A Punishment of the Severest Kind: Immigration Enforcement, the Social Degradation, and the Harm of Illegalization

By

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Abstract

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In this dissertation, I develop a systematic account of *illegalization*, which I define as *state practices of criminalization that use immigration enforcement as a tool of social degradation*. Noncitizen status almost always suggests some precarity, but just how much is an under-discussed problem that implicates matters of justice and harm from the vantage of the harmed themselves. Illegalization as the state's use of immigration enforcement as a tool for social degradation to create and sustain the permanence of an enemy, squares the punitive nature of immigration enforcement and its effects on aspects of the immigration apparatus outside of removal.

This dissertation finds its doctrinal home in crimmigration, the intersection of criminal and immigration law. Whereas the portmanteau brings to bear the similarities between these two legal domains, my paper focuses on the ways in which they are different and argues that such differences—like the lack of many procedural protections that are in the criminal law—are significant in that they provide a glimpse of how the state treats noncitizens.

WHAT IS ILLEGALIZATION

INTRODUCTION[1*]

"Don't treat us like criminals!" is a refrain many immigrant rights activists (including the author) have made to secure *some* immigrants a modicum of immigration relief. On the one hand, it is a rhetorically effective strategy; DREAMers are people who arrived in the United States as children, with perfect grades, impeccable English, no criminal record, and bear no culpability for breaking the host state's immigration laws.[2] On the other hand, however, the refrain raises three questions that are critical to understanding the plight of the contemporary noncitizen: 1) how *do* contemporary nation-states treat criminals? 2) Do these nation-states, in fact, treat immigrants like criminals? 3) Why does it matter if they do?

In this dissertation, I develop a systematic account of *illegalization*, which I define as *state practices of criminalization that use immigration enforcement tools as central to the mechanism of social degradation to create and sustain the permanence of an "other."* Although the central case in my argument is the figure of the "illegal alien," illegalization also focuses on groups of noncitizens such as Fanny Lorenzo, a permanent resident who was deported because of a criminal conviction whose sentence she completed decades prior.[3] Noncitizen status almost always suggests some precarity, but just how much is an under-discussed problem that implicates matters of justice and harm from the vantage of the harmed themselves.

Illegalization, as the state's use of immigration enforcement and as a tool for social degradation to create and sustain the permanence of illegal alien, squares the punitive nature of immigration enforcement and its effects on aspects of the immigration apparatus outside of removal.[4] This paper finds its doctrinal home in

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[1*] The title of this dissertation, *A Punishment of the Severest Kind*, is a reference to Justice Brewer's dissent in the case U.S. v. Ju Toy, 198 U.S. 253, in which he described the banishment of Ju Toy, a U.S. citizen, as "A punishment of the severest kind…The forcible removal of a citizen from his country is spoken of as banishment, exile, deportation, relegation, or transportation; but, by whatever name called, it is always considered a punishment." Banishment is more than the physical removal of the person, but a social degradation as well. Illegalization evokes the spirit of banishment so construed but applies it to noncitizens as well as citizens seen as unfit to be among the group of full rightsholders.

[2] Joel Sati, *The Futility of the DREAMer Endorsement,* Odyssey, (Feb. 8, 2016), *https://www.theodysseyonline.com/the-futility-of-the-dreamer-endorsement.*

[3] Jose A. Iglesias, *2 Decades Ago, Fanny Lorenzo Got Probation. Now, She's Been Deported*, MIAMI HERALD (Nov. 26, 2019, 8:55 AM), https://www.miamiherald.com/latest-news/article214277614.html.

[4] This dissertation focuses heavily on the U.S. immigration system, owing in large part due to my personal experiences with it as an illegalized immigrant for almost two decades (as of July 2022).

crimmigration, the intersection of criminal and immigration law. Whereas the portmanteau brings to bear the similarities between these two legal domains, my paper focuses on the ways in which they are different and argues that such differences—like the lack of many procedural protections that exist in criminal law—are significant in that they provide a glimpse of how the state treats noncitizens.

Informed by affliction, the literature of epistemic injustice, and status degradation ceremonies, I examine the dimensions of illegalization. I advance the concept of illegalization in the following way: I first introduce Simone Weil's concept of affliction, I then introduce Harold Garfinkel's concept of status degradation, and then combine insights from the two to posit the above definition of illegalization, which I expand on in the third section. Having defined illegalization, I place it against existing work on people without status. In the fourth section, I argue that the language of rights is unfit for the task of articulating and rectifying the harm of illegalization. More specifically, I respond to existing work in the political theory of migration. The main debate within this literature is between proponents of a right to freedom of movement (or generally more permissive attitudes toward immigrants) and those who argue for the state's right to restrict immigration. The literature is awash with the language of rights, and with reason; rights are a rhetorically effective language for those parties to such conversations. For the illegalized themselves rights are not only ineffective but pernicious. This introduction to my dissertation project develops an account of the harm of illegalization that does not rely on the framework of rights.

I. AFFLICTION AS A HERMENEUTICAL HARM

Simone Weil and her concept of affliction is the crux of my project to conceptualize the harm of illegalization. To understand affliction, I must first spell out her conception of injustice. Weil argues that within every human being there is something within them as "impersonal," something sacred in all humans.[5] Justice "consists in seeing [that] no harm is done to men."[6] The good is the only source of the sacred, and to do justice is to affirm the sacred in all people. [7] Weil writes that the sacred impersonal is a space,

> at the bottom of the heart of every human being, from infancy until the tomb, there is something that goes on indomitably expecting, in the teeth of

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I do intend for this project to provide insights useful to discussions on illegalization that focus on other areas of the world, such as Europe.

[5] Simone Weil, *Human Personality, in* SIMONE WEIL, AN ANTHOLOGY 317 (Siân Miles ed., 1986).

[6] *Id*. at 334.

[7] *Id*. at 72.

> all experience of crimes committed, suffered, and witnessed, *that good and not evil be done to him*. It is this above all that is sacred in every human being.[8]

Injustice, on the other hand, is a violation of the sacred and the impersonal. Recall the notion of "good and not evil be done" to a person. Injustice is the manner through which evil is done to its target. Injustice is expressed as a pain from "the depths of the human heart" and as the visceral cry: "Why am I being hurt?"[9]

Whereas injustice allows for episodic events, affliction is much more totalizing. In "For Love of God and Affliction," Weil defines affliction in its most extreme form as "physical pain, distress of soul, and social degradation, all at the same time…a nail whose point is applied at the very center of the soul, whose head is all necessity spreading throughout space and time."[10] Affliction is timeless injustice; it is a bottomless laceration to the soul, instantiating a pain with no beginning and no end. To suffer affliction is to be condemned to constant insecurity almost at the point of death; it is "an uprooting of life, a more or less attenuated equivalent of death, made irresistibly present to the soul by the attack or immediate apprehension of physical pain."[11] Affliction attacks the soul in all its parts: social, psychological, and physical.[12] A soul that is secure is not one that is afflicted.

For the afflicted, affliction operates as a hermeneutical silencing; that is, it attacks that part of the soul that allows one to make sense of their experiences and articulate it to others who can recognize them. The afflicted thus lack language to express the injustice they face, or otherwise possess language unfit to articulate their affliction. The afflicted are both incapable and unable to communicate their affliction. Moreover, even if the afflicted are somehow able to communicate (as a matter of intrinsic ability), there is still the matter of whether those not-so-afflicted are able to receive the message. Compassion toward the affliction is impossible.[13]

This interpretation differs from, yet adds to, concepts in social and political philosophy like hermeneutical injustice, which contends that such injustice hinges on a lack of hermeneutical resources. Hermeneutical injustice, a concept Miranda Fricker coins and develops in her book *Epistemic Injustice: Ethics and the Power of Knowing*, captures important dimensions of marginalization and plays an important role in how epistemology informs my account of illegalization. Epistemic injustice has two modalities: testimonial injustice and hermeneutical

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[8] *Id*. at 94. Emphasis mine.
[9] *Id*. at 315.
[10] Simone Weil, *For Love of God and Affliction*, *in* SIMONE WEIL, AN ANTHOLOGY 134 (Siân Miles ed., 1986).
[11] Weil, *supra* note 5 at 117.
[12] *Id.*
[13] *Id*. at 120.

injustice; I focus only on the latter. *Hermeneutical injustice* describes the prejudicial flaws in shared interpretive resources that prevent the subject from making sense of an experience that it is strongly in her interests to render intelligible. Fricker makes the further distinction between hermeneutical *marginalization* and hermeneutical *injustice*. Fricker defines hermeneutical marginalization as occurring "when there is unequal hermeneutical participation with respect to some significant area(s) of social experience."[14] Fricker intends the notion to possess a moral-political component, in that marginalized people are subordinated and excluded from a practice that would have value for those excluded. Hermeneutical injustice, on the other hand, is "the injustice of having some significant area of one's social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource."[15] Hermeneutical injustices occur within this general framework of marginalization.

If we take as our object of focus the phrase "I am being harmed," affliction as hermeneutical silencing extinguishes the soul in two important ways. The first is the concept of "I," and the second is the concept of "being harmed." If there is an object of affliction, then there is no harm that is perceptible to the un-afflicted. Affliction helps explain the hermeneutical lack because affliction seeks the destruction of these epistemic resources in addition to precluding the afflicted's discovery of them. This hermeneutical silencing describes the forced separation of the afflicted from a sense of personhood, and thus, their status as one who can communicate; communication here entails being a knower, communicating knowledge, and receiving one's "communicative due," so to speak. Because affliction is by its very nature inarticulate, its effects are also unintelligible to the unafflicted. The afflicter's actions against the afflicted are not perceived as harming them. For the illegalized person, the harm being done to them is not seen as harmful because they are not seen as a person, and thus not as an entity to whom harm can be done. The illegalized is not an object of moral concern. The illegalized are not being denied recognition as an agent of moral concern, to be illegalized is to render the idea of moral concern unintelligible. As Weil observes,

> [The afflicted] have no words to express what is happening to them. Among the people they meet, those who have never had contact with affliction in its true sense can have no idea of what it is, even though they have suffered a great deal. Affliction is something specific and impossible to describe in any other terms as sounds are to anyone who is deaf and dumb.[16]

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[14] MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 153 (2007).
[15] *Id*. at 155.
[16] Weil, *supra* note 5 at 120.

Affliction does not only affect the sufferer, but it also molds those who witness the affliction and become desensitized to the harm done to the afflicted. As a result, they are both unable to understand the afflicted and unable to see the afflicted as worth understanding.

I end this section with what Weil considers a necessary element in understanding affliction: the social.[17] Processes of state violence create the conditions for affliction through social degradation, which is a public, witnessed ritual.[18] The degradation the afflicted suffer must be done in a way that degrades the afflicted in the eyes of the witnesses. The witnesses, as the name suggests, are not themselves authoring or applying the affliction. But without them, there is no degradation and, therefore, no affliction. Who these witnesses are and what their relationship to the afflicter and the affliction itself, is the topic of my next section.

II. ILLEGALIZATION AS STATUS DEGRADATION

Affliction as social degradation is concerned with various acts of spectacle that relegate the afflicted further and further outside the sphere of moral concern. I argue that illegalization is an affliction because it degrades its targets, expelling them from the social scheme through their constant exposure to deportation.

Weil's notion of social degradation finds a kindred concept in Harold Garfinkel's concept of *status degradation*; for my purposes, these concepts are co-extensive, so I use them interchangeably. Garfinkel defines status degradation as "[a]ny communicative work…whereby the public identity of an actor is transformed into something looked on as lower in the social scheme of social types."[19] He further argues that the point of status degradation is to publicly deliver the following curse: "I call upon all men to bear witness that he is not as he appears to be but is otherwise a lower species."[20] The central elements of status degradation jump out: there is a denouncer levying the curse, the accursed, and the witnesses.[21] The witnesses play two important roles. The most apparent is that of the audience, but the more important one is that of the legitimators; they legitimize the denouncer and construct the social scheme necessary for degradation to have power. Garfinkel's contribution is his rich account of degradation's relevant players,

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[17] *Id*. at 119.
[18] *Id*. at 282, in which Weil mentions "the affliction of social degradation."
[19] Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOCIO. 420, 423 (1956).
[20] *Id*. at 423.
[21] "Accursed" has two definitions according to Merriam-Webster: being under a curse or being damnable. That duality is present in illegalization. Illegalization is the affliction/curse, and deportability is the damnability.

thereby sharpening our understanding of who degrades, who is degraded, what the degrader's motivations are, and the rituals through which that degradation occurs.

The degradation ritual itself has three main players: the denouncer, the witnesses, and the denounced. The ritual proceeds as follows. First, the event and the perpetrator must be recast as exceptional or out of the ordinary. Second, the perpetrator and the event must be placed in a scheme where the perpetrator's action is representative of an event of a particular type, rather than a distinct event; when a person who is an "illegal alien" commits a crime, it does not serve as evidence that this person is prone to crime; rather, it is evidence that "illegal aliens" commit crime.[22] Third, the denouncer must be a public entity; Garfinkel writes that the denouncer "must…be regarded as acting in [their] capacity as a public figure, drawing upon communally entertained and verified experience."[23] Fourth, the denouncer must articulate the ultimate values of the group and deliver the denunciation in their name. Fifth, the denouncer arranges to be vested with the right to speak in the name of the group's ultimate values. Sixth, the witnesses must recognize the denouncer as both a supporter and protector of the group's ultimate values.[24] Seventh, the denouncer must, through the denunciation, create a ritual separation between the perpetrator and both the denouncer and witnesses. Eighth and finally, the denounced person must be separated from a place in the legitimate order and put in a position antagonistic to it. The denounced are not just lower in the social scheme of things but separate from and incommensurable with the legitimate order. Status degradation, according to Garfinkel, is built on public denunciation as a paradigm of moral indignation.[25]

In this paradigm, the "denouncer" is cast as the "degrader" and the "denounced" is cast as the "degraded." This is because each group exists in relation to degradation; that is, what defines the degrader is the fact that they degrade, and what defines the degraded is that they receive degradation. One can think of the denouncers as engaging in *degradative* work and the denounced as *being degraded*. As a brief example, consider a "management" class in charge of an "unskilled laborer" class, the latter of which, as a function of their membership in that group, must do menial work for meager wages. The managers are doing degradative work; those who must work under those conditions are doing degrading work, or they are being degraded. The management class is doing degradative work because its members can control the kind of degradation, the methods of degradation, and the scope of degradation. This control, emblematic of degradative work, allows the denouncers to protect themselves from any degrading effects of their denunciation.

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[22] It might even go further than that; the claim might be that "illegal aliens" are criminals at their core.

[23] Garfinkel, *supra* note 19 at 423.

[24] *Id*.

[25] *Id*. at 421.

This element of control is important because degradative work, on its own, degrades both the author and the target. This is why ritual separation is important, not just to diminish the denounced, but to do so at no dignitary cost to the denouncer. Think of it as a hazmat suit; the suit does not divorce a biological agent from its lethal effects but allows its wearer to engage with the agent protected from its possibly lethal effects. On this point, I think of degradation as occurring on three levels: the level of the individual, the level of the individual as a member of a group/institution, and the level of the group/institution itself. For the degrader, degradative work does not degrade them as a person; it does not degrade them as a member of the degrading group or institution, and it does not degrade the group/institution of degraders.

Unlike the denouncers who can dish degradation shielding themselves from it, the denounced enjoy no such protection. Just like how degradative work has degrading effects, degrading work has degradative effects. The difference is whereas the denouncers can shield their work from any degrading effects, the denounced cannot shield themselves from any degradative effects. To explain, I begin from the idea that when one is denounced, they are degraded as an individual and degraded as a member of the denounced group. These effects are relative to the denounced individual. There are two further degradative effects outside of the denounced individual. The first is that denunciation degrades the group as a whole by making degradation the defining feature of membership in that group. The second degradative effect is that being denounced degrades *the idea of the group* on which the denunciation is premised. Whereas degradation of the group is a descriptive matter, degradation of the *idea* of the group diminishes the group's normative standing as well as normative possibilities of membership in that group. This is to say that the group should be degraded as a matter of normative treatment and should always be degraded as a matter of normative possibility. Degradation asserts that this is how the degraded should be treated now and into the future. What's more, the rationality that places people in a group whose defining factor is their degradation, then it logically follows that membership in the group necessitates this treatment.

At this point, I want to focus on the witnesses. As mentioned earlier, the witnesses play a unique role in the status degradation ceremony. The denouncer aligns themselves with the witnesses to form a "group" in five important respects. First, the ceremony implicates the group's fundamental values insofar as those values reflect themselves in their character. Second, the denouncer must convince the witnesses that an existential threat exists, and vow to protect the witnesses and these ultimate values from this threat. Third, the degrader must convince the witnesses that the degraded has a character that is incommensurable with the ultimate values and character of the witnesses. Fourth, the degrader must, through the act of degradation, exclude the degraded from any possibility of acceptance into

the group. Lastly, the degrader must convince the witnesses that the degradation both increases their own normative standing as well as increases confidence in the group's continuous existence. That said, the threat may return and require another such ceremony. For the afflicted, however, their position confirms an ugly truth: their place in society is built on publicized harm being done to them. Take immigration enforcement, for example. Not every act of enforcement must be public; that some practices of immigration enforcement are secret or otherwise happen outside public view does not strike at status degradation's explanatory ability. Even if some are done in secret (and they often are), the audience is aware that immigration enforcement engages in these kinds of actions. The public statement admonishing immigrants as criminals is as much of a degradation ceremony as the clandestine raid, and the separation of children from their parents is as much a degradation ceremony as the finding that one is ineligible for regularization or other relief due to one's immigration status.[26] his is because it continues to be clear that its targets deserve nothing but this kind of treatment, however it is applied.

And it is at this point we arrive at the definition of illegalization central to my project: *state practices of criminalization that use immigration enforcement as the central mechanism of social degradation*. Illegalization as a concept enjoys a history short enough to belie its influence. Nicholas De Genova's work on illegalization notes that it is infeasible to deport all 12 million illegalized people in the U.S., despite the state still engaging in raids and deportations in the interior, as well as detention and separation at the border.[27] Because the specter of deportation constantly hangs over those who are not yet deported, deportability and the degradation it represents is the experience of illegalization for the illegalized. Deportability becomes harm for the illegalized person, *regardless of the probability of their being deported*. Said differently, not only is the deported person harmed by the deportation but also, when deportations are publicized, those whose fears are triggered by the news are also harmed by living an underground, fear-filled existence, even when it is antecedently unlikely that they will be deported themselves. The deportation degrades the individual; the fear it triggers in other illegalized people is its degradative effects. By placing illegalized people outside of the group of citizens, possible citizens, or outside the sphere of moral concern, degraders can clean themselves of any pangs of conscience. This is because it would be degrading to all its fellow humans; moreover, it would be hard to degrade at all. But such a quandary disappears when noncitizens receive the marks of

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[26] Additionally, status degradation harms need not exhaust the possible kinds of harms that illegalized people can and do face; I acknowledge that such harms are only one kind among many.
[27] Nicholas P. De Genova and Ananya Roy, *Practices of Illegalisation,* 52 ANTIPODE 352 (2020). See also Nicholas P. De Genova, *Migrant 'Illegality' and Deportability in Everyday Life,* 31 ANNU. REV. ANTHROPOL. 419 (2002).

illegality such as *aliens*, *illegal aliens*, *undocumented immigrants*, or *noncitizens*—all of whom have no right to enter or stay in the nation-state. The practices of illegalization become palatable in this twisted landscape of moral concern as alienation of the illegalized not only makes degradation possible, *but easy* and morally correct according to the dominant logic.

Illegalization, because it is a process of degradation, occurs relative to dominant or hegemonic rationality in which the relationship between people ceases to think in terms of what conclusions are reasonable to draw from certain social facts to thinking in terms of logical entailment between social facts and normative justification. In her essay "For Love of God and Affliction," Weil argues that affliction discourages the empathy and compassion representative of kinship because "it stamps the soul to its very depths with the scorn, the disgust, and even the self-hatred and sense of guilt and defilement that crime logically should produce but actually does not."[28] Later she writes, "Our senses attach all the scorn, all the revulsion, all the hatred that our reason attaches to crime, to affliction…everybody despises the afflicted to some extent, although practically no one is conscious of it."[29] I do not take Weil to argue that crime should produce these ill effects. Rather, I take the claim to mean that if we were to think of something that stamps the soul to its very core with the scorn, disgust, self-hatred, sense of guilt, and defilement, we would think crime to be that concept. I do not think Weil is talking about what logically follows, or about what is normatively desired, but what would make sense (colloquially speaking) to conclude.[30] Her earlier-quoted statement where she speaks of "all the hatred *our reason attaches to crime*" supports the claim that "logically speaking" refers to a conception of crime accepted by both the witnesses and the denouncers. This conception of crime also blinds the denouncers and witnesses of affliction and its workings; what they find reasonable to attach to crime they instead attach to affliction. This conception of crime is retributive because those in control of the definition are not the targets of that retribution.[31]

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[28] Weil, *supra* note 5 at 121.

[29] *Id*. at 122

[30] Not sure if I am reading my own priors into this passage.

[31] De Genova (2020) *supra* note 27 at 354: "Insofar as we are particularly concerned with the legal production of illegality, immigration law must thus be seen as a kind of tactic that, in a very deliberate way, intervenes into the social field and produces conditions of possibility for the production of new categories of people. It also renders certain migrants extraordinarily vulnerable to the recriminations of the law and allows for that condition of illegality to be continually revised in a way that multiplies the punitive ramifications of that condition of illegality." De Genova's account of illegalization possesses all of the elements that my account has, though they are not tied together as tightly. There are two differences between his account and mine. First, he mentions "the production of new categories of people." I would disagree and instead argue that immigration law creates new categories of illegal acts, doing so by reconstructing the illegalized as those illegal acts. Such a construction recognizes the social context necessary to speak of "illegal aliens" or "illegal." The second difference is that he mentions the social "field" without going into its

Such a shift is important for three reasons. First, the audience does not realize the contingent nature of their attitudes and the social conditions that form them. Second, degradation not only requires a scheme of social types and the downward transformation of social types; it also requires that the scheme itself have normative content and that both the degrader and the audience buy into the social scheme and its normativity. Third, the social fact of a particular kind of treatment becomes normalized, i.e., the practices themselves have normative content of the form "X is how illegalized people ought to be treated. It is not enough, for the purposes of illegalization, for the illegalized to be treated a certain way; it is important that they *should be* treated a certain way. This insight about rationality is a very rich one, as one of my main questions in this dissertation is: Why, if immigration is a civil matter, does it use the methods of criminal law? This also explains why arguing that criminal legal protections should apply to things like removal misses the point. Illegalization is significant not because it runs its targets through a criminal legal process, but because it labels its targets as criminals. As such, affliction makes use of methods and rationalities made uniquely for the task.

From the perspective of the citizenry and the law, the illegalized are the criminals. It may be that Weil thinks the "criminals" are projecting their own criminality onto their targets; this includes the enforcement agents that carry out detention and deportation raids, the lawmakers that create and advocate for the legal institutions that conduct immigration enforcement, and the public who seek retributive punishment against the undesired (and undesirable). Illegalization goes over and above undocumented status in that it is not just the lack of legal status, but that lack serving as the premise for a degradation campaign through the law, policy, and social standing. There are many things I would suggest are processes of status degradation. They include, but are not limited to immigration enforcement lacking due process protections, practices of detention and separation, rhetoric and narratives of illegalized people, their inability to access arms of the administrative state, etc.

III. ILLEGALIZATION AS RIGHTS CRITIQUE

Having defined illegalization, I place it against existing work on liberal immigration theory, as there exists deep engagement with rights. This is true of both those who argue for expanded access to citizenship or free migration of persons across borders and those who argue for the state's right to restrict immigration or expel noncitizens. Against both, I reject rights language but just saying that is not enough. The central place immigration occupies in Western politics has, in part, led to wide-ranging advocacy in the service of migrants. Even

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importance. The social is important because the illegalized are constructed relative to a scheme in which they are degraded through immigration enforcement/deportability.

in the silo of the Western academy, many of the most influential arguments within the political theory of migration concern the rights of migrants and noncitizens.

In what follows, I aim to develop an account of the function of rights and rights language to argue that rights language is unfit to capture the degradation the illegalized face, much less to ameliorate it. This section spends the majority of its focus on the function of rights language; however, there are elements of its form that are central to the effectiveness—and ineffectiveness—of its function. I utilize a conception of justice defined as non-domination. In turn, rights are claims made by people who see themselves or others as entitled to insist on the benefits and protections of non-domination.[32] This is a very limited account, but they are sufficient for my purposes.

Rights, I argue, rely on a relational account of non-domination. By this I mean that rights language's main concern is about what norms constitute what relationships with whom, and rights language is attractive because it centers relationships of power and the norms that undergird them. Rights assert norms which in turn constitute relationships, and when those norms change, the relationship either changes or ceases to exist. For example, the right against unreasonable search and seizure is one that places limits on a relationship between an individual and the state, violation of which turns a relationship into an unjust one. Such a violation would obtain if the right was revoked or otherwise remained but its application vitiated the right. Another important dimension is that rights allow for hierarchy; if anything, rights are more important in hierarchical relationships. Many relationships are hierarchical and thus unequal. A relationship between parent and child, teacher and pupil, or general and private are relationships of inequality. The inequality is not wrong in itself (in fact it can actually be beneficial), but it can be problematic if the more powerful abuse that inequality in illicit ways. Rights do not forestall inequality completely but place important constraints on relationships in light of them.

I now turn to what rights do. Just as we order our world with words, we also order our politics with rights language. I argue that rights language does two things: one, rights language signals the moral importance of a domain to people with different if not opposing comprehensive belief systems. Because of this, rights language is effective for both coalition-building and capacity-building. Capacity-building consists of ensuring that people know that they matter politically. Second, because rights language helps facilitate political discussion in this way, it is effective in gaining political power despite limited political resources. As such, politics is time-intensive in a way that does not allow for much argument on the merits of any one political position. Those campaigning in support of a pro-immigrant referendum are more concerned about getting votes rather than

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[32] Leif Wenar, *Rights*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Feb. 24, 2020), https://plato.stanford.edu/entries/rights/.

convincing the public of the substantive benefits of a pro-immigrant stance. "Get-out-the-vote" campaigns reflect the notion that people can play an active role in protecting their right and those of others.

The protean nature of rights also renders them indeterminate. I refrain from arguing using rights language for two reasons. The first reason is that there is not a distinct moral content to which rights refer. Because there is no moral content to right, rights language opens itself up to both contestation and corruption. There is disagreement as to whether something is right. There is disagreement as to what grounds the right (e.g., is it someone's humanity, is it a legal right?). There is disagreement about to whom the right applies. There is disagreement on when it applies. There is disagreement on whether the right imposes a duty, and if so to whom. There is disagreement on when a right is violated or whether the *prima facie* violation is nevertheless permissible owing to certain factors. Even then, there is disagreement on who ought to make that determination and what reasons are relevant.

The second reason I avoid a rights argument is because rights language is subject to the limiting factor that is politics. The right for a state to control its borders is no more normatively sound than the opposing right to free migration. Absent a method of resolution, state power and political realities are backed by state power. A domain's candidacy for righthood can also depend on its political purchase, and politicians use that right as an issue to drum up support for policies consistent with the right. Additionally, the practice of state power can efface any practical difference between a right being violated and not having a right at all. And even if we circumscribed what could count as a right based on whether it implicates a basic interest, that standard is useless in rights debates where a domain's status as a basic interest is itself contested. Rights language is also very nonspecific. All rights can say is that the rightsholder has an entitlement that deserves to be respected.

What rights language cannot do is articulate the harm to the person themselves; that is, rights language is hermeneutically insufficient. The forced silence representative of affliction is not a lack of resources (which seems to suggest a redistribution of resources to remedy that lack) but an incapability, which suggests something that is not easily remedied by finding the right language. Weil writes,

> Affliction is by its nature inarticulate. The afflicted silently beseech to be given the words to express themselves. There are times when they are given none; but there are also times where they are given words, but ill-fitting ones, because those who choose them know nothing of the affliction they would interpret.[33]

[33] Weil, *supra* note 5 at 85.

The separation between those who choose language and the afflicted who are to use it is a deep-seated one. Affliction is inarticulate on two fronts: from the vantage of the afflicted, they are unable to accurately name, if at all, their experiences; from those on the outside looking in, they are unable to see the afflicted's suffering, let alone understand it.

So far, I argue that rights language is insufficient for the illegalized to name their experiences. However, rights language fails for a deeper reason: it does not account for harms that efface the very identity of the afflicted. The issue with illegalization is not one of domination but of elimination. Illegalization is a relationship of affliction, using immigration enforcement as the tool of social degradation. To explain what I mean, I revisit a central notion of Weil's work, the impersonal. For Weil, the impersonal is that which is sacred in every human being. It is something that transcends the ontological presuppositions of liberalism.[34] Liberalism begins from the idea of the individual and the personal; Weil contends that there is nothing about one's personality that prohibits someone else from harming them. What makes us human is this sacredness, this natural morality that leads us to expect that good and not evil be done to us. It is this impersonal that affliction extinguishes. Affliction imposes on its sufferer the condemnation that they do not matter, it eliminates the individuality of its targets. Hence, it is absurd for an illegalized person to say "I have rights that are being violated" because illegalization extinguishes the notion of an "I" from the onset. For this reason, affliction is necessarily inarticulable. Whereas the normative significance of rights depends on recognition, the normative significance of the impersonal does not. Affliction is incompatible with rights.

