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Dear workshop participants:

Please find attached a very early draft of an article tentatively entitled *Administrative Violence in Immigration Law*. The paper will be published in the ARIZONA LAW REVIEW later this year. I am I the process of reorganizing and expanding parts of the paper but this draft should give you a sense of my core argument. For this reason, please do not circulate or share without my permission. I very much look forward to hearing your reactions.

Sincerely,

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ADMINISTRATIVE VIOLENCE IN IMMIGRATION LAW

Stephen Lee[*]

This is an article about violence in the administration of our nation's immigration laws. In this context, agency 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. These programs foist the burden of seeking relief on migrants, obfuscating the realities that relief is temporary, limited, and hard to get, and draws attention away from the ways that relief programs are intertwined—politically, legally, and administratively—with the enforcement programs most responsible for egregious harms stemming from direct violence. 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 offers a way to push forward current conversations about the scope of agency power, which has tended to overlook the range of harms flowing from agency adjudications.

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[*] Professor of Law, University of California, Irvine. This article benefitted from feedback at workshops at the annual ClassCrits conference, the Power in the Administrative State series, and UCI's Center for Liberation, Anti-Racism & Belonging (C-LAB). For reviewing and commenting on various versions of this paper, I am grateful to Aziza Ahmed, Swethaa Ballakrishnen, Courtney Cahill, Jessica López-Espino, and Bijal Shah. I am indebted to Brianna O'Leary, Jessie Padua, and Anna Setyaeva for their research assistance. Finally, this paper benefitted from funds provided by UCI Dean Austen Parrish and the C-LAB fellowship.

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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 by demonstrating its essential unfairness.[1] Recently, a small but growing number of scholars have tried to shift this conversation towards a more pointed set of questions: This group of scholars has reframed questions about *harms* noncitizens experience in the immigration system in terms of whether and how agencies commit

[1] See Emily Torstveit Ngara, *Immigration Detention as a Violation of Transgender Detainee's Substantive Due Process Rights*, 26 Lewis & Clark Law Review 749 (2022); Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 University of Pennsylvania Law Review 1463, 1476-1482 (2019); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 Cardozo Law Review 2141, 2150-2154 (2017); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA Law Review 1346 (2014).

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 inviting questions about what role administrative law doctrines and norms play in fostering violent outcomes for migrants.[2] Rather than thinking about harms that *happen* to noncitizens, these scholars focus on the ways that agencies violence core legal commitments and obligations to noncitizens.

Importantly, while this conversation has argued *that* agencies exact violence upon noncitizens, scholars do not agree on what kinds of actions qualify as violence. This article contributes to this conversation by advancing a theory of *administrative violence*. I argue that the concept of administrative violence is crucial to understanding how the power and legal authority justifying the worst and most concerning acts of violence—namely apprehension, detention, and deportation—continues to define the immigration system in unchecked ways. While a precise definition of violence remains elusive, the recent work in violence within immigration law tend to define violence as actions initiated by agencies that use or threaten force.[3] Such examples include aggressive and sometimes lethal attempts to apprehend migrants,[4] the abusive and negligent treatment of migrants in detention,[5] as well as the deportation of

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[2] See, e.g., Emily R. Chertoff, *Violence in the Administrative State*, 112 Calif. L. Rev. __ (forthcoming 2024); MAYA PAGNI BARAK, THE SLOW VIOLENCE OF IMMIGRATION COURT: PROCEDURAL JUSTICE ON TRIAL (2023); Angélica Cházaro, The End of Deportation, 68 UCLA L. Rev. 1040 (2021); Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019).

[3] See Emily R. Chertoff, *Violence in the Administrative State*, 112 Calif. L. Rev. __ (forthcoming 2024) (defining violence in terms of "force"); Angélica Cházaro, The End of Deportation, 68 UCLA L. Rev. 1040 (2021); MAYA PAGNI BARAK, THE SLOW VIOLENCE OF IMMIGRATION COURT: PROCEDURAL JUSTICE ON TRIAL (2023). See generally David Alan Sklansky, A Pattern of Violence: How the Law Classifies Crimes *and* What It Means for Justice (2021).

[4] See Eileen Sullivan, *A Rise in Deadly Border Patrol Chases Renews Concerns About Accountability*, NY Times (Jan. 9, 2022).

[5] See ICE and CBP Deaths in Custody during FY 2021, Office of Inspector General (Feb. 1, 2023) at https://www.oig.dhs.gov/sites/default/files/assets/2023-

noncitizens.[6] Unquestionably, these agency actions embody or implicate what I call *direct violence*. Administrative violence refers to a slightly different but related phenomenon: agency actions that transpire in adjacent spaces that obfuscate and draw attention away from agency actions rooted in the use of direct force.

Under this definition, examples of administrative violence include immigration benefits programs that delay or neutralize the long-term threat of removal in varying degrees. Notable examples include the Deferred Action for Childhood Arrivals (DACA) program, cancellation of removal, and naturalization. As a formal matter, all of these programs take steps to administer these benefits through channels and by actors that are separate from those overseeing enforcement and removal. ICE and Border Patrol officers who pursue noncitizens in the field are often described as hard-charging quasi-police while USCIS bureaucrats adjudicate benefits and process paperwork in anonymous office buildings. But this perceived separation is illusory. Core enforcement functions like apprehension, detention, and deportation operate within this broader constellation of institutional actors who operate in related administrative spaces. Immigration officials often describe benefits-based programs for relief as an extension of these other, more obviously violent administrative powers. For example, Secretary Napolitano expressly justified and defended DACA as an exercise of prosecutorial discretion, a concept that animates much of the modern criminal legal system.[7] And programs like cancellation of removal are squarely embedded within removal proceedings with immigration judges—aptly described by

02/OIG-23-12-Feb23.pdf. See also Emily Baumgaertner, *Federal Records Show Increasing Use of Solitary Confinement for Immigrants*, NY Times (Feb. 6, 2024).

[6] See Angélica Cházaro, The End of Deportation, 68 UCLA L. Rev. 1040, 1072 (2021).

[7] See Janet Napolitano, *Anatomy of a Legal Decision*, Sibley Lecture at the University of Georgia School of Law (2014) https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1086&context=lectures_pre_arch_lectures_sibley.

Professor Angélica Cházaro as "violence workers"—overseeing the entire process.[8]

Developing the concept of administrative violence offers several benefits. First, it provides descriptive clarity on the kinds of agency action that might qualify as violence. Drawing from the social sciences and humanities, many legal scholars have critiqued legal concepts of violence as artificially limited to acts of force.[9] Many have pressed theories of violence that move past these narrow parameters noting that it might take months or years for harms caused by an agency to materialize or become apparent.[10] Cognitive limitations prevent stakeholders and the public at large from mobilizing to hold agencies accountable for these acts of slow violence.[11] Other scholars have resisted the urge to expand the definition of violence for fear that doing so risks draining the "analytical utility" of violence as a tool for assigning blame and responsibility within the law.[12] Concepts like slow violence are most effective at critiquing the law at a systemic level and revealing its contradictions, but can sometimes struggle to detail exactly how the law fosters the conditions of vulnerability. The theory of

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[8] See Angélica Cházaro, The End of Deportation, 68 UCLA L. Rev. 1040, 1072 (2021).

[9] See, e.g., Aya Gruber, *Equal Protection under the Carceral State*, 112 Nw. U. L. Rev. 1337, 1365 (2018); Geoff Ward, *The slow violence of state organized race crime*, 19 Theoretical Criminology 299 (2015).

[10] See Maya Pagni, The Slow Violence of Immigration Court: Procedural Justice on Trial (2023); Stephen Lee, *Family Separation as Slow Death*, 119 Columbia Law Review 2319 (2019).

[11] See Stephen Lee, *Family Separation as Slow Death*, 119 Columbia Law Review 2319, 2364 (2019) (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").

[12] See DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 18 (2023) (summarizing concerns that scholars have raised by expanding the definition of violence beyond acts of force).

administrative violence can help fill in the details. It rejects the overly narrow definition of violence as limited to the direct threat or use of force given the interconnected design of enforcement and benefits programs in immigration law. At the same time, administrative violence captures how exactly the law fosters slow violence. While slow violence scholars note the importance of the passage of time to stymie legal and political change, this assumes that time is a phenomenon that operates outside of the law when it is in fact a legal construction like many other concepts involved in the allocation of benefits.[13] The immigration benefits programs at the heart of my account of administrative violence demonstrate *how* the law facilitates this passage of time. Requiring migrants to apply for immigration benefits—difficult to obtain and often temporary—operates within the broader threat of forcible expulsion.

