# ADMINISTRATIVE VIOLENCE IN IMMIGRATION LAW

Stephen Lee*

*This Article is about violence in the administration of our nation's immigration laws. More specifically, it focuses on the types of agency actions that might be characterized as "violent," a key concept in separating legitimate and illegitimate agency actions. In this context, violence is commonly defined in terms of the use or threat of force against immigrants and immigrant communities—i.e., through apprehension, detention, and removal. This Article develops and defends a related theory of violence, what I call "administrative violence," which focuses on benefits programs that offer relief from removal. Although these programs are often described in inclusive terms, this Article argues that they help normalize and reaffirm the legitimacy of enforcement programs most directly responsible for the use and threat of force. Notably, these benefits programs foist the burden of seeking relief on migrants; obfuscate the realities that relief is temporary, limited, and hard to get; and draw attention away from the ways that relief programs are intertwined—politically, legally, and administratively—with the enforcement programs most responsible for egregious harms in the immigration context. The theory of administrative violence makes two contributions. First, it provides descriptive clarity on the range of illegitimate harms experienced by migrants at the hands of both field agents wielding quasi-police power as well as bureaucrats processing papers in anonymous office buildings. Second, it provides a basic vocabulary for pushing forward current conversations about violence in the administrative state, a dynamic that is attracting increasing scholarly attention, but which remains overly narrow.*

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## INTRODUCTION

For years, legal scholars have documented the brutalizing harms stemming from apprehension, detention, and deportation policies. This scholarship has made important contributions by highlighting the immigration system's cruelty and its essential unfairness.[1] Recently, a small but growing number of scholars have tried to shift this conversation towards a more pointed set of concerns. These scholars have reframed debates about *harms* noncitizens experience in the immigration system in terms of whether and how agencies commit *violence* in the regulation of migrants. A slight but significant change in approach, this body of work squarely poses questions about accountability, legitimacy, and rationality—reflecting on what role administrative law doctrines and norms play in fostering morally troubling outcomes for migrants.[2] Reframing harms that *happen* to noncitizens in terms of agencies exacting violence helps stop the political project of normalizing

1. *See* Emily Torstveit Ngara, *Immigration Detention as a Violation of Transgender Detainee's Substantive Due Process Rights*, 26 LEWIS & CLARK L. REV. 749, 754 (2022); Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1476–82 (2019); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2150–54 (2017). *See generally* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014).

2. *See, e.g.*, Emily R. Chertoff, *Violence in the Administrative State*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 25) (located at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4548867); *see also* MAYA PAGNI BARAK, THE SLOW VIOLENCE OF IMMIGRATION COURT: PROCEDURAL JUSTICE ON TRIAL 156 (2023); Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1070–83 (2021). *See generally* Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019).

subordination and degradation of migrant communities.[3] Most accounts of violence in the immigration system focus on enforcement policies that use or threaten force.[4] Such examples include aggressive and sometimes lethal attempts to apprehend migrants,[5] the abusive and negligent treatment of migrants in detention,[6] as well as the deportation of noncitizens.[7] Our legal system accepts that some degree of force is necessary and therefore legitimate. Only illegitimate acts of force—unnecessary, excessive, or cruel—carry the weight and the consequences of the label "violent." As critics point out, the problem is that so many instances of the use of force have been legitimated that the law has made violence disappear at least when exercised by state actors like the police.[8] Critics of violence in the immigration system make similar arguments.[9]

This Article contributes to this conversation by advancing a theory of *administrative violence*. I am less focused on (though no less concerned by) the kinds of agency actions that might be characterized as violence, and instead more interested in the universe of immigration agencies that help prop up and support the worst acts of violence. In mobilizing against immigration agencies, advocates understandably scrutinize and pressure front-line actors like Border Patrol agents, who pursue migrants attempting to cross into the United States, or Immigration and Customs Enforcement ("ICE") officers, who apprehend, detain, and deport legally vulnerable migrants. Cruel, demeaning, and objectionable in the eyes of advocates and of many in the public—these actions embody or implicate what I call forms of *direct violence*, which involve agencies using or threatening force for the purposes of physically harming or immobilizing migrants. By contrast, administrative violence describes tasks performed by agencies operating in adjacent institutional settings. Agencies like Citizenship and Immigration Services ("USCIS") and the

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3. *See, e.g.*, DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 5 (2015).

4. *See* Chertoff, *supra* note 2 (manuscript at 6, 6 n.18) (defining violence in terms of "force"); Cházaro, *supra* note 2, at 1077; BARAK, *supra* note 2, at 151 (footnote omitted) (explaining how "physical" and "psychological" abuse arises from "state custody"). *See generally* DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE (2021).

5. *See* Eileen Sullivan, *A Rise in Deadly Border Patrol Chases Renews Concerns About Accountability*, N.Y. TIMES (Jan. 9, 2022), https://www.nytimes.com/2022/01/09/us/politics/border-patrol-migrant-deaths.html [https://perma.cc/8MCT-URV3].

6. *See* OFF. OF THE INSPECTOR GEN., ICE AND CBP DEATHS IN CUSTODY DURING FY 2021, at 2 (2023); *see also* Emily Baumgaertner, *Federal Records Show Increasing Use of Solitary Confinement for Immigrants*, N.Y. TIMES (Feb. 7, 2024), https://www.nytimes.com/2024/02/06/health/solitary-confinement-immigrants-us.html [https://perma.cc/T59X-ZS7T].

7. *See* Cházaro, *supra* note 2, at 1072.

8. *See* SKLANSKY, *supra note* 4, at 105 (noting that "the only constitutional standard governing police violence is the general, open-ended rule that the police must act reasonably, under all circumstances"); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1189 (2017) ("The constitutional law of police force is not indeterminate, but determinately permissive.").

9. *See* Cházaro, *supra* note 2, at 1073 ("For the most part, the violence of deportation remains hidden in plain sight.").

State Department and, to a certain extent, administrative actors like political appointees across different agencies do not directly oversee the process of detaining and removing noncitizens. For this reason, it is easy to conceptualize their authority as operating outside of the regulatory domain of violence. If anything, these institutional actors are thought of as pursuing an inclusive regulatory agenda through the adjudication of benefits that provide relief or assurance against removal. Adjudicated on a case-by-case basis usually through individual applications,[10] notable examples include immigrant visas or green cards, the Deferred Action for Childhood Arrivals ("DACA") program, cancellation of removal, and naturalization.

Developing the concept of administrative violence can help clarify the range of institutional settings implicated by agency policies grounded in the use of force. In the immigration context, agencies are often understood as carrying out enforcement duties like detention and removal or as allocating benefits like relief from removal, both temporary and permanent. Agencies like ICE and the Border Patrol are understood as most directly responsible for violence in the immigration system.[11] But these agencies operate within a broader constellation of institutional actors that carry out different missions but draw authority from the same or similar underlying grants of power. Most notably, former Secretary of Homeland Security Janet Napolitano expressly justified and defended DACA as an exercise of prosecutorial discretion, a concept that animates much of the modern criminal legal system.[12] And programs like cancellation of removal are squarely embedded within removal proceedings with immigration judges—aptly described by Professor Angélica Cházaro as "violence workers"—overseeing the entire process.[13] Other actors, like consulate officers, engage with noncitizens outside of the United States where the Constitution does not apply, thereby reproducing power imbalances characteristic of the enforcement system. Agency bureaucrats reviewing applications for DACA, green cards, and citizenship, or immigration judges adjudicating applications for cancellation are often thought of as operating outside of the removal system. Therefore, these agency actors mostly avoid criticisms and the disapproval that comes with legal and political efforts to characterize enforcement policies as violent.[14] This overly narrow understanding of violence and accountability ignores a more complicated reality, which facilitates the process by which regulatory norms shift in a more punitive direction without attracting much public scrutiny.

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10. *See* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1797–803 (2023); *see also* Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 143–53 (2017); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 599 (2009).

11. *See, e.g.*, Chertoff, *supra* note 2 (manuscript at 4–5).

12. *See* Janet Napolitano, President, Univ. of Cal., "Anatomy of a Legal Decision" at the University of Georgia School of Law: John A. Sibley Lecture 14 (Oct. 27, 2014), https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1086&context=lectures_pre_arch_lectures_sibley [https://perma.cc/KA25-PPZ7].

13. *See* Cházaro, *supra* note 2, at 1072.

14. SKLANSKY, *supra* note 4, at 19.

A part of the problem is that the benefits that agencies adjudicate emphasize the inclusive principle underlying the relief and the voluntary nature of the proceedings. Under administrative law doctrine, the discretionary nature of the benefits renders those decisions unreviewable in most instances, thereby giving agency bureaucrats the final word. Approval by an agency means relief from removal, but a denial doesn't mean that the noncitizen maintains the status quo—i.e., continuing to live in the United States without status. Instead, it can mean something much worse, like removal or exclusion from the United States. This Article's holistic treatment of agency and interagency power provides a more accurate assessment of administrative law's domain of violence, which in turn can help the public resist the normalization of punitive governance strategies.

Part I of this Article provides a basic definition of administrative violence. Specifically, it distinguishes administrative forms of violence from the more familiar forms of direct violence. Part II illustrates how administrative violence operates within the immigration system. Here, I focus on immigration benefits programs that ostensibly advance inclusive regulatory goals meant to protect migrants against detention and removal. Compared to removal proceedings, the procedures governing these types of agency adjudications provide fewer procedural protections, thus raising the risk of denials on the basis of agency mistakes executed with little transparency and without judicial review. And because the consequences of a denial can often mean deportation, agency denials present the paradigmatic concern at the heart of the concept of violence: the illegitimate use of force by an agency actor. To illustrate how administrative violence operates in practice, Part III focuses on a few real-life examples. Part IV considers how the concept of administrative violence might help advance discussions about violence in immigration law. This is an important conversation that is still in its early stages and currently remains fixated on the use of force. I then conclude.

## I. DEFINITIONS

As a tool for moral critique, framing agency actions in terms of violence helps to separate legitimate and illegitimate uses of force. As a result, developing a clear picture of the kinds of state actors that engage in violent actions is important to the project of challenging agency power. This Part provides a working definition of administrative violence. As a topic of inquiry, violence appears throughout legal scholarship as a subject of analysis, debate, and great disagreement. For this reason, I want to set some qualifications for the discussion that follows. First, a core definition of violence involves some infringement or "violation" of a person's autonomy, which can be assessed in terms of causing or threatening physical harm. Most, if not all, scholars would agree that harmful actions that involve bodily harm qualify as violence. Disagreements arise over whether and how far a bad or harmful act might drift from this core definition and still qualify as violence. A second and important qualification is that my discussion focuses on violence committed by state actors or agency officials and not by private actors. This is an important distinction because, in our legal and political system, state actors are empowered to use force under certain circumstances—most obviously in relation to the exercise of police power, but also in the context of enforcing immigration policies. Therefore, discussions about agency violence often focus on whether the use of force is justified. It is against this backdrop that I advance what I call administrative

violence. Importantly, as I explain below, an agency action or policy does not have to cause physical harm in order to qualify as violence. It is enough that agency power derives from the same source and is embedded within the same scheme as government acts causing physical harm.

### *A. Direct Violence*

Legal scholarship shares a relative consensus that at its core, violence is defined as acts of force intended to cause or threaten harm.[15] For my purposes, I refer to this concept as *direct violence*. The concept of directness captures the importance the law in this area places on causation in establishing the relationship between the use of force and the harm—that is, evidence of the use of force allows the victim or survivor to hold the agent of violence *directly* responsible for the harm. In this context, the acts qualifying as violence are straightforward: physical harm and loss of life,[16] but also arrests and temporary seizures meant to immobilize people while state actors carry out ostensibly legitimate responsibilities.

Much of this scholarship rightly focuses on the police and individual interactions between officers and suspects.[17] For example, Professor Alice Ristroph argues that Fourth Amendment jurisprudence creates a set of rules that simultaneously normalize traffic stops while permitting the officers to beat or shoot suspects.[18] Professor Ndjuoh MehChu argues that the historical origins and purpose of the police justify reframing the concept of "police violence" in terms of the tort concept of assault. More specifically, he argues that "the institutional labor of policing is akin to a tortious assault on class-exploited Black and Brown people . . . ."[19] One thread that connects Ristroph and MehChu to other legal scholars of violence is their focus on physical harms. Although there is wide disagreement over which types of behavior constitute violence, there seems to be a consensus that, at the very least, the direct use or threat of force for the purposes of physically harming another falls within the category.[20]

Against this backdrop, legal scholars have begun theorizing immigration agency actions in terms of violence. Many of the duties and functions performed by immigration agencies resemble policing tactics. Agencies like ICE, especially its Office of Enforcement and Removal Operations ("ERO"), carry out a mission focused on identifying, apprehending, detaining, and deporting migrants—all acts

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15. *See* SKLANSKY, *supra* note 4, at 15–18.

16. As legal scholar Alice Ristroph notes, "[T]he costs of low suspicion thresholds are not merely the intrusions of stop-and-frisks, but also civilian lives, especially the lives of those civilians most likely to be deemed suspicious." Ristroph, *supra* note 8, at 1190.

17. A significant strain of work examines violence committed by state or government actors—most often the police—but also by their surrogates like private contractors. *See, e.g.*, SKLANSKY, *supra* note 4, at 89–122; *see also* Ristroph, *supra* note 8, at 1190; Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 613–15 (2005); David E. Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. & POL. 253, 258 (2003).

18. *See* Ristroph, *supra* note 8, at 1184.

19. Ndjuoh MehChu, *Policing as Assault*, 111 CALIF. L. REV. 865, 873 (2023).

20. In his recent book on violence in the law, Professor David Sklansky notes that "there is disagreement regarding how far, if at all, the concept should extend beyond the use of force to inflict physical injury." SKLANSKY, *supra* note 4, at 20.

that have a rough analogue within policing and prosecution.[21] And CBP, most notably through the Border Patrol, surveils and focuses on unauthorized border crossings, an activity that predictably involves pursuit and the use of force.

One reason immigration scholars have begun embracing the framework of violence is because of the way it structures conversations about holding agencies accountable for their actions. The concept of violence implicates other well-established concepts in the field of immigration law, especially punishment, which is a kind of state-sanctioned and state-generated harm. For years, courts recognized the harms exacted by the immigration system, but little in the field provided any kind of doctrinal basis for granting relief.[22] Then in 2010, the Supreme Court held that immigration penalties or harms like deportation—long considered a civil consequence—could constitute a kind of criminal punishment for Sixth Amendment purposes. This led to a significant shift towards providing immigrants greater protections in criminal proceedings with potential immigration consequences in the form of more robust protections related to the assistance of counsel.[23] In other words, noncitizen defendants could hold their lawyers accountable for failing to adequately protect them against downstream punishment. By pushing the conversation further—moving it from harm to punishment to violence—legal scholars can deploy tools that not only protect migrants but also begin to hold accountable bad actors. Professor Angélica Cházaro argues that deportation constitutes a form of violence, and, more importantly, that framing it in this way "allows for questioning the civility of both the process and end of deportation."[24]

Much of the law and discourse surrounding the use of force by police focuses on whether such force is justified by malleable concepts animating constitutional criminal procedure like "reasonableness" and "probable cause." As many legal scholars have pointed out, police officers can offer the barest of explanations for the use of deadly force, and the Fourth Amendment will deem it justified and therefore lawful.[25] Moreover, the fortification of qualified immunity doctrine protects police against civil rights suits challenging even egregious violations of law.[26] For those police departments infected by work cultures predisposed to violent activity, modern qualified immunity doctrine neutralizes any threat of accountability.[27] Because this area of law focuses heavily on police and agency justifications, much of the scholarship addresses the boundaries of when force is and is not justified, and spends comparatively less time on defining whether a particular agency action does or does not qualify as violent. This scholarship

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21. *See* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819, 1830 (2011).

22. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 314–26 (2001) (limiting its decision to statutory construction).

23. *See* Padilla v. Kentucky, 559 U.S. 356, 367 (2010).

24. Cházaro, *supra* note 2, at 1071.

25. *See* Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity"*, 66 STAN. L. REV. 987, 1001 (2014).

26. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017).

27. *See id.*

typically does not consider whether the constellation of actors working in close proximity to the police are also engaging in the enterprise of state violence.[28]

Parallel dynamics exist in the immigration context. In arguing that deportation should be abolished, Angélica Cházaro points to the ways that immigration officials sometimes insist that a certain degree of violence is necessary to carry out their duties and practices.[29] She goes on to characterize the various agency officials and bureaucrats who oversee deportation, detention, and enforcement in the interior and at the U.S.–Mexico border as "violence workers."[30] In envisioning an alternative immigration enforcement system to replace the current one dominated by ICE, Peter Markowitz argues for eliminating detention and allowing agencies to use a mix of fines and financial inducements to encourage immigrants to comply with notices to appear in court.[31] To minimize the harm caused by agencies, these approaches would simply remove the authority to use force from agencies altogether.[32] Although I share the impulse to reduce agency authority in context, this account implies that the threat of agency violence goes away once an agency's authority to detain and deport is withdrawn. Other accounts suggest that the threat of violence extends beyond the direct use or threat of force.

Several scholars have critiqued concepts of direct violence as artificially limited to acts of force.[33] Many have urged moving past these narrow parameters, noting that it might take months or years for harms caused by an agency to materialize or become apparent.[34] Cognitive limitations prevent stakeholders and the public at large from mobilizing to hold agencies accountable for these acts of slow violence.[35] Constrained by ideas like causation and moral commitments to assigning blame to individuals, many areas of the law embrace definitions of violence focused on physical harm that bears some obvious connection to a bad act.[36] Unburdened by

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28. For some notable exceptions, see Ndjuoh MehChu, *Neither Cops nor Caseworkers: Transforming Family Policing through Participatory Budgeting*, 104 B.U. L. REV. 73 (2024); Ji Seon Song, *Cops in Scrubs*, 48 FLA. ST. U. L. REV. 861 (2021).

29. *See* Cházaro, *supra* note 2, at 1082 (noting that federal officials defended the practice of separating parents and children at the U.S.–Mexico border as a necessary practice). Cházaro argues that "violence is not incidental to deportation" but rather that "deportation *is* violence." *Id.* at 1071.

30. *See id.* at 1073.

31. Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J.F. 130, 144–45 (2019).

32. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 139–63 (2019).

33. *See, e.g.*, Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1365 (2018); *see also* Geoff Ward, *The Slow Violence of State Organized Race Crime*, 19 THEORETICAL CRIMINOLOGY 299, 304 (2015) (U.K.).

34. *See* BARAK, *supra* note 2, at 36; *see also* Lee, *supra* note 2, at 2367.

35. *See* Lee, *supra* note 2, at 2364 (noting that forcible family separations at the U.S.–Mexico border illustrate "the importance of crisis narratives to generating political momentum"); *see also* Michele L. Landis, *"Let Me Next Time Be 'Tried by Fire'": Disaster Relief and the Origins of the American Welfare State 1789-1874*, 92 NW. U. L. REV. 967, 971 (1997) (arguing that historically claimants to relief have succeeded where they could "narrate themselves as the morally blameless victims of a sudden catastrophe").

36. *See* Lee, *supra* note 2, at 2322.

these limiting factors, humanists and social scientists have examined violence on a much broader terrain. These scholars have examined acts of violence and death that are "slow" or "symbolic."[37]

Slow violence scholars often focus on the temporal aspects of harm. While some forms of violence give rise to immediately recognizable harms and chaos, other instances of violence take time to unfold, creating documentation challenges that strain cognitive limitations.[38] Most notably, Rob Nixon has focused on the efforts of advocates to name and address environmental harms that threaten poor communities. Amid the realities of short attention spans and global distractions, Nixon argues, "Environmentalists routinely face the quandary of how to convert into dramatic form urgent issues that unfold too slowly to qualify as breaking news—issues like climate change and species extinction that threaten in slow motion."[39] In a related discussion, slow death scholars have focused on ideological or affective limitations, fantasies perpetuated by dominant cultural values. Focused on the inequality built into modern economic systems, slow death scholars point out that those who have been harmed by what appears to be a "rigged" system have an investment in ignoring it and choosing instead to believe in the possibility of winning.[40] In the immigration context, one of the reasons the family separations at the U.S.–Mexico border invited such a strong public reaction is the coverage that turned these acts into a "crisis" and "spectacle," thereby inviting maximum public scrutiny.[41] Readily identifiable bad actors and an obvious causal link between harm and policy activates the public, priming it to engage with the agency by asking it to explain its actions. Calls to district directors, high-level officials, and media coverage forces officials to answer these questions. The images of agents wresting children from the arms of parents rendered visible the power that agencies wield in

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37. For an example of scholarship theorizing both structural and symbolic violence, see Cecilia Menjívar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOCIO. 1380, 1383–88 (2012).

38. *See* Lee, *supra* note 2, at 2364. After a highly visible and harmful act occurs—such as a hurricane, bombing, or oil spill—the harms that follow may take months, years, or a generation to appear. At that point, the passing of time severs the connection between the original act and the subsequent harm, making it hard for courts, other decision-makers, and the public at large to fully appreciate the violent nature of the act. Failure to consider the temporal dimensions of violence, these scholars argue, risks leading decision-makers to misperceive violence as a series of harms born out of bad luck. *See id.* at 2335; *see also* Geoffrey A. Boyce, *Immigration, Policing, and the Politics of Time*, 14 GEOGRAPHY COMPASS 8 (2020); Alexander Vorbrugg, *Ethnographies of Slow Violence: Epistemological Alliances in Fieldwork and Narrating Ruins*, 40 POL. & SPACE 447, 452 (2019); Chloe Ahmann, *"It's Exhausting to Create an Event Out of Nothing": Slow Violence and the Manipulation of Time*, 33 CULTURAL ANTHROPOLOGY 142, 146 (2018).

39. ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 210–11 (2011).

40. This is central to Lauren Berlant's understanding of the slow death. She explains that "[c]apitalist ideology encourages a delay of response by locating the data about whether life was 'meaningful' along an arc of accrual." Nicholas Manning & Lauren Berlant, *"Intensity Is a Signal, Not a Truth": An Interview with Lauren Berlant*, 154 REVUE FRANCAISE D'ETUDES AMERICAINES 113, 114 (2018) (Fr.).

41. *See* LAURIE COLLIER HILLSTROM, FAMILY SEPARATION AND THE U.S.-MEXICO BORDER CRISIS 47–48 (2020).

cruel ways in pursuit of family separation policies.[42] These images cut through the fog. Returning to the topic of direct violence, police beatings and immigration workplace raids provoke a strong public response because they present state-inflicted harm in the form of a crisis. Videos and other media representations go viral because of the spectacle generated by the images and sounds.

As a critique of the overly narrow definition of violence that fixates on direct harm, slow violence scholars argue that as more time passes, the harder it is to generate momentum and interest to facilitate structural change.[43] The passing of time does not change the morally offensive nature of an agency action, but it does change the ability for interested parties to obtain relief either through legal or political channels. Using again the example of family separations at the border, while public interest has waned, it is notable that public health scholars have continued to push agency and public officials to address the ongoing harms experienced by parents and children arising from their initial separation.[44] Reuniting families should be the first goal of remediation, but doing so alone will neither lead to repair nor return them to wholeness. Public health scholars focus on both psychological stress as well as the physical manifestation of that stress in the form of increased risk of developing chronic medical conditions such as heart disease, cancer, and premature death.[45] The delayed expression of physical harm illustrates how some types of violent and morally condemnable acts such as forcible separation emerge only after a period of time, thereby frustrating efforts by affected parties or enraged members of the public to hold bad actors accountable.

Large and sudden enforcement actions like workplace raids further illustrate the limitations of conventional definitions of violence.[46] In the immediate aftermath of a traumatic incident like arrest, detention, and deportation, migrants might exhibit symptoms that initially track mental or emotional harms. Some argue that the offensive nature of violence is not so much proof of physical harm (which often comes later anyway) but the way that violence alters long-term life chances.[47]

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42. *See id.*

43. *See* Ahmann, *supra* note 38, at 146.

44. *See, e.g.*, Mitra Naseh et al., *Mental Health Implications of Family Separation Associated with Migration Policies in the United States: A Systemic Review*, 352 SOC. SCI. & MED. 1, 8–9 (2024).

45. *See* Kathryn Hampton et al., *The Psychological Effects of Forced Family Separation of Asylum-Seeking Children and Parents at the US-Mexico Border: A Qualitative Analysis of Medico-Legal Documents*, 16 PLOS ONE 1, 8 (2021); Mia Stange & Brett Stark, *The Ethical and Public Health Implications of Family Separation*, 47 J.L., MED. & ETHICS 91, 92 (2019); Laura C N Wood, *Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children*, BMJ PAEDIATRICS OPEN, Aug. 30, 2018, at 1, 3 (U.K.).

46. *See* Charles Bethea, *After ICE Came to Morton*, NEW YORKER (Oct. 31, 2019), https://www.newyorker.com/news/dispatch/after-ice-came-to-morton-mississippi [https://perma.cc/5BCC-V4CL].

47. Professor Dean Spade has argued that documentation requirements imposed by the Real ID Act of 2005 would create new opportunities for state actors to engage in "population management that distributes life chances" in a manner that raises serious concerns in terms of equality. *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731,

While raids and arrests offer clear examples of direct violence, the concept of slow violence captures the harms that emerge in the aftermath. Indeed, living within a state of uncertainty can diminish health outcomes for unauthorized migrants in terms of heart health and diabetes as a result of continuing trauma.[48]

### *B. Administrative Violence*

Notably, most accounts of direct violence conceptualize migrants within the agency–migrant relationship as passive parties. Apprehensions, detention, and deportations are things that *happen* to migrants. But there are a range of agency actions in adjacent institutional settings, which engage migrants as applicants or petitioners seeking some sort of relief. For this reason, it can be easy to miss the harm that flows from these programs. But because the requirements for obtaining benefits are so restrictive and the risks involve high-stakes outcomes like deportation, these types of relief are benefits in name only. Placing immigration benefits in their proper context—amid policies governing enforcement, detention, and removal—reveals a legal system that asks migrants to participate in their own demise. By focusing on the autonomy that migrants have in seeking administrative benefits, my point is not to discount the position of weakness from which migrants must seek relief. Instead, my goal is to highlight the different sets of questions related to abuse of agency power framed by affirmative applications for relief. In the context of detention or border enforcement, for example, questions of abuse arise in terms of state overreach with migrants' individual rights operating as constraints on that power. By contrast, focusing on claimants seeking benefits from agencies frames inquiries in terms of compliance. Discussions of agency abuse focus on whether the individual has satisfied threshold questions about qualifications, character fitness, and possessing the resources and time to navigate administrative proceedings. In the immigration context, the bureaucratic channels through which migrants must seek relief help explain the agency "sludge" confronting migrants in need of benefits.[49]

While enforcement agencies like ICE (especially ERO) and CBP (especially the Border Patrol) are often associated with forms of direct violence—forceful, immediate, and coercive—benefits agencies like USCIS dispense relief. Similarly, political appointees set priorities within and help coordinate the activities of all of these agencies, thereby reducing the scope of the most aggressive enforcement policies. These agencies and actors distribute a range of benefits that ostensibly mitigate or delay outcomes like removal. Assessing this allocation of power in terms of violence, it is clear that the agencies on the enforcement side of the enforcement/benefits distinction bear primary responsibility over the use of

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747 (2008) [hereinafter Spade, *Documenting Gender*]; *see also* SPADE, *supra* note 3, at 12. Anthropologist Akhil Gupta offers a similar account in his study of Indian bureaucracy. *See generally* AKHIL GUPTA, RED TAPE: BUREAUCRACY, STRUCTURAL VIOLENCE, AND POVERTY IN INDIA (2012).

48. *See* Erin R. Hamilton et al., *Immigrant Legal Status Disparities in Health Among First- and One-Point-Five-Generation Latinx Immigrants in California*, 41 POPULATION RSCH. & POL'Y REV. 1241, 1250–51 (2022).

49. *See* CASS R. SUNSTEIN, SLUDGE: WHAT STOPS US FROM GETTING THINGS DONE AND WHAT TO DO ABOUT IT (2021).

force. But agencies working on the benefits side bear related albeit distinct responsibility. Not only does the benefits/enforcement distinction overstate the degree to which the use of force can be traced to one type of agency, but it also obfuscates the degree to which the two types of agency missions reinforce one another.

One obvious point is that some of the benefits programs derive from the same sources of authority that empower enforcement agencies. The deferred action programs are the most obvious examples of this—as Secretary Napolitano explained, these programs are an exercise of agency discretion akin to prosecutorial discretion in the criminal context.[50] More practically, migrants seeking relief carry the burden of proving eligibility but do not always have access to the relevant documents that can substantiate their claims to relief, such as prior engagements and interactions with immigration officials across the administrative state. Thus, these migrants cannot obtain benefits from USCIS because in these instances, neither the migrant nor the agency has access to the relevant information necessary to establish critical data points. Although migrants bear the burden of assembling documents that might prove continuous presence, they do not possess a monopoly over the creation of the administrative record.[51] In fact, the immigration system from admission to removal involves agencies gathering large quantities of data on migrants, creating a kind of "one-way mirror" that structures many parts of immigration law.[52] For example, migrants must apply for adjustment of status with USCIS, but CBP[53]—a core enforcement agency—is the agency that gathers data on all people who have been "inspected and admitted or paroled," which is critical for adjustment of status applications.[54] Meanwhile, if ICE—a separate agency—has initiated removal proceedings against a migrant, disclosure delays may prevent the migrant from asserting relief from deportation, even if they are eligible.[55] In one notable example, migrants brought a class action suit against USCIS for failing to timely disclose information related to past interactions with immigration agencies.[56]

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50. *See* Napolitano, *supra* note 12, at 10.

51. For example, consider noncitizens seeking cancellation as a part of removal proceedings, where the immigration code explicitly puts the burden of proof on noncitizens. *See* 8 U.S.C. § 1229a(c)(4)(A)–(B).

52. *See* Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1584 (2014).

53. Visitors to the United States must complete the I-94 form, which records information related to a migrant's arrival and stay in the United States. The CBP, which oversees ports of entry, gathers these forms and maintains this data in electronic form. *See* Definition of Form I-94 to Include Electronic Format, 81 Fed. Reg. 91646 (Dec. 19, 2016); *see also* U.S. DEP'T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROTECTION FORM I-94 AUTOMATION (2013), https://www.dhs.gov/sites/default/files/publications/pia-cbp-16-I-94-automation-20130227_0.pdf.

54. *See* 8 U.S.C. § 1255(a) (permitting immigrants who have been "inspected and admitted or paroled" to apply for an adjustment of immigration status).

55. *See* Brown v. U.S. Customs & Border Prot., 132 F. Supp. 3d 1170, 1171 (N.D. Cal. 2015). *See generally* Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204 (2018).