However, the virtue of rights language is its vice: though rights language is rhetorically effective at indicating the presence of moral reasons, and building coalition and capacity across differing comprehensive religious, moral, and political doctrines, rights language cannot substitute for those moral reasons. I present all this if only to suggest that rights languages ask as many questions as they claim to answer. My project is much more radical than what rights language would allow. It is not just to improve the political lot of those illegalized, but to end illegalization. What is wrong about illegalization is not the violation of rights, but an affliction that is so severe that its sufferer cannot conceive of the desire not to be afflicted. And this is perhaps the greatest tragedy of rights language: in the struggle to determine what is a right, who is entitled to a right, and what duties stem from rights, we forget that rights are instruments made in service of *people*. Rights language is part of the very world—messy as is it—it claims to supersede. I

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[34] Riley Clare Valentine, *An Impersonal Liberalism: Simone Weil and the Sacred*, EPOCHÉ MAGAZINE (Feb. 25, 2021) https://epochemagazine.org/34/an-impersonal-liberalism-simone-weil-and-the-sacred/.

recognize that literature on both sides of the debate uses the language of rights. I would like to avoid such language if possible.

In the real world, rights only mean as much as their affirmation or enforceability will allow, and they are fairly effective when it comes to getting political buy-in. However, rights language is no more accessible to the illegalized than it is to the state. And in a faceoff between opposing conceptions of rights, the one with power behind it will prevail. The relationships in which rights are relevant are relationships of mutual recognition. Recall that the goal of social degradation is separating the denouncers from the denounced. Being illegalized is incompatible with having rights because illegalization is a relationship of degradation, whereas rights are premised on non-degradation (or non-domination). It is not accurate to argue that illegalized people lack rights; that seems to suggest that they lack something they can have. Being illegalized means not having the "right to have rights." Rights are left unintelligible by illegalization. The only way to improve the plight of the illegalized is to end illegalization.

OUTLINE OF ARTICLES

This dissertation exists as three papers, each of which explores the intersection between criminal and immigration law. I argue that illegalization is the most accurate account of deportability because it places into focus the harm to people who are illegalized. Though the bright-line case is the person without documents, illegalization shows that the scope of immigration enforcement is more expansive than that. Status illegality simply refers to lacking legal status. Those who possess status illegality are *per se* removable and can be ineligible to regularize. Those who regularize still are not shielded from removal. Noncitizens who commit crimes are often removed after the completion of their sentence, and new criminal categories are created that increase the number of offenses for which removal is a possible sanction. All of these different kinds of deportability fall under the banner of illegalization. I take it to mean that the methods of immigration law and the rationales behind those methods reflect a constant mission to reify the deportability of noncitizens.

The first paper, titled "Nowhere to Hide: Rights, Privacy, and the Impossibility of Border Enforcement," argues that the state does not have any right to carry out immigration enforcement. A 2018 report by the American Civil Liberties Union (ACLU) revealed that the fear of deportation deters illegalized immigrants from reporting crimes lest they risk exposure to immigration enforcement. Further, the report's authors concluded that immigrant reluctance to report crimes or participate in court proceedings compromises the criminal justice system's ability to protect public safety. In order to examine the contradiction between illegalized people seeking protection of their basic rights and avoiding deportation, this article

examines and critiques legal scholar Joseph Carens' proposal of a "firewall" between immigration enforcement and the protection of immigrants' basic human rights. Though both the ACLU and Carens make rhetorically forceful claims for legal interventions centered around protection of illegalized people's rights, their efforts are ultimately misguided. The ACLU and Carens incorrectly conclude that the fear of deportation is what prevents illegalized people from seeking protection of their basic rights. Though helpful in many ways, the "firewalls" concept does not account for government intrusion in non-basic rights domains, which influences whether legal rights are realized in practice. To that point, this article argues that that privacy is necessary for what I call "the egalitarian demand," which requires that nation-states maintain an environment in which all people enjoy the substantive exercise of their formally granted rights. Borders are inconsistent with protecting the human dignity of illegalized people, and no useful account of protecting the rights of illegalized people, consistent with the egalitarian demand, is compatible with the existence of nation-state borders.

In the second paper, "Postconviction Removal and the Criminal Law," I argue that the very existence of deportation as a consequence of criminal conviction excludes long-term resident noncitizens from being reintegrated into the community in which they have formed ties, an important benefit of criminal law that their membership should guarantee them. The reintegration of offenders into society is a keystone principle in criminal law, and deportation renders that impossible for long-term noncitizen residents. Moreover, such an opportunity cannot be rescinded because of a criminal conviction. My contention is that, for all noncitizens, once they have become members of the society in which they have formed ties, then the state is bound to give the noncitizen the benefits of membership, a necessary part of which is the right to be reintegrated into the society.

The third paper, titled "Streamline: Illegalization, Emergency, and the Enemy Criminal Law", argues that initiatives such as Operation Streamline represents an alternative, "enemy" criminal legal system designed to mark its targets as illegal. Such a system is a clear instance of illegalization, which I define as state practices of criminalization that use immigration enforcement as tool of social degradation. "Illegalization," and its sister term "illegalized," denote legal and social processes by which illegalized people are placed outside of the law yet nevertheless are subject to it. I utilize the work of Carl Schmitt, whose conceptions of sovereignty, the state of exception, and the state of emergency are important in how I set up the problematic of the paper. I then use the work of Elaine Scarry to make explicit the link between sovereign claims of emergency and corresponding suppression of procedure. When emergency is mobilized against enemies of the state, a new legal regime is built to deal with them: that of the "enemy criminal law." I apply the concept of the enemy criminal law and unify it with the concept of illegalization,

which I define as state practices of criminalization that use immigration enforcement as a tool of social degradation. I then apply the unified analysis to two enforcement programs: Operation Streamline and Title 42. Both of these programs involve the suppression of legal process but also are premised on the migrant as a potential enemy. Though this argument uses examples drawn from the U.S. immigration apparatus, the analytical potential that the illegalization framework possesses presents opportunities for examining other political environments and their unique problematics *vis-à-vis* variegated citizenship.

Through this dissertation, I aim to show that illegalization is much more than a punitive aspect of immigration enforcement, and its nonrecognition as punitive is one of its most dangerous aspects. Illegalization's surprising compatibility with liberal democratic states means that such states can exist ostensibly in a way true to their values and nevertheless place the illegal alien well outside its sphere of concern but well within its sights.

CONTRIBUTIONS AND CONCLUSION

This dissertation's main contribution is an original account of illegalization that incorporates the harm of illegalization, the law's central role in furthering it, and rights' incapacity to articulate or remedy the harm. This dissertation contributes to scholarly understandings of crimmigration by stating in clear terms its operating logic. The legal scholar César Cuauhtémoc García Hernández speaks of a tripartite definition of immigration enforcement: the criminalization of immigration, the immigration consequences of a criminal conviction, and the use of criminal legal enforcement tactics in immigration enforcement. The use of criminal legal tactics in immigration enforcement is more than misuse or a failure of the process; it is a successful case of affliction through degradation. These three facets of crimmigration are significant because they operate in service of illegalization. The reason why criminal law is so intimately connected with immigration enforcement is because the methods of the criminal law are uniquely suited to degradation.

This project also represents a novel relationship between rights language ostensibly used in service of illegalized immigrants. My account escapes the limitations that rights language imposes, which makes it a better framework to think about the possibilities that come with addressing illegalization. This dissertation is a work grounded in non-ideal theory. Non-ideal theory is defined as a theory that both presupposes the fact of injustice but also seeks to set out concrete actions that move us to a more just world.[35] Rights will not do that. A right to migrate entails a world in which some people cannot move freely across borders. We would not need

[35] Kevin M. Graham, *Non-Ideal Moral Theory*, in ENCYCLOPEDIA OF GLOBAL JUSTICE, (D. K. Chatterjee ed., 2011)

a right to clean water if everyone had access to clean water. When states or corporations deny people access to clean water, they harm those people. When border patrol agents rip children from their parents, they harm them beyond repair. But these harms are not so because they are a violation of rights, but because they harm that which is sacred in every human. For this project, it is not enough to say that the rights of the illegalized have been violated, but instead to interrogate the very idea of being illegalized.

My argument, if correct, has various important contributions in the project of ending illegalization and proposes concrete actions in the near term as well as articulating a larger normative position. Conversely, I want to argue that the noncitizen statuses that the state places upon people must come with a baseline set of protections identical to those that citizens enjoy. For example, states cannot create new criminal categories as ways to deport people or prevent noncitizens from regularization. Procedural interventions such as these would not be a panacea but would represent a material improvement in the lives of noncitizens. My argument would also mean that there ought to be firewalls that prevent some kinds of collaboration with non-immigration agencies as well as collaborations between federal immigration enforcement and sub-federal law enforcement bodies, such as state and local police. This project also has implications for the practice of criminal law. There are certain prosecutorial practices that are targeted to afflict the illegalized. Prosecutors often leverage removability, something I argue is unjust and would violate firewalls. The point here is that all who are going through the criminal legal process ought to be similarly situated and ought to be regarded in the same way for the same offenses. Further, given the absence of the very principles that undergird the criminal law in immigration law, noncitizens are forced to make a Faustian bargain that itself may not obtain by the time their sentence is completed. Issues of practicality with regard to plea bargaining and the prospect of removability arise.

To close, I believe that movement is a basic fact of human existence and a foundational building block for human flourishing. And when movement is couched in the language of difference, then we call it migration. When it is further limited by borders and the violence required to sustain them, the response is an affirmation of a "human right to freedom of movement," a well-meaning yet faint liberal attempt at remedying an injustice it is incapable of describing. In a just world, when we affirm movement's rightful place in the course of human life and the life of the communities of which they are a part, we will think it as absurd to talk of a human right to free movement as we do for a human right to breathe.

NOWHERE TO HIDE: RIGHTS, PRIVACY, AND THE IMPOSSIBILITY OF BORDER ENFORCEMENT

Joel Sati*

ABSTRACT

In this article I argue that the state does not have any right to carry out immigration enforcement. I make this argument in response to a 2018 report by the American Civil Liberties Union (ACLU) which revealed that the fear of deportation deters illegalized immigrants from reporting crimes lest they risk exposure to immigration enforcement. Further, the report's authors concluded that immigrant reluctance to report crimes or participate in court proceedings compromises the criminal justice system's ability to protect public safety. In order to examine the contradiction between illegalized people seeking protection of their basic rights and also avoiding deportation, I examine and critique legal scholar Joseph Carens' proposal of a "firewall" between immigration enforcement and the protection of immigrants' basic human rights.

Though both the ACLU and Carens make rhetorically forceful claims for legal interventions centered around protection of illegalized people's rights, their efforts are ultimately misguided. I contend the ACLU and Carens incorrectly conclude that the fear of deportation is what prevents illegalized people from seeking protection of their basic rights. Though helpful in many ways, the "firewalls" concept does not account for government intrusion in non-basic rights domains, which influence whether legal rights are realized in practice. To that point, I argue that privacy is necessary for what I call "the egalitarian demand," which requires that nation-states maintain an environment in which all people enjoy the

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substantive exercise of their formally granted rights. I maintain that borders are inconsistent with protecting the human dignity of illegalized people, and that no useful account of protecting the rights of illegalized people, consistent with the egalitarian demand, is compatible with the existence of nation-state borders.

INTRODUCTION

A 2018 report[1] by the American Civil Liberties Union (ACLU) revealed that the fear of deportation deters illegalized[2] immigrants from reporting crimes.[3] Collecting survey responses from law enforcement, prosecutors, judges, survivor advocates, legal service providers, and court staff,[4] the report's authors concluded that immigrant reluctance to report crimes or participate in court proceedings compromises the criminal justice system's ability to protect public safety.[5] The ACLU released this report at a time when the Trump Administration expanded Immigration and Customs Enforcement (ICE)'s presence in courthouses across the country, resulting in a higher number of courthouse arrests by ICE.[6] This development had a chilling effect on immigrant participation in investigations and criminal proceedings; for example, the report cites thirteen separate cases of women in Denver, CO who refused to participate in domestic violence proceedings against their abusers upon release of a video of ICE officers waiting in the courthouse hallways.[7] The ACLU report concludes that the militarization of the immigration system has thus created an excruciating bargain: the fear of deportation means that immigrants forgo seeking justice, even against their abusers or wrongdoers.[8]

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[1] Press Release, American Civil Liberties Union*, New ACLU Report Shows Fear of Deportation is Deterring Immigrants from Reporting Crimes* (May 3, 2018), https://www.aclu.org/press-releases/new-aclu-report-shows-fear-deportation-deterring-immigrants-reporting-crimes.

[2] See Joel Sati, *Noncitizenship and the Case for Illegalized Persons*, BERKELEY BLOG (January 24, 2017), https://blogs.berkeley.edu/2017/01/24/noncitizenship-and-the-case-for-illegalized-persons.

[3] RAFAELA RODRIGUES, ALINA HUSSAIN, AMANDA COUTURE-CARRON, LESLYE E. ORLOFF & NAHWAL H. AMMAR, *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey*, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW, (May 3, 2018), https://niwaplibrary.wcl.american.edu/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf.

[4] ACLU, *supra* note 1. According to the ACLU Report, they collected survey responses "from 232 law enforcement officers in 24 states; 103 judges, three court staff, and two court administrators in 25 states; 50 prosecutors in 19 states; and 389 survivor advocates and legal service providers spread across 50 states."

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Such a chilling effect is not limited to illegalized people only. Illegalized people live in mixed-status households, and citizen relatives have been unwilling to participate in investigations or

It is this problem, that of illegalized people deciding between seeking protection of their basic rights or avoiding deportation, on which Joseph Carens focuses when arguing for a firewall between enforcement of immigration law on one hand and basic human rights on the other. Carens argues that democratic states should "establish as a firm legal principle that no information gathered by those responsible for protecting general human rights can be used for immigration enforcement purposes."[9] Such a principle would "guarantee that people will be able to pursue their human rights without exposing themselves to arrest or expulsion."[10] Carens' central case is that of a survivor of sexual assault[11] who, after seeking medical help, was arrested and placed in deportation proceedings.[12]

Though both the ACLU and Joseph Carens make rhetorically forceful claims for legal interventions, their efforts are ultimately misguided. I contend the ACLU and Carens incorrectly conclude that the fear of deportation is what prevents illegalized people from seeking protection of their basic rights. I instead argue that both the fear of deportation and immigrant reluctance are two effects of a deeper underlying cause: violations of privacy. In developing my own account of protections for illegalized people, I make two claims: first, that privacy is a necessary component of liberal democracy; and second, borders are incompatible with liberal democracies. Borders require surveillance, and surveillance undermines the possibility of honoring the rights that liberal democracies assume all residents hold. Given the duties that the liberal state has to all who are present within the nation-state, a legitimate nation-state cannot claim a right to control its borders.

The grounding of my argument comes from what I will call the *egalitarian demand*. The egalitarian demand posits that an environment that precludes people from exercising their rights essentially creates an environment in which those rights cease to exist at all. Such grounding is an integral part of liberalism itself. The

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court proceedings for fear of exposing an illegalized relative. See Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, POLICYLINK at 14–16, (May 7, 2013), https://www.policylink.org/sites/default/files/insecure_communities_report_final.pdf. These effects are part of what the Southern Poverty Law Center called the "Trump Effect." See Maureen B. Costello, *The Trump Effect: The Impact of the Presidential Campaign on Our Nation's Schools* SOUTHERN POVERTY LAW CENTER (Apr. 13, 2016), https://www.splcenter.org/sites/default/files/splc_the_trump_effect.pdf.

[9] JOSEPH CARENS, THE ETHICS OF IMMIGRATION 133 (2013).

[10] *Id*. at 133.

[11] Both the ACLU report and Joseph Carens use examples of abused women as central examples for their arguments, both of which seek to place law at the forefront of protecting the rights of people including the marginalized. Though the examples do have shock value, the theoretical and practical shortcomings of the views ostensibly supported suggest that the well-being of the women is not a priority. I thank Aya Gruber for this observation.

[12] CARENS, *supra* note 9.

liberal nation-state has a duty to protect the dignity of all who are present in the nation-state. The egalitarian demand only obtains when all people can exercise their formal rights, a condition necessary to human flourishing. To Carens' account I add the important amendment that privacy is central to operationalizing firewalls. Because the egalitarian demand protects dignity and autonomy, privacy is a necessary condition for it.

This paper proceeds as follows. Part I introduces the Firewall account which draws from the work of Joseph Carens and the ACLU report above. The Firewall account posits that illegalized people forgo pursuit of their basic rights because they fear that the pursuit will likely expose them to immigration authorities. Situations where people are compelled to forgo rights protections is bad for the state because the state has a duty to protect the rights of everyone in its territory, and it cannot do that if people are scared to exercise them. People's fear of exercising their basic rights compromises the state's ability to protect everyone's rights through social ends such as public safety. At the foundation of the Firewall account is what I call the egalitarian demand, which requires that the state ensures that all inhabitants, even those without status, can exercise the rights formally entitled to them.

I then end the section by offering my critique of Carens' account and reject the idea that firewalls should be limited to basic rights. As an illegalized person myself, I can say that the fear of deportation imbricates every aspect of my life—not just the relatively narrow cases that might be deemed 'basic rights', but this fear derives from a larger problem related to privacy, or something. I am not negating that illegalized people's fear prevents them from having basic rights, but rather that their fear is indicative of a larger problem related to the right to privacy. Though I agree with Carens that formal rights without the environment to enjoy them are useless, I argue that his conception of firewalls fails in part because it would be impossible to apply in any meaningful way. Carens' account not only applies to basic rights, which is itself a limited category, but is only relevant to a very specific point in time and space. Given that the pursuit of basic rights may only be a small part of illegalized people's daily lives, Carens' conception of firewalls would still leave enough of the illegalized person's existence untouched to render the benefit of basic rights all but useless.

In Parts II and III, I explore the impacts of privacy violations on illegalized people. In Part II, I contend that violations of privacy inhibit illegalized people's ability to form the identities necessary to exercise rights in the way the egalitarian demand requires, and in Part III I argue that violations of privacy inhere in their legibility to immigration enforcement through information-sharing practices among institutions in rights and non-rights domains.[13] This institutional focus

[13] Let me first clarify what a rights domain is. A domain is the set of institutions and entities that are relevant to protecting the right. Take healthcare for example; the right to healthcare has a domain that includes things like healthcare providers, institutions, buildings, etc.

aligns with my definition of the egalitarian demand and emphasizes the importance of the environment in which people can or cannot exercise the rights to which they are entitled. I focus on two environmental aspects: the kinds of data collected by non-immigration enforcement entities and the extent to which non-immigration enforcement agencies engage in immigration enforcement activities. By spelling out the scope of contemporary immigration enforcement apparatus, I demonstrate that the intrusiveness of immigration enforcement involves violations outside of basic rights and reveals other moral concerns. And so, it is worth broadening the nature of the explanation. Basic rights violations can add urgency to the problem, but the problem is broader in that it involves non-rights domains. My point here is that, if we care about "basic rights," then we must care about protecting people's activities and pursuits that we don't regard as "basic rights" ("non-rights domains") because of the latter's impact on basic rights.

In Part IV, I argue that a system of privacy protections consistent with the egalitarian demand is incompatible with borders. I assert that the state's right to control its borders requires violating the privacy of those subject to removal. Because of such systemic violations of privacy—for illegalized people and citizens, people are thus unable to access the egalitarian demand. I contend that for people within a nation-state to be able to exercise their rights, no one should be rendered deportable. And in Part V, I consider and respond to objections.

To understand the stakes of this paper, I take you back to 2011. Joaquín Luna had just graduated high school in his hometown of Mission, Texas.[14] He was one of the millions of undocumented immigrants who reside in the United States. His family moved with him to the United States from Ciudad Juarez Alemán in Mexico when he was six months old. Though he was aware of his undocumented status for some time, his situation became more pressing as he approached adulthood, especially for someone with college ambitions.[15] Though Texas provided in-state tuition for undocumented immigrants, he nevertheless worried that even if he did finish college, his lack of an avenue to legally secure employment meant that he had no opportunities even with a college degree. Other states were not much better on this score, if at all. He paid attention to the news, becoming angry that other states like Alabama and Arizona passed anti-immigrant bills. He wondered how legislators could use the law to destroy so many lives. When the federal DREAM Act, which would have given undocumented immigrants with higher education ambitions like him a path to citizenship, failed to pass, it devastated him. It was in this sociopolitical milieu that Joaquín spoke of a "wall" that blocked out his future

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[14] Ed Pilkington, *Joaquin Luna: Undocumented Migrant Whose Lack of Hope Drove Him to Suicide,* THE GUARDIAN (Nov. 29, 2011), https://www.theguardian.com/world/2011/nov/29/joaquin-luna-immigration-texas-suicide.
[15] *Id.*

and precluded him from attaining his dreams.[16] At 9PM on November 25th, 2011, he put on what normally would be his Sunday Best: a suit with a white shirt and black skinny tie. His brother, Carlos Mendoza, would later say that he "dressed to go to God." He then died of suicide in his bathroom via a self-inflicted gunshot wound to the head.[17] He was eighteen years old.

Telling Joaquin's story and writing this article are part of a larger project to develop a systematized philosophical account of *illegalization*, which I define as *state practices of criminalization that use immigration enforcement as a tool of social degradation*.[18] I argue elsewhere in more detail about illegalization as the framework through which to examine non-citizenship, but I will discuss it briefly here to contextualize my use of it. To understand what I mean by "illegalization" and "illegalized persons," I want to analyze "undocumented." "Undocumented" was a term proposed as a less pejorative alternative to "illegal," and represented an improvement over its predecessor. Whereas "illegal" was seen to be a term that attached to the person (e.g., illegal alien), "undocumented" focused more on the circumstances in which people so labeled found themselves. That said, "undocumented" relies on an important normative assumption: not all documents are created equal, so the term is rather contradictory. As I wrote in earlier work,

> The shortcoming of "undocumented" as a term stems from the very circumstance it illuminates. Consider the following example. When DACA came out in August 2012…[applicants and their families] brought piles and piles of *documents* to satisfy DACA's evidentiary requirements. So, it is not that they had no documents; it is that they did not have the *right* ones.[19]

A strange consequence of the above analysis is that undocumented status, in this bare-bones conception, is *prima facie* consistent with the egalitarian demand. Protecting the rights of those present in the state's territory does not require any conception of legal status or lack thereof. The benefit of understanding "undocumented" and its ostensible parsimony as a concept is that many of the negative externalities associated with undocumented status are not a necessary consequence of lacking official authorization. It is one thing to lack documents; lacking documents often leads to the more dire societal and legal consequences of being portrayed as an illegal alien and living under the threat of deportation.

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[16] *Id.*

[17] Diasy Barrera, *Student Commits Suicide, Letters Reveal Worries over Immigration Status*, KGBT (Nov. 27, 2011), https://valleycentral.com/news/local/student-commits-suicide-letters-reveal-worries-over-immigration-status.

[18] Sati, *supra* note 2. Though I mention criminalization, I do not identify term only with the criminal law. The use of criminal law enforcement tactics in immigration enforcement establish that the administrative law is as important a site for illegalization as any.

[19] Sati *supra* note 2. Emphasis in original.

However, interferences with illegalized people's privacy in addition to their lack of immigration status are what illegalize them. For example, when status information becomes a requirement for access to various services and resources, lacking such documents becomes a practical impediment to living a life. And when immigration enforcement encounters few barriers in using and acting upon identifying information that undocumented people do give out, undocumented people are all but relegated to the shadows. In addition, illegalization is a concept consonant with this egalitarian demand because it focuses on the environmental factors that form the chasm between formal rights and their substantive enjoyment. That said, I will proceed to Carens' Firewall account.

I. THE FIREWALL ACCOUNT

A. The Firewall Account and Basic Rights

In his book *The Ethics of Immigration*, the political philosopher Joseph Carens examines what duties liberal democratic states owe to those who are present in their territory in violation of their immigration law.[20] He assumes, as part of this project, that states have a right to control their borders, part of which is the right to deport noncitizens.[21] The problem Carens is concerned with is whether the state can have these rights while protecting the rights of all who are present within its territory. Even though the state has a right to control its borders, it nevertheless must respect the rights of everyone within the state's territory, immigration status notwithstanding.[22]

Central to Carens' view is what I call the *egalitarian demand*. At the foundation of his Firewall account, Carens argues that "it makes no moral sense to provide people with purely formal legal rights under conditions that make it impossible for them to exercise those rights effectively."[23] Put simply, to have rights in name only is to have no rights at all. Cohen also makes the same point in his Marxist critique of Rawls, "Freedom and Money"[24]: it's not enough to have the formal legal right to do things like ride the subway; if you don't have money, you can't effectively

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[20] CARENS, *supra* note 9 at 13.
[21] *Id*. at 130.
[22] *Id.* at 130. "In discussing this topic, I will assume that normally the state is morally entitled to apprehend and deport migrants who settle without authorization. That is a corollary of the conventional view of the state's right to control immigration that I have adopted as a background assumption for the first several chapters of this book. However, this assumption does not preclude the possibility of moral constraints on how a democratic state may exercise its authority in dealing with irregular migrants."
[23] CARENS, *id.* at 167.
[24] GERALD ALLAN COHEN, ON THE CURRENCY OF EGALITARIAN JUSTICE, AND OTHER ESSAYS IN POLITICAL PHILOSOPHY 166-200 (Princeton University Press, 2011).

ride the subway. So liberal egalitarians must care not only about formal basic rights and liberties (law on the books) but must also care about securing the economic and social conditions so people can exercise their rights and liberties (law in action).

This difference between the formal grant of rights and its substantive exercise is not specific to Carens; it is a central tenet of liberalism. Even more restrictionist liberals who prioritize a state's right to self-determination must also concede the necessity of a firewall. For example, David Miller believes that some rights are "so important that they need to be safeguarded at all costs, regardless of whether this hinders the state in enforcing its immigration laws."[25] Drawing from the logic of territorial jurisdiction, Miller contends, requires "a state that claims authority to apply its laws to everyone within its territory" and "must also protect the human rights of all those present, whether legally or not."[26] So, even liberals who prioritize a state's right to control its borders must support policies that ensure people in a liberal democratic society can take advantage of their formally granted rights.[27] And even though Carens himself is an open borders theorist, that he engages in this exercise suggests that it is possible for the state to protect a noncitizen's basic rights and for the state to fulfill its duties to everyone while retaining the right to self-determination, operationalized through immigration enforcement.

Responding to a world with borders and enforcement, Carens argues for firewalls because he realizes that for people without status, the reason they are unable to exercise their rights is because they "are so worried about coming to the attention of the authorities that they are often reluctant to pursue legal protections and remedies to which they are entitled, even when their basic human rights are at stake."[28] Carens' central case is that of a survivor of sexual assault who, after seeking medical help was arrested and placed in deportation proceedings.[29] There are two claims implicit in Carens' arguments: the first is that the fear of deportation causes the individual to forgo their basic rights, and the second claim is that the object of the fear is their own deportation. This second claim is relevant as a matter of democratic morality because the state cannot uphold its duties if people are forced to forfeit their rights. Thus, Carens' conceptualization of firewalls as a "firm legal principle"[30] reflects the state's affirmative duty, dictated by the egalitarian demand, to ensure a person's substantive exercise of the rights to which they are formally entitled. The way the state operationalizes this duty is through law.

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[25] DAVID MILLER, STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION 119 (2016).
[26] *Id*. at 117.
[27] David Miller, *Border Regimes and Human Rights*, 7 L. & ETHICS HUM. RTS. 1 (2013).
[28] *Id*. at 132.
[29] CARENS, *supra* note 9.
[30] *Id.* at 130.

So far, Carens and the ACLU claim that the fear of deportation negatively affects the state's ability to meet its duty to the illegalized person's pursuit of a basic right, the person whose fear it is. Implicit in the Firewall account is the further claim that forgoing rights affects the state's ability to protect the rights of others. The ACLU takes the position that the fear of deportation compromises the criminal justice system's ability to protect public safety.[31] Sarah Mehta, who authored the report, remarks that "Courthouse arrests threaten immigrants' constitutional rights and *make our communities less safe*. When members of our community are afraid to call for help, go to court, and report crimes to the police, *public safety suffers*."[32] Here, immigrants' fear of deportation is significant not just because it precludes protection of their rights, but because it also precludes the nation-state from meeting its duty to protect the rights of all. And as a practical matter, firewalls then portend important benefits for wider society. On this model, victims would be able to report crimes and participate in legal proceedings without worrying that their involvement will expose them to removal. Further, protecting people from deportation when reporting crimes would lead to fewer unsolved cases and safer communities.[33] These objectives being met would represent tangible evidence that the state would be fulfilling its duties to further social goals in support of human flourishing.

It is important to note that Carens is not making a *de novo* argument for firewalls. Carens claims that for all liberals, there are some rights that a state ought to grant to everybody within their jurisdictions regardless of immigration status.[34] Carens does provide a few examples, such as the right to personal security (a right to protection against murder, assault, and robbery), freedom of thought, freedom of religion, and freedom of speech.[35] Whatever the right is and wherever it comes from, if a right meets that standard, then liberal democratic states must commit to its realization. There are basic rights granted to all people, and states must ensure those rights are guaranteed in practice (i.e., realizing the egalitarian demand).[36]

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[31] ACLU, *supra* note 1.

[32] *Id*. Emphases my own.

[33] Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation.*, N.Y. TIMES (June 3, 2018), https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html.

[34] CARENS, *supra* note 9 at 93. "I don't want to attempt to provide a precise list of these rights but merely to establish that there are some rights that everyone acknowledges ought to be granted by the state to any person within its jurisdiction."

[35] CARENS, *supra* note 9 at 93.