Second, as a form of critique, the concept of administrative violence challenges a range of normative commitments that animate debates surrounding immigration law, especially programs focused on membership benefits. Immigration benefits in the form of permanent status or deferred action are driven by arguments that membership should be allocated on the basis of those who exhibit the greatest attachment to the United States or those who have demonstrated personal responsibility and discipline through continuous work and avoidance of the criminal legal system. Rooted in notions of scarcity, these types of justifications normalize the legal vulnerability of migrants as if agencies administering relief from removal arrived at this regulatory challenge without any priors. Such reasons draw attention away from the legal vulnerability created by other agencies, like ICE, through the threat of force and other more directly measurable acts of violence.

Part I of this article provides a working definition of administrative violence. It distinguishes between the idea of *direct violence*, which captures the consensus definition of the use or threat

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[13] See Elizabeth F. Cohen, The Political Value of Time: Citizenship, Duration, and Democratic Justice (2018); Carol J. Greenhouse, A Moment's Notice: Time Politics across Cultures (1996).

of force, and *slow violence*, a theory that captures agency actions that harm migrants but which are harder to appreciate because of the realities of time. The concept of administrative violence shows how these two ideas fit together. Agencies like ICE and especially ERO foster conditions of legal vulnerability that direct migrants to seek relief from other administrative actors like USCIS (which allocates benefits) or political appointees (who intermediate and translate pressure from stakeholders into administrative outcomes). This arrangement redirects attention away from structural conditions of violence and reframes eligibility questions about harm and accountability in terms of burdens of documentation. Importantly, this account of violence recognizes that despite facing significant degrees of legal vulnerability, migrants possess some degree of autonomy and creativity to navigate and prevail in limited ways despite the threat of force and removal.

Part II illustrates how administrative violence operates within the immigration system. With few statutory opportunities to adjust or regularize status, migrants seek relief through a few, narrow corridors that require demonstrating continuous presence in the United States. Rather than operating in a defensive posture as migrants usually do in removal proceedings, migrants bear the burden of affirmatively seeking relief. Although the task of showing continuous presence in the United States seems straightforward, the task of gathering one's "papers" can be challenging for migrants who have to navigate a range of exclusionary policies governing basic social interactions and economic transactions. This aspect of building the administrative record highlights how the legal basis and justification for benefits programs like DACA draw directly from enforcement policies—the architecture of direct violence.

Part III illustrates how we might translate the concept of administrative violence into the realm of critique. Currently, the Supreme Court has evinced a renewed interest in the scope of agency power. Longstanding rules and doctrines preserving agency power such as hard-look review, the *Chevron* doctrine, and the non-delegation doctrine have been curtailed or are about to be. Many of these involve agency policies promulgated through rulemaking

leaving aside questions about whether the form of administrative action—rulemaking versus adjudication—matters for purposes of scaling back agency power. Relatedly, advocates and legal scholars have long argued in favor of increasing protections for migrants in immigration adjudications at least where acts of direct violence are implicated.[14] Recognizing the ways that violence can materialize in administrative forms can push this conversation forward by urging courts and advocates to consider the range of harms flowing from the adjudication of immigration benefits.

I recognize that intellectual contributions in the form of critique do not come without costs. Fussing over the imperfections of the legal and political solutions in front of us risks keeping such solutions at bay while migrants continue to face challenges on a daily basis. At the same time, a legal system that asks migrants to participate in their own demise highlights a different type of cruelty. It fosters a false sense of what is possible, or in this case, what is possible to achieve by way of narrowly-conceived programs like DACA and other benefits programs. To borrow an idea from slow death scholarship, relationships that are "optimistic [can turn] cruel when the attachment itself is what actively prevents us from achieving the aim that attracted us to it in the first place."[15] Immigration benefits programs like DACA and naturalization and the like are attractive but they are limited. In building steadily from description to application and then to critique, this article hopes to do what is necessary to fight, what Professor Leti Volpp calls, the common urge to "naturalize subordination in the name of accepting what is pragmatic or reasonable, limiting the possibility for transformative change."[16]

[14] See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369 (2005).

[15] See Kate Kenny, *Lauren Berlant: Cruel organizations*, in Morality, Ethics and responsibility in Organization and Management at 58 (eds., Robert McMurray & Alison Pullen 2020).

[16] Leti Volpp, *Migrant Justice Now*, 92 Colorado Law Review 1163, 1164 (2021).

I. Definitions of Violence

This Part provides a working definition of administrative violence. It synthesizes two definitions of violence, what I call direct violence and slow violence, and shows how the concept of administrative violence builds on both.

a. Direct

As a topic of inquiry, violence appears throughout legal scholarship as a subject of analysis. Within this vast universe of ideas and political projects, a significant strain of work examines violence committed by state or government actors most often the police but also by the military and their surrogates like private contractors. This scholarship shares a relative consensus that at its core, violence is defined as acts of force intended to cause or threaten harm.[17] 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, 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,[18] but also arrests and temporary seizures meant to immobilize people while state actors carry out ostensibly legitimate responsibilities.

Much of the legal scholarship theorizing violence in terms of the direct use of force rightly focuses on the police and the broader carceral system. For example, Professor Alice Ristroph argues that Fourth Amendment constitutional doctrine creates a set of rules that simultaneously normalizes traffic stops while

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[17] See David Alan Sklansky, A Pattern of Violence: How the Law Classifies Crimes and What It Means for Justice (2021).

[18] As legal scholar Alice Ristroph notes, "the 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." See Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. Rev. 1182, 1190 (2017).

permitting the officers to beat or shoot suspects.[19] 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[.]"[20] One thread that connects Ristroph and MehChu to other legal scholars of violence is the focus on physical harms. Although there is wide disagreement over which types of behavior constitutes violence, there seems to be a consensus that at the very least it includes the direct use of force for the purposes of physically harming another.[21]

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 Immigration and Customs Enforcement (ICE), especially its Office of Enforcement and Removal Operations (ERO), carry out a mission focused on identifying, apprehending, detaining and deporting migrants, all acts that have a rough analogue within policing and prosecution. Customs and Border Protection (CBP), most notably the Border Patrol, surveil and focus on unauthorized border crossings, an activity that predictably involves pursuit and the use of force.

One reason legal scholars have begun analyzing the immigration system in terms of violence is because of the framework it provides for holding agencies accountable for their actions. The concept of violence implicates other well-established concepts in the field of immigration law, especially harm and punishment. For years, courts recognized the harms exacted by the immigration system but little in the field provided any kind of

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[19] See Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. Rev. 1182, 1182 (2017).

[20] Ndjuoh MehChu, *Policing as Assault*, 111 California Law Review 865, 873 (2023).

[21] 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." See David Alan Sklansky, A Pattern of Violence: How the Law Classifies Crimes and What It Means for Justice 20 (2021).

doctrinal basis for providing relief. In 2010, when the Supreme Court recognized that immigration penalties or harms like deportation can constitute a kind of punishment, this shift was significant for providing immigrants greater protections early in the process in terms of counsel and legal protection.[22] 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 focusing on deportation one these terms "allows for questioning the civility of both the process and end of deportation."[23]

Much of the law and discourse surrounding the use of force by police focuses on whether such use is justified with justifications revolving around 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 Fourth amendment law will deem it justified and hence lawful.[24] Moreover, the fortification of qualified immunity doctrine protects police against civil rights suits challenging even egregious violations of law. For police departments animated by work cultures predisposed to violent activity, modern qualified immunity doctrine neutralizes any threat of accountability. Because this area of law focuses on 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.

Parallel dynamics exist in the immigration context. In arguing that deportation should be abolished, Angélica Cházaro

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[22] See Padilla v. Kentucky, 559 U.S. 356 (2010).

[23] See Angélica Cházaro, The End of Deportation, 68 UCLA L. Rev. 1040, 1071 (2021).