56. Nightingale v. U.S. Citizenship & Immigr. Servs., 333 F.R.D. 449, 453, 456 (N.D. Cal. 2019).

These delays left migrants seeking relief in a "legal limbo" and unable to meet various application deadlines. Notably, plaintiffs alleged that one reason USCIS could not timely respond was because relevant data regarding a migrant's entry was in the possession of ICE, thus demonstrating the degree to which enforcement agencies can disrupt the process by which immigration benefits are allocated.[57]

The theory of administrative violence advanced in this Article builds on foundational ideas articulated by Professor Dean Spade in the context of trans politics and advocacy. Spade observes that legal vulnerability stems in part from "laws and policies that produce systemic norms and regularities that make trans people's lives administratively impossible."[58] He further explains that norms are set through exercises of power at the level of population management.[59] Thus, policies that create individual rights or benefits do not necessarily alter broader factors enabling "structured insecurity." Instead, these policies unfold on the basis of the legally and politically constructed category of deservingness.[60] Ultimately, Spade focuses on "the administrative realm" as a location in which the law "structures and reproduces vulnerability for trans populations."[61] My aim is to extend this idea and define administrative violence in the context of immigration benefits programs, which require noncitizens with vulnerable legal statuses to submit themselves to a discretionary and mostly unreviewable process that might lead to relief from removal. These programs are voluntary, and they require migrants to gather and submit personal information. If a migrant fails to qualify for relief, in theory their files and personal information will not go beyond the control of the benefits agency, but officials do not make such guarantees. And if the agency makes a mistake, the discretionary nature of the decision largely prevents agencies from ever having to answer for those mistakes in federal court. The process of seeking relief puts migrants in the position of being supplicants almost completely at the mercy of agencies. Such a scheme—ostensibly voluntary, broadly discretionary, and mostly unreviewable—normalizes a regulatory culture, which sociologist Asad Asad calls "institutional surveillance," a mode of governance that mixes "punishment" alongside "reward."[62]

Where agency decisions are largely immune from reversal on judicial review, bureaucrats face few constraints on their power. Officials are mostly free to

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57. *See id.* at 453–55.

58. SPADE, *supra* note 3, at 12.

59. *See* Spade, *Documenting Gender*, *supra* note 47, at 740–41.

60. As Professor Spade observes:

> In fact, legal inclusion and recognition demands often reinforce the logics of harmful systems by justifying them, contributing to their illusion of fairness and equality, and by reinforcing the targeting of certain perceived "drains" or "internal enemies," carving the group into "the deserving" and "the undeserving" and then addressing only the issues of the favored sector.

SPADE, *supra* note 3, at 68–69. *See generally* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

61. SPADE, *supra* note 3, at 9.

62. ASAD L. ASAD, ENGAGE AND EVADE: HOW LATINO IMMIGRANT FAMILIES MANAGE SURVEILLANCE IN EVERYDAY LIFE 11 (2023).

reward and withhold benefits based on the ease with which facts can be classified and ordered.[63] In his study of the administration of anti-poverty benefits in India, anthropologist Akhil Gupta recounts speaking with a bureaucrat who noted, "If it is not in the file, it does not exist."[64] The example of immigration benefits illustrates how for migrants a version of that insight might be that it may be in the file, but the migrant doesn't know it. To obtain immigration benefits, migrants must submit themselves to a thorough examination and inspection of their lives. And the government, which possesses this information, is not typically obligated to affirmatively disclose it to migrants—at least not without prompting.[65] This is another aspect of the benefits application process that normalizes migrant vulnerability. Migrants must assemble documents born out of surveilled social and economic relationships to support a petition that can be denied based on information that the government possesses but does not share.[66]

The use of convictions and other criminal records further illustrates how immigration agencies use a range of documentary sources to adjudicate applications for benefits. A migrant's criminal history is a part of the administrative record.[67] Applications for benefits typically require noncitizens to volunteer information about any contact with criminal law enforcement actors, but even if they don't, immigration agencies often have access to these records through various information and database-sharing programs.[68] Convictions and other criminal records all create

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63. Reflecting on the broader role played by files in the administration of law, Cornelia Vismann observes, "Words are more easily ordered than territories, and they are more obedient than mercenaries." CORNELIA VISMANN, FILES: LAW AND MEDIA TECHNOLOGY 103 (2008).

64. GUPTA, *supra* note 47, at 146 (footnote omitted).

65. Indeed, migrants and their lawyers often have to resort to submitting FOIA requests in order to compel the government to share relevant information. *See* Kwoka, *supra* note 55, at 2224–30; *see also* Heeren, *supra* note 52, at 1589–93.

66. Commenting on the relatively weak position that those navigating bureaucracies face, anthropologist Akhil Gupta notes:

> The complaint and the petition represent two opposing modes by which subaltern peoples appeal to those in positions of power. Petitions are written by supplicants who desire to obtain something as a favor. They are pleas to the powerful to grant something that is in their capacity to authorize: a favor, an exception, a special dispensation. By contrast, the complaint is a demand to redress wrongs committed by a person in power. It asserts the complainant's right to due process and, in the case of complaints to government agencies, to his or her rights as a citizen.

GUPTA, *supra* note 47, at 167.

67. Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162, 170 (2021) [hereinafter Jain, *The Mark of Policing*]; Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826–33 (2015) [hereinafter Jain, *Arrests as Regulation*]. This point further illustrates how the expansion of criminal law as a mode of governance leads to agency abuse. *See, e.g.*, Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIA. L. REV. 556, 558–59 (2016).

68. *See* Ana Muñiz, *Bordering Circuitry: Crossjurisdictional Immigration Surveillance*, 66 UCLA L. REV. 1636, 1647–50, 1658–59 (2019).

a kind of "meta record" that goes into a noncitizen's "alien file" or "A-file."[69] The use of criminal records combined with the technical and seemingly neutral exercise of counting days and weeks naturalizes the punishment that surrounds programs like cancellation of removal.

The punitive aspects of these benefits programs are not always obvious. These programs serve important political purposes by enabling regulators to perform a kind of "care" or welfare function.[70] Gray Abarca and Susan Coutin note that this process operates as "a means of dissimulating structural violence, in that the bureaucratization of procedures allows the state to appear to 'care' for the needy while creating barriers that prevent services from actually being delivered."[71] This kind of "care" dynamic not only can amount to a kind of regulatory gaslighting—it can also provide cover for a range of intrusive data-gathering projects by the agency that are framed as necessary conditions for relief. In the parallel context of the administration of welfare benefits, legal scholars have noted that the public-assistance nature of programs give agencies a justification for displacing private interests, thereby reinforcing structural inequality via legal means. Legal scholar Kaaryn Gustafson has documented the ways that government agencies use fraud investigations as a way to justify making intrusive searches into the lives of welfare applicants and beneficiaries.[72] Similarly, legal scholar Khiara Bridges notes that within a universe of applicants seeking public benefits, pregnant women face an especially reduced set of privacy protections: "[I]f the state treated other persons who receive government benefits the same way that the state treats poor mothers who receive government benefits, there would be a general sense of outrage; people would claim, loudly and frequently, that the government was violating citizens' privacy."[73] In some important ways, immigration benefits differ from the nature and purpose of economic entitlements; but they are similar in that they offer relief to beneficiaries that is conditioned on a reduction in privacy rights, and they threaten beneficiaries with criminal policing and penalties for failing to comply with the range of conditions.

Migrants also have little recourse in federal courts. On the enforcement side, while the Supreme Court's due process jurisprudence theoretically enables migrants placed in detention and removal proceedings to assert such claims, broadly construed immunity doctrines prevent migrants from holding enforcement agencies

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69. *See* NAT'L ARCHIVES AT KANSAS CITY, ALIEN FILES (A-FILES) FOR GENEALOGICAL RESEARCH 1 (2012), https://www.archives.gov/files/calendar/genealogy-fair/2012/handouts/alien-files.pdf [https://perma.cc/FU8T-DJSA].

70. *See* Gray Albert Abarca & Susan Bibler Coutin, *Sovereign Intimacies: The Lives of Documents Within US State-Noncitizen Relationships*, 45 AM. ETHNOLOGIST 7, 9 (2018); *see also* Javier Auyero, *Patients of the State: An Ethnographic Account of Poor People's Waiting*, 46 LATIN AM. RSCH. REV. 5, 5–6 (2011) (discussing how "welfare clients become not citizens but patients of the state").

71. Abarca & Coutin, *supra* note 70, at 9.

72. *See* KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 157–60 (2011). Seeking out applicants who lie about relationships, home addresses, and other facts that might render applicants ineligible, agency officials make unannounced visits at the homes of welfare recipients, walking through homes and questioning residents. *See id.*

73. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 5 (2017).

accountable for even gross acts of negligence leading to migrant illness and death.[74] On the benefits side, courts typically do not interpret the Due Process Clause as reaching migrants seeking benefits unless and until they begin receiving benefits in the first place.[75] In other words, migrants who apply for, but are denied relief from, removal typically cannot challenge agency decisions.[76] Thus, agencies navigate a more favorable legal landscape when managing migrants through applications for relief. As a reminder, agency officials adjudicating applications for relief against removal do not take part in the detention and removal of migrants. At the same time, as a practical matter, their actions comprise the final step in determining a migrant's removability.

## II. IMMIGRATION BENEFITS AS ADMINISTRATIVE VIOLENCE

On the whole, unauthorized migrants tend to be long-term residents. Recent estimates show that the unauthorized migrant community has remained relatively steady since the Obama era. Since 2015, the unauthorized migrant population has hovered around 11.4 million with the vast majority of that population having lived in the United States for more than a decade.[77] According to best estimates, 9.6 million unauthorized migrants entered the United States before 2010, and 5.4 million—nearly half of the total unauthorized population—entered before 2000.[78] Thus, many, if not most, of the unauthorized migrant population have lived in the United States for more than two decades. As a general matter, there is great variance among the foreign-born population in terms of duration of residence in the United States. A 2022 study found that among the older group of immigrants, those residents had lived in the United States for "about 34 years on average" with almost 90% having obtained citizenship through naturalization by 2019.[79] Immigrants from

74. *See* Hui v. Castaneda, 559 U.S. 799, 802–03, 806 (2010).

75. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)) (noting that a benefit that is protected by the Due Process Clause requires a "legitimate claim of entitlement"); *cf.* Cushman v. Shinseki, 576 F.3d 1290, 1297 (Fed. Cir. 2009) (citation omitted) (discussing how "applicants for benefits, no less than benefits recipients, may possess a property interest in the receipt of public welfare entitlements" in the context of veteran disability benefits).

76. This is true for both statutory and constitutional reasons. *See* Patel v. Garland, 596 U.S. 328, 340, 346–47 (2022) (holding that federal courts lack jurisdiction to review factual findings in an application for discretionary relief through adjustment of status). In certain instances, where a statutory instrument creates a clear entitlement to a benefit, a first-time applicant for benefits might be able to assert a due process claim. *See Cushman*, 576 F.3d at 1297. The Supreme Court's Article III jurisprudence—specifically, its case law defining whether and how agencies can exercise judicial power without violating Article III—also tends to favor empowering agency adjudications without much judicial oversight. *See* Cox & Kaufman, *supra* note 10, at 1813–14.

77. *See* BRYAN BAKER, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015–JANUARY 2018, at 3 tbl.1 (2021).

78. *See id.*

79. Adrian M. Bacong & Lan N. Doan, *Immigration and the Life Course: Contextualizing and Understanding Healthcare Access and Health of Older Adult Immigrants*, 34 J. AGING & HEALTH 1228, 1238 (2022).

Mexico, El Salvador, Guatemala, and the Dominican Republic had the lowest percentages of naturalized citizens among their respective immigrant cohorts.[80]

It is against this backdrop that immigration benefits programs operate. At first glance, it may seem odd to describe such programs in terms of agency violence. But as this Part shows, the procedures governing these programs allow agencies to provide a kind of symbolic care, which draws attention away from the fundamental unfairness of the broader legal system. Instead, agency officials administering benefits focus on smaller but dispositive questions of individual compliance that highlight the individual traits and characteristics of claimants—information that is relevant but stripped of important context.

### *A. Attachment*

A range of immigration benefits require applicants to demonstrate that they have resided or have been present in the United States for a period of time. The extent of these benefits varies, but they all involve legally created benefits that lead to the migrant having the freedom to remain in the United States without fear of removal and, in some cases, the freedom to move freely across national borders. One principle they all share is prioritizing migrants with some degree of attachment to the United States. To illustrate the basic contours of these "attachment" benefits programs, I include a brief summary below.

The DACA program allows childhood arrivals to obtain temporary relief from removal provided applicants can demonstrate that they have continuously resided in the United States since 2007. DACA is perhaps the most well-known example of a benefits program that rewards attachment. This program requires applicants to demonstrate that they have "continuously resided in the United States from June 15, 2007, to the time of filing [their DACA] request" and that they were "physically present in the United States on both June 15, 2012, and at the time of filing [their] DACA request . . . ."[81] The temporal elements of DACA reflect the attempt by elected and appointed officials to provide a legal fix to the moral quandary posed by removing childhood arrivals.[82] As a legal instrument, DACA stems from a discretionary allocation of enforcement resources away from Dreamers and towards higher priorities for removal.[83] Like other discretionary agency actions,

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80. *Id.* Bacong and Doan focus on country of origin as a predictor of health outcomes in the hopes of complicating long-held assumptions that simply having health insurance should correlate with or be predictive of improved health outcomes. They suggest further examination of "institutional and structural factors [that] may contribute to the poorer health among older adults" and point to examples of traumas of U.S. colonialism in the Philippines and anti-immigrant legislation directed at Mexico as other dimensions for evaluating immigrant health. *See id.* at 1238–39.

81. Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53155, 53156 (Aug. 30, 2022).

82. DACA and deferred action programs more generally have been targets of litigation efforts to invalidate those benefits. *See, e.g.*, Texas v. United States, 691 F. Supp. 3d 763, 795–96 (S.D. Tex. 2023).

83. The criteria for eligibility for DACA was based on criteria from the Development, Relief, and Education for Alien Minors ("DREAM") Act that had been pushed

the DACA memo tried to immunize future agency officials against meaningful legal challenges by inserting language that the program did not confer substantive rights.[84]

Initially created in 2012, DACA was meant in part to put pressure on Congress to pass a law that would have provided more permanent forms of relief to Dreamers and other sympathetic classes of unauthorized migrants.[85] When Congress failed to do so, in 2014, the Department of Homeland Security ("DHS") under President Obama's leadership announced expanded versions of deferred action designed to benefit parents of citizens and green card holders, as well as a larger class of Dreamers who could apply for relief.[86] A key feature of the 2014 expanded DACA or DACA+ program was that it would have loosened the continuous presence requirement both by removing the age cap (which benefitted childhood arrivals from earlier years) as well as by updating the cut-off date from 2007 to 2010 (which benefitted childhood arrivals from later years).[87] Anti-immigrant activists immediately challenged the DACA+ program, which eventually led to a court injunction and DHS's termination of the program.[88] Recently, anti-immigrant activists once again brought a suit against DHS, this time targeting the original DACA program and leading to an injunction against processing new applicants for relief.[89] Thus, DACA remains frozen in time, a program that is available to a static pool of beneficiaries who entered the United States before 2007 and who were under

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but never passed in Congress. The DREAM Act would provide a path to citizenship for these high-achieving childhood arrivals. Thus, this category of noncitizens is often referred to colloquially as "Dreamers." *See generally* WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE (2013).

84. *See* Deferred Action for Childhood Arrivals, 87 Fed. Reg. at 53155. DACA has been recognized as a policy innovation in part because it allowed President Obama to centralize control over front-line decisions. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 135–42 (2015).