[36] That said, Miller is reluctant to go further. Illegalized people are only entitled to basic human rights. Because illegalized people are present without authorization, their interaction with domains outside of basic human rights will expose them to immigration enforcement. If an illegalized person seeks emergency healthcare, the liberal nationalist accepts the presence of a firewall. But if an illegalized person gives identifying information or seeks enrollment in grade school, the tension between Carens and a liberal nationalist becomes clearer. Suppose that the liberal nationalist takes the notion of basic human rights to refer only to those a person is entitled to because of their

Carens himself uses both "general human rights"[37] and "basic rights,"[38] both of which denote a right so fundamental that the state is duty-bound to protect it. Furthermore, the "basic rights" and "non-basic rights" is Carens' distinction, which I will use in framing my critique to come. By highlighting basic rights and the egalitarian demand as basic commitments of liberalism, Carens positions firewalls as stemming from commitments liberals already hold. He has a simple task: if Carens can make a compelling argument about a particular domain being a basic right, then liberal democracies must protect that right. Such a task is also appealing to groups like activists, legislators, direct service providers, and the like; appealing to a domain's status as a right is something that carries great political purchase. Moreover, giving the hitherto marginalized people access to something as powerful as rights language can, on this view, play a critical role in undoing (in part) such marginalization.

To summarize: The Firewall account holds that the fear of deportation prevents illegalized immigrants from receiving protection of their basic rights. Firewalls, in response, would be legal principles that allow illegalized people to enjoy the rights to which they are formally entitled. The fear of deportation is presented as the cause with two effects: it prevents illegalized people from pursuing basic rights and prevents liberal democratic states' ability to protect those rights. To the extent there exists a discrepancy between the formal grant of rights and their substantive exercise, such a discrepancy is important because it bespeaks an existing fear on the part of illegalized people. Firewalls allow the state to meet its duties to the individual, by allowing them to pursue their rights without fearing deportation, and to the community at large because people being able to exercise their rights means that the state has fulfilled its duties to the community as such. Combining the vantages of individual and institution, firewalls represent an "interest convergence" of sorts in which facilitating the pursuit and protection of basic rights allows for people to substantively exercise their formally granted rights.

Unfortunately, the Firewall account's simple appeal is its undoing. In what follows, I reject basic rights as the main site for firewalls because such an approach takes for granted both the law's ability to protect people's rights and does not question how the law has fallen far short of the egalitarian demand. I do not disagree with the idea that the individual's fear of deportation is what precludes illegalized people from pursuing their basic rights, but rather that their fear is part of a larger

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humanity. The state is tasked with protecting them, though they did not "create" these rights. Anything outside of that is reserved for citizens and those with authorization. But such a position is untenable. Though basic human rights are necessary to participate in a liberal democracy, they are insufficient. There are legal rights, such as freedom of speech or religion, which are not intelligible without legal enactment.

[37] CARENS, *supra* note 9 at 93.

[38] *Id*. at 94.

preclusion of exercising rights—that of privacy. The fear is real, it exists, I have felt it, and so have other illegalized people—but it is not the primary issue. It is part of a larger issue: systemic violations of privacy in the name of border enforcement.

B. Interrogating Law's Place

According to the Firewall account, illegalized people forgo the pursuit of basic rights because they fear that immigration enforcement authorities will become aware of their status and seek to remove them. When illegalized people do not pursue basic rights because of this fear, the account proceeds, it compromises the state's ability to fulfill the duties it owes to everyone in its territory as a matter of the egalitarian demand. And if the state fails in its duty to some, such a failure compromises its duties to all. Though a compelling account at first glance, the Firewall account fails to meet the egalitarian demand by misunderstanding the central issue: it is not just that illegalized people forgo rights because they fear deportation; rather, forgoing rights and the fear of deportation result from a social context in which almost any interaction exposes one to deportation. Because of this, I argue that the liberal democratic state cannot claim a right to deport anybody. To establish my argument, I find the following faults with the Firewall account.

The first fault of the Firewall account is that it ignores the law's place in creating the fear of deportation as the central object of its analysis. The "fear of deportation" analysis does not account for the harms that the legal system exacts on those who seek its protection and takes for granted its effectiveness in protecting the rights of marginalized people. The ACLU report uses the example of women who have suffered from domestic violence to make the claim that protecting victims from deportation is important for *the law's* ability to protect public safety.[39] But as feminist scholars have shown in work on domestic violence, maintaining the assumption that the law can protect the rights of the marginalized is incorrect at best and pernicious at worst. My worry is that both Carens' and the ACLU's conclusions reflect a value judgment that marginalized people should turn to the law "rather than shelters, community organizations, counselors, or other [non-legal and non-carceral] supports—for protection."[40] The suggestion is that, when her cooperation with police sends her abuser to prison and/or deportation proceedings, we can look back and say both that she is able to substantively enjoy her right to

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[39] ACLU, *supra* note 1. Recall the six groups surveyed in the report: law enforcement, judges, prosecutors, survivor advocates, legal service providers, and court staff. The focus on the surveyed groups is overwhelmingly in favor of those closely tied to the legal system and those who see remedies for marginalized groups as occurring through the legal system.

[40] Leigh S. Goodmark, *Law Is the Answer? Do We Know That for Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004) at 22.

safety/bodily integrity and that the public is safer for it. There is the assumption that the illegalized person has the agency to seek basic rights protections and that the scope of the protection she seeks is hers, either alone or primarily.

However, prioritizing legal responses does not consider how legal institutions, ostensibly there for women, take away their autonomy and expose them to further harm. As Leigh Goodmark argues, although the law presents itself as the tool to stop abuse and keep battered women and their children safe, pursuing legal avenues in response to domestic violence can give the abuser "a forum for terrorizing his victim and…the tools to perpetuate their abuse."[41] The state's intrusive involvement in the name of helping marginalized and protecting public safety in fact "deprived battered women of the right to make choices that will profoundly affect their lives."[42] The pursuit of rights is often accompanied with a relinquishing of agency, and that is a trade people are understandably reticent to make.

Furthermore, the pursuit of basic rights, insofar as they require interactions with the welfare state and other institutions, occurs in a context where the state assumes a right to be invasive in its interactions with the most marginalized among us. As will be apparent later in the paper, the extent of information that the state feels entitled to collect presents a practical barrier to whether illegalized people will seek basic rights. In her scholarship on public assistance, Khiara Bridges argues that the right to privacy for indigent, marginalized women is abridged when the state interferes in their private matters.[43] Bridges focuses on indigent pregnant women who seek to enroll in New York State's Prenatal Care Assistance Program (PCAP), a program that provides prenatal and other health services to women and teens in the state.[44] Women enrolling in PCAP are asked about their "sexual histories, experiences with substance use and abuse, histories of sexual and domestic violence, and strategies for preventing the conception and birth of more children."[45] These questions, according to Bridges, "far exceed the purview of a concern about the material conditions in which newborn children can expect to be placed."[46] Women who enroll in public prenatal care programs do not have an option but to answer these questions because, as indigent women, they must be fully exposed to have a chance at receiving perhaps the only care for which they are eligible.[47] Such a hegemonic power relationship is exacerbated when factoring in immigration

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[41] *Id*. at 33.
[42] *Id*. at 31.
[43] Khiara M. Bridges, *Privacy Rights and Public Families,* 34 HARV. JL & GENDER 113, 121 (2011).
[44] *Prenatal Care Assistance Program (PCAP)*, RICHMOND UNIVERSITY MEDICAL CENTER, https://www.rumcsi.org/services/obstetrics-and-gynecology/prenatal-care-assistance-program-pcap/.
[45] Bridges, *supra*, note 39, at 163.
[46] *Id.* at 163.
[47] *Id.* at 127.

status. For these women, seeking public services presents an unenviable situation: having to confess their immigration status during interviews. As Bridges writes:

> That the woman is residing in the country "illegally" is usually admitted when the woman, faced with her lack of official documentation in the form of a driver's license or state ID card, asks how she will be able to establish her identity for the purposes of the Medicaid enrollment process. It is an understatement of the highest degree to describe this as a frightening admission for women, pregnant or not, who are residing in the country without documentation.[48]

The woman is forced to out herself, an action with severe consequences that stand to destroy the very family that the law is supposedly protecting through the protection of one's rights. These fears do not even include how reporting instances of domestic violence means that one's immigration status and personal business have become public. That a firewall would protect illegalized people's basic rights without exposing them to deportation is moot when the data collected can expose members of their community. With this loophole, the state can seek information about others' immigration status under the guise of protecting the rights-seeker.

Further, the state's unwillingness to defer to these women in how to best care for their families "may be interpreted as manifesting a hegemonic discourse within which the failure to realize economic self-sufficiency justifies distrust, suspicion, and apathy."[49] Poor people, according to Bridges, are deemed unable to create or raise upstanding citizens. Thus, in the search for public assistance, the state is entitled to interfere with their privacy as a condition of providing public assistance.[50] One's supposed moral fitness, or lack thereof, becomes the pretext for state power and interference.

If indigent women who have citizenship status have no ability to contest the invasiveness of the state, one can only imagine the position in which illegalized people would find themselves. The state's widespread collection of information will implicate the safety of people other than the rights claimant, which is an issue that the Firewall account should recognize and be more responsive to. The Firewall account exists along the following terms: if X is a right, then a rights-holder should be able to claim that right; and extrinsic considerations like status should not get in the way. However, in practice, status will inevitably get in the way.

C. Firewalls in Practice

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[48] *Id.* at 130-131.
[49] *Id.* at 152.
[50] *Id.* at 123.

To paraphrase Catharine MacKinnon, if something is good in theory yet bad in practice, it is not good in theory.[51] There are three practical difficulties that affect firewalls. I present four critiques along this line.

My first critique of Carens' Firewall account highlights an assumption it suggests: the idea that it is the fear of *their own* deportation that leads illegalized people to forgo pursuit of their basic rights.[52] After presenting the chapter's central case of the woman who was sexually assaulted, Carens asks "Should the police have reported her to immigration authorities, as they did, or should she have been able to report the crime against her *without fear of being made subject to deportation*?"[53] Carens' framing focuses on situations in which the illegalized person seeks protection of *her* rights in exchange for assurances that interaction with the state will not lead to *her* deportation. But the fear of others' deportation is relevant as well. Take the ACLU report, for example; when it comes to illegalized, battered women reporting their (often) illegalized abusers, there is an assumption that the removal of the abuser from the home or the removal of the abuser from the country will put her in a better position to have her rights protected and will protect public safety. However, what will happen is that someone will be deported: the abuser. And as a result of that, the woman stands to lose a source of economic support for her and her family, the loss of community support, and childcare.[54] When women ask that their husbands not be arrested or taken away from their families, they are seen as "suffering from learned helplessness, as recalcitrant, or as dishonest."[55] Carceral responses to domestic violence do not regard the woman as a capable knower of the complexity of her situation.[56]

The second critique is the indistinct process of establishing what constitutes a basic right. Waiting until something is established as a right such that it triggers firewall protections is an intensive one. The task laid out by the original Firewall account was that if a domain is established as a rights domain, then there must be a firewall. The contrapositive is also true: if a domain does not have a firewall, then it is not established to be a rights domain. But what does it mean for a domain to be "established"? It could mean that it is an accepted legal norm that a domain is a

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[51] Catharine A. MacKinnon, *From Practice to Theory, Or What Is a White Woman Anyway? in* RADICALLY SPEAKING: FEMINISM RECLAIMED 45-55 (Diane Bell and Renate Klein eds., 1996).

[52] Not only do I take issue with the "fear of deportation" analysis on the merits, I want to interrogate both Carens and the ACLU's use of battered women as examples; I also want to take responsibility for advancing my own argument using these examples as well. In the case of the women in Denver as well as the woman in Carens' example, the idea is that these examples have a deep rhetorical force. That said, it is important to think about where that force comes from. Part of using these examples is to clearly articulate the stakes.

[53] CARENS, *supra* note 9 at 133. Emphasis mine.

[54] Goodmark, *supra* note 36.

[55] *Id*. at 21.

[56] MIRANDA FRICKER, EPISTEMIC INJUSTICE: ETHICS AND THE POWER OF KNOWING (2007).

basic right, or it could mean that political philosophers at elite schools agree that a domain is a right. But the process of establishment is not an instant process. It will require that marginalized people find the language, articulate it in the resource-intensive political process, have their claims be acceptable and then accepted, and have that acceptance lead to tangible effects. But politics takes time, and time is of the essence. If it is required that something is a rights domain before people can make moral claims against the state when it interferes with that domain, then democratic morality lacks the moral language to call out wrongs that the state carries out in non-rights domains. If immigrants and their communities must wait until a domain is considered a right or for legal institutions to act, families will be broken apart, children will be separated from their parents, communities will be overpoliced, and people will die.

Finally, a third critique is that there are likely to be important factual difficulties when determining whether someone is pursuing a right. Even when firewalls are implemented in basic rights domains, it would be nigh impossible to determine whether and when someone is in the process of pursuing a right.[57] To see why, suppose someone seeking protection of her basic right to healthcare drives to the hospital only to get stopped before she gets there. Would her appeal that she is pursuing a basic right be successful? Or suppose she runs to the hospital but passes by a courthouse, where immigration enforcement agents are known to make apprehensions. If an immigration enforcement officer stops her because they suspect her of being in the country illegally, can she appeal to the fact that she is headed to the hospital?[58] I worry that if a particular domain is not articulable as a right, then the case to institute protections within that domain fails as a result, despite that domain's importance to both illegalized people and the egalitarian demand. As an example, consider ICE officers stationed in courthouses. If ICE were instead some distance outside of the courthouse, they could wait until illegalized people leave the courthouse before detaining them. In this case, the benefit of eliminating immigration enforcement from courtrooms will be undercut if not negated by immigration enforcement's lying-in-wait until the right has been pursued.

Whatever right that the pursuit of remedies through the legal system could possibly suggest, firewalls do not do what they claim to do: ensure that those rights are realized in practice. These critiques not only demonstrate that firewalls in a

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[57] Additionally, his definition would require an almost idealized interaction between ICE/CBP and illegalized people, when immigration officers are fatefully under-trained especially in regard to asylum law and often act extrajudicially on their own racialized biases—the law, especially immigration law, does not exist outside of these systems. See MARTINEZ, D. E., HEYMAN, J., AND SLACK, J. (2020) 'Border Enforcement Developments Since 1993 and How to Change CBP.' *Center for Migration Studies of New York.*

[58] And can we be sure that immigration enforcement agents are able (assuming they are willing) to adjudicate these *ad hoc* claims?

bordered world do not meet their purpose, but they also show that Carens and the ACLU misunderstand why illegalized people forgo rights in the first place. Illegalized people are not doing so because they fear deportation, but because deportation exists. An account that seeks to protect illegalized people should better understand its operation.

D. Conclusion

My goal with offering a critique of the Firewall account is, ultimately, to strengthen it. The way to do this is to emphasize the connection between the prospect of an illegalized person's deportation and its effects on whether and how all people pursue their rights. For example, given the prevalence of mixed-status families and the extent of information that is often collected when pursuing basic rights, citizens may also be reticent to pursue their rights for fear that they will expose members of their family or community to immigration enforcement. This insight is reminiscent of the ACLU's concern that immigrant reluctance to engage with the criminal justice system makes the community less safe. The problem the Firewall account diagnoses is that illegalized people forgo rights because they fear being deported, and its remedy is the prescription that those present without status should have their basic rights protected without being exposed to immigration enforcement when they claim their basic rights.

However, as my critique above has shown, immigration enforcement has not only monopolized the world of basic rights, but also the world outside of basic rights as well. Focusing on non-rights domains is important because it is not important whether a domain is a rights domain; rather, a domain is important relative to the conditions in which it exists and the effects of those conditions on people's ability to exercise their rights. It is therefore helpful to redefine firewalls as a principle against the collection of information about immigration status, regardless of if the information is that of the rights claimant.

Despite the friendly amendment, I find that the application of firewalls only in basic rights domains is incomplete. This is because there is no qualitative difference between information that basic rights domains collect as opposed to that which non-basic rights domains collect. The singular focus the Firewall account places on basic rights domains does not adequately account for the reality of illegalized people's exposure to deportation in non-rights domains. Given that it is practically impossible to separate rights and non-rights domains, if non-rights domains can require or otherwise collect status information as a condition of access, then firewalls become useless. But my aim in this paper is to go beyond amending the firewalls argument, and to argue that firewalls cannot be realized so long as there is border enforcement, because illegalized people cannot have basic rights in the face of state surveillance connected to border enforcement.

In the next section, I argue that the focus on protecting basic rights makes it difficult, if not impossible, to articulate wrongs that occur in non-rights domain as well. The Firewall account ignores that immigration enforcement in non-rights domains influences whether illegalized people can enjoy their basic rights. Border enforcement requires surveillance, and non-rights domains provide ample opportunity for immigration enforcement to detect, detain, and deport illegalized people. The existence of such an expansive immigration enforcement apparatus, I advance, presents a practical barrier between illegalized people and the protection of their basic rights. Inherent to Carens' assumptions is that the availability of information required for deportation will be halted by the supposed firewall. In practice, however, the data sharing tendencies in our increasingly technological world provide very little privacy. Illegalized people are aware that immigration enforcement uses any tools available, often through third parties, to obtain information that could lead to their deportation. This critique demonstrates a hole in Carens' understanding of how firewalls would work in practice and is further explored in Part II of this paper in relationship to privacy.

II. NON-BASIC RIGHTS DOMAINS: ENFORCEMENT THROUGH SURVEILLANCE

As I demonstrated in the previous section, the Firewall account attempts to impose limits on how states enforce borders by demanding that states protect the rights of illegalized people. It contends that, in basic rights domains, the state cannot protect the rights of illegalized people when information in those domains is passed on to immigration enforcement. However, focusing on basic rights does not deal with the prospect of deportation in non-rights domains, which itself influences whether illegalized people pursue basic rights. Two things are important about non-rights domains. First, non-rights domains establish that full protection from deportation is impossible because immigration enforcement is how states operationalize self-determinations. And if rights domains are off-limits, then for self-determination to mean anything, states will have to get information from somewhere. Second, having protections that are intelligible only through rights domains absent consideration of non-rights domains would compel immigration enforcement to work around them in exercising their right to self-determination.

In this section, I argue that surveillance in non-rights domains creates conditions that make it impossible for people to exercise their rights. The egalitarian demand requires that all people are agents who can exercise rights. Just as it makes no sense to think of people having rights under conditions that make it impossible to exercise those rights, it makes no sense to think of people as having rights under conditions that make it impossible to be an agent who can exercise rights.

Moreover, it requires that the state meet its duties to protect the rights of all who are in its territory regardless of immigration status.

I argue that this places requirements on the kind of information that institutions collect, as well as requirements on whether (and, if so, how) to share that information and with whom. To take the project of protecting illegalized people's rights seriously is to question the propriety of deportation itself. I argue that the state cannot meet the egalitarian demand while retaining a right to self-determination. For borders to be legitimate, they must not compromise illegalized people's ability to exercise their rights or relieve the state of its duty to protect the rights of all who are present in its jurisdiction. However, given what they entail, I argue that borders are incommensurable with an environment whereby everyone within a territory can exercise their rights.

A. Vicinity to Basic Rights

For example, consider a possible response which argues that there is a right closely connected enough to the domain that explains why interfering with the domain is wrong. I interpret Carens to have a conception of wrongness that I derive from the value underlying firewalls: if a governmental action interferes with the substantive enjoyment of a right one formally possesses, such action is wrong. For example, illegalized people not being able to obtain a driver's license may prevent someone from claiming a basic right like healthcare (either because the provider is too far away, or they worry about being pulled over, etc.). Driver's licenses for illegalized persons are connected to the basic right such that interference with driver's licenses jeopardizes the right. And driver's licenses do not need to be connected to healthcare in every instance; the possibility that a driver's license facilitates protecting the basic right to healthcare is enough.[59] The wrong-making feature of interference here, the argument goes, would be its connection to a right.

In response, we cannot conclude from any connection between a non-rights domain and a basic right that the reasons why a particular interference is wrong are moral ones. Though access to healthcare may furnish an important *policy* reason to give illegalized people driver's licenses, it does not explain the wrongness that would remain about interference with a policy domain even if the policy reasons did not exist. Said differently, if we want to argue that these interferences are wrong, it is not clear how basic rights figure into *why they are wrong*. More importantly, we risk entering absurdity if we worry about whether the domain interfered with is a right—basic, legal, or otherwise. Are cellphones a basic right? Possibly. In our world though it's now almost completely impossible to gain

[59] A complication that would emphasize my critique of how this form of rights fits or doesn't fit into a liberalist perspective is that the privatization of healthcare in the United States has essentially stripped people of even the belief of healthcare as a human right.

employment without a cell phone. Maybe cell phones are not a right, but access to communication systems required for employment or access to basic services are. Whether a domain is or implicates a right is ultimately beside the point; it is not necessary to classify a particular domain as a basic right, or a right at all, to conclude that it is wrong when the government interferes with it even as it relates to people present without status. The focus of rights language glosses over the many interactions between the nation-state and illegalized people in non-rights domains. It is impossible to practically draw a line between non-rights and rights domains; people, regardless of migration status, do not live such bordered lives. Having basic rights as the justificatory basis for firewalls suggests that an immigration enforcement practice that would be impermissible when basic rights are at stake could be justified in situations where they are not.

One example demonstrates the practical danger of such an outcome.[60] In 2022, Sen. Ron Wyden called for an investigation of a collaboration between the Arizona Attorney General's office and the Department of Homeland Security in which they collected data on money transfers over $500 sent to or from Arizona, California, New Mexico, and Texas.[61] In addition, authorities collected such data on money transfers to or from Mexico.[62] By the ACLU's count, Arizona illegally obtained 145 million money transfer records.[63] According to the ACLU, when anyone in the United States "used…Western Union or MoneyGram to send or receive money to or from one of these states or Mexico—whether to send a remittance home, or help a relative with an emergency expense, or pay a bill—a record of their transaction was deposited into a database controlled by the Arizona attorney general and shared with other law enforcement agencies."[64] The database, created in 2014, was disguised under the name "Transaction Record Analysis Center" and ostensibly created to combat drug trafficking in concert with money transfer services like Western Union."[65] There are two insights that Arizona's tracking of remittances demonstrate. The first insight is that tracking of things like remittances pay more attention to domains that are central to how illegalized people live their lives than

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[60] I am thankful to Ramón Garibaldo Valdez for alerting me to this example.

[61] Dustin Volz & Byron Tau, *Little-Known Surveillance Program Captures Money Transfers Between U.S. and More Than 20 Countries*, WALL STREET JOURNAL, https://www.wsj.com/articles/little-known-surveillance-program-captures-money-transfers-between-u-s-and-more-than-20-countries-11674019904 (last updated Jan. 18, 2023).

[62] *How the Arizona Attorney General Created a Secretive, Illegal Surveillance Program to Sweep Up Millions of Our Financial Records*, AMERICAN CIVIL LIBERTIES UNION (Jan. 18, 2023), https://www.aclu.org/news/privacy-technology/how-the-arizona-attorney-general-created-a-secretive-illegal-surveillance-program.

[63] Peter Valencia & Michael Raimondi, *ACLU Says Arizona Illegally Obtained 145 Million Money Transfer Records*, AZ Family, https://www.azfamily.com/2023/01/18/aclu-says-arizona-illegally-obtained-145-million-money-transfer-records/ (last updated Jan. 18, 2023).

[64] ACLU *supra* note 65.

[65] Valencia & Raimondi *supra* note 66.

to whether the domain is a rights domain. The second insight is that the readiness and scope with which state agencies and immigration enforcement operate in non-rights domains should emphasize that there is no qualitative difference between the kind of information that is collected in non-rights domains as opposed to information collected in rights domains.

B. The Byproducts of Borders

Borders, in my conception, generate two byproducts. The first is that borders require enforcement to be meaningful, and surveillance is required for their enforcement. Immigration enforcement is built on finding illegalized immigrants in order to deport them. Since information collection is integral to immigration enforcement, we can assume that surveillance is necessary for border enforcement. Finding illegalized immigrants occurs, in part, by collecting identifying information about them. ICE, the immigration enforcement arm of the Department of Homeland Security, presents itself as an agency whose primary purpose is immigration enforcement. On their official website, ICE writes,

> To accomplish ICE's important immigration enforcement objectives, ERO [Enforcement and Removal Operations] coordinates closely with law enforcement partners within the U.S. and around the world. One of [ERO's most notable law enforcement coordination and partnership efforts] *involves the biometric and biographic identification of priority undocumented individuals* incarcerated within federal, state, and local prisons and jails.[66]

Though the agency describes its mission as enforcing immigration law against those present without legal authorization, ICE is much more than just a law enforcement organization. In practice, ICE is a surveillance juggernaut. According to the report *American Dragnet* by Georgetown Law's Center on Privacy and Technology, ICE has scanned license photos on 1 in 3 adults,[67] has access to driving records data on 3 in 4 adults,[68] tracks the movements of drivers commuting home in cities to 3 in 4 adults,[69] and can identify 3 in 4 adults through their utility records.[70]

The second fixed variable is that the presence of borders results in legal authorization as something attached to noncitizen entry or stay. If entry does not

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[66] *Immigration Enforcement*, U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/mission; (last visited Aug. 10, 2022) (emphasis added).
[67] AMERICAN DRAGNET: DATA-DRIVEN DEPORTATION IN THE 21ST CENTURY, GEORGETOWN LAW CENTER ON PRIVACY & TECHNOLOGY (May 10, 2022), https://americandragnet.org.
[68] *Id*.
[69] *Id*.
[70] *Id*.

itself entail legal entry, and if the right to self-determination means that the state has the right to change the conditions of entry or stay, then it means that people can be excluded or removed. David Miller examines this critique when he takes issue with how Carens understands firewalls. For Carens, firewalls allow those without authorization to seek the protection of their basic rights without exposing themselves to immigration enforcement. Miller thinks that full protection from removal, even when seeking basic rights protections, is an impossible standard when considering a state's right to self-determination. Even when pursuing basic human rights, illegalized people presently face *some* exposure to immigration enforcement.[71]

For those who are present without authorization, that lack of status is currently sufficient to render one deportable.[72] Later in their mission statement, ICE asserts that their Enforcement and Removal Operation

> also enhances the impact of multi-agency task forces through its administrative authority to arrest individuals deemed a threat to public safety on their unlawful immigration status without additional criminal charges.[73]

ICE chooses to focus on "priority immigrants" but has the authority to arrest anyone just for lacking authorization and has the discretion to determine who is a priority for removal. ICE has the assets to deport, but just as importantly, they have the kind of authority that renders illegalized people deportable.

Furthermore, the information that would be collected in basic rights domains can also be found in non-basic rights domains. Intrusion in non-basic rights domains can, and often does, prevent illegalized people from enjoying their basic rights. Firewalls become easy to get around if the data ICE currently collects from hospitals were available through other avenues, say, UberEats delivery data. If such a method is open to immigration enforcement, then firewalls do not protect illegalized people from seeking protection of their basic rights.

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[71] Miller, *supra* note 25, at 21. Miller thinks that full protection from removal is impossible when considering a state's right to self-determination. But what is most important about his position is that he believes that self-determination is consistent with the egalitarian demand. Said differently, the state determining its membership is consistent with protecting the rights of everyone including those who are present without authorization. Exposure to deportation, for Miller, is not evidence that one is inhibited from pursuing their human rights; rather, illegalized people must make determinations as to whether exposure to immigration enforcement is a bearable cost of living in a state where they lack authorization. In all, Miller accepts firewalls but disagrees with Carens in that exposure to immigration enforcement is not what prevents undocumented people from pursuing their rights. See MILLER, *supra* note 25, at 120.

[72] I should clear up here that DACA status is not protection from deportation, but it is a deprioritization.

[73] *Immigration Enforcement, supra* note 69.

Before diving into that critique, I must first distinguish between *status documents* and *status information*. Status documents are documents produced by the state that indicate whether one is legally present in a nation-state. Status information is any determination about one's legal status that is based on identifying information. Though all status documents convey status information, one can glean status information even without status documents. For example, someone who uses an Individual Taxpayer Identification Number (ITIN) is someone who likely is not eligible for a Social Security Number (SSN).[74] One determines that an individual is present without status by citing the lack of relevant status documents. Further, not all status documents indicate lawful status.[75] Given the information that immigration enforcement would need to collect to identify an illegalized person, basic rights domains are far from the only place through which immigration enforcement can obtain identifying data.

ICE's surveillance practices take advantage of a world in which people must provide personal, identifying information to access services. Applying for a driver's license means divulging personal information, including your name, address, biometric data, and health information. We also give identifying information when applying for cable, phone, electricity, gas, internet, jobs, etc. Companies store this information and sometimes sell it to third parties. Even as some states pass laws preventing ICE from accessing driver's license information, ICE often goes around these restrictions by buying data from data brokers such as Thomson Reuters, LexisNexis, and Palantir, among others.[76] ICE also purchases personal information from utility companies.[77] This presents an enormous loophole: it is a moot point to

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[74] According to the Internal Revenue Service, the Individual Taxpayer Identification Number "to help individuals comply with the U.S. tax laws, and to provide a means to efficiently process and account for tax returns and payments for those not eligible for Social Security numbers. They are issued regardless of immigration status, because both resident and nonresident aliens may have a U.S. filing or reporting requirement under the Internal Revenue Code. ITINs do not serve any purpose other than federal tax reporting." See *Individual Taxpayer Identification Number*, INTERNAL REVENUE SERVICE, https://www.irs.gov/individuals/individual-taxpayer-identification-number (last visited Jan. 6, 2023).

[75] DACA is an example here.

[76] Corin Faife, *ICE Uses Data Brokers to Bypass Surveillance Restrictions, Report Finds*, THE VERGE (May 10, 2022), https://www.theverge.com/2022/5/10/23065080/ice-surveillance-dragnet-data-brokers-georgetown-law.

[77] Moustafa Bayoumi, *Ice Reached a New Low: Using Utility Bills to Hunt Undocumented Immigrants*, THE GUARDIAN (Mar. 3, 2021, 6:11 AM), https://www.theguardian.com/commentisfree/2021/mar/03/ice-reached-a-new-low-using-utility-bills-to-hunt-undocumented-immigrants; Melissa Adan, *ICE Buys Driver's License, Utility Bill Data to Track Americans: Report*, NBC SAN DIEGO (last updated May 12, 2022), https://www.nbcsandiego.com/news/local/ice-buys-drivers-license-utility-bill-data-to-track-americans-report/2943863/. Major utility companies have now promised to no longer sell their information to ICE. See Chris Mills Rodrigo, *Major Utilities Agree to Stop Sharing Data with ICE*, THE HILL (Dec. 8, 2021, 2:44 PM), https://thehill.com/policy/technology/584944-major-

argue against immigration enforcement's access to information collected in basic rights domains when immigration enforcement procures much of the same information from state agencies, law enforcement agencies, private companies, or data brokers.

