counsel during [their] study period from 2007 to 2012."[315] Access to counsel in immigration court makes an enormous difference in outcomes in removal cases. Eagly and Shafer's study of 1.2 million immigration removal cases found that those in immigration custody who had counsel "obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts."[316] Expanding access to counsel in immigration cases offers an important way to surface claims of factual and legal error.

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311. *Id.* at 128.

312. *Id.*

313. *Id.* at 142 (Katzmann, C.J., concurring in part and dissenting in part); *see also* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 163 (2015) ("Guarding against unintentional errors with grave human consequences is alone a good reason to add a neutral review early in the process.").

314. 8 U.S.C. § 1229a(b)(4) (2018).

315. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015).

316. *Id.* at 9. The study controlled for other variables that could affect case outcomes, "including detention status, nationality, prosecutorial charge type, fiscal year of decision, and jurisdiction of the immigration court." *Id.*

As a general matter, jailhouse immigration screening requires rethinking criminal law and immigration law as distinct fields. In *Padilla*, the Court took this approach by holding that criminal defense attorneys must warn defendants if their guilty plea could trigger mandatory deportation.[317] In extending Sixth Amendment obligations to immigration penalties, the Court recognized how deportation is "intimately related to the criminal process."[318] Immigration removal decisions are mediated through the criminal justice system. The interconnections between immigration law and criminal law do not only come into effect after a criminal conviction; they affect the very beginning of the criminal arrest process. A regulatory approach should recognize how merged immigration–criminal consequences are experienced, rather than treating immigration law and criminal law as distinct bodies of law that both happen to operate in the jailhouse.

CONCLUSION

This Article has argued that in order to recognize the reach of immigration enforcement, it is essential to focus on how the legal institution of the jailhouse affects immigration regulation. The rationale for jailhouse immigration screening is to target enforcement on noncitizens who fall within federal removal priorities. But in practice, jailhouse screening creates unjustified detention within the criminal legal system based on suspected civil immigration violations, imposes enormous hidden costs on racial minorities most likely to be subject to low-level criminal arrest, and ultimately creates systemic risks of removal without adequate regard to legal, procedural, or equitable considerations. Given the sheer size of the criminal justice system, jailhouse immigration screening massively expands the reach of immigration enforcement and creates new risks that racially biased domestic arrests will lead to removal. This approach should call into question the role that the criminal justice system plays in determining who belongs in the United States. At a time when there is widespread agreement that the criminal justice system is too big and that it disproportionately controls and punishes racial minorities, it is time to reconsider whether immigration screening should take place in the jailhouse.

317. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

318. *Id.* at 365.