85. *See* Cecilia Muñoz, *Deferred Action Process for Certain Young People: Smart and Sensible Immigration Policy*, WHITE HOUSE: BLOG (June 15, 2012, 3:07 PM), https://obamawhitehouse.archives.gov/blog/2012/06/15/deferred-action-process-certain-young-people-smart-and-sensible-immigration-policy [https://perma.cc/NX4A-96RA]; *see also Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low [https://perma.cc/B47H-FTB8] (July 24, 2020).

86. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, & R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., 3–5 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_3.pdf [https://perma.cc/59ZV-LTVK].

87. *See id.* at 3–4.

88. *See* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016).

89. Various states including Texas have once again challenged the DACA program. The case is currently making its way through the federal courts as they consider what impact, if any, the Biden Administration's use of notice and comment rulemaking has on the ultimate legality of DACA. *See* Texas v. United States, 50 F.4th 498, 531 (2022) (preserving the district court's stay of an order vacating DACA at least as the order applied to existing recipients of relief).

31 years of age in 2012. As the beneficiaries under the original program grow older—today, some must be in their 40s—their relatively stable lives provide a sharp and arbitrary contrast to childhood arrivals from both earlier and later temporal cohorts who missed out on DACA's protection.

Another important benefits program is cancellation of removal, a form of relief that enables noncitizens to obtain or keep their green card provided they can satisfy a range of criteria, including that they have been present in the United States for a period of at least seven or ten years.[90] As a form of relief, cancellation embodies the modern merger between the immigration and criminal legal systems.[91] For decades, the primary vehicle for back-end equitable relief was suspension of deportation, which provided relief from deportation in a manner akin to the modern cancellation benefit with its primary focus on hardship to the migrant and their community.[92] Initially, a noncitizen's criminal record played a minor role in eligibility, but over the years, Congress increasingly used criminal records as a basis for elevating thresholds for eligibility, until eventually excluding noncitizens entirely on the basis of a wide range of criminal activity, both serious and minor.[93] The version of relief offered by cancellation in the modern era of immigration law continues the trend of making it easier to remove noncitizens on the basis of criminal grounds and harder for those noncitizens to obtain relief for the same reason.[94]

DACA and cancellation are the most obvious examples of immigration law requiring migrants to demonstrate attachment to the United States through continuous presence, but there are others. Another example is naturalization, which allows certain classes of noncitizens—usually green card holders—to acquire citizenship provided they can establish that they have resided continuously in the United States for five years before submitting an application for naturalization.[95] But with the expanded bases for removal or criminal prosecution of immigration-related crimes, even green card holders who have long resided in the United States can fail to qualify for naturalization, leaving them in a state of legal purgatory.[96]

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90. The seven-year continuous presence requirement applies to those who have a green card but who have been found to be removable. 8 U.S.C. § 1229b(a)(2). A more onerous version of cancellation is available to a broader range of noncitizens including unauthorized migrants provided they can establish ten years of continuous physical presence. § 1229b(b)(1)(A).

91. Although the story of cancellation of removal is one of evolution towards more punitive ends, the story still reflects a set of compromises that are not easily reconciled. As Professor Jill Family astutely observes, "The structure of the cancellation of removal statute reflects the hesitation to truly commit to the immigrant narrative." Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 414 (2017).

92. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214 (codified as amended in various sections of 8 U.S.C.).

93. *See* Family, *supra* note 91, at 395–98.

94. *See id.* at 401–02.

95. *See* 8 U.S.C. § 1427(a). The naturalization statute reduces or eliminates the continuous presence requirement altogether for certain classes of noncitizens. *See id.* § 1427(b)(2), (f) (containing specific provisions governing spousal green card recipients and those making "extraordinary contributions to national security").

96. *See generally* Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571 (2012).

DACA, cancellation, and naturalization are all legal programs that prioritize noncitizens who exhibit a degree of attachment to the United States. Charged with managing the population of noncitizens, agencies make enforcement decisions in light of limited resources and thus rely on prioritization rationales to justify intensifying or relaxing enforcement policies. Within that pool of noncitizens, agencies use benefits programs to protect noncitizens with the strongest attachments to the United States. They are the lowest priority in terms of expending public resources to advance enforcement goals. From the perspective of legislators and regulators, continuous presence requirements offer a straightforward way to implement the idea that migrants with deep attachments to the United States should be selected for membership or at least deprioritized from removal.

In the naturalization context, for example, applicants have to demonstrate that they have resided continuously in the United States for five years and that they are "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."[97] Other times, these programs use relationships with legal insiders like U.S. citizens or green card holders as a stand-in for an attachment analysis. One version of cancellation of removal requires applicants to demonstrate both that they have been "physically present" in the United States for ten years and that "removal would result in exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident who is a spouse, parent, or child.[98]

The nature of the attachment often focuses on familial relationships, but it sometimes can mean economic and social contributions.[99] These programs invite vigorous debates about attachment to the United States and more broadly about "deservingness." DACA was designed to protect the sub-group of unauthorized migrants who are likely to be the most attached to the United States by virtue of their arrival as children.[100] Benefits programs that provide relief from removal are implemented within a political and legal climate that emphasizes the equity and care impulses behind those programs. Most notably, President Obama emphasized that

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97. § 1427(a).

98. § 1229b(b)(1)(A), (D).

99. *See* § 1427(a) (permitting applicants to apply for naturalization provided the applicant, "during all periods [the applicant resided in the United States,] has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States"); *In re* Recinas, 23 I&N Dec. 467, 468–72 (B.I.A. 2002) (discussing hardships to qualifying family members); Barack Obama, President, Remarks by the President on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/V7A8-HTRY] (announcing the DACA program for childhood arrivals who "are Americans in their heart, in their minds, in every single way but one: on paper").

100. *See* Memorandum from Janet Napolitano, Sec'y, Dep't Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., John Morton, Dir., U.S. Immigr. & Customs Enf't 1 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/UK2E-4EC7].

DACA was designed to protect those who had "done everything right."[101] Defenders of DACA beneficiaries and Dreamers speak about such applicants for relief as if they had experienced the "bad luck" of carrying the burdens of legal violations made by their parents.[102] Importantly, the DACA example also illustrates how attachments can form not just with individuals but with institutions and communities as well. Professor Cristina Rodríguez argues that one reason the Supreme Court invalidated DHS's attempt to rescind DACA was the recognition of the broader social status, and not just legal status, that DACA undergirds.[103] The interests of DACA beneficiaries are "serious and weighty, but also . . . 'radiating outward' from the recipients themselves to the economic and social institutions with which they have become intertwined."[104]

At the same time, it is odd to characterize these immigration benefits as attempts to reward those noncitizens with the greatest attachment to the United States when those schemes are embedded within broader enforcement policies aiming to detain and expel migrants. A range of exclusionary policies actively strive to thwart efforts by unauthorized migrants to establish attachments to the United States. Although the Obama Administration created and pushed out the immigration benefits program, DACA, an often-overlooked aspect of the Obama era "Morton Memos"—a pre-DACA set of memoranda that articulated high priorities for apprehension and removal—is how they prioritized the removal of "recent illegal entrants." Alongside noncitizens who posed national security or public safety threats, the Morton Memos also targeted those who had recently entered the United States.[105] Prioritizing recent arrivals means reducing the number of long-time residents who might then develop attachments to the United States. Violations of immigration controls are not necessarily criminal violations, but even when they are, they do not implicate the same underlying moral concerns that the broader (and sub-federal) criminal legal system attempts to police. For this reason, the clustering of

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101. *See* Obama, *supra* note 99. Secretary Janet Napolitano, the author of the DACA memo, made similar remarks before Congress: "Some [children] came to our country – sometimes even as infants – and yet they live under the threat of removal to a country they may know little about, with a language they may not even speak." *Written Testimony of U.S. Department of Homeland Security Secretary Janet Napolitano for a House Committee on the Judiciary Hearing Titled "Oversight of the Department of Homeland Security"*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/news/2012/07/17/written-testimony-dhs-secretary-janet-napolitano-house-committee-judiciary-hearing [https://perma.cc/U3RQ-U5MB] (Mar. 10, 2022).

102. Such reasoning can be traced back to the landmark Supreme Court decision *Plyler v. Doe*, in which the Court invalidated Texas's attempt to exclude undocumented children in part for this reason. *See* 457 U.S. 202, 238 (1982) (Powell, J., concurring) (The class of affected school children were "excluded only because of a status resulting from the violation by parents or guardians of our immigration laws and the fact that they remain in our country unlawfully. The appellee children are innocent in this respect.").

103. *See* Cristina M. Rodríguez, *Reading Regents and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 26 (2021).

104. *Id.* (footnote omitted).

105. *See* Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees 1–2 (Mar. 2, 2011), https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [https://perma.cc/583Q-72MQ].

"criminality" and "recency" is notable for how it shapes and constructs the meaning of attachment.[106]

The adjudication of DACA, cancellation, and naturalization applications unfolds in institutional settings that are adjacent to the legal settings most directly responsible for the most visibly disturbing category of harms. Adjudicating claims in these settings resets baselines and begins producing systemic norms that make the lives of unauthorized migrants seem administratively impossible.[107] Defending programs like cancellation, DACA, and other similar forms of relief on attachment grounds creates a set of administrative norms that do not track the experiences of unauthorized migrants. Put differently, granting relief from removal, while undeniably a just and humane outcome, strips away important context. It ignores the different ways that immigration laws created policies that aim to *frustrate* the formation of attachments. A range of enforcement policies make it difficult for migrants to secure formal work opportunities, making it hard to demonstrate evidence of work and contributions that might foster the kind of attachment necessary to prevail in benefits applications.[108] Similarly, in the context of family formation, enforcement policies and the threat of deportation thwart and constrain efforts by young adults to document their emotional and financial attachments through marriage.[109]

The attachment principle distinguishes these benefits programs from other types of immigration programs and policies that also utilize continuous presence or residence requirements. For example, Temporary Protected Status ("TPS") allows noncitizens who are unable to return to their country of nationality because of an armed conflict or natural disaster to apply to stay in the United States temporarily.[110] Importantly, the TPS provisions require applicants to demonstrate that they have continuously resided and been present in the United States since the inception of the event underlying the TPS designation.[111] But the benefits are grounded in protection against unforeseen disasters and disruptions in sending countries.[112] Although these programs and others are framed in terms of agencies and other state actors providing

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106. "Criminal aliens" are often positioned as foils to long-term residents in the United States, distinguishing between those who "contribute" to society through familial relationships or perhaps through engaging in work and other economically "productive" activities, and those who "threaten" or detract from U.S. life by committing crimes. Anti-immigrant laws such as 1994 California Proposition 187 ("Prop 187") reflects the hostile conditions many migrants faced in traditional immigrant destination states during this period. *See generally* Huyen Pham, *Proposition 187 and the Legacy of Its Law Enforcement Provisions*, 53 U.C. DAVIS L. REV. 1957 (2020). Prop 187 presaged in part the 1996 federal laws eventually enacted by Congress by denying publicly funded health care and educational benefits to unauthorized migrants. *See id.* at 1959–60.

107. *Cf.* SPADE, *supra* note 3, at 11–12.

108. *See, e.g.*, *supra* note 81 and accompanying text.

109. *See* LAURA E. ENRIQUEZ, OF LOVE AND PAPERS: HOW IMMIGRATION POLICY AFFECTS ROMANCE AND FAMILY 4–5 (2020).

110. *See* 8 U.S.C. § 1324a(b)(1)(A)–(C) (listing various types of events for which the Attorney General may properly designate countries as unsafe for returning noncitizens in the United States to those countries).

111. *See id.* § 1324a(c)(1)(A)(i)–(ii).

112. *See id.* § 1254a(b)(1)(B)(i)–(iii).

administrative relief in the form of care, such care comes with conditions and through barriers that can evolve into something punitive over time.[113] Another example is the three- and ten-year bars to admission that prevent an otherwise admissible noncitizen from gaining admission where they have been unlawfully present in the United States for some non-negligible period of time.[114] These bars, although part of a benefits program, function as penalties that limit the availability of other benefits such as adjustment of status. The policy of barring unauthorized migrants from seeking admission for a period of years reveals that continuous residence requirements can operate as caps just as they operate as floors or minimum thresholds.

### *B. Culture of Papers*

Migrants seeking benefits in the form of relief from or deferral of removal carry the burden of establishing eligibility. This model of governance evokes the image of an application in the form of a government document supported by a stack of papers constituting the administrative record, all of which is submitted as a petition or application to an agency. But this image is only partly true. With an expansion of enforcement authority and advances in technology, agencies are able to amass and collect large reams of data on migrants, allowing officials to supplement the record underlying their adjudication. Agency adjudications unfold in the context of broader surveillance opportunities that make it hard for noncitizens to know what evidence will inform the ultimate adjudication over their claim.

As a starting point, it's important to note that applications for relief receive minimal procedural protections, usually much less than what is afforded in removal proceedings. Some benefits, like DACA, happen completely on paper, while others, such as cancellation and naturalization, involve a combination of papers and an in-person hearing.[115] Criminal records figure prominently in all of these adjudications with arrest and conviction records operating as a kind of singularity that draws in and overrides other salient information about a migrant's life in the United States.[116]

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113. This is a key insight offered by Dean Spade. He notes that various benefits programs are conceptualized at the policy level as "care-taking programs" that are ostensibly "aimed at increasing health, security, and well-being . . . ." SPADE, *supra* note 3, at 75.

114. Six months of unlawful presence triggers a three-year bar, while more than 12 months of such presence triggers a ten-year bar. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(I)–(II).

115. DACA requires applicants to submit documentary evidence at the time of filing. In some cases, applicants will be required to come in person to submit biometric data. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS 3 (2024), https://www.uscis.gov/sites/default/files/document/forms/i-821dinstr.pdf [https://perma.cc/M2CU-TDNR]. By contrast, applicants for cancellation of removal may have their applications adjudicated before an immigration judge as a part of removal proceedings. 8 C.F.R. § 1240.11(a)(1) (2024). Typically, applicants for naturalization must submit to an in-person interview in addition to submitting relevant documentary evidence. *See* 8 U.S.C. § 1446(a)–(d).

116. For example, the stop-time rule stops the clock for purposes of accruing time that counts towards meeting the continuous presence requirement. Thus, evidence related to other criteria for cancellation—such as "good moral character" or hardship to a family member—are rendered irrelevant in the ultimate adjudication of the claim. *See* 8 U.S.C. § 1229b(b)(1)(B), (D).

At the same time, very few evidentiary limits exist on the kinds of information and data that agency officials can use as the basis for adjudication. Removal proceedings are subject to a lax set of restrictions in terms of admissibility of evidence, allowing the government to introduce a range of information, even if only tenuously relevant.[117] The broader picture illustrates a systemic preference for paper adjudications on the basis of records that pull from a wide range of formal and informal sources.

On its surface, the task of documenting attachment through continuous presence seems like a banal exercise in gathering proof that captures everyday interactions and transactions such as receipts, paystubs, photographs, and paid bills. This legal regime practically encourages migrants to collect and hoard every documented moment for the opportunity to demonstrate a life well lived in the United States—working, studying, and consuming.[118] But these activities do not transpire within a legal system and culture that imbues many basic transactions with the threat of removal. More specifically, an adjudicative process that focuses on papers and administrative records engenders legal vulnerability in a few ways.