[24] See Josh Bowers, Probably Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity", 66 Stan. L. Rev. 987, 1016 (2014)..

points to the ways that immigration officials sometimes insist that a certain degree of violence is necessary to carry out their duties. and practices.[25] She goes onto 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."[26] 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 court.[27] These approaches would obviate the need to examine whether the use of agency force was justified by simply removing that authority from agencies altogether. Cházaro's and Markowitz's insights suggest that immigration law proceeds with the use of force or some other means beyond the scope of violence.

b. Slow

Outside of legal scholarship, humanists and social scientists have focused on expanding common definitions of harm and violence. Constrained by ideas like causation and moral commitments to assigning blame to individual, many areas of the law embrace definitions of violence focused on physical harm that bears some obvious connection to some bad act. Unburdened by these limiting factors, humanist 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."[28]

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[25] See Angélica Cházaro, 68 UCLA L. Rev. 1040, 1082 (2021) (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 "deportation *is* violence." See Angélica Cházaro, 68 UCLA L. Rev. 1040, 1071 (2021) (emphasis original).
[26] See Angélica Cházaro, 68 UCLA L. Rev. 1040, 1073 (2021).
[27] Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 Yale L.J. Forum 130, 144-145 (2019).
[28] For an example of scholarship theorizing both structural and symbolic violence, see Cecilia Menjívar & Leisy J. Abrego, *Legal Violence: Immigration Law and*

Slow violence scholars often define violence in temporal terms. For those ascribing to slow violence, the documentation challenges have to do with cognitive limitations. After a highly visible and harmful act occurs—such as a hurricane or 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 decisionmakers, and the public at large to fully appreciate the violent nature of the act. Without taking into account the temporal dimensions of violence, these scholars argue that decisionmakers risk misperceiving violence as a series of harms born out of bad luck. Most notably, Rob Nixon has focused on the efforts of environmentalists 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 concert 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."[29] 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 capitalist economic system, slow death scholars point out that even those who have been harmed by a plainly "rigged" system have an investment in ignoring it choosing instead to believe in the possibility of winning. This is central to Berlant's understanding of the slow death. She explains that "Capitalist ideology encourages a delay of response by locating the data about whether life was 'meaningful' along an arc of accrual."[30]

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the Lives of Central American Immigrants, 117 American Journal of Sociology 1380 (2012).

[29] Rob Nixon, Slow Violence and the Environmentalism of the Poor 210-211 (2011).

[30] See 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)

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. Readily identifiable bad actors and an obvious causal link between harm and policy activates the public priming it to engage with the agency asking it to explain its actions. Calls to district directors and 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 cruel ways in pursuit of family separation policies. These images cut through the fog.

While the public's attention to family separations at the border has waned, it is notable that public health scholars have continued to push agency and public officials to address the on-going harms experienced by parents and children arising from their initial separation. These efforts have focused on both psychological and physical harms emphasizing the increased chance of chronic medical conditions such as heart disease, cancer, and premature death.[31] Other large and sudden enforcement actions like workplace raids can also lead to similar outcomes.[32] In the immediate aftermath of a traumatic incident like arrest, detention, and deportation, migrants might exhibit symptoms that initially track mental or emotional harms though some argue that the offensive nature of violence is not so much proof of physical harm (which often comes later anyway) but that way that violence alters

[31] 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 Strange & Brett Stark, *The Ethical and Public Health Implications of Family Separation*, 47 Journal of Law, Medicine & Ethics 91 (2019); Laura CN Wood, *Impact of punitive immigration policies, parent-child separation and child detention on the mental health and development of children*, BMJ Paediatrics Open (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6173255/pdf/bmjpo-2018-000338.pdf.

[32] See Charles Bethea, *After ICE Came to Morton*, New Yorker (Oct. 31, 2019).

long-term life chances.[33] 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 and legal uncertainty.[34] As these examples illustrate, theories of violence within immigration scholarship across disciplines tends to focus on the distinction between physical and emotional harms as a way of delineating the outer boundaries for defining violence.

c. Administrative

To recap, direct violence refers to acts committed by agencies to threaten or use force against immigrants while slow violence refers to the malaise that migrants experience when failing to see where they might find a way out of the malaise. Administrative violence refers to the agency actions that blend these two concepts together. Although much of administrative doctrine places at the center of its analysis the agency-applicant relationship, the theory of administrative violence tries to broaden the frames of analysis. A migrant may be an "applicant" in one setting as they seek DACA relief from the USCIS but an "enforcement target" in another as they defend against removal initiated by ICE. Agencies can occupy overlapping or adjacent

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[33] 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 raised serious concerns in terms of equality. See Dean Spade, *Documenting Gender*, 59 Hastings L.J. 731, 747 (2008). See generally DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW 12 (2015). Anthropologist Akhil Gupta offers a similar account in his study of Indian bureaucracy. See AKHIL GUPTA, RED TAPE: BUREAUCRACY, STRUCTURAL VIOLENCE, AND POVERTY IN INDIA (2012).

[34] 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 Research and Policy Review 1241 (2022).

institutional spaces making it harder to pinpoint the legal origins of agency violence.

In the immigration context, agencies like ICE (especially ERO) and CBP (especially the Border Patrol) are often associated with these forms of violence—forceful, immediate, and coercive. But these agencies work within a broader constellation of administrative actors, such as the United States Citizenship and Immigration Services (USCIS) that dispense benefits as well as political appointees who set priorities within and help coordinate the activities of all of these agencies. While these actors do not typically show up in accounts of direct violence or slow violence, they are central to the project of administrative violence.

While enforcement policies are geared towards expulsion, agencies distribute a range of benefits that ostensibly mitigate or delay outcomes like removal. But a part of the reason why legally vulnerable communities struggle to document and make visible state exercises of power is that administrative programs often require migrants to affirmatively seek out relief from agencies. Requiring migrants to affirmatively seek benefits frames a different set of questions in analyzing abuses of power. Core exercises of state power do not directly affect migrants in the benefits context. In the context of detention or border enforcement, for example, questions of abuse arise in terms of state overreach with the individual rights of migrants 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.

This theory builds on ideas articulated by Professor 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."[35] They further explain that norms are set through exercises of power at the level of population-management. Thus, policies that create individual rights or benefits do not necessarily alter broader factors enabling "structured insecurity." As Professor Spade explains: "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."[36]

As a general matter, it is harder to make agency violence visible using procedures designed to allocate benefits. Most notably, claimants typically cannot assert protections under the due process clause unless and until they begin receiving benefits in the first place. Migrants who apply for, but are denied, benefits cannot challenge agency decisions on due process grounds at least in most cases.[37] Benefits programs also make compliance costly to applicants in 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.[38] These important arguments grow out of equality impulses, drawing force from the disparate treatment levied against pregnant women of color

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[35] DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW 12 (2015).

[36] DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW 68 (2015). See also Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination law: A Critical Review of Supreme Court Doctrine*, 62 MINNESOTA LAW REVIEW 1049 (1978).

[37] In certain instances, where the statutory instrument creates a clear entitlement to the benefit, a first-time applicant for benefits might be able to assert a due process claim. See Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009).

[38] Khiara M. Bridges, The Poverty of Privacy Rights 37-64 (2017).

especially black women.[39] The public assistance nature of the program gives the agency a justification for displacing private interests.

Administering benefits under these conditions can reinforce 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.[40] 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, there would be a general sense of outrage; people would claim, loudly and frequently, that the government was violating citizens' privacy."[41] 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 threaten beneficiaries with criminal policing and penalties for failing to comply with the range of conditions.

In the immigration context, this redistribution of agency power is expressed in the form of programs for relief against removal. Agency bureaucrats who adjudicate applications for relief

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[39] 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 or 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 Harvard Journal of Law and 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).

[40] Seeking out applicants who lie about relationships and 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 Kaaryn S. Gustafson, Cheating Welfare: Public Assistance and the Criminalization of Poverty 157-160 (2011).

[41] See Khiara M. Bridges, The Poverty of Privacy Rights 5 (2017).

are not directly responsible for harm that migrants experience at the hands of field officers in ICE but they do play an important part in surveilling migrant populations and therefore expanding the reach of agencies into the lives of migrants. Unauthorized migrants often worry about getting on "the radar" of government officials when applying for relief. 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.[42] This in turn opens the way for police and other criminal law actors to enter their lives. Thus, when agencies pursue criminal prosecutions, they not only punish migrants, they also erase the structural inequality that places the beneficiaries in a legally vulnerable position to begin with. This 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[.]"[43]

II. IMMIGRATION BENEFITS AS ADMINISTRATIVE VIOLENCE

The core insight of slow violence scholars is that the passage of time makes it hard to appreciate the full spectrum of harms fostered by agency actions. The concept of administrative violence sharpens this insight by focusing on the broader constellation of agency actors implicated and empowered by enforcement-oriented

[42] See Kaaryn S. Gustafson, Cheating Welfare: Public Assistance and the Criminalization of Poverty 166 (2011).
[43] See Kaaryn S. Gustafson, Cheating Welfare: Public Assistance and the Criminalization of Poverty 169 (2011). 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. Khiara Bridges calls this the "moral construction of poverty." Khiara M. Bridges, The Poverty of Privacy Rights 37-64 (2017).

policies. This Part illustrates how administrative violence unfolds in the context of immigration programs that provide relief based in part on the showing of continuous presence in the United States. By foisting the burdens of minimizing risk onto migrants through programs that give migrants a chance to apply for relief that is temporary, highly contingent, and often hard to obtain, such programs obfuscate the sources of the most immediate forms of danger in migrant communities. They also draw attention to questions of compliance, which highlight the individual traits and characteristics of claimants, information that is relevant but stripped of important context.

a. Presence

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[44] with the vast majority of that population having lived in the United States without authorization for more than a decade. 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.[45] 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. Immigrants from Mexico, El Salvador, Guatemala, and the Dominican Republic had the lowest

[44] See Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015-January 2018, Table 1 (Jan. 2021).
[45] See Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015-January 2018, Table 1 (Jan. 2021).

percentages of naturalized citizens among their respective immigrant grounds.[46]

It is against this backdrop that "continuous presence" requirements operate. 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 the 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. To illustrate the basic contours of continuous residence requirements, I include below some concrete examples drawn from immigration law. Legal scholars have thoroughly analyzed and probed each of these programs, but I am including a brief summary here to highlight the common thread of "continuous presence" that runs through all of them.