In "Immigration Surveillance," Anil Kalhan develops an account of the immigration surveillance state, in which new technologies "routinize the collection, storage, aggregation, processing, and dissemination of detailed personal information for immigration control and…facilitate the involvement of an escalating number of federal, state, local, private, and non-United States actors in immigration control activities."[78] Institutions of higher education are also part of this regime. The University of Arizona, a university about 60 miles from the border, provides and produces surveilling equipment and technology to border control agencies.[79] Despite recently being designated a Hispanic-Serving Institution, the university readily lets Customs and Border Protection (CBP) recruit at their career fairs and surveil on campus.[80] In 2019, a group of undergraduates protested the presence of CBP on campus, arguing that CBP presence threatened Deferred Action for Childhood Arrivals (DACA) students' immigration status; the university responded by pressing charges against the students (one could argue that the university infringed these students' right to free speech).[81] Such interoperability among agencies across different levels requires an expansive information-sharing regime.[82] Kalhan writes that the interoperability of databases among entities in the public and private sectors "integrates those institutions with the administrative infrastructure of criminal justice, national security, and military defense, employment, transportation, and other federal, state, and local, and private institutions—thereby enabling immigration control and enforcement institutions to be used for a range of other purposes."[83]

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utilities-agree-to-stop-sharing-data-with-ice; Corin Faife, *Utility Companies Will No Longer Share Data with ICE — but Many Loopholes Remain*, THE VERGE (Dec. 9, 2021, 1:37 PM), https://www.theverge.com/2021/12/9/22826271/utilities-ice-data-sharing-thomson-wyden.

[78] Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. (2014).

[79] Rachel Leingang, *University of Arizona Will Charge 2 Students over Protest of Border Patrol Event on Campus*, AZ CENTRAL, (Apr. 1, 2019), https://www.azcentral.com/story/news/local/arizona-education/2019/04/01/protest-university-arizona-over-border-patrol-event-result-charges-for-2-students/3335688002/.

[80] *Id*.

[81] *Id*.

[82] Kalhan, *supra* note 81, at 28. Kalhan introduces a four-part framework to understand immigration surveillance activities. "The processes and technologies that comprise the information infrastructure of immigration enforcement enable new approaches to four distinct sets of surveillance activities: *identification*, *screening and authorization*, *mobility tracking and control*, and *information sharing*."

[83] *Id*. at 40.

In addition to direct enforcement initiatives in which immigration enforcement itself uses collected information to carry out enforcement, the collection of status information is also part of indirect initiatives, which "restrict access to rights, benefits, and services based on immigration or citizenship status, thereby requiring both public and private actors…to verify immigration and citizenship status to make eligibility determinations."[84] The issue here is not whether illegalized people are entitled to these services as a matter of right or some other justification; in fact, let us assume that such a question is irrelevant. What is important is that status information is presented as a requirement for access, that even private agencies feel entitled to collect this information, and that there is no protection against sending this information to immigration enforcement.

C. Conclusion

Immigration surveillance not only expands the opportunities immigration enforcement has to collect status information and to use it to remove undesired noncitizens, but it also expands the use of status information as a condition of access to myriad services. Immigration enforcement's collection of information within non-basic rights domains is important because if immigration enforcement does not need to engage with basic rights domains to apprehend and remove illegalized people, then that jeopardizes the egalitarian demand given that the egalitarian demand is concerned with the environment in which people are (not) able to exercise their rights.

The target of my critique are egalitarian liberals like Carens who are committed to protecting basic liberties and, to use Rawlsian language, who want to try to ensure the "worth" of those liberties. It is important to note, however, that egalitarians disagree about what conditions need to be secured for people to be able to exercise their basic rights and liberties. This is what constitutes much debate about "distributive justice," e.g., how much inequality of income and wealth is compatible with ensuring people's rights and liberties are "worth" something so they can effectively exercise those rights. Until now, egalitarian liberals have mostly focused on economic conditions (opportunities, wealth, income). My focus goes beyond that to include concerns about legal status, identity, and, as I will argue in the next section, privacy.

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[84] *Id.* at 23; also see *id.* at 25 where he writes that indirect enforcement initiatives are "…significantly expanding the circumstances in which eligibility criteria for various services and benefits are based on citizenship or immigration status. These initiatives have dramatically expanded the categories of public and private actors that are placed in the position of collecting, storing, verifying, and disseminating…status information…."

III. PRIVACY AND THE EGALITARIAN DEMAND

I argue in this section that for states to meet the egalitarian demand, two things must be true: there must be an agent who can be said to have rights, and institutions must be built such that they ensure people can enjoy the rights to which they are entitled. The egalitarian demand states that it makes no moral sense to give people rights under conditions that make it impossible to exercise those rights. I focus on 'conditions' because environmental concerns that are not themselves rights compel illegalized people to forgo pursuit of their rights. Given what the egalitarian demand requires of the state, meeting that demand is fundamentally incommensurable with the presence of borders.

In addition to the demand of liberal egalitarian morality, I argue that privacy is another such fundamental demand. This is so because of the importance of privacy for (1) the formation and maintenance of an individual's identity, and for (2) respecting the dignity of persons. Moreover, because privacy is important for human dignity, information-sharing practices must conform to the egalitarian demand. Because privacy gives people the autonomy to determine what information to share and with whom, I argue that society and its institutions should engage in information-sharing practices that are consistent with human dignity and align with the egalitarian demand. With this account in tow, I then argue that illegalization represents a violation of privacy in that the state's immigration enforcement apparatus prevents illegalized people's from exercising their rights by attacking their very sense of self. I then examine what that means for the state's right to control borders.

A. Defining Privacy: Is It a Right?

Privacy is a protean concept that admits of many conceptions. That said, in legal scholarship the concept of privacy is couched in terms of a "right to privacy." For our purposes, if privacy is a basic right, then nation-states would be committed to its protection. Someone who finds my critique convincing but still wants to retain firewalls will argue that there is one basic right implicated: the right to privacy. The Firewall account would be recast as a legal principle that protects people's basic right to privacy without exposing them to immigration enforcement. Further, the argument claims that the right to privacy is what realizes the egalitarian demand, i.e., it ensures the practical exercise of formal rights. Privacy is implicit in Carens' definition of firewalls; Carens argues that one's immigration status information should be withheld from immigration enforcement when seeking basic rights. And to that aim, privacy (as a general concept and as a consideration that limits the state's power over the individual) is a much likelier candidate to get agreement among liberal democrats.

Perhaps the right to privacy's greatest appeal is that it can be applied to several settings that we would not normally consider rights domains. In thinking about institutions that collect data, we can think of the right to privacy as relevant if not central, and we can do this without bickering about whether a particular domain is a right. Privacy is not only relevant in domains such as healthcare, education, and criminal justice, which rely on privacy considerations (of patients, students, clients, etc.), it is also relevant when it comes to how private entities collect and share data with third parties. This may lead some to ask the following question: if privacy operates in a non-rights domain but privacy itself is a basic right, would that not make any domain where privacy operates a basic rights domain?[85]

The answer to that is no. Privacy can operate in a non-rights domain without making that domain a rights domain. We do not need to think of a particular domain as a basic right to conclude that privacy is necessary for the domain's operation. The right to privacy is important such that we should be concerned with violations of the right, even in non-rights domains. Ultimately, I do not believe privacy *has* to be a basic right, or that any domain in which it is relevant must be thought of as a basic rights domain for it to be integral to the egalitarian demand or for liberal democracies to be committed to its protection.[86] For one, non-rights considerations can be part of the conditions that necessarily influence whether people can practically exercise their formal rights. Even in non-basic rights domains, how immigration enforcement entities collect and act on information can affect whether formally granted rights are realized in practice and can constitute violations in some contexts.

Though privacy does not have to be a right, it is still a necessary condition for the egalitarian demand. I argue that violations of privacy inhibit illegalized people's ability to form the identities necessary to exercise rights in the way the egalitarian demand requires, and information-sharing practices make illegalized people legible to immigration enforcement and require violating the privacy of all people within the nation-state's jurisdiction.

B. The Value of Privacy

Privacy is normatively important because it protects human dignity, which facilitates an individual's ability to move through the world and be a part of it. This includes the ability to form an identity, build social ties, work, and otherwise participate fully in society. Jonathan Kahn examines privacy from the perspective

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[85] Credit to Jacob Schriner-Briggs for this insight.

[86] My critique is that if basic rights are necessary, then there would need to be an argument that goes into why privacy, and not another right, must be the basic right. It is not because privacy is a basic right because that would be circular.

of how the law constructs and manages identity.[87] Kahn writes that central to this process "lies the concern to define and protect certain dignitary interests that [are] critical to maintaining the integrity of the self in the face of modern, social and political forces."[88] Among these considerations is a commitment to "maintaining the conditions necessary for proper individuation and realization of the self over time."[89] Privacy, for Kahn, is valuable

> [Insofar] as it fosters the conditions within which an individual may establish, maintain and develop her identity as a core aspect of personhood. Thus conceived, invasions of privacy constitute an affront to human dignity by undermining one's identity. If our primary concern is with such affronts, then acts that are individually experienced and socially and historically understood as threats to the integrity of one's identity begin to define the "boundaries" of privacy.[90]

Autonomy is also an ultimate ground of privacy, as states are obliged to protect the basic dignity inherent in allowing a person to negotiate the world around them with a measure of autonomy and control over the process of creating an individual self who is capable of human flourishing.[91] I would take it that practical exercise of rights is necessary for human flourishing. Therefore, the egalitarian demand must obtain for human flourishing in the liberal state. Kahn relates the concepts of dignity and privacy in the following way:

> Whereas dignity broadly implicates a consideration of the inherent value of human beings, privacy involves the more focused right to protect conditions necessary to individuation. That is, where dignity broadly conceived is a condition of personhood, privacy is an attribute of individuality. The liberal tradition connects the two in so far as it posits that the full realization of one's personhood involves articulating and developing one's individual identity.[92]

Although Kahn's definition of privacy relies on the individual, privacy is integral to how people form communities as well as how people become a part of, or excluded from, communities. Carrying along this vein, James Rachels provides an account of privacy "based on the idea that there is a close connection between our

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[87] Jonathan Kahn, "Privacy as a Legal Principle of Identity Maintenance," 33 SETON HALL L. REV. 371, 373 (2003).
[88] *Id.* at 373.
[89] *Id.* at 373.
[90] *Id.* at 382.
[91] *Id.* at 373-74.
[92] *Id.* at 378 (citing JOHN RAWLS, POLITICAL LIBERALISM (1993)).

ability to control who has access to us and to information about us and our ability to create and maintain different sorts of social relationships with different people."[93] For Rachels privacy is necessary to create and maintain the variety of social relationships with other people that we desire.[94] Privacy is important in the formation and maintenance of community because it gives its members autonomy in choosing what kind of information to share and with whom to share that information.

In addition to dignity, autonomy, and community, I argue that privacy is important because it allows people to form authentic social relationships. Authenticity can be seen as a product of both dignity and autonomy: dignity in that people form relationships as their true selves, and autonomy in that people have the choice to form those relationships as their true selves. This does not suggest that people reveal every aspect of themselves; the fact and dimensions of that presentation are within the person's control. The standard of authenticity here is a conception of the person who chooses how they relate to the egalitarian demand. For example, let us assume that healthcare is a basic right. In this context, authenticity appears as a person having control over how to present their sexual orientation, so they can access that right in a manner consistent with their identity. Conversely, when people are not able to form authentic connections, they lack control over the formation and development of their identity, and their ability to take advantage of the egalitarian demand. Further, the inability to form authentic connections impacts the ability to find, establish, and rely on community.

In "Law and the Production of Deceit," William Eskridge writes about how the United States Military's policy of "Don't Ask Don't Tell" (DADT) did not just allow for deceit, but was premised on it.[95] Whereas heterosexual soldiers were free to speak about their romantic escapades with members of the opposite sex, the gay soldier had to not only remain discreet, but lie by affirming their heterosexuality.[96] So, when a gay soldier was asked questions about his sex life,

> Whatever the gay soldier says in response to those quite ordinary questions will be an affirmative lie. [LGBTQ+] soldiers had little choice but to lie – and lie they did under the "Don't Ask, Don't Tell" regime. They lied to their colleagues, they lied to their doctors, they lied to the chaplains, they lied to their friends off base. When they didn't lie, they risked investigation or even expulsion.[97]

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[93] James Rachels, "Why Privacy Is Important," PHILOSOPHY & PUBLIC AFFAIRS, 323, 326 (1975).
[94] *Id.* at 326.
[95] William N. Eskridge, *Law and the Production of Deceit*, *in* LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 254, 286 (Austin Sarat ed., 2015).
[96] *Id.* at 286.
[97] *Id.* at 286.

What is notable is that the success or failure of the policy was a burden squarely placed on the most excluded soldiers. Moreover, this pressure to lie spread to all other aspects of their lives. So, if gay soldiers wanted to interact with the world around them, they would have to lie about who they are or risk exclusion.

This argument becomes more pressing when it comes to rights. Consider an example in which a trans person must hide their gender to receive medical care because of their gender identity. A gay soldier, prior to the repeal of DADT, is rendered unable to reveal their sexual orientation in a medical setting. In either case, getting the required care requires revealing information that opens one up to stigma within the healthcare setting, being outed and possibly disowned by family, among other consequences. The person in this situation has no substantive right to healthcare because the provision of the right is only possible when the person is forced to keep information that is both central to their identity and to themself.

As one of the 12 million people who lack status in the United States, I can relate. Revealing your immigration status is deeply shameful, especially in situations where immigration status should not be relevant. For example, in college I was prohibited from receiving excess scholarship funds as cash in hand. So often I would starve while housing-insecure knowing full well I would have had the money to eat and pay rent but for some arbitrary rule.[98] Suffering becomes disrespectful when those who can do something about it so callously choose otherwise. Being all but forced to out myself inspired fear and economic insecurities in these spaces. I had nowhere to hide. Denials of privacy are significant because people who lack the autonomy necessary to present authentically must lie about traits central to their identities as a condition of participation in society.[99]

The concept of deceit is integral to understanding privacy because lacking privacy is more than just lacking control over whether to keep information to themselves; rather, lacking privacy pressures people to omit truths when pursuing their rights. Attempting to wrest back some modicum of control over one's information as well as become part of a community, illegalized people often lie about themselves in order to keep their status hidden and their place in the community intact. Illegalization violates privacy because the undue pressure illegalization exacts impinges on one's autonomy to choose to present themselves authentically. As an example, my lack of immigration status (even despite DACA) becomes a site of shame in a setting where one would think that academic performance and potential should be sufficient. I have lost count of the number of

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[98] There was a way I could use the money. With the help of a professor, I wrote down a list of books in philosophy I thought I needed, and the professor signed off on it. That meant that I could order the books through the bookstore and pay for them with the money. So, though I could not eat, I did have a formidable library; I still own many of those books.

[99] Eskridge*, supra* note 99, at 274.

times my well-meaning mentors or friends would forward me an opportunity or scholarship that I already know is open only to United States citizens and permanent residents or ask me if I am attending a conference in my field, but which is also located outside of the United States I then lie and say that I didn't get the scholarship, that I'll apply for the opportunity next year, or that I have a scheduling conflict with the conference so I would not have been able to attend anyway.[100]

C. Privacy and Institutions

My conception of privacy is not just limited to the individual; privacy's role in the formation of community also extends to relationships with people acting on behalf of institutions, organizations, entities, and the like. For example, people want to be able to purchase items or use a service provided by a company without their information being sold to a third party. People having control over their information facilitates their forming bonds of community and trust that not only affirm the dignity but also the autonomy of the individual. Examining the norms surrounding information collection and transfer is imperative because rights are useless in an environment where people cannot enjoy them. And if borders are supposed to be consistent with the egalitarian demand, that must be reflected somewhat in information-sharing practices. An environment in which firewalls only exist when human rights are at stake still exposes illegalized people to immigration enforcement.

Borders require institutions to become surveillance organs. This occurs by making immigration status a condition of access to certain services or making status information otherwise relevant. In the contextual integrity framework that I adopt, information-sharing practices associated with border enforcement contravene the egalitarian demand and are incompatible with any account of protections for illegalized people that are consistent with the egalitarian demand.

Privacy defined through contextual integrity, a concept developed by Helen Nissenbaum, "is preserved when information flows generated by an action or practice conform to legitimate contextual information norms" and "is violated when they are breached."[101] Contextual integrity places information-sharing norms into two groups: *norms of appropriateness* and *norms of distribution*. Norms of appropriateness concern the information being collected and the context in which that information is being requested. For example, a doctor asking a patient for their health information would be appropriate whereas if the patient were now at a park, a stranger asking them for health information would be inappropriate. Norms of

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[100] And I should note that, post-pandemic, conferences that had virtual options during the pandemic have now done away with them.

[101] Helen Nissenbaum, *Contextual Integrity Up and Down the Data Food Chain*, 20 THEORETICAL INQUIRIES L. 221, 224 (2019).

distribution concern the movement of information from one party to others and the context in which that movement occurs. They address the following questions: Did the data subject consent to the transfer? Is the data transferred in confidence or under privilege? Is the data transmission required by law (e.g., subpoena, warrant, discovery, etc.)? Was the data sold, requested, volunteered, leaked, or stolen?

Furthermore, there are five parameters we should consider when assessing the information-sharing norms of a particular context: the sender (who sent the information), the recipient (who received the information), the subject (about whom the information is), the information type (what types of data and what is the form in which it is being collected), and the transmission principle (under what constraints does the information flow).[102] The governing norms within a domain generate from the information flows that result from a particular configuration of these parameters, which are situated in the contextual ends, purposes, and values in society that are themselves influenced by history, law, social norms, and political standing.[103] Privacy arises from the ethical concerns that spring from these interrelations.[104]

Contextual integrity allows us to see how aspects of the information-sharing relationship raise questions about the nature of privacy and sites of its possible violation. Different dimensions of the information-sharing relationship, over and above the sharing of information, indicate possible privacy violations depending on the facts. We may think that certain transfers between two parties are appropriate while other kinds between the same parties are not. We may not fault a state agency for turning over identifying information in response to a subpoena, but that could change if we discover that the agency sold that data. In addition, information that may not be status information in one context may become status information in another context or could be compiled with information from other sources to constitute status information used in the service of immigration enforcement.

Because contextual integrity considers social roles and individual and societal expectations informed by history, culture, law, and social convention,[105] it lends itself well to the egalitarian demand; this is because the egalitarian demand is concerned with the environment (i.e., the context) in which people are (un)able to

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[102] *Id*. at 228.
[103] *Id*. at 232.
[104] In the previous section I entertained the notion of the right to privacy being the operative feature of firewalls. To hazard an answer, take friendship as an example. It seems strange to say that friends have a "right to privacy." Rather, we believe that privacy—or norms of information flow—constitute the relationship. The language of rights has passed friendship by. Where I stand now is to say that I do not think that rights language is a particularly useful tool to capture the moral force of firewalls though, especially against state action, as it may carry great rhetorical/political value.
[105] Nicholas Proferes, *The Development of Privacy Norms*, *in* MODERN SOCIO-TECHNICAL PERSPECTIVES ON PRIVACY 79-90 (Bart P. Knijnenberg et al. eds., 2022).

exercise their formal rights. Situating privacy as contextual integrity allows us to ask the following questions: Who benefits and who suffers from a particular flow of information? What are the ethical values at stake here?[106] It is important to note that personal autonomy need not be the grounding value for contextual integrity. There are connections between privacy and other ends, such as freedom of speech, political freedom, *et cetera*.[107]

Contextual integrity provides important insight on how to assess institutions within a liberal democracy. Privacy as reflected in the sharing of information relative to norms in each context indicates that privacy violations will look different depending on the context. However, what the violations will have in common is their violation of the egalitarian demand. So, when we say that an information-sharing practice is wrong, we are saying at bottom that the practice runs afoul to the egalitarian demand. By doing so, people are prevented from having autonomy over whether to share information, what is done with that information after it is shared, and even the knowledge of whether that information is being shared in the first place.

Therefore, contextual integrity's ability to examine the social dimensions of privacy allows us to see how immigration enforcement operates—in a way that the privacy of illegalized people weighs comparatively little compared to other concerns like security, anti-terrorism, or the political benefits that come with "being tough on border issues." That, in turn, can affect how other illegalized people interact with public and private service providers. Furthermore, actual practices themselves influence social expectations. Things like work raids, ICE collaboration with law enforcement agencies, ICE's contracts with data brokers, combined with a public image of looking to find and deport "criminal aliens," will influence public attitudes in such a way that it becomes more normal to share information in a way that facilitates a particular program of immigration enforcement. In a social context where ICE engages in the information-sharing practices that it does, illegalized people live with the knowledge that every piece of information on them can be used to find them, detain them, and deport them.

It is at this juncture that I make the link between the institutional considerations that concern contextual integrity and the egalitarian demand: the information-sharing norms within a particular domain influence the person's ability to be the agent who can exercise their rights. Furthermore, the way the state can guarantee equitable access to rights is to ensure that people can form authentic connections both between people and community members and between individuals and instiutitons allows them to do so authentically. Privacy also has a social aspect, and a liberal democratic nation-state must consider the legitimate ends of a particular domain; whether the collection of status information in rights and non-rights

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[106] *Id*. at 231.
[107] *Id*. at 232.

domains is necessary to meet those ends; and what norms should guide the collection, use, and dissemination of information in order to fulfill the nation-state's commitments vis-à-vis the egalitarian demand.

In our current bordered world, information-sharing norms are developed and redeveloped considering emerging technologies, much of which are used in the enforcement of immigration laws both at the border and in the interior.[108] Examining information-sharing norms implicates relationships between immigration enforcement and sub-federal agencies (like Departments of Motor Vehicles (DMV) or police), relationships between immigration enforcement and private businesses, relationships between different federal agencies, and relationships between different branches of the same agency. What is important here is that whether a domain is a basic rights domain is largely irrelevant. There is no difference between the kinds of information that are collected in rights domains and information collected in non-rights domains. Information would need to identify the illegalized person, confirm the illegalized person's immigration status, and be current enough for immigration enforcement to act upon it. The moral leverage does not come from the non-protection of a right; even if a domain is a privilege (e.g., driving) that information collected there can be used against illegalized people still implicates a basic right if it exposes people to deportation.

The right/non-rights dichotomy lags behind the myriad ways that immigration enforcement can easily acquire and act upon vast amounts of data on people. Moreover, the scope and ease with which immigration enforcement can do so directly impacts the egalitarian demand's success in practice given privacy's integral role in the egalitarian demand's efficacy. Immigration enforcement relies on information flows that expressly go against the egalitarian demand by violating the privacy of illegalized people and citizens as well.[109] At this juncture, I argue that information-sharing norms make illegalized people legible (i.e., detectable) to immigration enforcement. Information that identifies illegalized immigrants is not only collected in basic rights domains. Therefore, in discussing the deportability of

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[108] Nissenbaum *supra,* note 105. Central to contextual integrity are four theses. The first is that privacy concerns the proper flow of personal information. Contextual integrity rejects notions of privacy as limiting access to information, secrecy, etc. More importantly, it admits that there are ends that privacy serves, such as secrecy; a particular flow of information would better serve that. The second thesis holds that what is considered an appropriate flow of information depends on the context. Domains have key contextual roles, activities, practices, functions, and ends that determine an appropriate information structure within that context. For example, the legal profession has determined that privilege is an appropriate norm for the information that attorneys and clients share within that relationship. Within this relationship, there are practical ends, such as a link between increased candor and more effective representation, as well as ethical duties to which lawyers must adhere to remain in the profession.

[109] The justification for this arrangement is that legitimate ends are better protected, such as national security, personal security, state sovereignty, and citizens' economic well-being, among others.

illegalized people, the issue here is not that the domain is a rights domain; rather the important distinction is that the institution collects information that immigration enforcement can access.

D. Conclusion

In this section, I have presented a conception of privacy that highlights the critical role it plays in the formation and maintenance of individual and community identity. I then pair this conception of privacy with one that focuses on institutions and how they collect, store, and disseminate information. The information-sharing relationship these institutions have with immigration enforcement not only implicates autonomy, but also raises questions about whether institutions are allowed to collect status information and whether they can share it with immigration enforcement. Moreover, the role that institutions play in surveillance influences illegalized people's perception of their exposure to deportation. And given that the collection of status or otherwise identifying information leads to being subject to immigration enforcement, illegalized people as a function of their status are unable to exercise the rights to which they are entitled. Certain dimensions of how data is stored, collected, and acted upon (and by whom) has implications for the legitimacy of the nation-state.

I have demonstrated that privacy is necessary for the egalitarian demand in that it allows people to form a conception of personhood and community that allows them to enjoy formally granted rights. But for this to happen, the state has a duty to protect the rights of all who are present in its jurisdiction. People being present in violation of a state's immigration law is sanctionable, and the permissibility of the sanction is premised on the state's right to control its borders. Access to information that identifies illegalized people is permissible because identifying those who are present in violation of immigration enforcement is a necessary condition to enforce immigration law against them. Therefore, privacy is integral to defense of illegalized peoples' rights.

In the next section, I argue that the surveillance necessary for immigration enforcement violates illegalized people's privacy. Information sharing practices in non-rights domains render illegalized people as legible to immigration enforcement, and it is this legibility that makes deportability significant and the mark of illegalization.

IV. ILLEGALIZATION AND DEPORTABILITY

In this section, I argue that the situation illegalized people find themselves in is a consequence of a legal apparatus that not only fails to protect them, but actively seeks them out to remove them. Deportability, surveillance, and their effects are a

creature of law, and when it comes to what prevents the state from fulfilling its duties, the state need not look further than itself. Therefore, I term the creation and maintenance of the political situation of those without status *illegalization*, because the state itself impedes guaranteed protections and marginalizes certain populations into a zone of illegality. In service of this objective, immigration enforcement relies on mechanisms that serve the ends of criminalizing illegalized people, both through and as a pretext for, immigration enforcement.

A. Nowhere to Hide: Legibility to Surveillance Institutions

Immigration surveillance practices preclude illegalized people from seeking basic rights protections, but also impinge on illegalized people's ability to form identities such that they can exercise their rights. Earlier in the paper, I argued that authenticity is an integral consideration for privacy. Immigration status is an important dimension of people's lives. Lacking status exposes illegalized people to deportation but also denies us access to various state or private services. Deportability and the fact of deportations lead illegalized people to avoid institutions that keep records. According to sociologist Asad L. Asad, interactions between illegalized people and the United States immigration apparatus "[beget] fear and ultimately [trigger] these individuals' fear of other record-keeping systems."[110] There is a notable absence of a distinction between basic and non-basic rights domains, as Asad's conclusion suggests; the fear and reticence are effects of an interaction with immigration enforcement that motivate a deep distrust of record-keeping institutions of any kind.

Rather than thinking about illegalized people's reticence through a fear of deportation, here the interactions reflect certain institutional realities (record-keeping, surveillance) that undergird the ever-present probability of their marginalization. Information that reveals undocumented status will preclude access to certain things or expose the person to immigration enforcement. But in some cases, ICE uses information collected from private entities to carry out immigration enforcement. The selling of data to third parties raises an important issue. For example, state DMVs sell their license data to private data brokers, who then enter into contracts with immigration enforcement. The issue is people fear deportation when engaging with institutions that collect data. And the proximity to law makes those fears more, not less, salient.

However, illegalized people cannot avoid every record-keeping system. Legibility to immigration enforcement is integral to illegalization as well. Sociologist Asad L. Asad's work on *system embeddedness*, defined as legibility to

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[110] Asad L. Asad, *On the Radar: Systems embeddedness and Latin American Immigrants' Perceived Risk of Deportation*, 54 LAW SOC REV 133, 141 (2020).

record-keeping institutions, is particularly instructive here.[111] Various aspects of illegalized people's daily life require interaction with record-keeping institutions. Records that these institutions keep contain status information and other identifying information. That this information can be accessed by immigration enforcement means that the data subjects—illegalized people in this case—are legible to immigration enforcement. According to Asad, "System embeddedness considers how ostensibly 'good' types of regime involvement can represent pathways to surveillance and punishment for subordinated populations."[112] Allow me to present an example. When DACA went into effect, I volunteered for CASA de Maryland, an immigration advocacy and direct-services organization based in Hyattsville, Maryland. I was helping applicants and their families file their DACA applications. I remember the line of applicants wrapping around the block. People brought documents of all kinds: medical records, report cards, utility bills, etc. in support of their application. That sight stirred up a complex of emotions which I articulated through the following question: If we have so many documents, why do we call ourselves undocumented? In the years that followed I concluded that the documents we have are not the documents that matter, but that conclusion is not entirely true either. These documents matter, but not in ways that are helpful to illegalized people. The United States government, still the author of mass violence against illegalized people, has our addresses, biometrics, money, and other sensitive information. Moreover, there is no assurance that this information won't be used against us by the government to detain and deport DACA recipients and their family members.

Moreover, illegalized people live around and with residents and citizens; information that residents and citizens give to record-keeping institutions can also reveal information that can identify the illegalized people in their communities. In the limited ways illegalized people can interact with institutions, the lack of autonomy is represented in legibility to immigration enforcement, the possibility of deportation as a result of that legibility, and the divulging of immigration status as a condition of access. This is significant because to not interact with one's environment is to be excluded from opportunities to form connections that are important for human flourishing. Ineligibility for opportunities critical to building a life and regularizing status forces one into a closet because to seek ostensible protections is to expose oneself to sanction.