First, migrants experience significant difficulty and risk in gathering documentary evidence amid broadly exclusionary policies. Most obviously, the Immigration Reform and Control Act ("IRCA") of 1986 foisted onto employers the legal obligation to verify the immigration status of its employees.[119] This mode of governance placed heavy emphasis on documenting status through paperwork in order to gain access to economic institutions—most notably mid-sized and large workplaces but also within banks—leaving records everywhere.[120] This risk-laden culture of papers has only worsened over the years as an increasing number of state and local jurisdictions have passed anti-immigrant laws homing in on documentation requirements. This has included not just laws that make immigration status a condition to access basic services like housing[121] but also efforts to create or intensify criminal penalties on identity theft—a crime commonly associated with IRCA requirements.[122] Such a comprehensive regulatory scheme discourages

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117. The standard for admissibility in a removal proceeding is largely limited to evidence that is considered "probative" and "fundamentally fair . . . ." *See In re* Ponce-Hernandez, 22 I&N Dec. 784, 785 (B.I.A. 1999).

118. *See* ASAD, *supra*, note 62, at 136; *see also* Abarca & Coutin, *supra* note 70, at 11.

119. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360.

120. *See* Stavros Gadinis & Colby Mangels, *Collaborative Gatekeepers*, 73 WASH. & LEE L. REV. 797, 858–62 (2016); *see also* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 61–66 (1986) (describing gatekeeper liability); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 92 YALE L.J. 857, 890–91 (1984) (describing same).

121. *See* Keller v. City of Fremont, 719 F.3d 931, 937–38 (8th Cir. 2013).

122. For example, in *Kansas v. Garcia*, migrants challenged a state law criminalizing identity theft by arguing that IRCA had preempted the state scheme. A five-justice majority held that the state law was not preempted. This illustrates how the creation of any benefits scheme can also create opportunities to punish because of documentation requirements. *See* Kansas v. Garcia, 589 U.S. 191, 191 (2020). *See generally* Pratheepan

migrants from creating any kind of paper trail. Life in the informal or shadow economy limits unauthorized migrants to independent contractor jobs paid in cash and informal housing and work arrangements made through familial or hometown networks.[123] And the extension of immigration enforcement into local policing efforts also deters migrants from moving about too freely for fear of being stopped and harassed or being detained and deported.[124] These precarious arrangements can enable migrants to stay afloat and to remit wages to loved ones in other countries, but they make it very difficult to establish proof that they have resided continuously in the United States, despite working and living here, should they seek out benefits at some future point.

A second feature of an immigration system organized around a sociolegal culture of paper adjudications is that the same record that can establish presence also documents a migrant's illicit activities pursued without authorization. In a series of contributions, legal anthropologist Susan Bibler Coutin has documented the various challenges and contradictions tied up in migrant efforts to document life in the United States amid legal vulnerability.[125] She notes, for example, that banal, everyday documents like receipts and check stubs represent "objects of emotional investment" that simultaneously offer hope and fear within the modern punitive immigration system.[126] In a separate piece, Coutin and Gray Albert Abarca argue that "record-keeping practices" demanded by modern immigration law create significant stress and uncertainty in the lives of migrants.[127] As one of their interviewees observed:

> I am gathering everything having to do with my children's schooling, everything in order, like the vaccination records. So that they

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Gulasekaram, *Immigration Enforcement Preemption*, 84 OHIO ST. L.J. 535 (2023). The Kansas Supreme Court overturned the identity theft convictions. *See* State v. Garcia, 401 P.3d 588, 600 (Kan. 2017), *rev'd and remanded*, 589 U.S. 191 (2020). In his dissenting opinion, Justice Biles would have affirmed the convictions, though he noted his "apprehension" with reaching this conclusion in light of the concentration of identity theft prosecutions in one jurisdiction. *See id.* at 606 (Biles, J., dissenting). It seemed that the identity theft prosecutions in Kansas arose from just one county, Johnson County, which prosecuted identity theft at a much higher rate than other counties in the state. In response to data requests, the plaintiffs in *Garcia* learned that Johnson County issued more than 1,200 prosecution charges for identity theft during the relevant time period. *See* Br. for Resp't at 16 n.6 (Aug. 6, 2019). *See generally* Letter from Stephen M. Howe, Dist. Att'y, Tenth Judicial District of Kansas, to Michael Sharma-Crawford (Aug. 17, 2016), https://drive.google.com/file/d/19JDIaH5KkuSyWN0ll8GzE9E0_7H9nOux/view?usp=sharing [https://perma.cc/P35W-47A8]. Indeed, Johnson County appears to be the only county in which "identity theft" appears in the top ten offenses of crimes that are charged. KAN. SENT'G COMM'N, ANNUAL REPORT FY 2013: ANALYSIS OF SENTENCING GUIDELINES IN KANSAS 95 (2014); *see also* Gulasekaram, *supra* note 122, at 568, 568 n.182 (2023).

123. *See generally* Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994).

124. *See* Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1386–91 (2019).

125. *See generally* SUSAN BIBLER COUTIN & BARBARA YNGVESSON, DOCUMENTING IMPOSSIBLE REALITIES: ETHNOGRAPHY, MEMORY, AND THE AS IF (2023).

126. *Id.* at 19.

127. *See* Abarca & Coutin, *supra* note 70, at 7.

> [officials] see that I am not just getting [public benefits] for them [her children] but rather that I have raised them . . . doing my part as a mother, and that they see. And evidence such as the light [bill], the gas [bill].[128]

Requiring migrants to reveal or "out" themselves exacerbates the vulnerability that migrants already experience in an enforcement-oriented climate.[129]

A federal scheme that requires proof of immigration status combined with state laws that criminalize the use of false papers injects social and economic relationships with an element of danger. This leads to a third observation about paper-based adjudications, one that draws from the insights of sociologist Cecilia Menjívar. She notes that a wide range of laws empower a broad cross section of actors to request immigration-related documents from migrants, thereby "reifying the state's presence in immigrants' everyday lives through making documentation critical to their dealings with immigrants and for the immigrants' livelihood."[130] This kind of administrative scheme puts migrants in a position of collecting and maintaining a record of daily activities in the United States where that same record could also be used as the basis for their expulsion.

A culture of compliance operates mostly at the level of meeting threshold requirements and navigating regulatory sludge. Because of this, resistance looks a bit different here as well. Counterintuitively, documentation requirements confer upon migrants a degree of agency over how they can establish continuous presence. Migrants possess the ability to critique state practices. In various ways, state institutions depend on the presence of unauthorized migrants in the United States—to fill labor gaps and to sustain public coffers through taxes at the very least.[131] Immigration agencies aim to justify appropriations and related expansions of authority, and elected officials overseeing these agencies have their own political goals like filling the labor, social, or emotional needs of their constituents. This dependence, Abarca and Coutin argue, creates a readily identifiable "problem" or policy objective that justifies an agency's existence:

> [T]he state needs migrants to be present, yet their very presence—in the case of those who are unauthorized—suggests that the state has failed to control its borders, thus potentially exposing the state to

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128. *Id.* (alterations in original).

129. For example, in critiquing the United Kingdom's asylum policy, Lucy Mayblin notes that various laws simultaneously deny migrants the right to work, forcing them to rely on state welfare support which is set below the poverty line. LUCY MAYBLIN, IMPOVERISHMENT AND ASYLUM: SOCIAL POLICY AS SLOW VIOLENCE 46 (2020). Such a contradictory set of impulses amounts to a policy that is "detrimental" to migrant interests and sets them up to fail. *See id.*

130. Cecilia Menjívar, *Document Overseers, Enhanced Enforcement, and Racialized Local Contexts: Experiences of Latino/a Immigrants in Phoenix, Arizona*, *in* PAPER TRAILS: MIGRANTS, DOCUMENTS, AND LEGAL INSECURITY 153, 155 (Sarah B. Horton & Josiah Heyman eds., 2020).

131. *See* NICOLE PRCHAL SVAJLENKA, CTR. FOR AM. PROGRESS, PROTECTING UNDOCUMENTED WORKERS ON THE PANDEMIC'S FRONT LINES 8 (2020); *see also* LISA CHRISTENSEN GEE ET AL., INST. ON TAX'N & ECON. POL'Y, UNDOCUMENTED IMMIGRANTS' STATE & LOCAL TAX CONTRIBUTIONS 2 (2017).

> criticism, disruption, or economic challenges. Paradoxically, then, acts of boundary making expose the state's fundamental vulnerability: boundaries are permeable; they can be crossed.[132]

Administering benefits under a kind of "ideology of compliance" relies on agency discretion, which can lead to mistakes when adjudicating benefits.[133] Such mistakes are not mere annoyances, but significant findings of fact made by officials for the purposes of intermediating the relationship between legally vulnerable noncitizens and direct violence in the form of detention and expulsion. The risk of error is significant. When adjudicating cancellation of removal, immigration judges are not bound by the Federal Rules of Evidence, allowing immigration officers to consider a range of documentation and information.[134] The law also empowers a broader range of agencies and government actors to adjudicate these issues outside of immigration court on the basis of documentary evidence only—for example, USCIS officers adjudicating DACA and TPS claims without ever providing on in-person hearing or interview.[135] Adding to this complex mosaic of decision-making is that actors in different agencies sometimes adjudicate the same issues, as is the case with time requirements for those seeking asylum, which are subject to adjudication by both asylum officers in the DHS and by immigration judges who preside over immigration court in the DOJ.[136]

Mistakes in records or adjudications can be obvious, but are often evaluated in pragmatic terms, a kind of inevitable but ultimately acceptable consequence of splitting adjudicative duties between federal courts and agencies. But in the context of a system that is comprised of multiple agencies with overlapping jurisdictional authority, clerical or agency errors can have a snowballing effect. *Patel v. Garland* offers the clearest example of this dynamic.[137] This case focuses on Pankajkumar Patel, an unauthorized migrant and long-time resident in the United States, whose application for adjustment of status was denied by USCIS. In denying the application, the agency pointed to a driver's license application in which Patel falsely claimed to be a U.S. citizen, thereby rendering him ineligible for relief under the immigration code.[138] The agency further argued that this denial, as an exercise

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132. Abarca & Coutin, *supra* note 70, at 8.

133. *See* Ristroph, *supra* note 8, at 1231.

134. *See* Heeren, *supra* note 52, at 1584.

135. *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., *Ch. 8.1(e) Temporary Protected Status*, *in* ADJUDICATOR'S FIELD MANUAL 4 (2022), https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm38-external.pdf [https://perma.cc/PG29-NUK6].

136. New arrivals seeking asylum affirmatively must first apply for this benefit with an asylum officer who works within DHS and if that applicant is denied, the applicant can have that same claim readjudicated by an immigration judge who sits within the DOJ. These benefits rely on a finding of continuous presence in that they require applicants to seek asylum in this manner within one year of arriving in the United States. *See* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 814–20 (2015). Under the Administrative Procedure Act ("APA"), all of these decisions would be considered "adjudications," thus illustrating the breadth of that term. *See* 5 U.S.C. § 551(7) (defining "adjudication" as an "agency process for the formulation of an order").

137. 596 U.S. 328 (2022).

138. *See id.* at 333; *see also* 8 U.S.C. § 1182(a)(6)(C)(ii)(I).

of discretionary agency authority, was unreviewable by a court.[139] In a 5–4 decision, Justice Barrett wrote an opinion affirming the agency's denial on the grounds that courts lacked the authority to review the agency decision.

Justice Gorsuch dissented on behalf of four justices. The Court's decision, he explained, would "shield the government from the embarrassment of having to correct even its most obvious errors."[140] Central to Justice Gorsuch's claim was Patel's assertion that his driver's license application reflected a mistake, not an intentional effort to secure a public benefit.[141] To bolster his point, Patel explained that even as an unauthorized migrant, he was eligible for a driver's license under Georgia law. Therefore, he lacked the subjective intent necessary to have engaged in fraud for immigration purposes. Noncitizens engage with different agencies for different reasons. Although the majority's decision forecloses judicial review of denials of benefits like green cards, it still leaves open another path: review of final orders by immigration judges in removal proceedings. But Justice Gorsuch emphasized the enormity and scope of immigration benefits decisions, a process that involves "unpublished and terse letters, which appear to receive little or no administrative review within DHS."[142] The sprawling and unstructured nature of this process predictably leads to mistakes that will be locked in without further review by courts.[143]

### *C. Risk Management*

Unauthorized migrants often worry about getting on "the radar" of government officials when applying for relief.[144] This in turn opens the way for police and other criminal law actors to enter their lives.[145] If a migrant fails to secure relief, thereby falling into the removal pipeline, administrative law doctrine allows

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139. *See Patel*, 596 U.S. at 335–36. The posture of this case is unusual in that the government opposed Patel's position initially. By the time the case was argued before the Supreme Court, President Biden had been elected. Shortly thereafter, the government sided with Patel in its position, causing the Supreme Court to appoint counsel to argue the position on appeal. *See* Brief for Court-Appointed *Amicus Curiae* in Support of the Judgment Below, Patel v. Garland, 596 U.S. 328 (2022) (No. 20-979).

140. *Patel*, 596 U.S. at 348 (Gorsuch, J., dissenting).

141. *See id.* at 347, 349.

142. *Id.* at 363 (citation omitted).

143. *See id.* at 364.

144. Again, the economic entitlements example is instructive. Welfare entitlements provide important help, but they do not alone provide enough to achieve economic security in the lives of many of the beneficiaries, which means that these beneficiaries often violate the conditions in order to scrape together enough income to survive. *See* GUSTAFSON, *supra* note 72, at 166.

145. This dynamic legitimates a system that allocates benefits to deserving applicants through administrative channels while punishing undeserving applicants through criminal means, using a distinction that does not usefully separate the two categories. As an interviewee in Gustafson's study notes, "The system makes you cheat . . . ." *Id.* at 169. Ultimately, these benefits programs advance a moral project, which distorts and decontextualizes individual characteristics to explain away the need for public assistance in terms of laziness or incompetence or other grounds tied to individual shortcomings. BRIDGES, *supra* note 73, at 37. Khiara Bridges calls this the "moral construction of poverty. . . ." *See id.* at 37–64.

agencies to defend themselves, noting that migrants had voluntarily assumed the risks. Agency officials can wash their hands clean of the removal process—deportation and sometimes detention—as a foreseeable consequence of a migrant's actions. As a result, the process of navigating applications for immigration benefits is often described as an exercise of managing risk. The adjudication of these types of applications does not challenge or unsettle the legitimacy of programs implementing detention and deportation policies. Indeed, the adjudication of immigration benefits reflects a core exercise of administrative power in which agencies largely maintain the final word. In other contexts, parties may challenge abusive or arbitrary agency decisions in court. But migrants typically do not have similar sorts of opportunities when applications for relief are denied. The statutory authorization underlying agency authority—for both ICE and USCIS as well as other related components—is broad. And because courts have traditionally deferred to agency exercises of power in the immigration context, parties struggle to convince courts to depart from this practice of deference.

In the context of removal, the government carries the burden of proof to demonstrate a migrant's removability and general susceptibility to enforcement policies like detention. In this setting, noncitizens engage with agencies in a defensive posture. And at the end of the process, noncitizens may challenge a removal order with a federal court, ensuring some degree of appellate oversight of agency process. Indeed, the Constitution ensures that noncitizens receive some degree of due process given that detention and removal both implicate protectable constitutional interests. By contrast, migrants interested in challenging the denial or erroneous adjudication of benefits enjoy diminished access to courts and judicial oversight. As applicants, migrants must make an affirmative showing that they are eligible for benefits. They carry the burden of proof. Moreover, as discussed earlier, the Due Process Clause typically does not apply to the denial of an application for benefits because a person who never enjoyed an entitlement in the first place cannot have a protectable interest.[146] Migrants (and their lawyers) must go into the process of applying for benefits knowing that their claims will live and die with the agency.