The Deferred Action for Childhood Arrivals (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 continuous presence benefits. This program requires applicants to demonstrate two continuous presence-types of data points. One requires applicants to show that they have "continuously resided in the United States since June 15, 2007, up to the time of filing [their] request for DACA." A second asks applicants to establish that they were

[46] See Adrian M. Bacong & Lan N. Doan, *Immigration and the Life Course: Contextualizing and Understanding Healthcare Access and Health of Older Adult Immigrants*, 34 Journal of Aging and Health 1228, 1238 (2022). 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 healthy 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.

"physically present in the United States on June 15, 2012, and at the time of filing [their] request for DACA[.]"[47]

As a legal instrument, DACA stems from a discretionary allocation of resources away from Dreamers and towards higher priorities for removal. Like other discretionary agency actions, the DACA memo tried to immunize future agency officials against meaningful legal challenges by inserting language that the program did not confer substantive rights. DACA has been recognized as a policy innovation in part because it allowed President Obama to centralize control over front-line decisions.[48] 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.

DACA and deferred action programs more generally have been targets of litigation efforts to invalidate those benefits.[49] DACA was initially created in 2012 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. When Congress failed to do so, in 2014 the 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 to expand the class of Dreamers who could apply for relief. 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 updating the cut-off date from 2007 to 2010 (which benefitted

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[47] See Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53155-53156 (Aug. 30, 2022). See also DACA Guidelines, https://www.uscis.gov/DACA (last visiting Jan. 27, 2023).

[48] See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 135-142 (2015).

[49] See Texas v. United States, N/ 1"18-CV-00068 (S.D. Tex. 2023), https://storage.courtlistener.com/recap/gov.uscourts.txsd.1501682/gov.uscourts.txsd.1501682.728.0.pdf.

childhood arrivals from later years).[50] Anti-immigrant activists immediately challenged DACA+ program which eventually led to a court injunction and the DHS's termination of the program.[51] Currently, anti-immigrant activists have once again brought a suit against the DHS, this time targeting the original DACA program once again leading to an injunction against processing new applicants for relief. Thus, as a benefits program organized around continuous presence, DACA remains frozen in time, a program that is available to a static pool of beneficiaries who entered the U.S. before 2007 and who were under 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.[52] As a form of relief, cancellation embodies the modern merger between the immigration and criminal legal systems.[53] For decades, the primary vehicle for

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[50] See Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents, Memorandum Department of Homeland Security (Nov. 20, 2014), at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf.

[51] See Texas v. United States, 809 F.3d 134 (5th Cir. 2015), affirmed by an equally divided court, United States v. Texas, United States Supreme Court (June 23, 2016).

[52] The 7-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). 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. See 8 U.S.C. 1229b(b)(1)(A).

[53] 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

back-end equitable relief was suspension of deportation, which provided relief against deportation in a manner akin to the modern cancellation benefit with its primary focus on hardship to the migrant and their communities.[54] Initially, a noncitizen's criminal record played a minor role in eligibility but over the years, Congress increasingly use criminal records as a basis for elevating and lowering thresholds for eligibility until eventually excluding noncitizens entirely on basis of a wide range of criminal activity, both serious and minor.[55] 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.[56]

DACA and cancellation are the most obvious examples of immigration law requiring migrants to stay put in one place in order to establish eligibility for some kind of immigration benefit, but there are others. For example, Temporary Protected Status (TPS) allows noncitizens who are unable to return to their country of nationality because of armed conflict or a disaster like an earthquake may apply to stay in the United States temporarily.[57] 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.[58] Another example is naturalization, which allows

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cancellation of removal statute reflects the hesitation to truly commit to the immigrant narrative." See Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL LAW REVIEW 393, 413 (2017).

[54] See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in various sections of 8 U.S.C.).

[55] See Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL LAW REVIEW 393, 396-398 (2017).

[56] See Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL LAW REVIEW 393, 401 (2017).

[57] 8 U.S.C. § 1324a(b)(1) (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).

[58] See 8 U.S.C. § 1324a(c)(1)(A)(i)-(ii).

certain classes of noncitizens—usually green card holders—to acquire citizenship provided they can establish that they have resided continuously in the U.S. for five years before submitting an application for naturalization.[59] 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.[60]

All of these programs illustrate how agency adjudications involve lines of reasoning that blend and blue concepts associated with enforcement and benefits. One final example is the 3- and 10-year bars to admission 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.[61] These are a part of a benefits programs but instead 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. Papers

The concept of demonstrating continuous presence is straightforward enough: applicants must show their presence in a place over time. Many federal benefits programs impose similar

[59] See 8 U.S.C. § 1427(a)-(c) (INA § 316(1)-(c)). The naturalization statute reduces or eliminates the continuous presence requirement altogether for certain classes of noncitizens. See 8 U.S.C. § 1427 (cite specific provisions governing spousal green card recipients and those making "extraordinary contributions to national security").

[60] See Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 Indiana Law Journal 1571 (2012).

[61] Six months of unlawful presence triggers a 3-year bar while more than twelve months of such presence triggers a 10-year bar. See 8 U.S.C. § 1182(a)(9)(B)(i)(I)-(II).

temporal requirements.[62] But in the case of immigration benefits, the burden of demonstrating presence over time arises in the context of a life lived in the United States—working, studying, and consuming—amid an array of exclusionary policies, many of which invite the risk of removal and expulsion.

The challenges of documenting continuous presence begin well before submitting a discrete application. The lead-up to the application process involves sorting through a hodge-podge of documents gathered over the course of a life navigating social relationships and economic transactions rooted in a sociolegal culture of "papers," a regulatory approach that is strongly associated with the passage of the Immigration Reform and Control Act (IRCA) of 1986. IRCA foisted onto employers the legal obligation to verify the immigration status of its employees. This mode of governance placed heavy emphasis on the creation of paper trails on documents within economic institutions—most notably mid-sized and large workplaces but also within banks—leaving records everywhere.[63]

On its surface, the task of documenting presence seems like a banal exercise in gathering proof capturing everyday interactions and transactions such as receipts, paystubs, photographs, and bills paid. This legal regime practically encourages migrants to collect and hoard every documented moment in case the opportunity for seeking relief materializes. But these activities did not transpire in a vacuum. Instead, they were pursued and negotiated within a legal system and culture that imbues many transactions with the threat of removal. While federal legislation in the form of IRCA formally ushered in an era of document-keeping and gatekeeping, states and

[62] See, e.g., Shayak Sarkar, *Capital Controls as Migrant Controls*, 109 Calif. L. Rev. 799 (2021); Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 Nw. U. L. Rev. 361 (2020).

[63] See Stavros Gadinis & Colby Mangels, *Collaborative Gatekeepers*, 73 Wash. & Lee L. Rev. 797 (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) and Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 92 YALE L.J. 857 (1984).

other subfederal entities eventually followed by passing laws conditioning access to other services on immigration status.[64] This also included intensifying criminal penalties on identity theft, a crime commonly associated with IRCA requirements.[65]

The example of identity fraud illustrates the power that state and local jurisdictions have over the administrative record in applications for immigration benefits. As agencies adjudicate applications for benefits like cancellation of removal, DACA, or TPS, agency officials will have access to criminal conviction records generated by different law enforcement agencies. *Garcia* is significant because it illustrates the degree to which administrative records (and hence immigration outcomes) can be altered by localities. In *Kansas v. Garcia*, migrants challenged a state law criminalizing identity theft arguing that the state scheme had been preempted under IRCA. A five-justice majority held that the state law was not preempted.[66] State officials in *Garcia* did not implement a policy as a general response to perceived problems with identity fraud. Rather, it was a targeted response.[67] More specifically, it seemed that the identity theft prosecutions in Kansas arose from just one jurisdiction pointing to the uneven ways criminal law unfolds across a state.[68] This illustrates how the creation of any

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[64] See Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013).

[65] See Kansas v. Garcia, No. 17-834, Supreme Court (2020). See generally Pratheepan Gulasekaram, *Immigration Enforcement Preemption*, 84 Ohio State Law Journal 535 (2023).

[66] See Kansas v. Garcia, No. 17-834, Supreme Court (2020).