If, through this legibility, immigration enforcement concludes that someone is present without status, and this unauthorized status is sufficient for the state to sanction the individual through detention and deportation, then illegality as sufficient for sanction is entailed by the right to self-determination. Methods of

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[111] *Id.* at 149.
[112] *Id.* at 142.

illegalization include knowing the whereabouts of so-called "criminal aliens,"[113] expanding the categories of crimes that warrant removal, retroactively in some cases,[114] and upholding the legal doctrine that illegalized people do not have the right to privacy because their illegality should not be allowed to hide.[115]

The starting point for my analysis is the Supreme Court case *INS v. Lopez-Mendoza*, in which the Court held that the exclusionary rule need not apply to deportation proceedings. In the case, the Immigration and Naturalization Service (INS) arrested respondents Adan Lopez-Mendoza and Elian Sandoval-Sanchez, both Mexican citizens, during a warrantless search of their workplace. [116] Lopez-Mendoza objected to appearing for his deportation hearing because of an unlawful arrest, while Sandoval-Sanchez objected to evidence of his admission in his deportation hearing as the fruit of an unlawful arrest.[117] Both objections were unsuccessful; an immigration judge ordered their deportation. Upon appeal, the Supreme Court consolidated their cases. The issue was whether the Fourth Amendment and its attendant protections applies to deportation proceedings.[118]

In a 5-4 decision, the court said no. Justice O'Connor's plurality opinion begins by holding, "The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."[119] There is a very close connection between one's identity and one's lack of immigration status. Being present without status is not something that immigration courts could act upon if they do not know exactly who the person present without authorization is. The discovery of someone's identity coupled with a reasonable suspicion that they are in the country illegally thus puts them at risk of deportation. There is no right, the argument proceeds, to one's illegality remaining hidden, and states should not be expected to close their eyes to the kind of lawbreaking that an illegalized person's continued presence represents.

Later in the opinion, O'Connor writes, "Applying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing

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[113] *ICE Announces Results of Latest Operations Targeting Criminal Aliens*, U.S. IMMIGRATIONS AND CUSTOMS ENF'T, (Sept. 1, 2020), https://www.ice.gov/news/releases/ice-announces-results-latest-operations-targeting-criminal-aliens.

[114] See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §1, 110 Stat. 1214; also see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §1, 110 Stat. 3009.

[115] INS v. Lopez-Mendoza, 468 U.S. 1032, 1046 (1984).

[116] https://www.law.cornell.edu/wex/i.n.s._v._lopez-mendoza

[117] https://www.oyez.org/cases/1983/83-491

[118] https://supreme.justia.com/cases/federal/us/468/1032/

[119] INS v. Lopez-Mendoza note 120 at 1032, 1039.

violations of the law."[120] By positioning the purpose of deportation proceedings as one that prevents ongoing violations of the law and not as punishing past transgressions, the exclusionary rule becomes something that would frustrate immigration enforcement's ability to enforce immigration law. The methods of surveillance and enforcement look to find and deport illegalized people, preventing them from remaining in the country illegally. There is no right to hide one's unlawful presence. When the person is an "illegal alien," there is no privacy; the state seeks to know their body, person, and location.

The Court's findings and the rhetoric in this case demonstrate how illegalized people are viewed within the United States legal system. O'Connor argues,

> Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized…[121]

In this quote, O'Connor analogizes illegalized people to hazardous waste and contraband—inanimate objects, reinforcing the idea that the state has no obligation to protect those who are in the United States illegally. There are two significant dimensions that make this comparison significant. The first is the ongoing nature of the problem (the leaking hazardous waste dump) and an urgent circumstance (the return of drugs or explosives to people who, presumably, are seeking to carry out a crime). The end of removing those unlawfully present justifies the means, even if those means are unlawful. The second dimension of this case that warrants note is that concerns over human rights are subordinated in favor of factors like administrative efficiency. In perhaps the worst conclusion in the ruling yet, O'Connor connects the exclusionary rule facilitating lawbreaking with the view of deportation as an administrative consequence of unlawful presence to reach the following conclusion:

> Even the objective of deterring Fourth Amendment violations should not require [the use of the exclusionary rule in deportation proceedings]. The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.[122]

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[120] *Id*. at 1046.
[121] *Id*. at 1046.
[122] *Id*. at 1047.

The immediate outcome of this opinion is that immigration enforcement is not incentivized to respect procedural rights when doing their work. A further logical outcome of this precedent are the border enforcement changes like Operation Streamline, which converted border crossing from a civil offense to a criminal offense and thus criminalizes all migrants in automated, routinized, and efficient court hearings that to any sane person observing are huge violations of human rights.[123] Illegalized people are made to be criminals strictly because of their presence within the borders, even when they have no criminal record or have committed no criminal acts. Their illegality is fabricated through the creation of borders and systems of criminalization that dictate where they are allowed to exist. Raquel Aldana notes that there is a trend toward legal doctrine that undermines or otherwise extinguishes noncitizens' reasonable expectations of privacy.[124] She writes that "[i]n this construct, law enforcement abuses of power are tolerated, ignored, or worse yet, rationalized through law on the faulty premise that privacy should not allow illegality to hide."[125]

The "illegal alien as constant lawbreaker" trope has its contemporary proponents. In the oral argument for *Department of Homeland Security v. Regents of the University of California*,[126] Solicitor General Noel Francisco argued that DACA "actively facilitates violations of the law by providing advance forbearance, coupling it with affirmative benefits like work authorization and Social Security benefits, doing it on a categorical basis...[without a] limiting principle."[127] DACA not only facilitates violations of the law, according to Francisco, but it also rewards such violations.[128] He later says of DACA, "Simply as a matter of law enforcement policy, it is eminently reasonable for a law enforcement agency to say, I'm not going to push this doubtful authority to its logical extreme when it…undermines confidence in the rule of law itself."[129] Francisco and O'Connor categorize a class of people whose existence constitutes an active violation of the law. Policies or legal principles that protect or recommend non-enforcement against illegalized people are seen as facilitating active violations of the law. In this case, the formal grant of the right to privacy would facilitate lawbreaking.

The immigration enforcement apparatus that primarily illegalized people face comes from the general lack of privacy itself in the surveillance system the Court

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[123] Joanna Jacobbi Lydgate, *Assembly-line justice: A review of Operation Streamline,* CALIF. L. REV. 98 (2010).
[124] Raquel Aldana, *Of Katz and Aliens: Privacy Expectations and the Immigration Raids*, 41 UC DAVIS L. REV. 1081, (2008).
[125] *Id.* at 1091 (internal quotations omitted).
[126] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).
[127] Transcript of Oral Argument at 33–34, Dep't of Homeland Sec. v. Regents of the Univ. of Cal.
[128] I am a DACA recipient as well as a declarant in this case, See *supra* note 129.
[129] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., *supra* note 128, at 37.

permits the state to institute, accompanying the specific risk of immigration enforcement. Still, the way in which O'Connor, Francisco, and Miller cite exigent circumstances does not seem to acknowledge other compromised social goals. For example, illegalized victims of crime may refuse to cooperate with authorities because of the risk of removal. This also applies to mixed-status families, where even citizens may be reticent to cooperate with authorities lest they risk exposing an illegalized relative to immigration enforcement. Illegibility to oneself as well as legibility to immigration enforcement are two sides to violations of privacy, the coin of the bordered realm.

The problem is a practical dilemma—illegalized people choosing between protection of basic rights or legibility to immigration enforcement. This dilemma reflects a failure of the nation-state to fulfill its duty to protect the rights of all who are in its jurisdiction, a nuanced failure that requires the recognition of state collaboration to criminalize illegalized people across private and public entities. The consequences of this moral and political failure are reinscribed in how illegalized people make themselves legible in private, in community, and to the state. Legibility to immigration enforcement does not only compel people to forgo rights but can also compel illegalized people to conceal their lack of status through deceit. This is because legal status is made a condition of access to important aspects of leading a life such as being able to work; so, to make a living, illegalized people must expose themselves to criminal liability.

To lack privacy is to have almost every aspect of daily existence under surveillance or judgment, and though the significance of this claim is hard to explain maybe a personal example can help. When I was homeless in the winter of 2014, I got back on my feet in part by staying on a friend's couch for about three weeks. Couch-surfing for that long became surprisingly corrosive to my sense of self; I had no privacy, spatially or personally. I couldn't choose to go to sleep early most days because that's when my friend's favorite shows were on. My presence felt more intrusive and unreasonable; it was absurd to tell my friend he cannot watch *his* TV on *his* couch in *his* home because I needed to go to sleep early for class or my internship. I wasn't complaining, let's be clear; the couch was orders of magnitude better than sleeping on the street. Nevertheless, when normally private, foundational aspects of one's life become public, help becomes degrading.

I mention the above story to emphasize that personal infringements of privacy are related to structural infringements of privacy. For an example in housing, access to housing is often dictated by a criminal background check, credit score check, past housing recommendations, the need for a guarantor, etc. There are levels to the privacy—because there are institutional violations of privacy that open illegalized people up to enforcement, they are then forced into situations of personal infringements on privacy like in my anecdote above. I may not fear enforcement by living with my friend, but there is certainly a violation of privacy that is related to

a structurally dictated violation of the right to privacy as well, i.e., my lack of status restricting the licit opportunities I must secure housing.

One may ask the following: how is the violation of privacy experienced by illegalized people different from the lack of privacy experienced by other legal subjects in daily life? For other legal subjects, their information is not specifically being sold to immigration enforcement. Sure, identifying information on residents and citizens is being collected, but it is surely not being collected by an agency seeking to determine their eligibility to exist within the United States. Information collection and surveillance is a risk to everyone. Though one might conclude these constitute privacy violations for everyone attempting to obtain housing, but only certain populations are at risk of incarceration or deportation as a result of these breaches of privacy.

To conclude, what renders the practices examples of illegalization is the stance, in both doctrine and practice, that the targets of immigration enforcement have no privacy that the nation-state ought to respect. Being the subject of extensive surveillance efforts is the hallmark of illegalized status. Characterizing illegalized people's reticence to pursue basic rights in terms of the fear of deportation leaves unquestioned the reality that illegality is defined through legibility to immigration enforcement. And so long as deportability is present somewhere, the borderless nature of information-sharing in which there are no privacy protections will expose the dark underbelly of ostensibly ameliorative policies. Assessing current practices of immigration enforcement, I argue that such practices violate the privacy of its targets.

B. Conclusion

Focusing on the collection of information also gives a more accurate account of why illegalized people are reluctant to expose themselves to immigration enforcement through their interactions with institutions. People worried about state punishment are especially likely to avoid institutions that keep formal records. The fear of state punishment has an influence on everyday routine. Regardless of whether we are concerned with a rights domain, to interact with an institution that collects information is to make one much more legible to immigration enforcement. The information collected may not itself be status information, but absent protections against its sharing, immigration enforcement can piece together data from various sources to identify illegalized people and mark them for deportation.

In summary, in this section, I developed an account of privacy that draws from two branches of privacy scholarship. The first branch develops the idea that privacy is a necessary condition of identity formation and development. The second branch focuses on privacy as a complex of information-sharing norms among institutions. This combined account supports my argument that illegalization relies on

institutions operating as surveillance institutions and prevents its targets from being the kinds of agents that take advantage of the egalitarian demand. Institutions either require status information or identifying information as a condition of access, which can be (and often is) passed onto immigration enforcement. That such information transfer is a possibility in myriad contexts, and that illegalized people lack the autonomy that privacy requires as a result, I argue, is incommensurable with the egalitarian demand.

Furthermore, my account avoids the distraction that is determining whether privacy is a basic right. I believe that such a project is both contentious and beside the point. Whether privacy is a basic right is moot because even if privacy is not a right, the denial of privacy necessarily implicates an environment in which illegalized people are prevented from enjoying their formal rights.[130] To be clear, violations of privacy do not have to be directly (or closely) connected to the pursuit of a basic right to be an injustice; i.e., to have an environmental effect on the climate in which formally granted rights are (or are not) realized. And given that liberal democratic states must be sensitive to those environmental factors for the egalitarian demand to matter, it does not matter whether the intrusion occurs in a basic rights domain or whether the intrusion itself is a violation of the right to privacy.

In the next section, I examine…

V. AN OBJECTION: DEPORTATION WITHOUT HARM

In the previous section, I argue that what determines a legitimate social end is whether it is consistent with a conception of privacy that gives everybody within the nation-state access to the egalitarian demand. When the egalitarian demand fails to obtain, it is because at least some people do not have their dignity protected. The violation of privacy is a harm because it "ultimately implicates the integrity of individual identity."[131]

A. Deportation Without Harm?

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[130] One way to think about violations of privacy is to think of the right to privacy in the same way as we would think of a customary norm in international law. For something to achieve the status of custom, there must be practice plus *opinio juris*. It would be beneficial for firewalls to exist as customary norms for two reasons. One, firewalls as norms would allow for a critique of practices that either are consistent with or do not violate positive law. The second is that the development of customary norms does not just rely on state actors (e.g., legislators, bureaucrats, judges, etc.). This allows for an appreciation of the role non-state actors play in developing norms that counter state practices without waiting for them to be reflected in positive law.

[131] Kahn, *supra* note 91, at 377.

I entertain the objection that (some) illegalized people have chosen to be in this situation: in a territory without authorization status.[132] Since they have chosen to put themselves at risk of deportation, the objection goes, they should have no reasonable expectation that their lack of status be kept from immigration enforcement. And even if they interact with domains utterly unrelated to immigration, their information can properly be used against them in immigration enforcement. Even for noncitizens who are regularizable, the state reserves the right to place conditions on their residence and can revoke their path to membership should the noncitizen violate those conditions. In either case, the state is justified in exercising its right to control the content of its membership. Even if deportation is not justified in every case, the nation-state's right to self-determination means that it is justified in some.

If this argument is correct, then deportability is consistent with the egalitarian demand, so long as its practice allows for illegalized people to pursue their basic rights and have them protected. In "The case against removal: *Jus noci* and harm in deportation practice," Barbara Buckinx and Alexandra Filindra[133] argue that democratic states should avoid harm in deportation practice and propose a normative principle called *jus noci*, or the right to not be harmed.[134] In determining whether a prospective deportee has been harmed, they look at what they consider to be "the prospective experience of the noncitizen in the event that she is physically removed from the state of long-term residence."[135] In order to calculate harm, the authors propose the following counterfactual exercise: what does the noncitizen stand to lose if the state deports them?

> The persons who are most likely to be harmed are those who are especially well integrated in their country of residence, and who, conversely, cannot easily be reintegrated in their country of citizenship. They include graduates whose education has prepared them for the job market of their country of residence rather than the one that they find themselves facing upon removal; individuals who speak the language(s) of the country of residence rather than the language(s) of the country to which they are deported; and individuals who were socialized in the country of residence and lack familiarity with the social norms and customs of their country of origin.[136]

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[132] See RYAN PEVNICK, IMMIGRATION AND THE CONSTRAINTS OF JUSTICE (2011). Pevnick makes this very argument: his joint ownership theory of immigration control is based on consent.
[133] Barbara Buckinx and Alexandra Filindra, *The Case against Removal: Jus noci and Harm in Deportation Practice,* 3 MIGRATION STUDIES 393, (2015).
[134] *Id.* at 395.
[135] *Id.* at 397.
[136] *Id.* at 395.

The marks of integration are language, educational attainment particularized for their country of residence's job market, and socialization to the cultural and professional norms of the country of residence. According to Buckinx and Filindra, well-integrated people have a lot to lose (in fact, by losing their familiarity with the norms and customs of their country of origin, they have lost a lot already). According to these authors, deportation can cause great harm. For one, deportees may not be able to perform the job for which they were trained and would lack the skills and network necessary to compete in the local economy; these effects are exacerbated in contexts where employment is not secured in a meritocratic way or is state controlled. Additionally, social or state-sanctioned prejudice against deportees may lead to discrimination and economic deprivation.[137] If I understand them correctly, Buckinx and Filindra argue that the harm in deportation is that it essentially turns people into immigrants.

As the argument suggests, the authors mention two instances in which deportation is permissible if not advised:

> First, and most obviously, individuals who will not be significantly harmed by deportation may in fact be removed. Not all noncitizens are well integrated in their country of residence: they may not speak the language well enough to communicate with citizens, and they may not have been exposed to the prevailing norms and customs of the host society—either because they arrived very recently or because they remained segregated from the wider community. While it may be preferable from their own standpoint to remain in the host country, they may be deported as long as it is unlikely that they will suffer substantial economic, social, physical, or psychological harm upon their return.[138]

Assessing prospective harm assumes three things. First, deportation and harm are separable; it is possible to have deportation that does not cause harm. Second, the harm states should be concerned with is the harm that occurs after the individual has been deported. Third, because the harm calculus is a prospective one, long-term residents can be deported.

Let us place this argument in the world it hopes to influence: the world we live in. The *jus noci* account does not fully account for the role that past autonomous decisions play in its ostensibly prospective analysis, nor does it consider the practical barriers to illegalized integration that are raised by the law itself. Buckinx and Filindra's argument relies on the concept of autonomy in determining prospective harm.

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[137] *Id*. at 399.
[138] *Id.* at 408.

> In addition to our concern with proportionality, we also worry that any blanket justification of deportation as a response to crime risks lumping together categories of individuals who are not equally culpable. In particular, the association of unauthorized presence with crime may wrongly target individuals who are present in the territory through no fault of their own.[139]

This is because the decision to enter or stay without authorization stems from a choice, the argument proceeds. People who are deportable either chose to enter without authorization or chose to stay despite a lapse in authorization. Autonomous choice not only makes deportation sufficient, but proportional in cases where a prospective deportee's choice can be established. A consequence of their argument would only be available to well-educated people who have lived in their country of residence for a long period of time and, correspondingly, have had little access to their country of origin; people who meet these criteria often migrated as children. Because those who migrated as children could not have made the autonomous choice to migrate, a prospective analysis would argue against their removal for proportionality concern. Having spent their formative years in the host country, the customs of their country of origin are unfamiliar if not foreign.

Regardless of whether one chose to migrate, the *jus noci* argument devalues the prospective deportee's autonomy. The noncitizen's desire to not be deported is grounded in terms of individual preference, whereas state's interest in deporting them is considered a matter of right.[140] It is unclear what goes into determining whether someone is unlikely to "suffer substantial economic, social, psychological harm upon their return."[141] The assumption is that the state makes this determination. Further, the amorphous, probabilistic determination of whether the noncitizen is likely to suffer substantial harm suggests a high bar for the noncitizen to clear. This lags far behind the practice of immigration (il)legality, in which entering or remaining in the country without authorization is the sanctionable event. I find it curious that the authors are concerned with this topic at all given the

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[139] *Id.* at 407.

[140] Buckinx and Filindra, *supra* note 135, at 408. If there is any detention involved in the deportation process it subjects the person to traumatization (and deportation when obligated and not prompted by choice is inherently traumatizing). Furthermore, who gets to decide whether these qualifications fit each person—under the Trump admin, they refused to grant asylum for people fleeing domestic violence and gang violence from Guatemala, Honduras, and El Salvador—but these are the primary reasons for leaving the country. Some people cite it as economic problems because it is taboo to talk about domestic and gang violence and don't realize that they need to have credible fear for asylum cases. But if the structure for determining credible fear (or in the case of your paper for determining harm caused by deportation) is dictated by those in power, then it will never truly grasp the lived experiences of those going through the process of deportation.

[141] *Id.*

inexactness of their prescriptions and the latitude it provides states to make unilateral determinations about whether the state stands to harm the people it ostensibly does not want.

In all, this prospective argument demonstrates the agentive effects of deportation only insofar as they occur after the deportation occurs. However, the effects of deportation on the noncitizen occur through the shadow of its threat before deportation itself. In fact, Buckinx and Filindra's argument suggests that recent arrivals as well as those who "remained segregated from the wider community" are less likely to face substantial harm if they were deported.[142] Yet the authors do not recognize that lack of integration is the result of deportability itself. For one, I wonder what the authors mean when they talk of people who are not exposed to the prevailing norms of the host country. As the preceding discussion on legal productions of deceit show, those who are unable to access licit methods of finding work and sustenance turn to crime like many marginalized citizens. It seems like immigrants so situated are quite assimilated to prevailing norms and customs. The focus on people who do not speak the language well and people who haven't been exposed to the "prevailing norms and customs" also renders deportable people who entered either well into adulthood, parents, etc. If fluency with the language serves as a proxy for assimilation, it is not an accident that immigrants from Western countries stand to benefit.[143] If noncitizens can exercise their autonomy and pursue their rights, does it matter what language they speak if they are able to integrate without fear?

Regardless of whether institutions are part of a rights domain or not, they represent an important part of whether and how noncitizens integrate with their communities, and how they develop their identity through an intentional interaction with their world. The issue with such accounts is that they want to make integration a condition of membership but protecting membership's value requires making integration incredibly difficult for illegalized people. Most arguments in support of regularizing unauthorized noncitizens argue that the passage of time, and the strength of the social ties that one forms over the course of that time period, should ground a claim for membership.[144] In practice, however, making those ties are so fraught with a deadly dilemma; interact with institutions and risk deportation as a result of exposing oneself to immigration enforcement, or avoid institutions and

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[142] Further, the argument punishes people who have established connections with people in their countries of origin, as those connections then become the basis for determining that an individual will have access and networks there.

[143] The U.S. has no official language. Walk into a neighborhood in Tucson and you'll see signs in Spanish and will struggle to use English. Same goes for entire districts of large cities in the bay, NYC, DC, etc. People assimilate among their own and often with long lines of friends and relatives who have immigrated so the assumption that they must assimilate by speaking English is xenophobic in and of itself.

[144] See Joseph H. Carens, *The Integration of Immigrants*, 2 J. MORAL PHIL. 29 (2005).

risk deportation because of a demonstrable lack of social ties. Given what legibility to immigration enforcement can lead to, for illegalized people, seeking important services is a Hobson's Choice.[145] Though DACA is a benefit because it allows people to have some legal protection from deportability, the process also opens DACA recipients up to precarity as the legislation has failed to provide a path to citizenship. Additionally, the annual $495 DACA application renewal fee upholds an economic barrier that traps recipients in a high fee schedule. Any benefits should be tempered with the reality of intergenerational conversations about the costs of lacking status, which extend beyond the economic. DACA recipients are also placed in a state of surveillance—their approval is dictated by maintenance of "good behavior" and requires breaches of privacy as recipients must continually provide personal information and biometric data to immigration enforcement. Though DACA offered some solutions to complicated problems, the results are anything but an easy choice for applicants and recipients.

We live in a reality where the collection of status information underpins an expansive program of exclusion against those without status, especially those who are not young, fluent in English, assimilable, or otherwise sympathetic within political or academic discourse. The problem is not that illegalized people will not integrate; rather, the surveillance and information-sharing practices represent state-authored procedures that make it impossible for immigrants to integrate. Divulging status information becomes a condition of access to education and jobs, placing barriers to acquiring skills and networks necessary for economic access. Second, the information collected is not qualitatively different (and is often identical) in non-rights domains than in rights domains. As a result, information is collected, packaged, and shared with immigration enforcement without worrying about rights violation concerns. All of this occurs regardless of whether illegalized people fear deportation. Socioeconomic determinants of marginalization, which serve to segregate immigrants from the wider community, then become the basis to argue that illegalized people are not part of the community and as such it is no great harm to deport them.

One must assume that despite the harm in deportation and lack of access that illegalized people face, the state's interest in self-determination is even more important. This idea is at the heart of immigration law, and a hitherto unquestioned premise in theorizing about immigration. Even immigration advocacy begrudgingly accepts that deportation is an unavoidable cost of securing reform for as many immigrants as possible. This malaise represents what immigration scholar Angelica Cházaro calls the "common sense of deportation."[146] The project of

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[145] According to Merriam-Webster, an apparently free choice when there is no actual alternative. "Hobson's Choice," MERRIAM-WEBSTER, 2022, https://www.merriam-webster.com/dictionary/Hobson%27s%20choice.

[146] Angelica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, (2021).

immigration reform, therefore, becomes about how to find a humane program of deportation, a humanity whose value lies only in its instrumentality to maintaining state sovereignty through borders. Existing work exposes an instructive tension between liberal commitments and the permissibility of a comprehensive program of immigration enforcement. For those who want to retain borders, it is not enough to say that illegalized people, by choosing to enter without authorization, have opened themselves up to immigration enforcement; the restrictionist must also argue that what the illegalized person may have opened themselves up to is consistent with the egalitarian demand, something I argue is impossible.

This is because to be illegalized is to have no right to privacy that is intelligible through the logic of borders. The illegalized person is the crime, and according to the state, the crime must be exposed; constant exposure to immigration enforcement is a necessary condition for their existence as such. I want to compare the articulation of the state's duty to not turn a blind eye to ongoing violations of the law and the ACLU's claim that illegalized reticence to pursue criminal justice remedies compromises the state's ability to protect public safety. Both require that the illegalized person be visible to the state; these claims are in conflict. If the state assures protection of illegalized people's rights without exposing them to immigration enforcement, it has forgone its competing duty to deny illegality a hiding place.

However, as Carens said, borders have guards and guards have guns.[147] International borders are necessarily violent, and likewise, deportability is not a bug but a feature of border enforcement's violence. Illegalized immigrants are subject to maltreatment and sexual abuse, harassment, and assault.[148] Illegalized workers are often subject to wage theft, horrendous working conditions, and other kinds of labor exploitation.[149] Illegalized status is linked with myriad negative health externalities. Deportability leads to shorter life spans. It is not just that deportation prevents people from seeking medical care; deportability makes people unhealthy.[150] Studies show a link between increased presence of immigration

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[147] Joseph H. Carens, *Beyond Trafficking and Slavery: The Case for Open Borders*, OPEN DEMOCRACY (June 5, 2015), https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/case-for-open-borders/.

[148] Freedom for Immigrants, *Widespread Sexual Assault,* (2018) https://www.freedomforimmigrants.org/sexual-assault.

[149] Susan Ferriss and Joe Yerardi, *Wage Theft Hits Immigrants—Hard,* PBS (2021) https://www.pbs.org/newshour/economy/wage-theft-hits-immigrants-hard; also see Walter Ewing, *Corrupt US Employers and Smugglers Are Exploiting Migrant Teens for Profit*, IMMIGRATION IMPACT (2022), https://immigrationimpact.com/2022/02/09/us-employers-smugglers-exploiting-migrant-teens/.

[150] Abigail S. Friedman and Atheendar S. Venkataramani, *Chilling Effects: US Immigration Enforcement and Health Care Seeking Among Hispanic Adults*, 40 HEALTH AFFAIRS (2021), https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.02356.

enforcement and a deterioration in illegalized people's mental health,[151] even driving them to suicide.[152] Another study shows an association between the threat of immigration enforcement and delays in testing for or seeking treatment for COVID.[153] These studies show the human cost of characterizing migration and residence in criminal terms, the labelling of the illegal alien as criminal, and the framing of unauthorized presence as an ongoing violation of the law. Policies that pretend to protect illegalized immigrants serve to criminalize them and frame them as facilitating or rewarding lawbreaking. Immigration enforcement is framed as a moral issue, implicating the social costs of not enforcing immigration law and the administrative efficiency considerations when determining that the exclusionary rule need not apply. Immigration surveillance and enforcement practices thus become a tool for social degradation, analogizing human beings to hazardous waste and drugs, restricting their right to privacy, and claiming that their continued presence as unauthorized persons compromises the rule of law.[154] Regardless of whether illegalized immigrants chose to enter in violation of a state's immigration law, the issue of choice is independent of whether certain consequences for unauthorized status are justified. The negative consequences and dangers of being without status are not necessary consequences of unauthorized presence.

Further yet, the premise that illegalized people choose to accept certain consequences is incorrect. Otherwise, one would have to assume that people have clear and informed knowledge of the consequences—an assumption that would be difficult to make, especially in the case of children. Furthermore, the consequences change after the fact, which then changes the degree of risk unauthorized people face. It is not clear that this is an issue of chosen exposure.[155]

B. The Rights of Citizens

Recall that according to the egalitarian demand, the state holds a duty to protect the basic rights of all within its territory. Nevertheless, some might contest the claim and instead argue that the state has a duty to protect its citizens (for example, the state has a duty to protect its low-wage domestic workers from even lower-wage

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[151] Julia Shu-Huah Wang Neeraj Kaushal, Health and Mental Health Effects of Local Immigration Enforcement, NATIONAL BUREAU OF ECONOMIC RESEARCH, (2018), https://www.nber.org/system/files/working_papers/w24487/w24487.pdf.

[152] As in the case of Joaquin Luna. See Pilkington *supra* note 14.

[153] See May Sudhinaraset et al, *Association between Immigration Enforcement Encounters and COVID-19 Testing and Delays in Care: A Cross-Sectional Study of Undocumented Young Adult Immigrants in California*, 22 BMC PUB. HEALTH 1, https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-022-13994-0 (2022)

[154] INS v. Lopez-Mendoza, *supra* note 120.

[155] Jose Iglesias, *Miami, FL Woman Deported over Two-Decade Old Pot Case*, MIAMI HERALD, https://www.miamiherald.com/news/local/crime/article213819834.

unauthorized workers), and that deportation is necessary to do so. One such example is ICE's Criminal Apprehension Program, which has as its mission "targeting undocumented noncitizens with criminal records who pose a threat to public safety."[156] The Department of Homeland Security expresses its commitment to " enforcing…immigration laws so that we can secure our border and keep the American people safe."[157] Given that the egalitarian demand requires that the state fulfill its duty to protect the rights of all in its territory, on this construction the state's discharging its duty is not only consistent with the demand but in furtherance of it.