Government lawyers and agency officials have pointed out that one of the design strengths of a benefits programs like DACA is that it allows migrants to maintain control over the decision to submit applications, thus enabling self-screening and the ability to manage exposure to risk of removal.[147] Predictably, this model for allocating benefits focuses on the information that migrants have at the front end of the process. This information helps migrants manage their exposure to the risk of removal. This risk-management approach to adjudication differs from enforcement actions and removal proceedings, which put migrants in a defensive position. Benefits programs communicate to the public a clear set of criteria that applicants must meet to qualify, which helps migrants navigate an immigration system heavily weighted in favor of enforcement and removal. This kind of self-

146. *See supra* text accompanying notes 75–76 (referencing *Cushman v. Shinseki*, 576 F.3d 1290, 1297 (Fed. Cir. 2009).

147. *See* JENNIFER M. CHACÓN, SUSAN BIBLER COUTIN, & STEPHEN LEE, LEGAL PHANTOMS: EXECUTIVE ACTION AND THE HAUNTING FAILURES OF IMMIGRATION LAW 82 (2024); *see also* Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879, 1881 (2019).

screening mode of governance is often described as a method of empowerment for this reason. Rather than having to navigate a byzantine and scary legal system by backpedaling in removal proceedings, migrants can decide for themselves whether they may proceed. At the same time, risk-management discourse draws attention away from the broader set of political failures undergirding the modern immigration system and spreads out the blame onto migrants one applicant at a time. Agency adjudications that are measured in terms risk management—as in, did the agency give the applicant enough information to make an informed decision—inevitably focus on questions of applicant compliance. Immigration benefits that focus on proxies for attachment (like continuous presence), rely on a range of records in paper adjudications, and proceed within a culture of care create an adjudicative system that fixates on questions of compliance. The result is an adjudicative setting that decontextualizes the benefits agencies are charged with dispensing from the punitive context that make them necessary in the first place.

Programs like DACA, cancellation, and naturalization illustrate what is distinct about immigration benefits and policies more generally. Many programs that allocate administrative benefits and welfare entitlements reflect government attempts to correct economic problems stemming from structural inequality or a misalignment between individual skills and labor market opportunities. Welfare entitlements, for example, provide economic stability for people who do not have sufficient income to survive. Disability benefits provide similar relief to those with disabilities preventing them from fully accessing work opportunities. But the kinds of problems that immigration benefits address are the result of vulnerabilities stemming from a legally manufactured status—namely lack of authorization or a minimally reliable form of authorized status.[148] Lawmakers can solve this problem through other means outside of DACA and cancellation. There are legal channels for solving this problem, namely statutory reform, and historical precedents that such solutions are politically feasible, most notably IRCA's mass legalization program.[149] Other common types of administrative benefits, like welfare entitlements and disability benefits, are commonly understood as legal interventions to correct market failures. They are often described as temporary fixes for people who have fallen out of the labor market because of injuries or other factors that exclude them from work opportunities.[150] By contrast, programs like DACA and cancellation attempt to remove legally constructed barriers to free movement—geographically, socially, and economically. To be clear, all of these benefits programs have been hampered in the modern era. Welfare and other economic benefits also experienced significant curtailment in 1996. Thus, many areas of governance in the modern era have exacerbated inequality through the strategic use of moral judgments and stigmatic harms tied to messages of personal responsibility. Still, the fact that much of the vulnerability experienced by migrants could be

148. *See* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 733 (2015).

149. One could also argue that the ratification of the Citizenship Clause also functions as a kind of mass legalization policy at a constitutional level. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2091–92 (2008).

150. *See generally* Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361 (2020).

addressed through a change in law speaks to the exclusionary undercurrents of these programs. It isn't that lawmakers *can't* address immigrant vulnerability, it is that they don't *want* to do so.

## III. EXAMPLES

The theory of administrative violence demonstrates how care programs ask migrants to participate in their own demise. This Part explores how administrative violence operates in practice. It focuses on two case studies—both of which illustrate the challenges of successfully navigating the application process. Both examples involve migrants voluntarily complying with threshold programmatic requirements; agencies making erroneous or contestable factual assertions; and consequences for migrants that threaten far worse outcomes than the status quo. These immigration benefits programs are regulatory projects grounded in principles of inclusion but serve to obfuscate a landscape animated by exclusionary impulses. The point of administrative violence is not to persuade people that reviewing papers and detaining and abusing migrants are equivalent forms of violence. Rather, these examples illustrate how bureaucrats can sometimes make it harder to see and hold ICE field agents accountable—how they obfuscate urgent and consequential types of harm in the enforcement context.

### *A. An Absent Presence: Jorge Zaldivar*

In recent years, Jorge Zaldivar's story received significant media coverage for the cruel and arbitrary ways that immigration law leads to the separation of families.[151] A Mexican national who entered and lived within the United States without authorization for many years, Zaldivar secured lawful permanent resident ("LPR") status after many rounds of litigation and continued community activism and organizing.[152] According to Zaldivar, he entered the United States surreptitiously across the U.S.–Mexico border sometime in 1997.[153] He eventually married Christina, a U.S. citizen who sponsored him for a spousal visa.[154] When that application was rejected, Zaldivar sought relief in the form of cancellation, but faced problems meeting the ten-year threshold on the front and back end.[155]

Many elements of Zaldivar's journey illustrate how the enforcement and benefits functions of immigration law fit together uncomfortably. Initially, Zaldivar attempted to obtain a green card through a spousal visa. Christina Zaldivar sponsored Jorge as a spouse within the "immediate relative" category of the immigration code.[156] As a noncitizen who entered without inspection, Jorge had to leave the United States for consular processing in Mexico. Although he had a

151. *See* Saja Hindi, *Colorado Father, Whose 2020 Deportation Drew National Attention, Returns from Mexico*, DENV. POST (Nov. 5, 2022), https://www.denverpost.com/2022/11/05/jorge-zaldivar-immigration-colorado-deportation/ [https://perma.cc/G5LC-3KD7]; Julie Turkewitz, *Deportation Looms, and a Father Prepares to Say Goodbye*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/us/immigration-deportation.html [https://perma.cc/2QC4-TJ3L].

152. Zaldivar's immigration record is sealed and on file with the author.

153. *See id.*

154. *See id.*

155. *See id.*

156. *See* 8 U.S.C. § 1151(b)(2)(A)(i).

qualifying relationship—namely, marriage to a U.S. citizen—the consular office denied Zaldivar a visa because he allegedly failed to disclose a prior incident in which he was arrested but the charges were ultimately dismissed.[157] Once he was in Mexico, Zaldivar could not lawfully return to the United States, and his wife went on without him. Eventually, Zaldivar returned to the United States and sought relief on another basis—cancellation of removal. To do this, Zaldivar had to concede deportability, thereby shifting the burden from the government to Zaldivar, who had to prove that he was eligible for cancellation.[158] In the adjudication of this application, the government used Zaldivar's documents pertaining to his prior spousal visa application against him. Most notably, Zaldivar's wife Christina wrote a letter to consular officials requesting an update on the status of Zaldivar's initial application for a green card by marriage. In opposing Zaldivar's application for cancellation, the government argued that he had failed to satisfy the ten-year continuous presence requirement. For support, it used Christina's consulate letter to illustrate that Zaldivar's departure from the United States for his consular interview broke his continuous presence. Procedural rules regarding evidence give agencies an advantage in light of the limited control that migrants have over both where and how their information can be gathered and shared. The lax rules governing such adjudications allow the agency to pick and choose documents from across administrative settings.

Other aspects of Zaldivar's cancellation application illustrate the difficulties of establishing attachment through continuous presence. He claims to have entered the United States in 1997, which meant that he had in fact resided in the United States for longer than the statutorily prescribed requirement of ten years.[159] But his application faltered because he could not substantiate this. In the administrative record, Zaldivar testified to the date of his initial entry, but the immigration judge found him to not be credible.[160] He also submitted documentary evidence, but the agency found none of it acceptable.[161] Zaldivar submitted "two short, unsworn letters" from people claiming that he had lived or worked in the United States since 1997, but these were not affidavits. The agency found that they lacked "persuasive, supporting details and documentation that would resolve the respondent's lack of credibility." Zaldivar also offered pictures of his time in the United States that he asserted were taken in 1998 or 1999, but the agency refused to credit them since they were not authenticated and did not include sworn affidavits. Although he never received credit for these initial few years in the United States,

157. The consular office determined that failing to include this information amounted to "willfully misrepresenting a material fact . . . ." *See supra* note 152; *see also* § 1182(a)(6)(C)(i).

158. *See* § 1229a(c)(4)(A) (noting that the noncitizen "applying for relief or protection from removal has the burden of proof").

159. *See supra* note 152.

160. *See id.*

161. *In re* Jorge Rafael Zaldivar-Mendieta, Decision of the Board of Immigration Appeals (Dec. 7, 2012) (on file with author).

Jorge Zaldivar was able to establish a ten-year presence once a change in law allowed him to extend the end date for eligibility.[162]

Jorge and Christina Zaldivar's experience at the U.S. consular office in Mexico is not unique. Their struggles tap into a broader story about the procedural advantages that the government enjoys in the immigration benefits context. By leaving the United States, Zaldivar effectively abdicated any constitutional protections he might have enjoyed had he either been allowed to pursue such benefits from within the United States or had he sought to defend against the deportation instead of conceding it. A recent case that went before the Supreme Court illustrates the constitutional gap that redounds in favor of the government when a noncitizen submits to consular processing—that is, when he is forced to leave the country in order to complete the process for securing a green card. In *Department of State v. Muñoz*, Luis Asencio-Cordero sought a green card on the basis of his marriage to a U.S. citizen, Sandra Muñoz.[163] Like Zaldivar, Asencio-Cordero was required to leave the United States and pass an interview at a consulate office in his home country, El Salvador. Also like Zaldivar, his application was denied. The consulate officer's denial cited the statutory provision governing inadmissibility grounds related to security and "unlawful activity" but did not provide a factual basis for its determination.[164] Asencio-Cordero and Muñoz submitted requests for reconsideration and each time the agency responded with only a citation to the statutory ground.[165] Given that Asencio-Cordero had no criminal history in the United States, the couple suspected that his tattoos might have led to consular officials to mistakenly believe he belonged to a gang. Finally, the couple submitted additional evidence in the form of a letter from a gang expert asserting that none of Asencio-Cordero's tattoos "were 'related to any gang or criminal organization in the United States or elsewhere.'"[166] Only after the couple affirmatively sued the agency in federal court did the parties receive an agency explanation of the factual basis of the denial—a declaration from an attorney-advisor in the State Department.[167]

Justice Sotomayor's dissent captures the ways that immigration policy empowers the government to reroute power away from enforcement settings and into benefits settings, giving them an invisible advantage. After summarizing the

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162. Under the cancellation statute, the "stop-time" rule allows the government to stop the clock in terms of granting time-credits under certain circumstances. One such circumstance is whether the government issues a Notice-to-Appear ("NTA") document, which is the immigration equivalent of a prosecutor's indictment or charging document. *See* § 1229b(d)(1)(A). Immigration officials took some procedural shortcuts in issuing the NTA, a practice that invalidates government attempts to enforce the stop-time rule. *See* Niz-Chavez v. Garland, 593 U.S. 155, 164 (2021).

163. *See* 144 S. Ct. 1812, 1817 (2024).

164. *Id.* at 1819; *see also* § 1182(a)(3)(A)(ii) ("Any alien who a consular officer . . . knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any other unlawful activity . . . is inadmissible.").

165. *See Muñoz*, 144 S. Ct. at 1831 (Sotomayor, J., dissenting); *see also* Muñoz v. Dep't of State, 50 F.4th 906, 910–11 (9th Cir. 2022).

166. *Muñoz*, 144 S. Ct. at 1832 (Sotomayor, J., dissenting) (quoting Muñoz v. Dep't of State, 50 F.4th 906, 911 (9th Cir. 2022)).

167. *See id.* at 1832; *see also Muñoz*, 50 F.4th at 912.

process that noncitizens receive while navigating removal proceedings within the United States, Justice Sotomayor turns to the consular process governed by the doctrine of consular nonreviewability.[168] In effect, she points out that migrants seeking visas from consular offices do so as supplicants and armed only with requests for reconsideration and opportunities to submit additional evidence instead of concrete, enforceable rights.[169] By statute, consular officers are not even required to provide the factual basis of the denial.[170] The factual question concerned the meaning of tattoos on the noncitizen spouse. The Department of State found that the tattoos reflected gang affiliation despite declarations by court-approved experts speaking to the contrary. The key passage in her dissent concerns the difference in process that noncitizens receive in seeking benefits compared to removal proceedings:

> Had the Government sought to remove Muñoz's husband when they were living together in the United States, he would have had his own constitutional protections in those proceedings. Instead, because the Government forced him to leave the country and reenter in order to adjust his immigration status, he lost them.[171]

Crucially, the dissent observes that the system by which migrants adjust their status requires already vulnerable migrants to take on even greater vulnerability in order to secure a benefit. [172]

### *B. Accessing the File: Mirsad Hajro*

Mirsad Hajro immigrated to the United States from Bosnia.[173] He grew up in Bosnia and was a young man during the Bosnian War in the 1990s.[174] While attending a German university, Hajro met his future wife, a U.S. citizen.[175] He eventually immigrated to the United States on a temporary visa and applied for a green card based on his marriage to a U.S. citizen.[176] In response to a question about past membership in foreign military service, Hajro indicated that he had no such experience.[177] In fact, he was drafted into the Bosnian army like other men of his age during the Bosnian War.[178] Given his limited English, Hajro applied for a green card with help from a coworker.[179] During the interview with the immigration officer, Hajro admitted that he had served in the military and explained that he

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168. *Id.* at 1836.
169. *See* 8 C.F.R. § 42.81.
170. *See* 8 U.S.C. § 1182(b)(1)(A)-(B).
171. *Muñoz*, 144 S. Ct. at 1836 (Sotomayor, J., dissenting).
172. *Id.* at 1838 (noting that the process meant that Muñoz's husband "lost his own procedural protections when the Government required him to leave the country").
173. Hajro v. Barrett, 849 F. Supp. 2d 945, 949 (N.D. Cal. 2012).
174. *Id.* at 948–49.
175. *Id.* at 949.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*

misunderstood the question on the form.[180] In 2000, despite this misunderstanding, Hajro received a green card.[181] A few years later, Hajro applied to naturalize.[182] USCIS denied his application citing inconsistencies between his responses during his green card interview and his initial paper application.[183]

In order to contest the agency's conclusions regarding inconsistent testimony, Hajro submitted a Freedom of Information Act ("FOIA") request under expedited procedures.[184] The USCIS denied his request, claiming that his case fell outside of the categories entitled to such processing. If he was denied naturalization, Hajro then also faced the possible risk of having his green card stripped because the agency's denial alleged a kind of fraud to secure immigration benefits. Hajro then sued USCIS showing a "pattern and practice" of violating FOIA requests, leading to a court to issue an injunction requiring USCIS to expedite Hajro's request.[185] Hajro eventually was able to successfully naturalize.

While applicants for naturalization bear the responsibility of assembling a record that demonstrates continuous presence, the process of securing durable benefits like green cards and citizenship includes major events or moments like interviews, entries and inspections, and other significant touchpoints between noncitizens and agency officials. These touchpoints, in turn, create records which remain in the exclusive possession of agency officials unless and until a migrant seeks them.[186] Without access to these records, a process in which a migrant is seeking a benefit can quickly morph into removal proceedings subjecting that migrant to the risk of detention, deportation, and other exercises of force.