[67] See Pratheepan Gulasekaram, *Immigration Enforcement Preemption*, 84 Ohio State L.J. 535, 560-64 (2023). The state legislature passed the laws at issue in *Garcia* prior to the Supreme Court's decision in *Arizona v. United States* so the plaintiffs in that case did not argue that the laws were passed in response to the Supreme Court's holding that limited state power in this realm.

[68] All of the convictions that formed the basis of appeal in *Garcia* arose in Johnson County, which prosecuted identity theft at a much higher rate than other counties in Kansas. 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 Kansas v. Garcia, respondent's brief at 16, https://www.supremecourt.gov/DocketPDF/17/17-834/111404/20190806180503489_17-834.bs.pdf. See also Letter from Stephen M.

benefits schemes can create opportunities to punish because of the documentation requirements.[69]

The example of Kansas v. Garcia affirms sociologist Cecilia Menjivar's observation 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."[70] At a practical level, 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 of their expulsion. As legal anthropologists Susan Bibler Coutin and Barbara Yngvesson note, 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.[71] The practice of gathering documents fosters a culture of hoarding.[72]

In some obvious ways, legally vulnerable community members such as unauthorized migrants face significant obstacles

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Howe, District Attorney, to Michael Sharma-Crawford (Aug. 17, 2016), at 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. See Kansas Sentencing Commission, FY 2013 Annual Report at 95 (Apr. 2014), at https://perma.cc/2G5Y-3DHB.

[69] The Kansas State Supreme Court overturned the identity theft convictions. In his dissenting opinion, Justice Biles would have affirmed the convictions, he noted his "apprehension" with reaching this conclusion in light of the concentration of identity theft prosecutions in one jurisdiction. See State v. Garcia, 306 Kan. 1113, 1142 (Kan. 2017) (Biles, J., dissenting).

[70] 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 (Horton, S.B. & J. Heyman, eds. 2020) at 155.

[71] See SUSAN BIBLER COUTIN & BARBARA YNGVESSON, DOCUMENTING IMPOSSIBLE REALITIES: ETHNOGRAPHY, MEMORY, AND THE AS IF 19 (2023).

[72] See Gray Albert Abarca & Susan Bibler Coutin, *Sovereign intimacies: The lives of documents within US state-noncitizen relationships*, 45 American Ethnologist 7, 11 (2018).

to participating in activities that might produce proof of documentation. 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.[73] A Mexican national who entered and lived within the United States without authorization for many years, Zaldivar recently—after many rounds of litigation and continued community organization—finally secured lawful permanent resident (LPR) status. According to Zaldivar, he entered the United States surreptitiously across the U.S.-Mexico border sometime in 1997. He eventually married Christina, a U.S. citizen with children from a prior relationship. He sought relief in the form of cancellation but Zaldivar faced problems meeting the 10-year threshold on the front and back end. He claims to have entered the United States in 1997, which meant that in fact he had resided in the United States for longer than the statutorily-prescribed requirement of 10 years. But his application faltered because he could not substantiate this.

In the administrative record, Zaldivar testified to this fact but the agency could found him to be not credible thereby invalidating the veracity of those facts. He also submitted documentary evidence, but the agency found none acceptable.[74] He submitted "two short, unsworn letters" from people claiming that Jorge had lived or worked in the US 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." Neither did the agency find that the "recently discovered" photographs of Jorge taken in 1998 or 1999 were not authenticated and did not include sworn affidavits. Eventually, with the help of lawyers and a broad network of community supporters, Zaldivar was able to return to the United

[73] See Saja Hindi, *Colorado father, whose 2020 deportation drew national attention, returns from Mexico*, The Denver Post, Nov. 5, 2022; Julie Turkewitz, *Deportation Looms, and a Father Prepares to Say Goodbye*, NY Times, March 8, 2019.
[74] In re: Jorge Rafael Zaldivar-Mendieta, Decision of the Board of Immigration Appeals (Dec. 7, 2012) (on file with author).

States and obtain a green card but his case illustrates the difficulty of documenting presence amid far-reaching exclusionary policies.

These types of documentation gaps are built into the regulatory infrastructure. Immigration laws excluding unauthorized migrants from formal employment opportunities push them into independent contract or informal work that does not typically produce pay stubs or comparable forms of documentation. 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. Hovering over these examples is the threat of apprehension, detention, and removal—paradigmatic exercises of force and direct violence—which both exacerbates societal inequality and reduces the opportunities of migrants to form the kinds of relationships that produce a record of continued presence.

Although the federal government possesses the sole authority to define which types of "papers" may count for establishing claims for relief, the flexibility and pragmatism that defines the process of administering these requirements creates opportunities for migrants to challenge this power.[75] In theorizing legally-imposed documentation requirements, anthropologists Gray Abarca and Susan Coutin argue that "record-keeping practices" demanded by modern immigration law creates significant stress and uncertainty in the lives of migrants. In the words of one of their interviewees: "I am gathering everything having to do with my children's school, everything in order, like the vaccination records. So that they [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]."[76] Requiring migrants to reveal or "out" themselves exacerbates the vulnerability

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[75] See Ruth Gomberg-Muñoz, *Knowing Your Rights in Trump's America: Paper Trails of Migrant Community Empowerment*, *in* Paper Trails: Migrants, Documents, and Legal Insecurity 189 (Horton, Sarah B, Heyman, Josiah eds 2020).

[76] See Gray Albert Abarca & Susan Bibler Coutin, *Sovereign intimacies: The lives of documents within US state-noncitizen relationships*, 45 American Ethnologist 7, 7 (2018).

that migrants already experience in an enforcement-oriented climate.[77]

Although time is usually thought of as an objective or natural phenomenon that can be easily documented, the example of immigration benefits shows this to be false. Continuous presence claims ask applicants to document mundane activities of everyday life—a legal requirement that decontextualizes a migrant's activities by stripping away the broader exclusionary context in which migrants remained present. By allocating mobility as a benefit as opposed to an essential or inherent right, debates in this context accept the realities of deportation and by extension the suffering that this legal tool engenders. Imagining alternate realities is hard when "deportation is part of our everyday."[78] At the same this, this also naturalizes the belonging experienced by other migrants. As Josiah Heyman notes: "It is not only that the undocumented or liminally documented are disadvantaged, but, conversely, naturalized advantage adheres to privileged immigrants and citizens, much of this through normalized access to and handling of documents."[79]

Finally, asking applicants to demonstrate continuous presence perpetuates assumptions that the gathering of information is a part of an apolitical, merely technical task to implement a program. And over time, these categories take on a veneer as a kind of basic truth about what kinds of information are relevant and obvious.[80]At the same time, although my broader point is that modern regulatory approaches that foster a culture of papers

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[77] For example, in critiquing the UK'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. Such a contradictory set of impulses amounts to a policy that is "detrimental" to migrant interests and that sets them up to fail. See Lucy Mayblin, Impoverishment and Asylum: Social Policy as Slow Violence 46 (2020).

[78] See Leti Volpp, *Passports in the Time of Trump*, 25 Symploke 155, 170 (2017).

[79] See Josiah Heyman, *Documents as Power*, 242 in PAPER TRAILS: MIGRANTS, DOCUMENTS, AND LEGAL INSECURITY (eds., Horton & Heyman, 2020).

[80] See generally, DEAN SPADE, A NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW 76 (2011).

and document-keeping can create uncertainty and vulnerability in the lives of migrants, it is important to emphasize that the administrative record offers a legal instrument that recognizes migrant "knowledge and activity."[81] The task is challenging because they are asked to document a life or several years in a life as opposed to a specific moment or incident. Although time is usually thought of as an objective or natural phenomenon that can be easily documented, the example of immigration benefits shows this to be false.

c. Records

Legal systems that ask potential beneficiaries to document their claims do not just advance abstract ideas of fact-finding. The reduction of lives to documents also reflects political projects, ways to reward and withhold benefits based on the ease with which facts can be classified and ordered. Reflecting on the broader role played by files in the administering of law, Cornelia Vismann observes: "Words are more easily ordered than territories, and they are more obedient than mercenaries."[82] Although migrants bear the burden of assembling documents establishing continuous presence, they do not possess a monopoly over the creation of a record. In fact, the immigration system from admissions to removal involves agencies gathering large quantities of data on migrants.