Suppose the claim that the state has a right to prioritize if not exclusively protect the basic rights of citizens is true. I contend that deportation is incompatible with even *that* limited conception of a state's duty. It is practically impossible to carry out immigration enforcement without violating the rights of citizens. I stated earlier that illegalized people do not lead such bordered lives, and that refrain bears reiteration here. For one, surveillance as a necessary feature of border enforcement will require surveilling citizens to identify illegalized people. As an example, ICE has relied on DMVs to obtain information about car owners;[158] further, ICE asks DMV offices to use their facial recognition systems to detect illegalized people.[159] As the National Immigration Law Center (NILC) notes, "[s]earches are run against all the images in the DMV database, not simply against the photos of individuals suspected of wrongdoing or violating immigration laws."[160] As immigration enforcement collects information to find illegalized people and begin deporting them, that requires surveillance of citizens and collection of their data as well.

Moreover, illegalized people and citizens live with and around each other, love each other, form community with each other, and develop individual identity around each other. Deportation or its prospect, therefore, cannot leave citizens unscathed. Many families in the United States are classed as "mixed-status," with members having varying immigration status; predominant family situation consists of citizen children of immigrant parents, or (non-exclusively) one citizen spouse

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[156] *Criminal Apprehension Program*, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT, https://www.ice.gov/identify-and-arrest/criminal-apprehension-program (last visited Jan. 6, 2023).
[157] *Stopping Illegal Immigration and Securing the Border*, U.S. DEPARTMENT OF HOMELAND SECURITY (ARCHIVED CONTENT), https://www.dhs.gov/stopping-illegal-immigration-and-securing-border (last updated Dec. 31, 2020).
[158] Joan Friedland, *How ICE Uses Driver's License Photos and DMV Databases*, NATIONAL IMMIGRATION LAW CENTER (Aug. 6, 2019), https://www.nilc.org/2019/08/06/how-ice-uses-drivers-license-photos-and-dmv-databases/.
[159] *Id.*
[160] *Id*. And as the NILC notes, facial recognition technology produces more false results for people of color. See Natasha Singer, *Amazon Is Pushing Facial Technology That a Study Says Could Be Biased*, THE NEW YORK TIMES (Jan. 4, 2019), https://www.nytimes.com/2019/01/24/technology/amazon-facial-technology-study.html.

and one noncitizen spouse. [161] Deportation has negative effects on their United States citizen family member. One study concludes that children with a deported parent have worse mental health than those without a deported parent.[162] Another study shows an association between the presence of a restrictive immigration bill in Arizona and lower birth weights among immigrant Latina women but not United States-born White, Black, or Latina women.[163] Even United States citizens without illegalized family members fear being mistaken for people without status;[164] such a fear is well-founded and supported by examples.[165] These examples demonstrate that when the specter of deportation hangs over the noncitizen, it hangs of the citizen as well. Given the inextricability of immigration enforcement and its effects on citizens, even if the restrictionist wants to limit the scope of individual the state has a duty to protect, I contend that it is impossible, even if the state believed that it only has a duty to protect the rights of citizens, to do so without violating the rights of citizens.

Given that the privacy of co-nationals/those without status is often implicated, a proponent of borders must contend with the state's expansion of its surveillance apparatus, impinging on the privacy of residents and citizens—all just to deport illegalized people. Vis-à-vis the employment of sub-federal law enforcement in immigration enforcement, I argue that the norms that govern law enforcement's place in their communities are not only different but conflicting, such that deputizing local law enforcement to carry out immigration enforcement jeopardizes their roles in the society (if such a role can be articulated). For example, under 287(g) agreements, named after the corresponding section of the Immigration and Nationality Act, ICE trains officers to carry out various immigration functions and also deputizes and trains local law enforcement agents. In practice, such agreements have been a failure.[166] They have also been damaging to many localities because they lessen cooperation not just from illegalized people, but from others who fear

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[161] *Fact Sheet: Mixed-Status Families*, CENTER OF ADVANCED STUDIES IN CHILD WELFARE, UNIVERSITY OF MINNESOTA, http://cascw.umn.edu/wp-content/uploads/2014/02/Mixed-StatusFamilies.pdf (last updated Feb. 2014).

[162] See Brian Allen et al., *The Children Left Behind: The Impact of Parental Deportation on Mental Health.*, 24 J. CHILD & FAM. STUD. 386 (2015).

[163] See Florencia Torche & Catherine Sirois, *Restrictive Immigration Law and Birth Outcomes of Immigrant Women*, 188 AM. J. EPIDEMIOLOGY 24 (2019).

[164] Asad L. Asad, *Latinos' Deportation Fears by Citizenship and Legal Status, 2007 to 2018*, 117 PROCEEDINGS NAT'L ACAD. SCI. 8836 (2020).

[165] Meagan Flynn, *U.S. Citizen Freed After Nearly a Month in Custody, Family Says*, THE WASHINGTON POST (July 24, 2019), https://www.washingtonpost.com/nation/2019/07/23/francisco-erwin-galicia-ice-cpb-us-citizen-detained-texas/.

[166] *Getting off ICE Has Made Communities Safer, Georgia Sheriffs and Activists Say*, GEORGIA LAW NEWS (May 5, 2022), https://georgialawnews.com/getting-off-ice-has-made-communities-safer-georgia-sheriffs-and-activists-say-2/.

putting illegalized people at risk through interaction with police.[167] If illegalized people are afraid to participate in cases against abusers or wrongdoers, then that weakens the ability of the state to protect all people living near or in community with those abusers or wrongdoers. Even with a ruling like *United States v. Arizona*[168] that affirms the federal government's exclusive right to enforce immigration law, the federal government has pressured municipalities to participate in immigration enforcement. Perhaps the clearest example of firewalls here is sanctuary jurisdictions, which are jurisdictions that reject collaboration with immigration enforcement.[169] When a municipality refuses to reveal the location of illegalized people, all it needs to say is that it is not the municipality's job to take part in immigration enforcement. In the Secure Communities example, some municipalities decided against honoring ICE detainers. In addition, when sanctuary cities refused to help enforce Trump's immigration laws, Trump threatened to defund them. These examples of firewalls in practice demonstrate the limits of this course of action within the current United States immigration system.

C. Conclusion

Relationships of interrelation, not antagonism, represent a significant dimension of life in a cosmopolitan society. Regardless of immigration status, people form connections in service of building community. Making eligibility for certain services or rights protection dependent on immigration status or opening the possibility that interaction with a particular domain can expose one to immigration enforcement makes it difficult to the point of cruelty for an illegalized person to build these social connections. There are instances in which the prospect of anti-immigrant or pro-enforcement bills has led to people fleeing their communities, affecting citizens and noncitizens alike.[170] These effects are necessary components of deportability, a condition that I argue is incompatible with the egalitarian demand. Illegality is built on ensuring that people are subject to the following false choice: those who cannot access community cannot demonstrate social ties, and those who risk access also risk being deported. If the state were committed to

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[167] RODRIGUES ET AL., *supra* note 3.

[168] Arizona v. United States, 567 U.S. 387 (2012).

[169] Sanctuary cities, or municipalities that limit their cooperation with national immigration enforcement, are a great example of firewalls in action. There is no official legal definition, but in almost all accounts, local law enforcement either do not collect status information or do not report it to national immigration enforcement. See Matthew Green, *'Sanctuary Cities' Explained*, KQED (Oct. 25, 2017), https://www.kqed.org/lowdown/18799/explainer-what-are-sanctuary-cities.

[170] Marshall Fitz & Angela Maria Kelley, *The Nasty Ripple Effects of Alabama's Immigration Law*, CENTER FOR AMERICAN PROGRESS (Oct. 27, 2021), https://www.americanprogress.org/article/the-nasty-ripple-effects-of-alabamas-immigration-law/.

granting illegalized people opportunities to integrate, then illegality as a lack of status sanctionable through deportation would not exist.

CONCLUSION

In this paper, I demonstrate that there is a class of people whom the state regards as having no privacy and whose lack of status serves as the justification for surveillance, detention, and deportation. In this case, the state denies that the group has a formal right to privacy. Illegalized people (at least in the United States) are not considered to have a right to privacy.[171] For people to exercise rights, they must first be agents, and institutions must meet their duties to protect the rights of all under their jurisdictions. As I establish in this paper, privacy interests are, in fact, as much a part of a liberal political morality as basic rights, independent of legal status.

I argue that surveillance and deportability violate the privacy of illegalized people. Borders and their enforcement strike at its targets' ability to form a sense of self and have that sense of self reflected in the communities they can build and the life they are able to lead. For the illegalized, the risk of deportation is ever-present; in fact, I would argue deportability is the defining condition of illegalization[172] as it serves to corrode the illegalized target's agency. Illegalization harms its subjects because it targets the ability of illegalized persons to have an aspect of themselves that is not under the watchful eye of immigration enforcement.[173]

An accurate understanding of democratic morality is not only incompatible with enforcing borders. Just as it makes no sense to think of people having rights under conditions that make it impossible to exercise those rights, it makes no sense to think of people as having rights under conditions that make it impossible to be an agent who can exercise rights. The sharing of information with immigration

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[171] Eskridge *supra* note 99.

[172] See Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419 (2004); also see THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT (Nicholas P. De Genova & Nathalie Peutz eds., 2010).

[173] One might object that it is too much to say that illegalization exposes its targets to immigration enforcement in *every* domain of life. Such a view is hung up on whether people should fear deportation while doing the most benign, quotidian things. Maybe illegalization affects more domains than just basic rights, and maybe it affects more domains than we care to admit while still leaving some intact. Some might say it would be absurd to think that deportability is significant even when an undocumented person goes to the store to get ice cream.

I would respond to such an argument in the following way: regardless of how likely I am to be apprehended in any given moment, the fact that I am considering the likelihood itself is built on the idea that my deportation is possible at any given moment. ICE waits for people at courthouses, raids workplaces and homes, and puts out detainers for those arrested by local police and are suspected of lacking status.

enforcement extinguishes the egalitarian demand. My paper makes an important critique of the Firewalls account and shows how well-intentioned defenders of firewalls like Carens and the ACLU have not given sufficient attention to privacy. Further, I show the impossibility of border enforcement for those who accept the importance of privacy and the egalitarian demand. The issue with an uncritical prescription of legal interventions for illegalized people is that illegalization itself is a creature of law, and solutions that rely on exposing its ostensible beneficiaries to immigration enforcement are not solutions at all. Legal interventions such as those prescribed by a Firewall account, may present themselves as a material improvement in protections for illegalized people but will instead be an instance of exposure to deportation. Furthermore, even if it is the case that a firewall placed within a rights domain prevented surveillance, such a prevention would only be limited to that domain. If the same information can be found through non-rights domains, then the protection is performative at best and ineffective at worst.

Through lived experiences demonstrated throughout this paper, the failure to provide protections of rights moves beyond ineffectiveness and causes harms to not only illegalized people but stands as an imperious but not indestructible barrier between us and a just world. On that note, I end the paper with one last story of mine. In 2011, I graduated high school in Rockville, Maryland. I moved to the United States from Kenya when I was nine yet, unlike Joaquín, I did not learn of my undocumented status until much later. While applying to colleges I asked my mother what my SSN was; she told me I did not have one, and that I had no papers. It was a devastating discovery for someone with college ambitions. Maryland did not yet provide in-state tuition for undocumented immigrants, so even if I did finish college, my lack of an avenue to legally secure employment meant that I had no opportunities even with a college degree. Like Joaquín, I too became angry that other states passed anti-immigrant bills, and I too was devastated when the DREAM Act failed to pass.

At 6PM on December 15, 2011, I quit looking for a way out: there simply was none. I took the inside part of a gum wrapper and scribbled a suicide note.[174] I then recalled a news article I read a week or so prior about a young man named Joaquín Luna, undocumented like me, who took his own life because he so desperately sought escape from his illegality. I went back to it read about how his family hurt as a result; I realized that if my mother came home from work and found me dead, the discovery would break her. Despite her work schedule replete with “doubles” and “triples” for shifts, she managed to cobble together enough money so I could take one semester of classes at the local community college. And upon remembering her joy in sharing that bit of news, I realized that I had found the escape I desperately sought: education not suicide. I did not know where the path

[174] The contents of which I am thankful I forgot.

would lead or how long it would take; what mattered was my journey would never again be charted on the inside part of a gum wrapper. In sum, this escape from illegality is not a challenge reserved only for Joaquin, me, or the millions of illegalized people; it is a challenge that any state committed to human flourishing must undertake.

POSTCONVICTION REMOVAL AND THE CRIMINAL LAW

INTRODUCTION

I begin with the story of Fanny Lorenzo, who immigrated to the United States from Nicaragua in the 1980s. Though she entered without authorization (some would say illegally), she married an U.S. citizen in 1995 and became a legal permanent resident soon after. However, in 1997 federal authorities arrested Lorenzo and charged her as an accessory to her husband's marijuana growing operation. Lorenzo cooperated with authorities rather than face extensive prison time, pled guilty, and received a reduced sentence of five years' probation. She completed the terms of her probation, after which she lived a life without incident.[1]

That was until the fall of 2017, when Lorenzo returned to her hometown of Miami after one of her many trips to Nicaragua to visit her family. U.S. Customs officials flagged her 1995 arrest and asked her to appear for an interview on January 29, 2019. When she arrived at the interview she was arrested, stripped of her green card, detained for four months, and ultimately deported despite having completed her probation two decades prior.[2] Lorenzo's removal and the criminal conviction that catalyzed it reflect the increasing connection between criminal law and immigration law, what scholars call "crimmigration."[3]

While I primarily rely on other theoretical foundations, crimmigration can be used to situate many of the systems I describe in this paper that demonstrate how U.S. criminal and immigration systems interact and cooperate to regulate noncitizens' lives. Crimmigration captures the legal developments that retroactively made Lorenzo deportable. The Anti-Drug Abuse Act of 1998, the Immigration Act of 1990, the Immigration and Nationality Technical Corrections Act of 1994, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 expand the definition of an "aggravated felony" to a crime with a penalty

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[1] Though I am speculating, it is likely t
hat Lorenzo did not naturalize because she had the conviction on her record and, as a result, did not want to call authorities' attention to it. The 1996 immigration laws make it nearly impossible to naturalize with a criminal record. In regard to El Salvador, in the late 90s after the passage of this law the state deported thousands of gang members because of a criminal record.

[2] Jose A. Iglesias, *2 Decades Ago, Fanny Lorenzo Got Probation. Now, She's Been Deported*, MIAMI HERALD (Nov. 26, 2019, 8:55 AM), https://www.miamiherald.com/latest-news/article214277614.html.

[3] "Crimmigration," according to legal scholar César Cuauhtémoc Garcia Hernández, examines the legal, institutional, social, and normative intersections of criminal law and immigration along three axes: the immigration consequences of criminal convictions, the criminalization of immigration violations, and the use of criminal law enforcement tactics and personnel in immigration enforcement: César Cuauhtémoc García Hernández, *Criminalizing Migration,* 150 DAEDALUS, 106, 106-119 (2021).

of 5 years or more.[4] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) makes aggravated felony a crime with a penalty of just one year and made it possible to deport retroactively. These legal developments had a huge impact on noncitizens. When Lorenzo was arrested, her crime was not considered an aggravated felony, but these laws retroactively changed the definitions to render her and thousands of others deportable. In addition to rendering Lorenzo and others deportable, these developments made certain crimes disqualifying for citizenship, even for those with permanent resident status.[5] Criminal conviction has two consequences: it renders the noncitizen deportable, and it forecloses their access to citizenship. Moreover, the state claims the right to make these developments at will and retroactively.

I argue that the very existence of deportation as a consequence of criminal conviction excludes long-term resident noncitizens from being reintegrated into the community in which they have formed ties, an important benefit of criminal law that their membership should guarantee them.[6] The reintegration of offenders into society is a keystone principle in criminal law, and deportation renders that impossible for long-term resident noncitizens.[7] Moreover, such an opportunity cannot be rescinded because of a criminal conviction. My contention is that, for all noncitizens, once they have become members of the society in the sense of having formed ties in that society, then the state is bound to give the noncitizen the benefits of membership, including the right to remain in and be reintegrated into the society.

Lorenzo's case is important for yet another reason: her legal permanent residence.[8] She would not be deportable but for IIRIRA, which made her retroactively deportable on account of her conviction. For those who are deported, especially those who are long-term residents like Lorenzo, deportation to their country of origin does not reintegrate them into the host society. The connections that such noncitizens have made are extinguished, and depending on the circumstances, people who are removed are rendered inadmissible for a period long

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[4] *Illegal Immigration Reform and Immigration Responsibility Act Overview,* CORNEL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act.

[5] The laws mentioned above changed which crimes disqualify one from citizenship. The war on drugs, with politics of anti-immigration and US war/expansion/imperialism in the 80s/90s, neoliberalization and privatization, etc.

[6] I only focus on long-term resident noncitizens for want of space. I will expand to include other classes of noncitizens in future work.

[7] I take "long-term residents who have no prospect of acquiring citizenship" to include undocumented people.

[8] 8 U.S.C. §1101 defines someone as lawfully permitted to permanent residence as "having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." As far as non-citizens are concerned, the permanent resident is at the point penultimate to status citizenship.

enough to terminate those ties altogether. To describe it briefly, she committed a crime, pled guilty, and served the terms of her sentence; that conviction led to her deportation years later, despite over two decades of law-abiding residence, and that deportation serves as a form of double punishment for her original crime.[9]

The argument proceeds as follows. In Part I, I examine what removal (often known as deportation) is, and how legal systems regard it as either punitive or not. I argue that, regardless of how it is labeled, removal shares important qualities with things we regard as punishment. This is a point further supported by the practical realities of removal—the institutions that detain, deport, and monitor immigrants reflect the legal and political landscape that places immigrants in a subjugated social position. A society of equals can only be achieved if noncitizens have protections against deportation that not even crime can extinguish. Legitimate punishment depends on the establishment of relations of equality, and conviction for a crime does not extinguish those relations. Given the deep, far-reaching effects of removal on the person and on the social ties they have formed, it is important to scrutinize the separate punitive nature of removal when appended to incarceration, already a criminal punishment.[10]

In Part II, I introduce the article's main contribution: I argue that a long-term resident noncitizen's social ties make them a community member in the eyes of the criminal law system. This is significant because members have a right to what I call the reintegrative function of criminal law, which is the idea that after one's punishment, a member is reintegrated into their community. Because long-term resident noncitizens have formed deep social attachments, they are entitled to reintegration. Deporting long-term residents is unjust, as it is the reintegrative function that justifies the state's punishment in the first place. To argue this point, I utilize the work of R.A. Duff and William Wringe as well as the work of Ayelet Shachar and Joseph Carens. Carens' work draws upon the idea that "living in a society over time makes one a member and being a member generates moral claims to legal status.[11] Ayelet Shachar's concept of *jus nexi* is also instructive here. *Jus nexi* is built on the idea that social attachment undergirds a claim for membership status, which entitles the member to a share of the rights and obligations that come with that membership status. For all the benefits of viewing membership through social connection, neither Carens nor Shachar's account considers the situation of resident noncitizens who have committed crimes nor do they deal with criminal law at all. That said, the criminal law theory literature also does not answer this question. My contribution is to bridge these two parallel tracks of thought. I argue

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[9] Also, part of the issue is how women and people of color are criminalized (arrested more for same crime) and then how they're treated once arrested (less access to good lawyer, encouraged to take plea deals that go against their interests, etc.)

[10] This paper only focuses on removal as a consequence of criminal conviction.

[11] JOSEPH CARENS, THE ETHICS OF IMMIGRATION 159-160 (2013).

that utilizing the *jus nexi* account can show that genuine social attachment means that one has a say in criminal law and what its justificatory aims are. And a long-term noncitizen resident can claim for themselves the reintegrative purpose of criminal punishment.

In Part III I consider the following objection: despite long-term noncitizens' deep ties, most entered the country or stayed without authorization, and so have implicitly accepted as a risk of their residence both deportation and the loss of the prospect of citizenship. They are therefore appropriately treated by criminal law like any short-term guest: subject to its terms and ineligible for long-term reintegration. That is, it is not automatically true that they are automatically eligible for reintegration. Perhaps, the commission of crime should call into question the membership of long-term noncitizens, if not invalidate it altogether. I consider Juliet Stumpf's proposal of a graduated system of immigration sanctions in line with how criminal legal sanctions are patterned.[12] Her account aims to rein in the scope of removal by limiting the number of crimes that are considered grounds for a sanction and adds elements of procedure within proceedings that are designed to make for a "fairer" process. I argue that her account can place the noncitizen offender at a disadvantage because proceedings can be used against them as they attempt to stave off removal.

A challenge is to determine the value of long-term resident noncitizens' membership relative to criminal law and the state's right to control its borders. If we assume that the state has a right to put conditions on membership, that still does not mean that the state can degrade noncitizens. Post-conviction removal pits issues of fairness in criminal punishment against the state's right to control its borders, reflected in the right to remove. Some scholars look to confront the state's right to determine how it enforces its right to control borders by applying many of the norms of criminal law to immigration enforcement. Such an approach assumes that removal is assimilable to criminal law. However, I argue that, for members, the reintegrative function of the criminal is incommensurate with removal.

Before proceeding I emphasize important considerations that structure this paper. This argument takes place within a particular kind of nation-state and with a particular set of justifications. The state claims the right to enforce its borders and does so, in part, through deporting those who do not meet a requirement (entered without inspection), those who went outside the bounds of their permission (visa overstays), and those who violated the terms of their regularization by committing a crime. However, the realities of immigration enforcement are such that regardless of whether one is on the path to citizenship, on a non-immigrant visa, having overstayed their visa, or having entered without inspection, all noncitizens are

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[12] Juliet Stumpf, *The Process is the Punishment in Crimmigration Law, in* THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION 58-75 (Katja Franko Aas and Mary Bosworth eds., 2013).

subject to postconviction removal. That said, I focus on long-term residents as doing so allows me to cleanly isolate issues of membership.

This paper's implications are applicable to all noncitizens, and its insights shed light on the shared precarity of noncitizens. Further, though I write this using the U.S. legal system as my object of study, the conclusions I draw are transferable to other parts of the world, because liberal states, often influenced by U.S. policy, are everywhere putting philosophical and tactical pressure on citizenship and its exclusions. This paper also contributes to an expanding literature on the differential treatment of people in the criminal legal system in ways that implicate matters of justice**.** Discussions within immigration theory about membership and criminal law theory's discussions about citizenship often operate on different tracks, and the purpose of this article is to bring them together. Before I do that, I now turn to an analysis of removal and argue that it represents an extinguishing of social ties.

I. WHAT IS REMOVAL

In this section, I examine removal both in isolation and as a consequence of criminal conviction. Immigration law and criminal law are alike, in part, because they both regulate membership. However, when combined, the way each domain of law regulates membership operates at cross-purposes. Criminal law regulates membership with the purpose of reintegrating offenders back into society. Immigration law regulates membership by expelling those it considers undesirable or otherwise worthy of expulsion.

Removal is a process whereby the state's immigration enforcement apparatus expels a person after determining that they should no longer remain in the nation-state. Often, removal occurs either in the context of being caught attempting unauthorized entry, or being present without authorization through expiration (e.g., a visa lapsing), revocation (e.g., losing a job for which a person was sponsored for a visa), or having entered undetected and without inspection. However, even noncitizens who are legally present in a nation-state, including legal permanent residents, are subject to removal. Although there are myriad ways by which people so situated can become removable, I focus only on those who become removable as a result of a criminal conviction. Removal has four dimensions relevant to my contention that it is incompatible with any account of criminal law that is premised on equality between citizens and noncitizens, even in the limited sense. Even though the previous section demonstrated that it is possible to disaggregate status citizenship from membership, and even if it is possible to disaggregate equality in criminal law from the full complement of the benefits and privileges of citizenship, postconviction removal renders long-term resident noncitizens unequal in an impermissible way. This is because the social attachment they have formed entitles them to continued membership in their community, a benefit that reintegration after

punishment protects. This also means that when long-term resident noncitizens are convicted of a crime, the state has a duty to reintegrate them into society. In what follows, I list four dimensions of removal which not only highlight its increasing influence in law, but also emphasize why its use as a response to conviction raises such important legitimacy concerns for the criminal law.

First, removal is now a common consequence for criminal convictions. Juliet Stumpf notes that states are "virtually unconstrained in their imposing removal as the invariable sanction for violations of immigration law" as well as violations of criminal law.[13] In the U.S., every immigration statute passed since 1986 has expanded the universe of crimes which trigger removal proceedings.[14] Legislatures continue to create new crimes and categories of crimes whereby a conviction under these categories triggers removal. Removal's ubiquity along these dimensions means that someone convicted of possessing a small quantity of drugs is as subject to removal as someone who was convicted of a violent crime, because the state has attached a penalty to both. The visa overstay is treated the same as a sex offender; in either case, removal is the statutorily defined consequence. Furthermore, state judges, Article III judges, and immigration judges have lost increasing amounts of discretion to weigh individual circumstances when determining the removability of a prospective deportee.[15] With these legal developments showing little signs of slowing, the attachment of removal as a consequence to a panoply of crimes raises a proportionality problem.[16] Removal imposes an additional penalty with a constant objective disvalue, independent of the gravity of the crime.

Second, all classes of noncitizens, including legal permanent residents are removable. Lorenzo was a permanent resident. Even someone such as she, formally on the path to citizenship, can be removed from that path and sent back because of her criminal conviction. Those with more precarious legal statuses (or those with no such legal status at all) are also candidates for removal. The effect of this second dimension is that, even at best, noncitizens are never truly immune from removal. Even legal permanent residents who have committed no crime can be removed at will. Still, the point I make here is that the "permanence" of residence is conditional on not violating terms of what is essentially a "probationary" status. The best one can hope for is to be a lesser priority for removal. The best example of deprioritization in this context is the Obama-era executive order Deferred Action for Childhood Arrivals (hereinafter "DACA"). The U.S. Citizenship and Immigration Services (USCIS) describes DACA as "a use of prosecutorial

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[13] Juliet Stumpf, *Penalizing Immigrants*, 18 FED. SENT'G REP. 264, 265 (2006).
[14] See *supra* note 4.
[15] Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. LJ 243 (2009).
[16] See Michael J., Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 32 (2011).

discretion to defer removal action against an individual for a certain period of time." To be eligible for DACA, one must: be under the age of 31 by June 15, 2012; have entered the U.S. before their 16th birthday; be in school or have graduated from high school (or received a GED); have either had no lawful status on or before June 15, 2012, or have had one's parole or lawful status expire before that date; and, perhaps most importantly, "have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety."[17]

Third, many central elements of the immigration enforcement apparatus borrow substantively from criminal legal institutions. Those whom immigration enforcement detains are held in facilities that either closely resemble prisons in form or function or are themselves prisons or jails. And it is not a coincidence that prisons and detention centers are owned by the same private prison companies.[18] Moreover, local law enforcement increasingly participates directly in immigration enforcement.

One example of this parallel function of immigration and local law enforcement—or even their overlap and collaboration. Perhaps the prime example of such collaboration are 287(g) agreements, named after section 287(g) of the Immigration and Nationality Act. The agreements allow the director of Immigration and Customs Enforcement (ICE) to enter into a Memorandum of Agreement (MOA) with local law enforcement agencies to carry out some immigration enforcement functions on behalf of ICE. Their work is done under the direction of ICE agents. The agencies are then able to perform limited immigration

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[17] In addition to a stringent set of eligibility requirements, petitioning for DACA requires ample documentary support. The Department of Homeland Security (DHS) requires proof of identity, proof of arrival before the age of 16, continued presence, student status, or honorable military discharge (for whom this may be applicable), and proof of immigration status. Meeting this latter requirement would be easy enough for visa overstays; a copy of their visa along with its expiration date will suffice to prove erstwhile lawful status. However, for those who entered unlawfully (i.e., Entered Without Inspection, or EWI), one would have to have a final order of removal issued as of June 15, 2012, or a charging document placing them in removal proceedings. So, if you meet the requirements but you have not been placed into removal proceedings (or you just don't want to expose yourself to DHS) then you are unable to access DACA. DHS demands that the undocumented person provide these documents to prove extensive ties such that, combined with their lack of a criminal record, support receiving Deferred Action. The fact that DACA recipients arrived in the U.S. as children (the violation that is either unlawful entry or visa overstay is small and their role in being in the U.S. unlawfully was minor if not nonexistent), and also have great ties to the U.S., made them lower priorities for removal and so they received work authorization and a limited Social Security Number. It is important to note that despite having DACA, its recipients are still removable, though the existence of DACA legislation makes the threat less imminent.

[18] Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU, (Oct. 5, 2021), https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration.

functions but, according to ICE, must receive comprehensive training and constant retraining. The process of training a police officer for immigration enforcement is detailed. For one, officers who take part in this agreement must be U.S. citizens and must have knowledge and experience with enforcing the relevant immigration laws in their jurisdiction. Further, through Designated Immigration Officers (DIOs), candidates for 287(g) powers receive a four-week initial training from ICE's Enforcement Removal Operations (ERO) field office. In addition to the initial four-week training, 287(g) candidates receive a one-week refresher training every two years.[19] Participating agencies and officers are to perform only those immigration functions specified in the MOA.

The ostensible aims of the 287(g) program are to detain and deport criminal immigrants whom immigration enforcement deem to be a grave danger to the community.[20] Because of this, ICE contends that these agreements are mutually beneficial.[21] The benefit that law enforcement claims is the removal of violent criminals from their streets. ICE benefits from the community-specific knowledge of local law enforcement agencies, which they then use to detain those in the country illegally. Further, ICE argues that working with sub-federal agencies makes the arrests of undocumented persons much safer than they would be without the help of local law enforcement.[22] Though the agreements often differ in form, their basic upshot is the same: ICE grants local law enforcement powers that they did not have before. Absent ICE's authorization, enforcing immigration was not in the job description for a local police officer. But the result of these agreements is that removal is part of what is at risk when an unauthorized person interacts with *local* law enforcement.