The regulatory policies and practices surrounding Hajro's case highlight important aspects to the mechanics of administrative violence. First, the absence of formal discovery rules and obligations means noncitizens can only access government records through FOIA, which is an important transparency tool but not

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180. *See id.* at 949–50. Apparently, he interpreted the question about "foreign military service" to mean whether he had ever served in the U.S. military outside of the United States. *Id.* at 949 (citation omitted).

181. *Id.* at 950.

182. *Id.*

183. *Id.* at 952.

184. Agency delays in responding to FOIA requests in the immigration context first emerged as a serious regulatory problem in the late 1980s. This led to a settlement agreement in which the USCIS would expedite FOIA requests where failure to process the request implicates "life or personal safety" or raises "substantial due process" concerns. *See, e.g.*, Mayock v. Nelson, 938 F.2d 1006 (9th Cir. 1991). For a helpful summary, see Heeren, *supra* note 52, at 1590–93. For the terms of the settlement agreement, see Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 365–77 (1994).

185. *See* Hajro v. U.S. Citizenship & Immigr. Servs., 832 F. Supp. 2d 1095, 1104, 1120 (N.D. Cal. 2011), *rev'd in part, vacated in part*, 807 F.3d 1054 (9th Cir. 2015), *withdrawn, amended, and superseded by* 811 F.3d 1086 (9th Cir. 2016); *see also* Bob Egelko, *Case Shows Snags for Those Denied U.S. Citizenship*, SF GATE (Oct. 19, 2011), https://www.sfgate.com/bayarea/article/case-shows-snags-for-those-denied-u-s-citizenship-2326908.php [https://perma.cc/W6SN-NFZ2].

186. *See* MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT 80–92 (2021).

one that was designed to operate as a substitute for discovery in immigration adjudications.[187] Without much clear guidance or instruction from Congress, USCIS, like other immigration agencies, is free to create its own policies regarding disclosure.[188] Notably, the ad hoc "expedited process" began only after USCIS's predecessor agency, the Immigration and Naturalization Service ("INS"), was sued and agreed to such a process through a settlement agreement.[189] In this sense, Hajro's experiences mirror those of Ascencio-Cordero in that the government disclosed information only after being forced to through litigation.

Second, a part of the reason USCIS had to create an expedited process was because it faced a serious backlog with regard to FOIA requests. Hajro's case concluded in 2012, now more than a decade ago during the Obama Administration, but USCIS continues to face significant backlogs leading to noncitizens seeking their files for similar reasons. Indeed, in 2022, a similar suit was filed against USCIS for access to records.[190] Literally millions of immigration files are stored in a business complex—colloquially referred to as "the cave"—leaving agency officials to sort through a massive filing system to track down paper.[191] These different waves of lawsuits illustrate the structural nature of USCIS delays in response to requests made under an ad hoc solution in FOIA.

Third, all of this illustrates how ad hoc tools combined with structural deficits in USCIS infrastructure lead the agency to set policy through prioritization amid a scarcity of agency resources. A part of the problem in Hajro's case was that the initial settlement agreement excluded those seeking green cards and naturalization. Instead, the agreement prioritized those who were facing removal at the moment.[192] This makes some intuitive sense given that removal and its surrounding policies create a sense of urgency. But immigration—both the sociological realities and policies—have changed since the late 1980s when the settlement agreement was first reached. People like Hajro increasingly face vulnerability within the United States despite having status. To put the burden on such migrants to demonstrate that they are entitled to expedited processing focuses on his defects or idiosyncrasies as an applicant. Hajro was eventually able to obtain citizenship,[193] thereby providing him with durable protection against state

187. *See id.*

188. *See* Heeren, *supra* note 52, at 1590–93.

189. *See id.* at 1590–91.

190. *See* AM. IMMIGR. COUNCIL, *Challenging USCIS To End Naturalization Application Delays*, https://www.americanimmigrationcouncil.org/litigation/challenging-uscis-naturalization-application-delays [https://perma.cc/747U-5HMR] (last visited Sept. 13, 2024). But by September 13, 2022, all except one plaintiff to the suit had naturalized, and on November 16, 2022, the parties dismissed the lawsuit as per a joint stipulation. *See id.*

191. *See* Catherine E. Choichet, *Their Records Were Locked in Caves During the Pandemic. Now They Say an 'Unreasonable Delay' Is Stilling Stalling Their Citizenship Applications*, CNN (June 13, 2022), https://www.cnn.com/2022/06/12/us/immigration-records-lawsuit-limestone-caves-cec/index.html [https://perma.cc/AH7Z-WPSK].

192. *See* Hajro v. U.S. Citizenship & Immigr. Servs., 811 F.3d 1086, 1093–94 (9th Cir. 2016); *see also* Mayock v. Nelson, 938 F.2d 1006, 1008 (9th Cir. 2001).

192. *See Hajro*, 811 F.3d at 1094.

immobilization and expulsion, but none of the procedural protections he received until that point fully captured the peril he faced.[194]

## IV. FURTHER REFINEMENTS

Thus far, I have done three things: (1) suggest that violence is not a monolith within immigration law; (2) argue that administrative violence operates within interstitial institutional spaces in ways that obfuscate direct forms of violence; and (3) illustrate how that is so through two case studies. These three things have advanced a larger point, namely that a range of agency actions prop up a system that enables the exercise of force against migrants. This Article has used the example of immigration benefits to explore how violence operates and remains concealed beyond the domain of force, a topic that has only recently begun attracting the interest of administrative law scholars.[195] To help legal scholars further explore whether and how the use of force by agencies qualifies as violence, this final Part identifies larger questions that we might pursue to help further develop our understanding of violence in the administrative context.

As an analytical framework, violence is valuable as a discursive concept because it challenges the process by which subordination and harm within the legal system become normalized. This is a throughline that connects the most capacious theories of violence—slow, symbolic, structural, and atmospheric[196]—with my account of administrative violence. Characterizing marquee immigrant-friendly legal relief programs like DACA and cancellation in terms of violence helps reveal the falsity underlying binaries like the benefits/enforcement distinction and highlights the legally and politically constructed nature of ideas like deservingness. Thus, the argument for administrative violence is an attempt to inject legal and political debates with urgency. It highlights agency actions that not only cause incidental harm to migrant communities but also describes a system designed to exact or perpetuate harms.[197] Calling an agency action violent is an attempt to draw attention to the way that an agency has transgressed or violated a set of norms meant to protect bodily integrity.

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194. Neither did most of the court opinions. While Hajro was able to obtain relief for himself, his lawsuit seeking reform of USCIS's FOIA practices was dismissed as moot given that he had naturalized. *Id.* at 1007.

195. *See, e.g.*, Adam Davidson, *Administrative Enslavement*, 124 COLUM. L. REV. 633, 638 (2024) (arguing that "our current system of prison slavery is built on the sorts of mundane processes and decisions that seem small and unimportant individually but, in the aggregate, create a regime that this Article calls *administrative enslavement*").

196. *See, e.g.*, Ahmann, *supra* note 38, at 144–46 (explaining "slow violence"); Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. OF PEACE RSCH. 167, 171–72 (1969) (explaining "structural violence"); Seth M. Holmes, *"Oaxacans Like to Work Bent Over": The Naturalization of Social Suffering among Berry Farm Workers*, 45 INT'L MIGRATION 39, 58 (2007) (explaining "symbolic violence"); ERIC A. STANLEY, ATMOSPHERES OF VIOLENCE: STRUCTURING ANTAGONISM AND THE TRANS/QUEER UNGOVERNABLE (2021) (explaining "atmospheric violence").

197. In arguing that deportation is a form of violence, Angélica Chazaro argues that "violence is not incidental to deportation—it is not an occasional, or even regular, add-on to deportation. . . . [D]eportation *is* violence." Cházaro, *supra* note 2, at 1071.

With this in mind, this Part identifies conversations about violence in the administrative state that are already underway and explores how the example of immigration benefits might join and contribute to these conversations. Within these conversations, the broader normative goal is to shrink agency power that is most responsible for apprehension, detention, and deportation—i.e., acts of direct violence. One conversation focuses on *visibility*. The idea is that exposing the acts of violence committed by agencies can help mobilize the public and can help generate momentum and political will to strip away this power. A second conversation focuses on *compliance*—what it conceals and the kinds of agency behavior it enables. Third and finally, I focus on *punishment*. Here, the goal is to reveal the ways that the use and threat of force can be characterized as punishment—a core purpose of criminal law—which can help focus reform efforts on increasing protections that migrants might be able to receive.

### *A. Visibility*

For advocates seeking to persuade the public and stakeholders of the injustice and unfairness of the immigration legal system, finding sharp and pointed examples that represent these harms is critical for gaining momentum for change. But even when advocates can mobilize around crises and spectacles, the diffusion and decentralization of agency power can make it hard to identify lines of accountability. Thus, thinking about the relationship between direct and administrative forms of harm can help shape discussions about overlapping jurisdictions between and among agencies.

Agency and elected officials routinely divide immigration policy into categories of "enforcement" (associated with agency violence) and "benefits" (thought of as humanitarian).[198] This structural distinction is one of the hallmarks of a post-9/11 immigration architecture.[199] Critiques levied at ICE and CBP officers as committing or perpetuating acts of violence mirror many of the same critiques deployed against police and other law enforcement agencies in the criminal context. The authority to investigate, arrest, and, under certain conditions, kill people gives ICE officers powers that are comparable to those of police on the streets.[200] Even while the benefits/enforcement distinction has political salience, it does not accurately describe legal realities. Despite the distinct work cultures and career trajectories of ICE and USCIS officials, for example, the agencies work within a joint or "shared" adjudicative space.[201] The highly decentralized but interconnected nature of the immigration system means that any number of interactions with

198. *See supra* Sections I.A–B.

199. *See* DAVID A. MARTIN, MIGRATION POL'Y INST., IMMIGRATION POLICY AND THE HOMELAND SECURITY ACT REORGANIZATION: AN EARLY AGENDA FOR PRACTICAL IMPROVEMENTS 1 (2003), https://www.migrationpolicy.org/sites/default/files/publications/insight_4-2003.pdf [https://perma.cc/V6CC-LBW3].

200. Indeed, immigration policy renders the police–ICE distinction meaningless in many instances given the degree to which federal immigration agencies collaborate with state law enforcement actors. *See* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1130 (2013).

201. *See* Shah, *supra* note 136, at 810.

government agencies and private actors can create a file or a record indicative of a noncitizen's immigration status.

This reality has profoundly shaped advocacy strategies. Migrants are eligible for, and should be encouraged to pursue, a range of government benefits and market-based goods and services irrespective of their immigration status. This is true for educational opportunities, workplace protections, as well as for other economic opportunities such as independent contract work. Yet, in all of these scenarios, the critical challenge is preventing migrants from getting on ICE's radar, which reflects the understanding that once a migrant gets pulled into the removal pipeline, the outcome is inevitable. For example, the Department of Labor ("DOL") and other labor and employment enforcement agencies have memoranda of understanding ("MOU") to help them coordinate enforcement actions with the DHS. Such MOUs govern the conditions under which information about a complainant's immigration status may or may not be shared with DHS officials and also creates some pathways for relief for noncitizen workers pursuing labor and employment claims against their employers.[202] Similarly, sanctuary policies instituted by local law enforcement agencies create a kind of firewall preventing police and sheriffs from sharing information about an arrestee's immigration status with federal officials, again save for certain exceptions.[203] This strategy was organized around a principle of containment and separation—contain the reach of federal immigration officials and separate other entities from federal reach.

A regulatory system that relies on a coordinated approach by agencies leverages expertise across institutions but in the process can make it difficult to hold actors accountable given the way that power and authority disappear and blend into one another. This is especially true for courts tasked with the duty of reviewing such actions. This aspect of administrative violence—an adjudication environment defined by multiple agencies wielding overlapping authority—can make it hard for applicants and other affected parties to identify the officials who are most directly responsible for adjudicative outcomes. Professor Bijal Shah puts it this way: "In coordinated interagency adjudication, the ability of a court to have access to and to review agency determinations becomes frustrated because the role of each agency

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202. *See, e.g.*, Revised Memorandum of Understanding Between the Dep'ts of Homeland Sec. & Lab. Concerning Enf't Activities at Worksites (Dec. 7, 2011), https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf [https://perma.cc/J5RL-K9E5]; *see also* Memorandum of Agreement (MOA) Between the Dep't of Homeland Sec. (DHS), U.S. Citizenship & Immigr. Servs. (USCIS) & the Dep't of Lab. (DOL) Regarding Emp.-Based Petition, Lab. Certification, & Lab. Condition Application Data (Aug. 12, 2016), https://www.uscis.gov/sites/default/files/document/foia/Employment-Based_Petition_Labor_Certification_and_Labor_Condition_Application_Data.pdf [https://perma.cc/N3G3-GK2W]; Press Release, U.S. Dep't of Homeland Sec., DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations (Jan. 13, 2023), https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations [https://perma.cc/XVW9-49R2].

203. In 2017, the California legislature passed the California Values Act, which prohibited state law enforcement agencies from "from using money or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes" except for certain exceptions related to those arrested for a "serious or violent felony." *See* S.B. 54, 2017-2018 Leg., Reg. Sess. (Cal. 2017).

might be ill-defined and traces of disagreement might be hard to uncover and harder yet to scrutinize . . . ."[204] Building on this observation, theorizing immigration benefits in terms of administrative violence sharpens our focus on what is being missed in this amorphous adjudicative space. As the examples of Jorge Zaldivar and Luis Asencio-Cordero illustrate, migrants who opt to seek relief through applications for benefits effectively give up their right to challenge agency actions altogether, short-circuiting the process through which courts—and by extension the public—seek to pinpoint the underlying reasons for the harmful agency action.

In arguing that deportation constitutes violence, Professor Angélica Cházaro helps broaden the project of theorizing violence beyond police-like activities of apprehension by ICE officer encounters. Notably, for Cházaro, deportation does not unfold in a vacuum but instead fits within a broader set of policies that create a series of ongoing harms from apprehension to detention and removal. She explains that "[d]efining deportation as violence across both time and space highlights the way in which deportation constitutes an ongoing harm. It is violence that does not stop as long as it remains a possible outcome for a population."[205] This crystallizes a normative impulse motiving scholars interested in theorizing immigration law in terms of violence. The challenge isn't to document or establish that harmful acts grounded in the threat of force are occurring—plenty of evidence confirms this reality—rather, it is to explore different ways to make such harms visible and available for public consumption. The theory of administrative violence pushes further still. The purveyors of violence within the administrative state are not just those who look and act like feature players in the criminal legal system—police officers and sentencing judges—but also the bureaucrats who gather records and adjudicate applications far removed from the field. Similar discussions are unfolding among criminal law scholars as well, with scholarship drawing attention to the full constellation of state actors responsible for incarceration, including probation officers and not just the police.[206] The adjudication of immigration benefits draws attention and resources away from enforcement programs—the primary setting for the use and threat of force—and in this sense makes it harder to stop the machinery responsible for direct violence.

### *B. Compliance*

Characterizing agency officials who allocate benefits in terms of violence might strike some as a cheap rhetorical move. This criticism stems from the view that the nature of violence must involve the direct use or at least threat of force. Under this view, those who stretch the meaning of violence to describe harms flowing from words or structural arrangements dilute the meaning of the term,

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204. *See* Shah, *supra* note 136, at 819. Uncovering abuses by agencies like ERO and the Border Patrol already faces challenges through conventional civil rights or *Bivens* actions in court. *See* Adekoya v. Holder, 751 F. Supp. 2d 688, 693 (S.D.N.Y. 2010). Cramped constructions of immunity doctrines and constitutional tort claims make it hard to sue agency officials and their surrogates in federal courts. *See* Hui v. Castaneda, 559 U.S. 799, 801–02 (2010); *see also Adekoya*, 751 F. Supp. 2d at 694–95.