Migrants across a range of immigration statuses face restrictions on mobility. Those seeking admission must submit visa applications, which involves submitting to an interview and handing over substantiating documents. Once in the United States, admitted migrants typically must register their address and contact information and submit to periodic check-ins.[83] DACA recipients

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[81] Sharon Luk offers a critique of the growth of the modern administrative state vis-à-vis anti-Asian policies. Her critique focuses on the paper trail or record that migrant created with the aim of "[creating] discursive space to contextualize the life of paper as itself a site of knowledge and activity[.]" See SHARON LUK, THE LIFE OF PAPER: LETTERS AND A POETICS OF LIVING BEYOND CAPTIVITY 171 (2018).
[82] Cornelia Vismann, Files: Law and Media Technology 103 (2008).
[83] See 8 U.S.C. § 1302(a).

must submit renewal applications every two years and for TPS recipients, the period is even shorter.[84] Similarly, those in the United States with liminal statuses must apply for travel certificates if they wish to leave and return and this process involves similar degrees of examination. Unsanctioned departures and returns can disrupt and stop the clock for migrants seeking to establish that their presence in the United States has been continuous, thus securing documentation for these events are important to their applications for benefits.

Legal scholar Geoffrey Heeren calls this the "one-way mirror" that animates many parts of immigration law.[85] To obtain immigration benefits, migrants must submit themselves to a thorough examination and inspection of their lives, a process that begins for many migrants even before setting foot in the United States. These inspections establish records, which the government possesses often across many different agencies and which they are under no obligation to affirmatively provide at least not without prompting.[86]

As agency officials adjudicate claims for relief in light of the administrative record, it is important to remember that the record includes criminal records. This point further illustrates how the expansion of criminal law as a mode of governance leads to agency abuse.[87] Administering immigration benefits within legal trends defined by hyper-criminalization demonstrates how much control

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[84] See 8 U.S.C. § 1254a. TPS designations are tied to a migrant's country of nationality so periods of extensions and redesignation can vary. See Secretary Mayorkas Extends and Redesignates Temporary Protected Status for Haiti for 18 months, Dec. 5, 2022 https://www.dhs.gov/news/2022/12/05/secretary-mayorkas-extends-and-redesignates-temporary-protected-status-haiti-18.

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

[86] Indeed, migrants and their lawyers often have to resort to submit FOIA requests in order to compel the government to share relevant information. See Margaret B. Kwoka, *First-Person FOIA*, 127 Yale L.J. 2204, 2224-2230 (2018). See also Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 Brook. L. Rev. 1569, 1589-1593 (2014).

[87] See, e.g., Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. Miami L. Rev. 556 (2016).

migrants cede over the process creating the administration record. Legal scholarship on the immigration consequences of criminal convictions offers similarly helpful insights on the control that agencies have over the boundaries of the record. Legal scholars have argued in favor of a strict application of the categorical method of analyzing criminal convictions. In short, the categorical method offers a methodology through which courts and agencies decline to impose immigration penalties unless it is absolutely clear based on a limited record that a conviction necessarily fits within the categories of conviction-based removals Congress defined.[88]

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.[89] Convictions and other criminal records all create a kind of "meta record" that goes into a noncitizen's "alien file" or "A-file." A strict application of the categorical method means limiting the kinds of information agency officials can consider in adjudicating immigration consequences. It sets firm boundaries around the administrative record by entire categories of documents from the analysis—police reports and other similarly unreliable documents. Put another way, these records function as a kind of anti-passport in this context, documents that hinder instead of facilitating movement across borders.[90]

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[88] See Jennifer Lee Koh, *the Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 Geo. Immigr. L.J. 257 (2012) Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 NYU Law Review 1669 (2011); Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. Miami L. Rev. 979 (2008).

[89] See Ana Muñiz, *Bordering Circuitry: Crossjurisdictional Immigration Surveillance*, 66 UCLA L. Rev. 1636 (2019).

[90] They share in common the trend of concentrating control in the hands of state actors through "documentary attestation of identity." See John Torpey, *The Great War and the Birth of the Modern Passport System*, at 256-57, *in* Documenting Individual

Criminal convictions not only shape what sorts of information gets into the record, it also determines what stays out. To illustrate this point, consider the example of the stop-time rule. In most if not all of the immigration benefits programs, the legal significance of a criminal conviction is that it "stops the clock" for purposes of counting time spent in the United States. In other words, to qualify for cancellation of removal, unauthorized migrants have to demonstrate that they have been present in the United States at least 10 years. But a migrant who has lived in the United States for two decades but was convicted of tax evasion or aggravated assault after 7 years in the United States will not get the benefit of their long-term presence. Even as that migrant has continued to age and build ties through two decades, for legal purposes, they will forever remain stuck at year 7. This basic exercise of counting days is a legally constructed exercise that reflects policy choices. Migrants do not get to count every day lived in the United States towards meeting a continuous presence threshold. 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.

The Supreme Court was asked to decide which types of crimes trigger the use of this "stop-time rule" in *Barton v. Barr*. In that case, a long-term lawful permanent resident (LPR) applied for cancellation of removal but was denied relief on the grounds that an assault he committed 6 and a half years after his admission as an LPR prevented him from meeting the 7-year continuous residence requirement. A five-justice majority upheld the government's denial. Writing for the Court, Justice Kavanaugh described the benefit of cancellation of removal as operating effectively as a "recidivist" statute that authorizes the imposition of "greater sanctions on offenders who have committed prior crimes."[91] This view portrays legally-created benefits like cancellation as filling the negative space left open by a far-reaching criminal legal system.

Identity: The Development of State Practices in the Modern World (eds., Jane Caplan & John Torpey 2001).

[91] See Barton v. Barr, slip opinion at 2 (2019).

Construing the stop-time rule as an anti-recidivist policy affirms an ethos of "individual responsibility" in which migrants must refrain from engaging in criminal activity to maintain eligibility for benefits. Justice Kavanaugh expressly (and casually) draws a parallel from sentencing enhancements in the criminal context: "It is entirely ordinary to look beyond the offense of conviction at criminal sentencing, and it is entirely ordinary to look beyond the offense of removal at the cancellation-of-removal stage in immigration case."[92]

Of course, criminal records don't simply appear or exist. They are constructed. Characterizing the imposition of additional, collateral penalties on criminal conviction as "entirely ordinary" offers an incomplete characterization, one that misses the broader racial realities that lead to police stopping and arresting (and killing) individuals because of bias and not because of some action taken by a migrant evincing dangerousness. In *Moncrieffe v. Holder*, for example, the Court was asked to answer a relatively straightforward question of statutory interpretation involving whether a drug possession conviction could lead to removal. The case focused on a Jamaican immigrant, a fact that the Court mostly ignored in summarizing the enforcement actions that necessitated the legal determination. Dean Kevin Johnson astutely noted how that case both illustrated the convergence of two destructive policy streams—immigration enforcement and the war on drugs—and obfuscated the "racially skewed" nature of enforcement in the immigration context.[93] A similar set of insights apply to the treatment of racial realities in *Barton*, in which the Court implied that bad choices made by the noncitizen led to the "ordinary" application of the stop-time rule instead of interrogating whether this provision exacerbated biased policing practices leading to inequitable outcomes in the cancellation context.

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[92] See Barton v. Barr, slip opinion at 8 (2019).

[93] See Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of* Moncrieffe v. Holder, 48 U. MICH. J. L. REFORM 967, 968-69 (2015).

As a form of administrative violence, using criminal records to sort applicants for relief pushes to the periphery two institutional settings in which state-initiated violence has been well-documented: the criminal system dominated by state and local actors like police and sheriffs and the immigration system comprised of federal officers in agencies like ICE and the border patrol. 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.

d. Attachment

Migrants who can establish presence, gather the right types of papers, and keep the administrative record free of evidence of criminal activity put themselves in a position to obtain relief. As a population management tool, agencies often point to beneficiaries as the highest priority for public resources among the noncitizen population. Often, they are described as noncitizens who exhibit the strongest attachments to the United States. But the theory of administrative violence illustrates how this presents a highly skewed account of migrant life.

When advancing attachment narratives, the nature of the attachment often focuses on familial relationships especially with U.S. citizens, but it sometimes can mean economic and social contributions.[94] These programs invite vigorous debates about attachment to the United States and more broadly about "deservingness." In the naturalization context, for example, applicants not only have to demonstrate that they have resided

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[94] See 8 U.S.C. § 1427 (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."); Matter of Recinas, 23 I&N Dec. 467, 468 (BIA 2002) (discussing hardships to qualifying family members); President Barack Obama, remarks by the President on Immigration (June 15, 2012) (announcing the DACA program for childhood arrivals who "are Americans in their heart, in theirminds, in every single way but one: on paper.").

continuously in the United States for 5 years, they are "attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States."[95] Other times, these programs use relationships with legal insiders like US 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 US for 10 years and that "removal would result in exceptional and extremely unusual hardship" to a US citizen or lawful permanent resident who is a spouse, parent or child.[96]

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 in the United States as children.[97] Importantly, the DACA example also illustrates how attachments can form not just with individuals but with institutions and communities as well. Professor Cristina Rodriguez argues that one reason the Supreme Court invalidated the DHS's attempt to rescind DACA was the recognition of the broader social status, and not just legal status, that DACA undergirds. 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."[98]

These different programs ask migrants to document how they have developed attachments to the United States over a period of years and agencies reward them on this basis. And yet it is odd to justify the allocation of immigration benefits to 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. Agency adjudication of these benefits

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[95] See 8 U.S.C. § 1427(a).