Fourth, removal is civil and not criminal. That is, immigration violations, unlike criminal violations, are classified as civil violations; the processes by which those violations are adjudicated are administrative.[23] Such a characterization has important effects. Classifying removal as civil means that noncitizens have fewer constitutional protections against error in removal proceedings. Immigrants in

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[19] Is there a financial incentive too? Both on an individual level and also departments receiving federal funds? I'm sure there is, and I can confirm this with further research.

[20] *The 287(g) Program: An Overview*, AMERICAN IMMIGRATION COUNCIL (Jul. 8, 2021), https://www.americanimmigrationcouncil.org/research/287g-program-immigration.

[21] *Id*.

[22] *ICE's 287(g) Program*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/identify-and-arrest/287g.

[23] In practice, Operation Streamline changed this. "Being in the United States without proper documentation is a violation of immigration law, which is a civil not a criminal matter. Prior to Operation Streamline, U.S. attorneys were able to exercise prosecutorial discretion, initiating civil deportation proceedings against most undocumented immigrants while reserving criminal charges for repeat entrants or those with criminal records." See *What Is Operation Streamline*, ENDSTREAMLINE, https://endstreamline.org/what-is-operation-streamline/.

removal proceedings do not have a right to government-appointed counsel,[24] and the Sixth Amendment protections afforded to criminal defendants are not available to those in removal proceedings.[25] Moreover, in the U.S., courts have seen removal as a "remedial sanction" and have almost universally held that removal is a collateral consequence of criminal conviction and is not itself a criminal punishment. Because it is not a criminal punishment, constitutional protections that would apply to criminal punishment do not apply to removal; the latter is a mere collateral consequence. Despite removal's classification as a collateral consequence and removal proceedings as civil processes, its effects are deep and far-reaching. During apprehension, detention, and removal, those who are removed are often separated from their family and their communities. Removal is a kind of banishment, one a Supreme Court Justice decried as "a punishment of the severest kind."[26] One problem is that, if two crimes were identical save the fact that one was committed by a noncitizen and the other by a citizen, the noncitizen would be subject to a sanction that the citizen would not be.[27]

The previous section defined removal and examined it considering how it operates in the contemporary enforcement context. Removal is both a possible sanction for an ever-increasing number of crimes and, given that immigration judges have less and less discretion, is becoming the actual consequence imposed on convicted noncitizens.

II. MEMBERSHIP, IMMIGRATION LAW, AND CRIMINAL LAW

In this section I make the following normative claim: long-term residence makes

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[24] Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, AMERICAN IMMIGRATION COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[25] *Id*.

[26] United States v. Ju Toy, 198 U.S. 253 (1905).

[27] There are many circumstances in which two different people commit the same crime and are punished differently (and not by exercise of discretion). In one example, consider the same act taken by a person on probation versus someone who is not on probation. This example is particularly resonant given that legal permanent residency is, like other noncitizen statuses, considered a "probationary" period. A non-legal example would be in the employment context, in which new employees are told that any infractions within the first few weeks of employment will result in termination, whereas a more tenured employee would receive a lighter discipline. At least in the employment context, the disanalogy would be that all employees went through this probationary period. The long-tenured employees survived the probationary period. In the context of the legal permanent resident versus the natural-born citizen, the latter individual did not go through such a probationary period. However, vis-à-vis a naturalized citizen, the employee example is more apt and raises the questions about the nature of naturalized citizenship. Interesting as those questions may be, they are outside the scope of this paper.

someone a full member in the eyes of the criminal law system. One of the important dimensions of criminal law is that it reintegrates offenders into society. Deportation is incompatible with the reintegrative function of criminal law. For members, criminal law reintegrates the offender into society upon completion of their term of punishment. The state incurs a debt to people when it imprisons them. I argue that long-term residents, regardless of their citizenship status, are entitled to be reintegrated into the society that has become their home. As such, it is impermissible for nation-states to deport them even as a consequence of criminal conviction.

Criminal law and immigration law have a lot in common. Both draw on a state's right to control its membership, though each does it principally through different means. Criminal law regulates the conduct of its membership, whereas immigration law regulates the content of its membership. When seen through the framework of regulating the conduct of its membership, certain normative statements about criminal law become magnified. For one, the state has the right to regulate conduct; there is a kind of conduct that the state can regulate, and it is good that such conduct is regulated. But what is most important, perhaps, is that when a democratic state regulates conduct, it does so in the name of its members, i.e., the people. A similar set of justifications occur regarding immigration law. The state claims a right to regulate the content of membership; it can exclude or remove groups of people it considers undesirable for any reason really, and if noncitizens engage in certain kinds of forbidden conduct, then the state has the right to expel them. What these two domains of law have in common is a normative framework that justifies the use of state's coercive power in the service of a bounded community. In immigration law, the person is presumed to be outside of the community. So, in criminal law, state violence is used in the name of people who belong, and in immigration law state violence is used in the name of people who belong against people who do not. This relationship between criminal law and immigration law should inform how we think of both the immigration consequences of criminal convictions as well as the criminalization of immigration.

In *Punishment, Communication, and Community*, R.A. Duff argues for a normative, "communicative" account of criminal punishment in which such punishment communicates to the offender the censure that their illegal actions deserve. Duff undergirds his account of punishment by developing the notion of liberal communitarianism. Communitarians structure themselves along the tenets of liberalism; this means they respect the freedom, autonomy, privacy, pluralism, and mutual regard of the community's members. Community requires a shared commitment by the community's members to certain defining values. Further, members of the community must have mutual regard for one another as fellow members of the community that is itself structured by the community's defining values. Duff writes that "…the language of the law and of punishment [must] be

one that the agent can reasonably be expected to understand and speak for herself as a language of public values that are or could be her own."[28] The law speaks on behalf of the community whose law it is, and it is important that the law speaks in one language accessible to the offender.

One of the important insights of criminal law theory is the idea that members have a unique relationship to criminal law, and that relationship justifies the existence and administration of that law. Duff argues that the purpose of criminal law is to call people to account for their alleged offenses. What is important is that the alleged offender is held to account through the rules and institutions that they, as a liberal democratic citizen, have co-authored. The state is accountable to the alleged offender, and the process and its outcomes are fair insofar as the person who is called to account is recognized as a citizen who is not only the co-author of the rules, as are their fellow citizens, but is also co-equal to their peers. Such a status is unchanged, regardless of whether the offender is convicted as opposed to accused. The defining aspect of criminal law according to Duff is that when called into account, the offender is regarded on equal footing with the jury (of his peers) as well as society at large. Duff's account uses citizenship as a signifier of the sort of person who co-creates the legal community and thus can, in recognition of their equal status as a co-creator, be held accountable by the law. Gideon Yaffe writes that citizens in the normative sense "are authors of the law—not in the causal sense of having written it or having directly contributed to its content, but in the sense that their entitlement to exert influence over the law is part of what accounts for and explains the very existence of the law." [29] Citizenship, here, I take to denote an equality with others in the community in line with the conditions laid out above; the demands on criminal law apply to everyone equally and does not distinguish between citizens and noncitizens.

Duff discusses noncitizens in *The Realm of Criminal Law*, where he answers the question of how the state can have authority over them. Duff recognizes that the process by which a noncitizen becomes a citizen affects the law's authority over the person. He concludes that the process of naturalization should be inclusionary and generous because "the more welcoming a polity is to its new citizens, the fewer there will be who must live under laws that are not theirs."[30] Duff accepts that noncitizens are differently situated compared to citizens, bound by a law that isn't theirs, and so are not relating to the law under conditions of equality. Such an

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[28] In the case of the noncitizen there are two senses in which the law "could be her own." The first sense deals with hypothetical consent. But what naturalization also brings to bear is the actual consent that it implies: in accepting citizenship, I am accepting the law as my own (or now formalizing an already existing acceptance). R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001), p. 75

[29] Gideon Yaffe *Punishing Non-Citizens,* 14 CRIM. L. & PHIL. 347, 361 (2020).

[30] R.A. DUFF, THE REALM OF CRIMINAL LAW 121 (2018). Though one can object by raising denaturalization, I do not discuss it here though I will elsewhere.

inclusive conception of regularization and eventual naturalization leads to systems and policies whereby the goal is to expeditiously open citizenship to noncitizens. On that point specifically, Duff says the following on the topic of punishing noncitizens:

> …[I]n thinking about how we may punish offenders we should begin by *seeing them as citizens*; ask how far what we impose on them or require of them could be consistent with that civic status…; and then ask whether there are ways in which their citizenship might justifiably be qualified or suspended in light of their crimes.[31]

It is important to emphasize that being seen *as* a citizen is not identical to *being* a citizen. The former conceptualization accepts that noncitizens and citizens are not similarly situated. But Duff argues for a kind of perceptual stance; he wants citizenship to serve as an ideal, informing how the state can exercise its authority over noncitizens. The kind of influence Duff envisions for citizenship is aspirational: being seen as a citizen means that the criminal legal apparatus should regard and address noncitizen offenders as citizens as much as possible.

Noncitizens cannot be citizens, but they can be members.[32] He writes that

> [I]t is a mistake to treat citizenship as I have been implicitly treating it, as a unitary, all or nothing matter—as if one is either fully a citizen, or not a citizen: for surely citizenship is better seen as a package of rights and responsibilities, some of which can be removed or suspended without making them a noncitizen.[33]

Duff's account of criminal law accepts that membership is a status that can be attained by anyone regardless of their legal status. Bill Wringe, commenting on Duff, reviews the different kinds of noncitizens with whom criminal law might interact. Tourists and temporary visitors, for example, have no interest in staying long-term in a given country and have no aspiration to full or partial membership in that country's community. There are those who do not meet the requirements of citizenship but intend to meet those requirements; these people aspire to membership. Still, Wringe argues that criminal law "must explain how it can apply to…residents who have no plan or prospect of acquiring citizenship.[34] And though

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[31] *Id.* at 142.

[32] A question to consider: if it is the state's right to remove, then, where the gap is between membership and citizenship?

[33] DUFF, *supra* note 15, at 142.

[34] Bill Wringe, *Punishing Noncitizens*, 38 J. APPLIED PHIL. 384, 387 (2021).

Duff addresses the topic of unauthorized immigrants[35], he does not answer whether unauthorized immigrants can be members. Those who do not have legal status in the nation-state could still be able to form ties of membership, though their lack of status presents obstacles to doing so. Duff states that while unauthorized immigrants are in the nation-state they are entitled to the law's protection. However, if I am right that unauthorized migrants are not excluded from becoming members, they then are owed a duty to be reintegrated to the community they have formed.

In sum, Duff's account allows for non-members to become members but is missing an account of how that should happen. In what follows, I introduce work on social membership. I engage with Ayelet Schachar's concept of *jus nexi*, which argues that the fact of social attachments should ground claims of membership. I then argue that regardless of one's migration status, deep social ties acquired over time entitle one to the benefits of membership, an important one being reintegration after punishment.

Social Membership, Reintegration, and the Problematic of Postconviction Removal

In answering the question of how non-members can become members in Duff's account, I use Ayelet Shachar's concept of *jus nexi*. *Jus nexi* is built on the idea that "some proximity must be established between full membership status in the polity and an actual share in its rights and obligations…"[36] In this section, I transfer her insights into criminal law theory, an area that has just started to engage with the philosophical problems that immigration law, and in particular unauthorized migration, introduces. I contend that for long-term resident noncitizens, their social ties make them members, and their membership grants them the same relationship to criminal law as citizens. From the point of view of criminal law, long-term resident noncitizens should not be seen as citizens; morally speaking, they *are* already citizens. In other words, social ties serve as the normative grounds for inclusion into citizenship. Long-term resident noncitizens are entitled to citizenship and the rights and benefits it entails.

According to Schachar, *jus nexi* "offers a path for…residents whose lives have already become deeply intertwined with the bounded community in which they have settled to enjoy legal rights and protections as permanent residents and a predictable path to becoming full members."[37] Though Shachar argues that people who have made sufficient ties are entitled to full membership reflected in

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[35] DUFF, *supra* note 15, at 126.
[36] AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY165 (2009).
[37] *Id*. at 181.

citizenship status, she takes pains to clarify that *jus nexi* does not force such membership onto people. What it does instead is it "creates an eligibility or presumption of inclusion on behalf of those whose life center has already shifted."[38]

Jus nexi allows for earned citizenship arising from the establishment of a real, genuine, and effective link to the nation-state and its culture.[39] *Jus nexi* is based on what Shachar calls the "rootedness principle," which "recognizes the social membership of long-term residents who, as a result of their involvement and stake in the life of the polity, become part of the [community]."[40] It takes seriously the idea that inclusive, democratic citizenship in a liberal state should reflect a nexus between rights and duties as well as between membership and social attachment.[41] Such an approach enables us to welcome those who have already been social members based on presence and participation in the life and economy of the state.[42] If the person has been present in the nation-state and forms ties within it, the person can claim political membership. *Jus nexi* holds normative appeal and contemporary relevance as it develops an equitable standard of citizenship for those who either cannot benefit from existing citizenship and immigration principles or remain barred from naturalization under current law.[43]

It is important to note that *jus nexi* does not force membership upon anyone; it requires that a noncitizen display both intent and effort in the development of these 'real and effective links' if they choose to join the society and go down the path of earned citizenship. *Jus nexi* citizenship adds dignity to immigrants' experience, as it serves as a source for agency in seeking and securing political membership in addition to validating community involvement. This avenue to full political membership is grounded in the ideas of social membership understood as real and effective contribution and social attachment. I should note that, though membership is defined in some relation to citizenship, my account does not rely on claiming that long-term noncitizens be given the full status of citizenship. By disaggregating the benefits of membership from citizenship, I can focus on the specific elements of membership most relevant to my argument.

Accounts of social membership answer the question of how noncitizens can become members in the way Duff envisions. Those who reside in a nation-state for a long enough period of time are entitled to certain benefits owing to the ties that they have formed and the social membership those ties reflect. One of these benefits is that criminal law has a duty to reintegrate members into their community after

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[38] *Id*. at 180.
[39] *Id*. at 5.
[40] *Id*. at 20.
[41] *Id*. at 27.
[42] *Id*. at 19.
[43] *Id*. at 8. See United States v. Wong Kim Ark, 169 U.S. 649 (1898). Shachar notes that the decision pronounces that there are "two sources of citizenship, birth and naturalization."

their punishment; I call this criminal law's duty to reintegrate. Reintegration is important because it allows its members, regardless of their citizenship status, to stand in relationships of equality with each other. And for those who are members, even those who navigate the criminal legal process, criminal law only becomes legitimate when they are considered equal to their peers. The long-term residents who have made their lives in their chosen community are by the fact of their attachment, entitled to the fruits of that attachment.

In Duff's view, reintegration is an important part of how criminal law is justified in punishing citizens. Noncitizens who meet the requirements for membership cannot actually be members–they cannot be equal to citizens–if they are not eligible to be reintegrated at the completion of their term of punishment. The idea that the offender remains an equal suggests that though an individual's ties are somewhat suspended through criminal punishment, but in the lived reality of the individual's life, those ties still matter. And after such a term of punishment is complete, the state should, at the very least, not create obstacles to the resumption of those suspended ties or place unreasonable obstacles in the formation of further ties.

Duff's focus on the individual as part of a community whose values help create the criminal legal system allows us to examine whether such a view can accommodate for a process in which removal as a consequence of criminal punishment can be an agreed-upon sanction. Duff attempts a delicate balance between the state's right to expel noncitizens and the long-term resident noncitizen's right to be bound by a system accountable to them. Postconviction removal runs counter to his normative account, where he contends that the goal of criminal law would "address noncitizens, prosecute them, and convict and punish them, not as people who have forfeited their civic standing, but as citizens who are being held into account by their fellow citizens."[44] Postconviction removal is significant for the following reason: if the purpose of criminal punishment is to reintegrate the offender into society, and if long-term resident noncitizens can be members, how can the state justify its punishment of long-term resident noncitizens when removal is a consequence of criminal conviction? Regardless of whether deportation is a punishment or a collateral consequence, it is a consequence of criminal convictions that 1) invalidates a noncitizen's possible entitlement to reintegration and 2) questions whether criminal law can justify removal.

Noncitizens and Belongingness

However, so long as deportation is a consequence of criminal conviction, long-term resident noncitizens cannot be members at all, let alone equal to citizens. In this section I engage with the work of Bill Wringe because he sees that Duff's

[44] DUFF, *supra* note 15, at 141.

conception of citizenship raises issues for his account of the criminal law. However, Wringe resolves the ambiguity by denying noncitizens access to membership and, consequently, the reintegrative function of the criminal law. Discussing Wringe also isolates the problematic of removal which I focus on in the next part of the paper.

Wringe rejects the idea that Duff's account of criminal law can include non-members on the same level as citizens at all. Wringe and I agree that an adequate account of criminal law needs to explain how it applies to long-term noncitizen residents. According to Wringe, if we are committed to the view of seeing even long-term noncitizens as citizens, we are also "committed to the view that punishment involves inviting them to become citizens in at least the lay sense of citizenship."[45] Wringe, however rejects inviting long-term noncitizens to lay citizenship because, to him, doing so would be "overdemanding, presumptuous, and paradoxical."[46] It is overdemanding in that "it does not seem obviously unjust for a state to impose requirements for citizenship which offenders may not meet."[47] It is presumptuous because "in some cases the offenders...may have no desire to become part of our political community.[48] Wringe notes that punishing noncitizens as if they were citizens is paradoxical because immigration law's purpose is to regulate the content of a nation-state's membership.[49] He writes that it "is hard to see how punishment for breaking laws of this sort could be aimed at reintegrating individuals into a community from which those laws debar them from membership."[50]

I start by responding to the latter two charges (presumptuousness and paradox) and then leave the charge of overdemandingness for later in the paper as it presages an important challenge to my account. With regard to presumptuousness, recall that the theory of social membership does not impose anything; rather, it recognizes that the fact of social connection is already established. According to the social membership/jus nexi principle discussed above, the longer a person lives in a place, the stronger their claim to the rights and protections that such membership entails. Regardless of someone's desire, a noncitizen exists in the world. They go to school, work, and church. They love, hang out with, build community, pay taxes, etc. They play important roles in the lives of those around them, influenced by their ability to access things people consider important, be they relationships or institutions. Furthermore, many classes of noncitizens, especially those who lack status, are unable to do things like work or form certain kinds of ties such as with others

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[45] Wringe, *supra* note 19 at 391.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*.

beyond their inner circle of family and friends?. Moving past Lorenzo, who was a documented resident, and thinking about undocumented people, not only are many precluded from accessing a path to citizenship, let alone acquiring it, but the practicalities of border enforcement place undocumented people in constant risk of deportation. Yet, in spite of this risk, undocumented people have formed social ties through living and working in the host society.

Further yet, the paradoxical nature of punishing noncitizens is important in ways that neither Duff nor Wringe appreciate. Violation of immigration law leads not only to preclusion from membership; it also means that those who are found to be present without authorization are held in detention centers and removed. Further, the conditions of detention, hearing, and removal constitute hard treatment. The paradox is that the immigration law is to regulate the content of a nation-state's membership through expulsion, which is incompatible with one central aim of punishment, which is to reintegrate individuals into a community. But for a Duffian, the "justification to punish someone within criminal law entails the imposition of harsh treatment of offenders with a view to communicating to them the wrongness of their conduct, in a way that invites them to repentance."[51] To the extent that including is paradoxical, then resolving the paradox means changing the immigration law. Detention, monitoring, and deportation are the ways that immigration laws are enforced in not only the U.S., but in many western nations. And considerations of sovereignty are such that these punitive methods are not just the preferred way to enforce borders, they are the only way that borders can be seen to exist. So Wringe would have to develop a justification for the criminal law that accommodates for deporting long-term noncitizens.

As for Wringe's charge of overdemandingness, it does not follow from the idea that states may impose requirements that offenders may not meet, that states being willing to offer them the status of full members of the political community is overdemanding. That said, the charge of overdemandingness comes from the idea that granting long-term residents access to the reintegrative function of criminal law takes away an important tactic that the state uses to control its membership: postconviction removal. The question now is: why must the reintegrative function be part of the limited benefits for those who have passed the residency threshold? This is because of two reasons. First, the kind and strength of connections are indistinguishable from that of citizens and other qualified residents. But the second important reason is because of the alternative, removal, does not allow for reintegration.

In sum, the kind of community membership that matters morally in a communitarian account of criminal law is not formal status, and it is not forever determined by an unauthorized entry or stay. Rather, community membership is a

[51] *Id*. at 385.

matter of the substantive emotional, social, and economic connections that people make with each other over time. That membership is significant in that it renders them equal, albeit in a limited sense: they are entitled to what I call the reintegrative function of criminal law. By that, I mean that one justification of criminal law is to reintegrate offenders to society. Removal as a consequence of punishment not only goes against the reintegrative function, it nullifies the membership of long-term noncitizens.

In what follows, I consider the following objection: Removal represents the idea that the state views noncitizens' rehabilitation to society as at best a responsibility of the state from which they come—the state is only responsible for rehabilitating *their own* criminals and thus exports noncitizens to reintegrate into their home countries. They have the option to reincorporate, but the commission of a crime voids that option *within the nation-state's borders.* Offenders have forfeited their membership and their right to remain. Some might even contend that the conviction of crime is an affirmative statement rejecting one's membership. This objection and my response to it is the focus of the final part of the paper, where I introduce Juliet Stumpf and her balancing account.

III. THE BALANCING ACCOUNT

As I have argued, with the sufficient passage of time, a noncitizen becomes a member in a way that a criminal conviction cannot negate. As discussed above, removal is both a possible sanction for an ever-increasing number of crimes and, given that immigration judges have less and less discretion, is becoming the actual consequence imposed on convicted noncitizens.

In this section, I consider the following objection to my argument: despite long-term resident noncitizens' deep ties, most entered the country or stayed without authorization, and so have implicitly accepted as a risk of their residence both deportation and the loss of the prospect of citizenship. I respond to a charge that is represented by the Wringe's charge of overdemandingness. That is, in determining the feasibility of removal as an option, it would be overdemanding that the state be willing to offer everyone the status of full citizenship. The issue then is whether it is possible to acknowledge the ties that noncitizens have formed without being overdemanding in the way Wringe alleges.

Crimmigration scholar Juliet Stumpf provides an account that can meet this challenge. Her "balancing account" compares the significance of an individual's social ties to their conviction. Balancing aims to give due weight to the social ties a noncitizen forms while also acknowledging the state's right to control its borders, and part of that right includes the right to place crime as a disqualifier for membership and as a pretext for removal. The balancing account may not automatically demand that an offender be removed, but that the nature of an offense

demands at the very least such an accounting.

Stumpf begins her argument by noting that using removal, in particular as a civil sanction, has two effects. The first is that noncitizens have fewer constitutional protections against errors in the civil process than citizens have in the criminal process. The second is that governments are unconstrained in applying removal as the necessary consequence of immigration violations.[52] Stumpf raises two main concerns with these effects of removal. The first concern is that of proportionality; Stumpf wants to restrict removal to a few instances, where it is justified relative both to the offense and to the ties (or lack thereof) that the person awaiting removal has formed. The second concern is that of discretion: even where removal may be justified, Stumpf wants to give immigration judges (or those who are in a position to order removal) discretion to make individualized judgments as to whether someone who would be removable will, in fact, be removed.[53] To solve these twin issues, Stumpf's account argues for a graduated system of penalties—what I call the balancing account—based on the criminal law sanction system.[54] In her 2009 article "Fitting Punishment," Stumpf describes her proposal for:

> …a proportionate system of sanctions for immigration violations [which] should consider (1) the gravity of the violation, taking into account the nature of the violation and any consequences, (2) the benefit to the United States of imposing the proposed sanction and, conversely, any harm to the United States, the noncitizen, or others resulting from its imposition, and (3) the stake that the noncitizen has in remaining in his country.[55]

Stumpf's account would require those making determinations on a person's removal to weigh their conviction against the social ties formed while as a resident in the nation-state relative to their ties in the original state as well. Such a system takes into account the severity of the violation, the context in which it happened, and the strength of ties the immigrant has to the community.[56] Ties can be thought of as tangible and material—where one has lived, gone to school, worked, married, etc. In addition, ties have a reputational aspect. For example, allies of a person facing removal often cite their standing in the community when making the case

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[52] Stumpf, *supra* note 38 at 265.

[53] Though she does not argue this explicitly, I would think that she would either reject removal as a retroactively applied consequence for crimes where removal was not a collateral consequence at the time the crime was committed or would encourage judges to use their discretion to not remove those for whom removal was a sanction retroactively applied. It would make more sense, I believe, to argue for the former; my intuition is that there is such a thing as too much discretion.

[54] Unclear whether this means that she would support giving immigration law processes the same level.

[55] Juliet Stumpf, Fitting Punishment, 66 WASH. & LEE L. REV. 1683, 1732 (2009).

[56] Stumpf, *supra* note 38 at 264.

against removing the person. Stumpf further writes that:

> When the immigration violation is relatively minor, the reason for admitting the noncitizen is still compelling, and the noncitizen has strong ties to the country such that her stake in remaining is great, the sanction should be lighter. When the immigration violation is egregious, the rationale for admission is weak (either because of the violation or due to other circumstances) and the individual has few ties to the United States (and thus little stake in remaining) the sanction should be heavier.[57]

Stumpf argues that if a prospective deportee's stake is great (i.e., they have extensive ties to the country) and the violation is comparatively minor, removal should not be the sanction. However, if the violation is great and the stake is minor, then Stumpf argues that removal is an appropriate sanction (not that they must be removed).[58] If the violation for which a noncitizen is convicted invalidates the extensive ties they have formed, then the removal process is balancing between the commission of a heinous act and very few genuine ties. In that case, removal is a very real possibility. If the authenticity of the ties is not being questioned, the problem is whether the crime outweighs even extensive genuine ties. It is important to note that Stumpf's model is not binary, calling for either removal or no further consequences. She does consider a range of possible sanctions, such as a further wait for naturalization, payment of fines, commission of community service, etc.

A balancing approach that weighs social ties against criminal convictions raises the question of how we can categorize which crimes are outweighed by the social ties of the person convicted of the crime. Within the balancing account there is the understanding, shared between the state and the prospective deportee, of the value of certain ties and the ways the person facing removal can demonstrate those ties.[59] The relationship between the conviction and the ties only exists insofar as they are weighed against each other. However, the balancing account, as Stumpf presents it, is a much-too-simplistic account of the relationship between the conviction and a noncitizen's community ties. For one, there may be relationships between convictions and ties that introduce problems with balancing.

Stumpf asks the reader to consider two people who have been convicted for possession of cocaine. One is a lawful permanent resident, and the other has a B-1

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[57] Stumpf, *supra* note 56 at 1733.

[58] That's assuming that there is no issue of double jeopardy, retroactivity, etc.

[59] As an example of the relationship between the value of ties and how to demonstrate them, Deferred Action for Childhood Arrivals (DACA) not only has evidentiary requirements but also lists pieces of evidence that can meet these requirements. To prove its identity requirements, one can use a birth certificate from the home country, a school/military ID, or a U.S. government document bearing their name and photo.

visa authorizing business travel for six months to a year. The legal permanent resident has a U.S. citizen spouse and a U.S. citizen child. The business traveler, outside of some industry conferences, has no other connections. Stumpf notes that under the law at the time of the article, both are equally removable based "on the deportability ground for conviction of any drug offense and there is no relief from such offenses regardless of the immigration status of the noncitizen."

Stumpf assesses their respective cases, which I reproduce in part. Considering the nature and severity of the violation, Stumpf concludes that "the criminal penalty imposed for the drug conviction is likely a sufficient sanction for the permanent resident."[60] Considering the benefit or cost to the U.S. of imposing the sanction, Stumpf writes that what those benefits may be and how much they should weigh in terms of a sanction "depends on the strength of the proposition that noncitizens admitted to the United States should be held to a higher standard than citizens."[61] For those who would consider my proposal overdemanding, the benefits are not only important but can also be articulated in expressive terms: the U.S. disapproves of the violations of its norms by noncitizens, and citizenship is only available to those who abide by the rules.[62]

The consideration of the noncitizen's stake in the U.S. is important for analyzing the merits of balancing as Stumpf understands it. Stumpf compares the case of a lawful permanent resident and a business traveler. She makes two claims about permanent residence. The first is that "stake is inherent in the status of permanent residence."[63] One can be a permanent resident by meeting a residency threshold or by marrying a U.S. spouse. To be a permanent resident one must already have a serious stake. The second claim is that permanent residency is itself facilitative of social ties and is made for that very purpose. She writes that "immigration law invests permanent residents with a status that is stable enough to encourage tie-formation, as family relationships, employment, social relationships, cultural and community integration, and other innumerable forms of investment in residing in the nation."[64] Permanent residency both entails a stake and generates a deeper stake as a result. It is important to consider various legal statuses because they are differently situated in the social ties and stakes assumed and also in whether (and how) the presence of a legal status facilitates the building of deeper bonds. Getting lost here. These paras. are very unclear.

Consider Stumpf's discussion of the business traveler, who "holds comparatively little stake in remaining in the United States." The length of the visa term provides much less opportunity to establish significant ties in the United

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[60] Stumpf, *supra* note 56 at 1734.
[61] *Id*.
[62] *Id*. at 1735.
[63] *Id*. at 1736.
[64] Stumpf, *supra* note 56 at 1736.

States."[65] I disagree with this conclusion. For it to be true, then Stumpf would have to accept that lawful presence influences whether one's ties are "significant." But that is not always the case. Stumpf's position suggests that when it comes to long-term resident noncitizens who are present unlawfully, their ties count for less. Contra Stumpf, the length or type of the visa is not necessarily indicative of one's capacity to form significant ties or their intent to make them. The person who overstays their visa may still be able to make significant ties, even while their capacity is diminished both by the lack of legal sanction and the increased exposure to immigration enforcement. Moreover, it may be that it is a greater benefit to the U.S. to remove people who are present unlawfully as an expression of disapproval for those who seek the benefits of membership by violating immigration law.