205. *See* Cházaro, *supra* note 2, at 1076.

206. *See* Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1242 (2019).

thereby drawing attention away from the most harmful category of harms. While I agree that the term "violence" can sometimes be deployed too readily, such a concern is not present here. In particular, the heavy emphasis on individual compliance raises suspicions about the broader scope of immigration benefits programs. In the policing context, Professor Alice Ristroph notes that both doctrine and scholarship on this topic tend to focus on the compliance of suspects to police investigations as a way of evaluating the effectiveness and safety of investigations. The thinking goes that if only suspects would comply with police orders, violence would not follow. Ristroph notes the disproportionate burdens of compliance carried by racialized minorities and is skeptical that compliance can be the metric against which policing can be evaluated as successful. She notes that theories of policing that start from the place of compliance "take for granted the basic normative legitimacy of the criminal law and the punishments it imposes."[207]

A similar criticism could be deployed against immigration care and benefits programs that arise within a broadly punitive immigration system that carries significant risks. Agency arguments that fixate on whether applicants have met minimum requirements should provoke similar degrees of skepticism. The exercise of counting days for purposes of establishing continuous presence, for example, is a legally constructed requirement that reflects policy choices. Migrants do not get to count every day lived in the United States towards meeting a continuous presence threshold. As Jorge Zaldivar's case demonstrates, in the context of cancellation of removal, immigration officials are empowered to stop crediting days to noncitizens when a noncitizen commits a range of crimes.

In related ways, legal scholars might focus on the costs of compliance, specifically in terms of personal and privacy costs. Legal scholars who critique administrative benefits often focus on the diminution of privacy rights and argue that these schemes create and enforce a double standard against poor women, especially poor women of color vis-à-vis wealthy white citizens.[208] Legal scholars have pursued similar queries in parallel contexts. In the context of school records, Professor Fanna Gamal has critiqued dominant concepts of privacy, which focus on nondisclosure of information. [209] While protecting privacy of students is important, she notes that students often "cannot control how their information is created, collected, and recorded" by schools and other educational institutions.[210] Today,

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207. Ristroph, *supra* note 8, at 1225.

208. BRIDGES, *supra* note 73, at 37-64. These important arguments grow out of equality impulses, drawing force from the disparate treatment levied against pregnant women of color especially black women. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419 (1991). In the context of benefits like SNAP and TANF, which provide support to families living in poverty, the implementation of those programs disrupts what has traditionally been understood as a sphere of privacy. The parenting decisions that are made within families, especially by parents on behalf of children, fit within a broader set of liberty interests. *See* Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 153 (2011). *See generally* Janet L. Dolgin, *The Family in Transition: From* Griswold *to* Eisenstadt *and Beyond*, 82 GEO. L.J. 1519 (1994).

209. *See* Fanna Gamal, *The Private Life of Education*, 75 STAN. L. REV. 1315 (2023).

210. *Id.* at 1355.

with information regularly harvested, integrated, and then shared or sold, often without the knowledge of individuals. Professor César Cuauhtémoc García Hernández calls this digital policing.[211] He notes that ICE partners with information brokers like Lexis—a private company most familiar to lawyers and law students for its searchable databases of cases, statutes, and other legal authorities—giving immigration officials the ability to quickly "[comb] through driving records, phone logs, and jail arrest data."[212] Hernández explains that other information brokers, like Palantir, provide ICE access to data drawn from property records, driver's licenses, and vehicle registrations, giving officials the ability to "sift through vast amounts of data quickly and efficiently."[213] In this world, a data point can be created for one purpose, wander, be stripped of context, and then serve an entirely different purpose.[214] One of the challenges with remedying harms related to informational injuries is articulating exactly how people are injured. It is hard to pinpoint exactly how people are injured by errors nestled within records. But as Gamal observes, "While the precise injury that flows from an inaccurate but (externally) undisclosed informational archive is difficult to quantify . . . the inaccurate but internally maintained records created a risk of future harm."[215] This kind of injury tracks the experiences of the Zaldivars who unsuccessfully tried to receive information about the status of the spousal visa application with a consular agent, only to have that exchange used against them at a subsequent adjudication of the cancellation application. Although the prior exchange with the consular agent seemed neutral on its face as a reflection of Jorge Zaldivar's character, it ended up operating as a kind of "negative credential," the equivalent of an anti-resume, marking him as deviant and incompliant.[216]

### *C. Punishment*

Public law and administrative law scholars have also addressed the unjustified use of force by agencies in terms of judicial oversight. This conversation tends to focus on the punitive nature of agency authority and the incentives that

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211. *See* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, WELCOME THE WRETCHED: IN DEFENSE OF THE "CRIMINAL ALIEN" 111 (2024).

212. *See id.* at 113.

213. *See id.* at 116–17.

214. Recently, the Supreme Court has made it harder for people with informational injuries to seek redress in federal court. *TransUnion LLC v. Ramirez* focused on consumers alleging that a credit reporting agency had not taken necessary precautions to compile personal and financial information, thereby sharing with third-parties erroneous and damaging information. 594 U.S. 413, 417 (2021). The named plaintiff in *TransUnion* could not buy a car when the dealer ran a credit check, finding Ramirez's name in a federally managed terrorist-watch list. *See id.* at 420. The Office of Foreign Assets Control in the Department of Treasury maintains a list of "[s]pecially [d]esignated [n]ationals" deemed to be threats to national security. *See, e.g.*, OFF. OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST 1 (2024), https://www.treasury.gov/ofac/downloads/sdnlist.pdf [https://perma.cc/M535-G8S6].

215. Gamal, *supra* note 209, at 1357 (footnote omitted).

216. *See* Jain, *The Mark of Policing*, *supra* note 67, at 174; *see also* Jain, *Arrests as Regulation*, *supra* note 67, at 825 (2015). Although Professor Jain coined this term in the context of encounters with law enforcement officials, the observation applies as well to consular officers as illustrated by the Zaldivars' experiences.

agencies and lawmakers have in characterizing regulatory goals as nonpunitive in order to justify the absence of procedural protections.

In *Estep v. United States*, a registrant for the Selective Service System challenged his criminal prosecution for refusing to serve in the military on the grounds of his membership in the Jehovah's Witnesses. Within the System's administrative scheme, local boards issued orders determining whether registrants complied with the terms of registration and whether induction into the military was merited. Importantly, where boards determined registrants to violate the scheme, courts enforced criminal sanctions. The registrant there, Estep, claimed that the agency had misclassified him, arguing that he was entitled to an exemption as a Jehovah's Witness. The Supreme Court sided with Estep and had this to say: "We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. *We are dealing here with a question of personal liberty*."[217] A unanimous Court rejected the notion that a registrant could be punished with incarceration and other criminal penalties on the basis of a procedurally defective administrative order. This decision illustrates how courts are more willing to scrutinize agency decisions involving a punitive element.

At the same time, once a punishment is imposed, courts recede once again into the background and defer to agency officials. In a recent contribution, Professor Adam Davidson has drawn attention to the use of forced labor in prison, a regulatory task that belongs to the nearly unfettered discretion of prison officials in many states. Calling this administrative enslavement, Professor Davidson notes that while decisions about whether someone will be sent to prison are made by judges, many criminal codes place the decision to transfer a convict from the general pool of the incarcerated into the prison labor pool with prison bureaucrats.[218] The example of prison labor and the administrative law questions it raises find many parallels to the example of immigration benefits. For one thing, prison labor is often characterized as a good or benefit in the same way that immigration relief is. Defenders of prison labor point to the job training such work provides to prepare prisoners for eventual reentry into society and the economy.[219] Of course, leaving prison officials to decide how to make prison labor assignments raises problems of exploitation.[220] Finding a way to provide job training while remaining vigilant of the risks of exploitation makes crafting policy in this area complicated.[221] Characterizing prison labor opportunities as "benefits" also serves a similar function to that same characterization in the immigration context—namely highlighting opportunities for relief while ignoring the legal vulnerability of prisoners and noncitizens in the removal pipeline. Professor Davidson notes that while some states have passed laws

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217. *See* Estep v. United States, 327 U.S. 114, 121–22 (1946) (emphasis added).

218. Davidson, *supra* note 195, at 676–80.

219. *See* Sarah Shemkus, *Beyond Cheap Labor: Can Prison Work Programs Benefit Inmates?*, GUARDIAN (Dec. 2, 2017, 1:01 PM), https://www.theguardian.com/sustainable-business/2015/dec/09/prison-work-program-ohsa-whole-foods-inmate-labor-incarceration [https://perma.cc/6HLV-54L3].

220. Davidson, *supra* note 195, at 685.

221. *See* Noah D. Zatz, *The Carceral Labor Continuum: Beyond the Prison Labor/Free Labor Divide*, *in* LABOR AND PUNISHMENT: WORK IN AND OUT OF PRISON 133–68 (Erin Hatton ed., 2021).

requiring that prison labor be filled on a voluntary basis only, in the context of prisons and the Thirteenth Amendment, the key question is always: "[V]oluntary compared to what?"[222] This incisive question tracks almost exactly the kinds of deference that courts give to agency denials of immigration benefits.

In the immigration context, where noncitizens have faced similarly punitive and coercive agency actions through apprehension, detention, and removal, the Supreme Court has consistently recognized agency actions as touching upon a noncitizen's liberty interest. Acts of direct violence, expressed in terms of immigration enforcement, enable migrants to bring due process claims against agencies. The paradigmatic example is when agencies and officials immobilize migrants, which separates them from family members, in the interests of national security. In key cases issued during the 1950s—the early years of the Cold War—the Supreme Court upheld a range of harsh and potentially indefinite detention decisions rendered by agencies. *United States ex rel. Knauff v. Shaughnessy* involved a noncitizen seeking entrance to reunite with her U.S. citizen spouse,[223] and *Shaughnessy v. United States ex rel. Mezei* concerned a long-term permanent resident returning to the United States after spending time out of the country.[224] Treating the migrant interests as a set of privileges and not rights, the Court left the migrants unprotected and within the ambit of agency power to detain as necessary.[225] Neither *Knauff* nor *Mezei* had much to say about the nature of the harm involved with long-term detention, choosing instead to ground the analysis on whether the detention was justified irrespective of the harms. Although the Court characterized these cases in terms of the executive branch acting in a time of global hostility, the decisions contributed to ideas of immigration exceptionalism in regard to judicial review of agency actions.

In recent years, as mixed-status marriages based in the United States have become more common, the Court has resisted characterizing the denial of benefits as punitive or implicating a fundamental interest. But the disagreements have been on full display. Most notably, in *Kerry v. Din*, a 2015 decision, the Court addressed the due process interests of a citizen sponsoring and living in the United States with a noncitizen spouse.[226] A fractured five-justice majority held that Fauzia Din's due process rights were not violated by denying her husband, an Afghani citizen, a spousal visa. The Court split three ways on the question of whether the benefit of obtaining a spousal visa qualified as an interest protected under the Due Process Clause. Only four members of that Court—all of whom were in the dissent—would have held that the Due Process Clause's liberty interest contained the right for married couples to live together in the United States.[227] Justice Scalia wrote on behalf of three justices to uphold the State Department's denial of a visa and did so on the basis that the Constitution's liberty interest did not include a right for married couples to cohabitate in the United States.[228] And in his concurring opinion, written on behalf of two justices, Justice Kennedy assumed without deciding that married

222. Davidson, *supra* note 195, at 685 (footnote omitted).
223. 338 U.S. 537, 539–40 (1950).
224. 345 U.S. 206, 208–09 (1953).
225. *See id.* at 215–16; *see also Knauff*, 338 U.S. at. 546–47.
226. Kerry v. Din, 576 U.S. 86 (2015).
227. *Id.* at 106–107 (Breyer, J., dissenting).
228. *Id.* at 88, 101 (plurality opinion).

couples possessed such a liberty interest, upholding the agency's decision on process grounds—that is, whatever process the agency provided satisfied the constitutional due process requirement.[229]

This past term, the Court provided a definitive answer to the question of whether the denial of a spousal visa triggered particular constitutional concern. As discussed earlier, *Department of State v. Muñoz* involved the denial of a spousal visa to Asencio-Cordero because of alleged gang affiliation.[230] Writing on behalf of five justices, Justice Barrett definitively answered the question left open in *Kerry*, namely that a U.S. citizen had no constitutionally protected liberty interest to reside in the United States with her spouse.[231] Under the relevant test, only interests that are "objectively, deeply rooted in this Nation's history and tradition" are entitled to be recognized as a fundamental right or liberty entitled to protection under the Due Process Clause.[232] On this point, Justice Barrett explained that "[o]n the contrary, the through line of history is recognition of the Government's sovereign authority to set the terms governing the admission and exclusion of noncitizens[,]"[233] noting that admission has been treated as a "favor" and not a "right."[234] But characterizing admission as a "favor" seems no different than a benefit in the immigration context with agencies having the power to dispense and withhold visas at their discretion with little oversight. *Muñoz* is not a case about the reach of immigration authority in the context of detention and removal. Instead, it is about the power that agencies have once migrants voluntarily draw attention to themselves. Towards the end of the opinion, Justice Barrett observed that "[t]he bottom line is that procedural due process is an odd vehicle for Muñoz's argument . . . ."[235] Perhaps. But it is no less odd than Congress and the Executive creating a system that rewards migrants on the basis of attachments to the United States, while creating an enforcement climate that stymies and undermines everyday efforts to form such attachments.

## CONCLUSION

In this Article, I have drawn attention to the administration of immigration benefits—the process that governs them, the human costs at stake, and the elements that inform the range of possible outcomes. At its heart, this Article focuses on the process by which migrants become visible to agency officials—to the state itself. Although the concepts of attachment, papers, and risk management seem neutral and self-evident—not touching upon broader elements of the immigration system that seek to punish migrants—as I have tried to show, the immigration benefits system implicates and reveals the reach of a punitive system. Moreover, while these benefits programs have undoubtedly provided relief to discrete classes of individuals, they do not address structural elements of the immigration system and, in some ways, obscure them. Using the example of immigration benefits programs can help sharpen understandings of how harm from the most obvious exercises of force—

229. *Id.* at 102 (Kennedy, J., concurring).
230. *See supra* Section III.A.
231. *See* Dep't of State v. Muñoz, 144 S. Ct. 1812, 1823–25 (2024).
232. *Id.* at 1822 (internal quotation marks omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).
233. *Id.* at 1823.
234. *Id.* (citation omitted).
235. *Id.* at 1827.

apprehension, detention, and removal—radiate outwards and unsettle many parts of the administrative state. It also can help shape a growing interest in legal scholarship on the topic of violence within the administrative state. Relative to other fields of law, critical perspectives on race, power, and inequality have arrived late to the field of administrative law. In recent years, legal scholars have called on administrative law scholars to take up these issues with more urgency and in greater numbers—to help build out "a moral framework of administrative law."[236] Accepting this challenge means developing a broader and more expansive vocabulary. This Article attempts to do that by analyzing the modern immigration system in terms of administrative violence.

236. Bijal Shah, *Toward a Critical Theory of Administrative Law*, 45 ADMIN. & REGUL. L. NEWS 10, 11 (2020) (footnote omitted).