[96] 8 U.S.C. § 1229b(b).

[97] See, e.g., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, DHS memo, (June 15, 2012).

[98] See Cristina M. Rodriguez, *Reading Regents and the Political Significance of Law*, 2019 SUPREME COURT REVIEW 1, 26 (2021).

are not directly responsible for the apprehension, detention, and forcible removal of noncitizens. Instead, those decisions are made 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.[99] Defending programs like cancellation, DACA, and other similar programs 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. Unable to lawfully secure formal work opportunities, unauthorized migrants have to turn to independent contract work—landscaping, moving, and a variety of subcontracting work—within a cash economy that does not lend itself to easy documentation and hence "attachment." Similarly, in the context of marriage and other types of family formation, enforcement policies and the threat of deportation thwarts and constrains efforts by young adults to document their emotional and financial attachments through marriage.[100]

In addition to punitive federal immigration policies, a broader set of exclusionary policies have also advanced anti-immigrant ideas at the state level. Anti-immigrant laws such as the 1994 California Law, Proposition 187 (Prop 187) reflects the hostile conditions many migrants faced in traditional immigrant destination states during this period. Prop 187 presaged in part the 1996 federal laws eventually enacted by Congress by denying publicly-funded health care and educational benefits to

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[99] See DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW 12 (2015).

[100] See LAURA E. ENRIQUEZ, OF LOVE AND PAPERS: HOW IMMIGRATION POLICY AFFECTS ROMANCE AND FAMILY 4 (2020).

unauthorized migrants[101] and reflecting on-going racial anxieties from shifting demographic patterns.[102]

These exclusionary policies actively strive to *thwart* efforts by unauthorized migrants to establish attachments to the United States. "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" activity and those who "threaten" or detract from US life by committing crimes. But migration, including unauthorized migration, continues into the United States and those new arrivals threaten this overly neat dichotomy. An often overlooked aspect of the Obama era "Morton memos" is how they lumped "recent illegal entrants" in with noncitizens who posed national security or public safety threats.[103] 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 subfederal) criminal legal system attempts to police. For this reason, the clustering of "criminality" and "recency" is notable for how it shapes and constructs the meaning of continuous presence.

In some important ways, the process for obtaining immigration benefits is an empowering one. Unauthorized migrants can exert some control over whether they want to expose themselves to the risk of removal. And the open-ended nature of "continuous presence" as a factual question gives migrants significant latitude over the story they want to tell. For migrants, an administrative scheme that creates benefits and imposes

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[101] See Huyen Pham, *Proposition 187 and the Legacy of Its Law Enforcement Provisions*, 53 UC DAVIS LAW REVIEW 1957 (2020).

[102] In particular, rising migration flows from countries in the global south such as Mexico and the Philippines informed this anti-immigrant and xenophobic sentiment. See Peter H. Schuck, *Introduction: Immigration Law and Policy in the 1990s*, 7 YALE LAW & POLICY REVIEW 1, 2 (1989).

[103] See Civil Immigration Enforcement: Priorities for Apprehension, Detention, and Removal of Aliens, Memo from John Morton, Director, to All Ice Employees (March 2, 2011), https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

documentation requirements offers migrants the opportunity to gain legitimacy in exchange for legibility in the eyes of the state.[104] As Salley Engle Merry and Susan Coutin note, in the context of DACA, "The mere act of requesting deferred action therefore makes the population of undocumented students visible."[105] Gray Abarca and Susan Coutin describe paperwork 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."[106] They points to check stubs, receipts, tax records, bank statements, medical records, and letters to demonstrate continuous presence under DACA.

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. 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 political and economic vulnerability because the 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 criticism, disruption, or economic challenges. Paradoxically, then, acts of boundary making expose the state's

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[104] See Sarah B. Horton & Josiah Heyman, Resistance and Refusals, 179 in Paper Trails: Migrants, Documents, and Legal Insecurity (eds., Horton & Heyman, 2020).

[105] See Sally Engle Merry & Susan Bibler Coutin, *Technologies of truth in the anthropology of conflict: AES/APLA Presidential Address, 2013*, 41 American Ethnologist 1, 10 (2013).

[106] See Gray Albert Abarca & Susan Bibler Coutin, *Sovereign intimacies: The lives of documents within US state-noncitizen relationships*, 45 American Ethnologist 7, 9 (2018). See also Javier Auyero, Patients of the State: An Ethnographic Account of Poor People's Waiting, 46 Latin American Research Review 5 (2011).

fundamental vulnerability: boundaries are permeable; they can be crossed."[107] They continue: "Such intimacy and vulnerability are mediated by documents. By collecting records that seemingly hold out a promise of legal inclusion (documents like the reentry permit and vaccination records), migrants seek to speak back to the state in its own language."[108] These documents reflect a life affected (but not defined) by vulnerability and is a story that a migrant often gets to tell on their own terms without government interference at least at the start. To borrow a phrase from humanist Professor Ann Cvetkovich, administrative documents in this context reveals an "archive of feelings."[109]

III. ADJUDICATING VIOLENCE

Thus far, I have tried to make two points: (1) that administrative programs operating within interstitial institutional spaces can minimize scrutiny of acts of direct violence while also explaining how the law fosters broader harms of slow violence; and (2) that immigration relief programs based on continuous presence exemplifies this dynamic against a backdrop of a massive commitment of resources to immigration enforcement.

This Part explores how these insights might inform current debates about the scope of agency power. The Supreme Court has sparked this debate most notably by revisiting longstanding doctrines of deference, such as the *Chevron* doctrine.[110] Moreover, a growing number of justices have vocalized an interest in resuscitating the long-dormant nondelegation doctrine.[111] These lawsuits have tended to sideline questions about agency form

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[107] See Abarca & Coutin, *Sovereign intimacies: The lives of documents within US state-noncitizen relationships*, 45 American Ethnologist 7, 8 (2018).

[108] See Gray Albert Abarca & Susan Bibler Coutin, *Sovereign intimacies: The lives of documents within US state-noncitizen relationships*, 45 American Ethnologist 7, 8 (2018).

[109] Ann Cvetkovich, An Archive of Feelings: Trauma, Sexuality, and Lesbian Public Culture (2003).

[110] See Loper Bright Enterprises v. Raimondo, No. 22-451 (TBD 2024).

[111] See, e.g., Gundy v. United States, No. 17-6086 (2018) (Gorsuch, J., dissenting).

though most of these cases at the center of litigation have involved policies promulgating through rulemaking. Indeed, as some scholars have pointed out, while the Court has placed many aspects of the administrative state in its crosshairs, it has "defend[ed] and depends upon a vast adjudicate state to resolve millions of legal claims outside of Article III."[112] The concerns of agency abuse are not obvious when focused on adjudications, especially when it involves immigration benefits and administrative violence. To help develop conversations surrounding agency power, this Part focuses on core legal concepts that merit revisiting: the scope of constitutionally-protected liberty in entitlements and the consequences of bureaucratic mistakes.

a. Constitutional Liberty

From a constitutional standpoint, if there is a theory of violence committed by agencies it is grounded in ideas related to force—that is, through the use of direct violence. When the Court has discussed violence in the context of the administration of laws, it has often looked a lot like what police officers do—arrest and detain people through the use of force.

For example, *Estep v. United States*, a registrant for the Selective Service challenged his criminal prosecution for refusing to serve in the military on the grounds of his membership in the Jehovah's Witnesses. Within the administrative scheme, local boards issued orders determining whether registrants complied with the terms of registration and induction into the military and where boards determined registrants to violate the scheme, courts enforce 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

[112] Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 Yale L.J. 1769, 1773 (2023).

regulations which define their jurisdiction. *We are dealing here with a question of personal liberty*.[113] 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.

In the immigration context, where noncitizens have faced similarly punitive and coercive agency actions through apprehension, detention, and removal, the Court has consistently recognized agency actions as touching upon a noncitizen's liberty interest. That is, 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 a migrant, 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. *U.S. ex rel. Knauff v. Shaughnessy* involved a noncitizen seeking entrance to reunite with her U.S. citizen spouse[114] and *Shaughnessy v. U.S. ex rel. Mezei* concerned a long-term permanent resident returning to the United States after spending time out of the country.[115] 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.[116] 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, they contributed to ideas of immigration exceptionalism in regards to judicial review of agency actions.

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[113] See Estep v. United States, 327 U.S. 114, 121-22 (1946) (internal citations omitted and emphasis added).
[114] U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).
[115] Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206 (1953).
[116] Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206 (1953).

The Court has been much less clear and strained when addressing agency benefits leaving the idea of administrative violence underdeveloped as a constitutional matter. In the modern era, as immigration policies became more centrally focused on marriage-based admissions, the Court reconsidered the liberty implications of agency actions in the immigration context. 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. 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.[117] 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.[118] And in his concurring opinion, written on behalf of two justices, Justice Kennedy assumed without deciding that married couples possessed such a liberty interest and upholding the agency's decision on process grounds—that is, whatever process the agency provided satisfied the constitutional due process requirement.[119]

Some of this has to do with immigration exceptionalism. But some of this has to do with modern metrics for governance generally. In the context of modern governance schemes, one of the most dominant principles for explaining, defending, and justifying policies is cost-benefit analysis (CBA). It plugs into a broader conversation taking place among legal scholars challenging the hegemony and near universal acceptable of CBA as a principle of

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[117] See Kerry v. Din (Breyer, J., dissenting).
[118] See Kerry v. Din (Scalia, J., opinion of the court).
[119] See Kerry v. Din (Kennedy, J., concurring).

governance. A consistent theme of these criticisms has been that policies often assume that the regulatory project is for which quantification is appropriate. An apt and disturbing example is the Department of Justice's decision to apply cost-benefit analysis to rules aimed at eliminating rape and sexual abuse in prisons.[120] In justifying the standards for curbing sexual abuse in prison, agency officials attempted to translate avoiding sexual misconduct in prison into monetizable benefits to the prisoners—that is attempting to estimate how much it would be worth to a prisoner *not* to be raped.[121] The DHS did not engage in such a brazen application of CBA to the MPP context, but the agency's effort to terminate the program leaned heavily on programmatic costs illustrating the pervasiveness of this type of thinking. This resonates with studies and analyses of bureaucratic contexts in which agency officials make decisions about the allocation of resources meant to alleviate human suffering without much regard to the beneficiary instead focusing on systemic logics of prioritization and expertise.[122]

b. Bureaucratic Mistakes

Agencies sometimes make mistakes when adjudicating benefits. These 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 force 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. The law also empowers a

[120] See National Standards to Prevent, Detect, and Respond to Prison Rape, Department of Justice, 77 Federal Register 37109 (June 20, 2012).
[121] Agency officials landed on somewhere between $310,000 and $480,000. See National Standards to Prevent, Detect, and Respond to Prison Rape, Department of Justice, 77 Federal Register 37109, 37111 (June 20, 2012).
[122] See Akhil Gupta, Red Tape: Bureaucracy, Structural Violence, and Poverty in India (2012).

broader range of agencies and government actors to adjudicate these issues outside of immigration court. USCIS officers adjudicate DACA and TPS claims.[123] Adding to this complex mosaic of decisionmaking 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 immigration judges who preside over immigration court in the DOJ.[124] Under the Administrative Procedure Act (APA), all of these decisions would be considered "adjudications," thus illustrating the breadth of that term.[125] Moreover, DACA and TPS claims are resolved on the basis of the submitted file or "on paper" rather than through an in-person hearing. Migrants carry the burden of proof, therefore migrants typically must create an administrative record to substantiate claims that they have lived in the United States for a period of years. The administrative record is the relevant adjudicative unit. It is a file, which makes it hard to see. As legal historian Cornelia Vismann observes:

> When subjected to legal criteria, files are nothing. They are a noninstitution, a nondocument, nonlaw, nonproperty, legally nonbinding; they have neither author nor originator and count as 'writs without address' without any claim to validity and they are of no duration.[126]

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[123] See, e.g., USCIS Policy Manual, Chap. 38.1(e), Temporary Protected Status, https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm38-external.pdf.

[124] New arrivals seeking asylum affirmatively must first apply for this benefit with an asylum officer who works within the DHS and if that applicant is denied, 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. 805, 814-820 (2015).

[125] See 5 U.S.C. § 551(7) (defining "adjudication" as agency process for the formulation of an order").

[126] Cornelia Vismann, Files 11-12 (2008) (internal citations omitted).

So many different information streams flow into the process of adjudicating immigration benefits. In that context, mistakes happen. Agencies can commit legal errors and both agencies and applicants can make factual ones. In the context of direct violence, agencies and their proxies also make mistakes but not actions are not typically framed in such terms. Officials who target and then escalate in the use of force undergo scrutiny and ex post litigation that focus on questions of bias, animus, or outright cruelty. This is, in part, a function of the civil rights frameworks that underwrite efforts to hold agency actors accountable. For example, victims of agency violence often bring suits under the Federal Tort Claims act (FTCA), the elements of which track notions of direct violence. Consider *Hui v. Castaneda*, which involved a noncitizen, Francisco Castaneda, who died of cancer after agency officials denied his requests for treatment while in immigration detention.[127] Castaneda's heirs sued the agency under the FTCA, which requirement them to show "damage for personal injury, including death, resulting from the performance of medical or related functions." The alleged abuse and incompetence here fits within a familiar discourse grounded in the threat of executive overreach.

Discussions surrounding abuse and incompetence in the adjudication context are harder to pin down. 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 the mistakes in the context of a system that is comprised of multiple agencies with overlapping jurisdictional authority means that a clerical or agency error can have a snowballing effect.

Patel v. Garland offers the clearest example of this dynamic. 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

[127] Hui v. Castaneda, 559 U.S. 799 (2010).

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.[128] The agency further argued that this denial, as an exercise of discretionary agency authority, was unreviewable by a court.[129] In a 5-4 decision, Justice Barrett wrote an opinion affirming the agency's denial on the grounds that the Court 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."[130] Central to 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. To bolster his point, Patel explains that even as an unauthorized migrant he was eligible for a driver's license under Georgia law and therefore 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 emphasizes 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."[131] The sprawling and

[128] See 8 U.S.C. § 1182(a)(6)(C)(ii)(I).

[129] 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.

[130] See Patel v. Garland, Slip No. 20-979, 596 U.S. __ at 1 (2022) (Gorsuch, J. dissenting).

[131] See Patel v. Garland, Slip No. 20-979, 596 U.S. __ at 17 (2022) (Gorsuch, J. dissenting).

unstructured nature of this process predictably leads to mistakes which will be locked in without further review by courts.[132]

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. 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.[133] Today, with information regularly harvested and then shared or sold, often without the knowledge of individuals, mistakes can create harms for individuals. 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. 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.[134]

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 sitting within records. But as Fanna Gamal observes, As Fanna Gamal notes, "While the precise injury that flows from an inaccurate but (externally) undisclosed informational archive is difficult to quantify, the inaccurate but internally maintained

[132] See Patel v. Garland, Slip No. 20-979, 596 U.S. __ at 17 (2022) (Gorsuch, J. dissenting).

[133] Fanna Gamal, *The Private Life of Education*, 75 Stan. L. Rev. 1315 (2023).

[134] See TransUnion LLL v. Ramirez, Slip Op. 20-297, 594 U.S. __ (2021) at 4. The Office of Foreign Assets Control in the Department of Treasury maintains a list of "specially designated nationals" deemed to be threats to national security. See, e.g., Specially Designated Nationals and Blocked Persons List, Office of Foreign Assets Control, (Sep. 7, 2023) https://www.treasury.gov/ofac/downloads/sdnlist.pdf.

records created a risk of future harms."[135] Relatedly, criminal legal scholar Eisha Jain has argued that criminal arrest records create a "negative credential," the equivalent of an anti-resume, which marks people as dangerous and deviant. In the case of migrants seeking immigration benefits, every encounter with law enforcement officials presents the possibility of an arrest and therefore the creation of a criminal record that could be folded into an administrative record pertaining to an application for immigration benefits.[136]

CONCLUSION

In this article, I have tried to draw attention to the administration of immigration benefits—the process that governs them, the human costs at stake, and the temporal and territorial elements that inform the range of possible outcomes. At heart, this article focuses on the process by which migrants become visible to agency officials—to the state itself. Although the concept of continuous presence seems neutral and self-evident, one that does not touch upon broader elements of the immigration system that seek to punish migrants, as I have tried to show, the activities captured by continuous presence implicate and reveal 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 continuous requirements—and immigration benefits more generally—helps sharpen understandings of how instances of slow violence persist within the machinery of legal systems. It also can help shape a growing interest in legal scholarship on the topic of administrative violence. Relative to other fields of law, critical perspectives on race, power, and

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[135] See Fanna Gamal, The Private Life of Education, 75 Stan. L. Rev. 135, 1357 (2023).

[136] See Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 Stan. L. Rev. Online 162 (2021); Eisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 809 (2015).

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."[137] 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.

[137] See Bijal Shah, *Toward a Critical Theory of Administrative Law*, 45 Admin. & Reg. L. News 10, 11 (2020).