I want to return to Duff and connect his view of the criminal law with the balancing account developed by Stumpf. Duff also attempts to give due importance to the membership of residents while retaining the state's right to call that membership into question. Duff wants to argue that the state can punish noncitizens as citizens. This framing suggests it is possible to have a perceptual stance that places noncitizens on par with citizens when it comes to criminal law. However, Duff suggests there are ways in which one's membership can be "qualified or suspended" as a consequence of crime.[66] He does not clarify whether removal is under the ambit of a "qualification or suspension" of membership. That said, Duff's view does not foreclose it either. What becomes apparent is that removal must meet a high bar to be justified. That is, a noncitizen's membership must still be intact, on Duff's view, after Stumpfian balancing determines that a convicted noncitizen should be removed. Not only must the conviction outweigh the ties, but one's status as a noncitizen member must still remain after the determination of removal.

Balancing throws reintegration into serious doubt. And accepting that premise is significant because long-term residents are thus not equal to citizens. Citizens who commit crime are not expelled from the country. But someone who agrees with Stumpf's notion of balancing or who agrees with the idea of forfeiture/probation will just say that is the cost of doing business (nation-state building). Even when one concedes that long-term noncitizens are not equal to citizens, what are long-term resident members entitled to? I would argue that balancing dispenses with ideas that one's membership should not be thrown into doubt once membership has been established. Once one becomes a member, one should continue to be treated as a member, which forecloses any balancing approach that would permit their removal?

Whether long-term noncitizens can reintegrate into the society in which they have formed ties is incredibly relevant for two reasons. First, reintegration is central to whether long-term noncitizens stand in relations of equality to citizens. Second,

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[65] *Id*.

[66] See supra note 15

reintegration recognizes the ties that long-term noncitizens have formed through their social attachments. Removal and the accompanying inadmissibility (removal arguably has no heft without it) prevents the noncitizen from reintegrating into their community and renders them unable to formalize their connections into the legal status of citizenship. Removal is not a qualification of membership but more an outright extinguishing of it.

The Issue with Balancing

There are two issues with Stumpf's model that I must address before proceeding. The first is that the balancing account has an underdeveloped view of the relationship between crime and social ties. That is, though Stumpf's contribution is mainly in reducing the universe of crimes for which removal is a sanction, her account does not adequately address the idea of membership—in particular, the significance of social ties as a basis for inclusion as members. Long-term residents stand to be removed in violation of the state's duty to them as members. The second issue is that Stumpf does not provide an account of discretion, i.e., how states ought to decide which crimes merit removal.

My first critique implies that balancing is impractical because it does not consider the role that crime plays in the formation of ties. Suppose there was a person who only felt he could stay in the country by procuring false documents to work and provide for his family. Consider yet another example of someone who sold drugs to fund her little sister's education. These examples provoke two important considerations. First, if people form connections, even the connections we value, occur through crime, how should society treat connections mediated through crime, especially in a balancing account? Second, in the case of people who use false documents, they do so in part because they may not have access to legitimate documents. And whether someone has documents or not is a critical part of whether people form any connections. As much as "long-term resident" seems like a settled category, the state controls the bounds of such a category and can transform how categories like permanent residency relate to crime.

My second critique is that there are important questions about discretion left unanswered by her account. The balancing account retains the valuation of membership and social ties. However, it rejects my account that social ties are indefeasible, even past a certain point in time. Let us assume that a removal adjudicatory process reflecting Stumpf's balancing account exists in a Duffian criminal legal system. Then, let us view things from the vantage of the person who is convicted of a removable crime, and it is determined in proceedings that the conviction outweighs whatever countervailing ties they have. Though the model argued for does introduce discretion, it is unclear where such discretion can apply. But it is clear that where it applies depends on the institutional form that removal

proceedings take and whose task it is to make these decisions, i.e., where the state can exercise its right to remove.

It behooves me to explain what "valuing" and "jeopardizing" those social ties mean in this context. Recall the assumption: that there is a shared understanding of the ties the state values and a shared understanding of how the noncitizen can provide proof that she has formed those ties. When a noncitizen presents these ties to motivate a case against removal, the noncitizen also makes the case that the ties have the kind of probative value that support non-removal. Or, specifics of the crime and ties aside, does the commission of a crime allow the state to question whether the offender values the ties? I would respond by saying though the existence of ties cannot be questioned even by bad conduct, to the extent that the noncitizen can claim that the ties they have formed are valuable enough to motivate a defense against removal, the state can call that into question.

In conclusion, Stumpf's balancing account rightly gives weight to noncitizens' social ties. Her requirement that one's conviction outweigh the ties the noncitizen offender formed allows for those social ties to defeat removal and thus reduces the scope of an immigration enforcement regime that, at the moment, is expansive. Furthermore, the balancing account reflects a general desire to include process in an apparatus that sorely lacks it. However, as I have shown, Stumpf's account opens itself up to allowing the state to devalue the social ties a noncitizen forms before the balancing takes place. For Stumpf's account to be effective, it must first protect the interests of the noncitizen at the outset of the removal. The stakes of postconviction removal, thus, are more significant than comparing one's conviction and ties. Further, these stakes also provide insight into the daily existence of noncitizens.

CONCLUSION

In sum, postconviction removal occupies a unique and pressing space within both criminal and immigration legal systems and raises important philosophical questions about criminal law. Contextualizing removal is integral to my argument that removal as a consequence of criminal convictions undermines one central justificatory aim of criminal law, which is to reintegrate members into the society in which they have formed ties. One central purpose of criminal law is to reintegrate members into society, and for long-term resident noncitizens to be deported as a consequence of criminal convictions renders the justification for the original punishment void.

The increasing interconnection of immigration law and criminal law, through removal or other mechanisms of enforcement, is one with great legal and philosophical importance. As immigration law and criminal law begin to resemble each other in form and function, this development befits an examination of the point

of criminal law as well as the point of immigration enforcement. This paper describes a diagnostic project and investigates the consequences of legal status in different domains of law, how the state operates in each domain, and what happens when certain domains intersect. And as Stumpf and Duff's work has helped me show, the value of such a project is manifold. For one, the difficulty of developing an account of justified removal should give us an idea of the precariousness that is built into noncitizen status of any kind. Such precariousness arises from, among other things, the increased opportunities to be subject to removal as well as the (lack of) procedure that removal often involves.

This paper is part of a larger project that explicates "illegalization," which I define as state practices of criminalization that use immigration enforcement as a tool of social degradation. The upshot of this paper is that though we can acknowledge that the immigration enforcement apparatus and criminal legal system not only resemble each other but collaborate, the ways in which they differ and why they differ are instructive and shed critical light on the nature of that resemblance and collaboration. Furthermore, this paper contributes insight into the fragility of noncitizen status, even among those—like Fanny Lorenzo— who were once on the path to citizenship but for the unchecked partnership between immigration and criminal law.

INTRODUCTION

A 2017 *Mother Jones* article[1] begins with a harrowing vignette depicting 50 immigration detainees being shuffled into a Tucson, Arizona courthouse. These detainees are defendants involved with Operation Streamline, a 2005 joint initiative between the Department of Justice (DOJ) and the Department of Homeland Security (DHS) that required that people detained at the border for crossing illegally be sent to federal criminal courts rather than civil immigration courts.[2]

Under Stremaline, U.S. Border patrol refers apprehended migrants to DOJ under the assumption that being charged and convicted with illegal reentry will deter others from crossing the border illegally. Migrants prosecuted through Operation Streamline are "typically detained for 1 to 14 days before appearing in court.[3] They frequently have no counsel until their hearings, allowing little time to consult with an attorney to understand the charges and plea offers, consequences of conviction, and potential avenues for legal relief."[4] Furthermore, a single attorney can represent dozens of defendants at a time and there are not enough translators relative to the number of defendants who need them.[5] Judges in Streamline proceedings "typically combine the initial appearance, arraignment, plea, and sentencing into a single hearing, sometimes taking as little as 25 seconds per defendant."[6] From the facts presented, it is apparent that Streamline defendants are not going through a "normal" criminal trial, but an alternative process.[7]

But as the vignette suggests, those detained under Operation Streamline are not going through the kind of criminal trial that other classes of defendants face. Mass trials, the lack of meaningful access to counsel, and a dearth of translators raises important questions about due process.

This paper is about the exceptional character of the treatment of immigrants in criminal proceedings. In this article I argue that initiatives such as Operation Streamline and Title 42 reflect the existence of an "enemy criminal law." The

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[1] Bryan Schatz, *A Day in the "Assembly-Line" Court That Prosecutes 70 Border Crossers in 2 Hours*, MOTHER JONES (Jul. 21, 2017), https://www.motherjones.com/politics/2017/07/a-day-in-the-assembly-line-court-that-sentences-46-border-crossers-in-2-hours/.

[2] *Id*.

[3] Chris Rickerd, *Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing*, ACLU, https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf.

[4] *Id*.

[5] Chad R. Doobay, Operation Streamline – A Failure of Due Process, National Immigrant Justice Center (Dec. 11, 2015), https://immigrantjustice.org/staff/blog/operation-streamline-failure-due-process.

[6] Rickerd *supra* note 3 citing Fernanda Santos, *Detainees Sentenced in Seconds in 'Streamline' Justice on Border*, NY TIMES (Feb. 11, 2014), http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html.

[7] Words fail me here.

enemy criminal law also behoves me to redefine the conception of illegalization that is at the center of my work. Whereas I have defined illegalization *as state practices of criminalization that use immigration enforcement as tool of social degradation*, I now define illegalization as *state practices of criminalization that position immigration enforcement as both a consequence and a driver of sociolegal processes that turn immigrants into enemies of the state.*

I choose the enemy criminal law as an object of analysis because it has three defining features: first, the punishment comes well before an actual harm occurs; second, the punishment is disproportionate relative to the offense; third, the enemy criminal law suppresses procedural rights.[8] Emblematic of this alternative enemy criminal law system, Streamline trials suffer from due process concerns and disproportionate punishment as well as ineffective assistance of counsel concerns, thus fitting Jakobs' three defining features. These legal developments at the border blur the line between an offender and an enemy.

My argument proceeds as follows. In Part I I analyze two examples of the enemy criminal law at the border: Operation Streamline and Title 42 exclusions as a response to the COVID-19 pandemic. Operation Streamline is a clear example of the enemy criminal law in action and highlights the criminalization of unauthorized entry. Title 42 exclusions highlight the executive use of emergency to exclude migrants out the border without process, and highlights how attitudes of enmity or skepticism of those can create an underclass of deportable migrants.

In Part II, I argue that recent legal developments reflect the presence of what German theorist Günther Jakobs labels the "enemy criminal law."[9] I further situate his work in relation to the work of Carl Schmitt, Elaine Scarry, and Giorgio Agamben both to situate the concept in a long intellectual history while also positioning it to contribute to contemporary discussions the kind of which I engage in this article.

In Part III I connect the concept of the enemy criminal law with the concept of illegalization by demonstrating that both Operation Streamline and Presidents Trump and Biden's use of Title 42 are premised on the migrant as a potential enemy.

Though this argument uses examples drawn from the U.S. immigration apparatus, the illegalization framework offers tools/resources for examining other political contexts and the unique problems that arise when regulating non-citizenship.

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[8]Carlos Gómez-Jara Díez, *Enemy Combatants Versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and Its Relevance to the Anglo-American Discussion on the Legal Status of Unlawful Enemy Combatants*, 11 NEW CRIM. L. REV. 529 (2008).

[9] Günther Jakobs, *Bürgerstrafrecht und Feindstrafrecht*, 5 HÖCHSTRICHTERLICHE RECHTSPRECHUNG STRAFRECHT 88 (2004).

This article contributes to legal scholarship on crimmigration by presenting a rigorous theoretical account of the role that criminal law plays in the practice of immigration law. Moreover, the interaction between criminal law and immigration law has implications for how "citizen" criminal law is practiced, especially for noncitizen defendants. The purpose of my paper is to fill a conceptual lacuna in migration scholarship; though existing literature has done well in linking the concept of the "illegal alien" to the criminal law, I argue that it is important to accurately describe the political situation of those labeled "illegal alien" as an ongoing process in its clearest terms. "Illegalization" fits the bill.

I. TWO PHENOMENA

In this section I introduce the two main programs that are at the center of my analysis: Operation Streamline and Title 42. Though they have differing histories and are criminal and civil programs respectively, I argue that both share a logic of exclusion premised on seeing migrants as enemies of the state.

Operation Streamline

Before going into Operation Streamline, it is important to note that criminalizing unauthorized entry is not a phenomenon limited to the U.S. Far from being the province of developed or otherwise populous nations, no fewer than 124 nations consider unauthorized entry a crime to which these nations respond with fines, deportation, increased penalties for re-entry, or a combination of all three.[10]

The U.S. code criminalizes illegal entry and re-entry under "entry-related offenses." 8 U.S.C §1325 focuses on unauthorized entry in the first instance, while 8 U.S.C. §1326 focuses on unauthorized re-entry.[11] Examples of actions charged under §1325 and §1326 (1) crossing the border in a place that is not a border checkpoint; (2) being smuggled in the back of a vehicle or truck, or through the use of tunnels; or (3) lying on a visa application or buying/obtaining falsified entry

[10] LL File No. 2019-018034, *Criminalization of Illegal Entry around the World*, LIBRARY OF CONGRESS (Aug. 2019). It is important to note that some countries regard unauthorized entry as an administrative offense. More nations make the distinction between unauthorized entry and re-entry, with much more severe sentence for the latter.

[11] U.S.C. §1326 makes it a crime to "unlawfully re-enter, attempt to unlawfully re-enter, or to be found in the United States after having been deported, ordered removed, or denied admission. This crime is punishable as a felony with a maximum sentence of 2 years in prison. Higher penalties apply if the person was previously removed after having been convicted of certain crimes: up to 10 years for a single felony conviction (other than an aggravated felony conviction) or three misdemeanor convictions involving drugs or crimes against a person, and up to 20 years for an aggravated felony conviction."

papers (including a green card).[12] Though imprisonable on their own, these entry-related offenses can (and often do) serve as aggravating factors when an unauthorized entrant is convicted of certain crimes like drug possession or human trafficking.

Operation Streamline was a 2005, Bush-era joint initiative between the Department of Homeland Security and the Department of Justice. Previously a civil violation, Operation Streamline began to apprehend migrants who sought to enter the U.S. illegally and referred them to the DOJ for federal prosecution.[13] However, what began as a Bush-era program became bipartisan as it developed. Under Barack Obama, the program ballooned in size. Prosecutions not only doubled over the course of his two terms, but Streamline cases accounted for more than half of all federal prosecutions in 2016.[14] In 2018, the Trump Administration revived Operation Streamline, adding the cruel twist of immediately separating thousands of children from their parents.[15] In addition, they instituted further barriers to asylum, issuing specific guidelines to consider illegal entry as a factor they can count against a migrant's asylum claim.[16] On that point, some have argued that Streamline "violated Article 31 of the Convention on the Status of Refugees, which prohibits persecuting illegal crossing or presence as a criminal offense."[17]

Operation Streamline has had a massive impact on the U.S. criminal legal system. Streamline's rise led to unauthorized entry offenses being the most prosecuted in federal court, comprising 65% of the federal docket.[18] This has increased the caseloads for the federal judicial system. Moreover, five of the U.S.'s 94 federal districts handle 78% of the immigration-related criminal cases (the Southern District of California, the District of New Mexico, the District of Arizona,

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[12] Ilona Bray, *Is It a Crime to Enter the U.S. Illegally?* ALLLAW https://www.alllaw.com/articles/nolo/us-immigration/crime-enter-illegally.html.

[13] Rickerd, *supra* note 3.

[14] Schatz, *supra* note 1.

[15] *Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy*, HUMAN RIGHTS WATCH, (August 16, 2018, 8:00 AM), https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy.

[16] *Id*. Also see *AILA Policy Brief: USCIS Guidance on Matter of A-B- Blocks Protections for Vulnerable Asylum Seekers and Refugees*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, (July 23, 2018), https://www.aila.org/infonet/uscis-matter-of-a-b-asylum-refugees.

[17] Rommel H. Ojeda, *How Operation Streamline Changed Illegal Border Crossing*, DOCUMENTED, (Mar. 5, 2022), https://documentedny.com/2022/03/05/operation-streamline-meaning-border/.

[18] *Fact Sheet: Prosecuting People for Coming to the United States,* AMERICAN IMMIGRATION COUNCIL, (Aug. 23, 2021), https://www.americanimmigrationcouncil.org/research/immigration-prosecutions. See also Rickerd, *supra* note 3: "Mass prosecutions of border crossers also overwhelm federal court districts along the southwest border, draining resources that could be used to pursue actual threats to public safety. Illegal entry and re-entry prosecutions constituted more than 80 percent of all prosecutions in the District of Arizona, District of New Mexico, Western District of Texas, and Southern District of Texas in FY 2013."

the Western District of Texas, and the Southern District of Texas).[19] Between 2005 and 2016, the U.S. criminally prosecuted 730,000 migrants—412,240 for illegal entry and 317,916 for illegal re-entry.[20]

As the name suggests, migrants faced a streamlined journey through the criminal system. According to a report by Immigration Forum, "Several steps of a federal criminal case with prison and deportation consequences—including initial appearances, preliminary hearings, pleas, and sentencing—are combined into a single hearing that lasts only minutes."[21] Up to 75 people can be prosecuted in an hour, with dozens being prosecuted per hearing.[22] Lawyers can, at best, meet their clients briefly. Faced with lengthy prison sentences, those apprehended plead guilty to the lesser crime of illegal entry, serving an average of 17 months in what are known as Criminal Alien Requirement prisons before being deported. [23]

The scale of Operation Streamline and its practice (think of the dozens of detainees shuffled into a courtroom for simultaneous hearings) reflects what De Genova calls the "Border Spectacle."[24] As the name suggests, the border spectacle is a "scene of ostensible exclusion, in which the purported naturalness and putative necessity of exclusion may be demonstrated and verified, validated and legitimated, redundantly."[25] The concept is instructive in understanding illegalization as a production of how the law "in demonstrable and calculated ways, has in fact produced the terms and conditions for the 'illegality' of [migrants]"[26] by emphasizing its naturalness through constant, repetitive practices of exclusion. The legal scholar Cesar Cuauhtémoc García Hernández writes that immigration policy "is a sign of virtually unbridled executive power and an example of law's willingness to push migrants into a marginal, by-their-fingernails hold onto recognition inside the court rooms."[27] Cuauhtémoc García Hernández states that unlike the Board of Prisons, Immigration and Customs Enforcement "[does not] imprison to punish;" rather, "it imprisons to give the federal government time to decide who gets to be in the United States and who doesn't. This isn't punishment,

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[19] *Operation Streamline Factsheet*, NATIONAL IMMIGRATION FORUM, (Sept. 1, 2020) https://immigrationforum.org/article/fact-sheet-operation-streamline/#_edn11.
[20] Bill De La Rosa, *Managing Non-Citizens Through the Criminal Justice System: The Mass Prosecution of Migrants Under Operation Streamline*, UNIVERSITY OF OXFORD FACULTY OF LAW BLOGS: BORDER CRIMINOLOGIES, (Nov. 12, 2019), https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/11/managing-non.
[21] *Operation Streamline Factsheet, supra* note 73.
[22] De La Rosa, *supra* note 74.
[23] Rickerd, *supra* note 3.
[24] Nicholas De Genova, *Spectacles of Migrant 'Illegality': the Scene of Exclusion, the Obscene of Inclusion,* 36 ETHNIC AND RACIAL STUD. 1180 (2015).
[25] Id. at 1181
[26] *Id*. at 1182.
[27] César Cuauhtémoc García Hernández, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS, 92-93 (2019).

courts tell us; it's just deciding where on the map people should stand."[28] Here we see the recognition that the unchecked nature of executive power is such that it can be used to push migrants into a space where they are targets of state violence.

Title 42

Title 42 of the United States Code was a previously dormant clause of the 1944 Public Health Services Act."[29] Originally created to address public health matters, it "grants government the ability to take emergency action in numerous ways including to 'stop the introduction of communicable diseases.'"[30] At the start of the COVID-19 pandemic in March 2020, the Trump Administration used Title 42 to regulate border crossing, citing COVID-19 precautions as the reasoning.[31] More specifically, it allowed the United States to expel migrants at the border without providing them an opportunity to request asylum.[32] The Trump Administration used Title 42 to override immigration law that allowed people to seek asylum after entering illegally, "arguing that taking migrants into custody in federal facilities would create…a public health risk."[33]

The Biden Administration not only continued Title 42 but expanded it.[34] On January 5, 2023, the Department of Homeland Security announced an expansion of Title 42 expulsions.[35] On February 10, 2023, U.S. Customs and Border Patrol cited a 40 percent drop in the number of undocumented immigrants found at the U.S.-Mexico Border.[36] In all, there have been more than 2 million expulsions of migrants under Title 42 since March 2020, though that number can be explained in large part by recidivism.[37]

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[28] *Id*. at 121.
[29] *Title 42 Explained*, PUENTE HUMAN RIGHTS MOVEMENT, https://puenteaz.org/title42.
[30] *What is Title 42 and what does it mean for immigration at the southern border?* PBS NEWS HOUR, (Jan 13, 2023, 9:14 AM) https://www.pbs.org/newshour/nation/what-is-title-42-and-what-does-it-mean-for-immigration-at-the-southern-border.
[31] *Id*.
[32] Michelle Hackman, *What Is Title 42? What It Means for Immigration and U.S.-Mexico Border,* WALL STREET JOURNAL, (May 5, 2023, 12:54 PM), https://www.wsj.com/articles/what-is-title-42-border-rules-migration-11649118539.
[33] *Supra* note 84.
[34] Hackman, *supra* note 86.
[35] Adam Isacson, *How the Biden Administration May Keep Asylum out of Reach After Title 42*, WASHINGTON OFFICE ON LATIN AMERICA, (Feb. 17, 2023), https://www.wola.org/analysis/biden-asylum-after-title-42/.
[36] *Id*. See also *CBP Releases January 2023 Monthly Operational Update*, U.S. CUSTOMS AND BORDER PROTECTION, (Feb. 10, 2023, 12:00 PM), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-january-2023-monthly-operational-update.
[37] *Supra* note 84.

And though the Title 42 order expired on May 11, 2023 along with the federal public health emergency, the end of Title 42 does not signify a softer approach at the border. In fact, Biden sent 1,500 armed, active-duty troops to the southern border in anticipation of a surge of up to 65,000 migrants.[38] Despite this move, the number of migrants illegally entering the U.S. border reached its lowest point since the beginning of the Biden Administration with only 3,000 entering per day.[39] Moreover, though the number of people living in Mexican tent cities waiting to cross was estimated at 65,000, counts that occurred around and after the expiration of Title 42 had the number at 25,000 eight days after its expiration and around 20,000 at the end of the month.[40]

Asylum processes will also carry heavy restrictions. Under a new rule, border officials would reject asylum claims if asylum seekers did not seek asylum in a third country.[41] The Biden Administration also announced that it will "set up migrant processing centers in Latin America, increase deportations and expand legal migration pathways in a bid to reduce the number of migrants crossing the U.S.-Mexico border unlawfully."[42]

Integral to the history of Title 42 is how it has operated in the context of a skepticism toward asylum as well as the transformation of the border to a place where criminals enter the country. Because of such a development, the condition of illegality also has attached to it the label of criminality. This has the added rhetorical effect of labeling those who enter unlawfully as criminals, which is intentionally adding to the intended deterrent effect of the policy. Crossing the border increasingly becomes associated with crime, and the resulting move to create illegal migrants creates criminal enemy from whom law abiding citizens require protection. On this point, consider comments President Donald Trump made in May 2018 to a group of California lawmakers and law enforcement about the influx of Mexican and Central American migrants:

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[38] Julia Ainsley, Mosheh Gains, Peter Alexander, Courtney Kube, and Summer Concepcion, *Biden to Send Active-Duty Troops to the Southern Border as Covid Restrictions End,* NBC NEWS, (May 2, 2023, 6:05 PM), https://www.nbcnews.com/politics/joe-biden/biden-expected-send-active-duty-troops-southern-border-covid-restricti-rcna82429.

[39] Julia Ainsley & Didi Martinez, *The Number of Migrants Crossing the Border Has Hit Its Lowest Point Since Biden Took Office. Here Are Four Reasons There Was No Post Title 42 Surge.*, NBC NEWS (June 2, 2023), https://www.nbcnews.com/politics/immigration/four-reasons-there-was-no-post-title-42-migrant-border-surge-rcna87325#

[40] Id.

[41] Diana Roy, Can Biden's New Asylum Policy Help Solve the Migrant Crisis? Council on Foreign Relations, (March 7, 2023, 12:08 PM), https://www.cfr.org/in-brief/can-bidens-new-asylum-policy-help-solve-migrant-crisis.

[42] Camilo Montoya-Galvez and Margaret Brennan, *U.S. Takes New Steps to Reduce Migrant Arrivals When Title 42 Border Rule Ends in May*, CBS NEWS, (Apr. 27, 2023, 8:18 PM), https://www.cbsnews.com/news/immigration-title-42-migrant-centers-latin-america-deportations/.

> We have people coming into the country or trying to come in—and we're stopping a lot of them—but we're taking people out of the country. You wouldn't believe how bad these people are. *These aren't people. These are animals*. And we're taking them out of the country at a level and at a rate that's never happened before.[43]

Trump's statement that migrants "aren't people" is significant in two ways. First, the statement that they are not people is to set up the charge that they are animals. Migrants are both foreign to and lower than those who are considered people, but also that positioning is permanent. Such as an animal will not turn into a person, those coming through the border illegally will never turn into law-abiding citizens. To Trump, Americans are vulnerable to animals coming in and endangering human beings and the political apparatus those humans rely on—in other words, the exclusion is necessary to sustain the current political order.

And in his remarks to the Republican Jewish Coalition in Las Vegas, Trump additionally mocks asylum seekers, calling the asylum process a "scam."[44] Further yet, he says that most asylum seekers more closely resemble Mixed Martial Arts fighters than people who can legitimately seek asylum.[45] The rhetoric has transformed from the practical impossibility of finding and separating duplicitous criminals from legitimate asylum seekers to the unilateral declaration that the asylum system is a scam. This, of course, is not to mention that it represents the height of irony that Trump's declaration of the asylum system as open to corruption was made to a group who have been refugees in the past. [46]

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[43] *Remarks by President Trump at a California Sanctuary State Roundtable*, TRUMP WHITE HOUSE ARCHIVES, (May 16, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable/. Emphasis mine.

[44] *President Trump Mocks Asylum Seekers, Calls Program a "Scam*," C-SPAN, (Apr. 6, 2019), https://www.c-span.org/video/?c4790668/president-trump-mocks-asylum-seekers-calls-program-scam.

[45] *Id*.

[46] GEORGE LAKOFF AND MARK JOHNSON, METAPHORS WE LIVE BY, (1981). It is also important to discuss the metaphor that is all but apparent in Trump's words, that of the catch-and-release metaphor. George Lakoff and Mark Johnson's 1981 book *Metaphors We Live By* argues that metaphors are not mere flourishes of language but constitute human cognition. About policy, the metaphors we use determine whether a phenomenon is a political problem, and influence how we conceptualize said political problem as well as—and this is perhaps most important—how we conceptualize policy responses. The catch-and-release element is but a part of just how apparent the dehumanization is in Trump's statement. Moreover, the relegation to mere life also makes palatable the removal of process. There is a tension the sovereign must navigate between the enemy being animalistic enough to not need process, yet smart and cunning enough to bypass whatever laws and processes would be in place anyway. The illegal alien is too cunning to obey laws yet too stupid for legal protections.

Trump is not an aberration but a vulgar version of something deeper. Title 42, which was in operation across a Republican and a Democratic administration, is an example of this. Title 42's enforcement provides insight into how suspicion slowly becomes part of official policy by not rhough skepticism of asylum claims but doubting the motives of asylum seekers themselves. However, it is also important to note that Title 42 is a *continuation* of an attitude of skepticism and enmity toward asylum seekers already reflected in policies such as Operation Streamline. The state of exception was the pandemic of border crossers—reflecting the continued uses of metaphors of disease and crime. The COVID-19 pandemic added a layer of public health emergency. De Genova writes the following about the how illegalization leads to the restriction of asylum and the delegitimization of its claimants:

> Indeed, the criteria for granting asylum tend to be so stringent, so completely predicated upon suspicion, that it is perfectly reasonable to contend that what asylum regimes really produce is a mass of purportedly 'bogus' asylum seekers. Hence, in systematic and predictable ways, asylum regimes disproportionately disqualify asylum seekers, and convert them into 'illegal' and deportable migrants.[47]

The labeling of "potentially dangerous individuals" and the constant vigilance against reflects an institutional commitment to make exclusion seem necessary to maintaining the integrity of the nation-state.

I. THE ENEMY CRIMINAL LAW

It is here that I turn to Günther Jakobs and his concept of the "enemy criminal law."[48] Enemy criminal law is the idea that some people are enemies of the state and are excluded from the state's protection. More than that, the enemy criminal law represents a positive program to identify, target, and exclude people deemed to be enemies of the state. Enemy criminal law is a concept that Jakobs has been developing since 1985. Since the attacks of September 11, 2001, Jakobs' work received renewed interest from scholars mainly from Germany and Spain.[49] Moreover, by the time of the attacks, Jakobs had transformed his thinking on the enemy criminal law from a descriptive account of German policies around that time to a normative account of how states respond to perceived enemies.

According to Jakobs, enemy criminal law has three aspects. The first is that punishment comes well before any actual harm occurs. The second is that the sanctions are disproportionate relative to the offense, either in past or in the future.

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[47] De Genova, *supra* note 78, at 1180-81.
[48] For simplicity's sake I will just be describing it as the "enemy criminal law."
[49] Golser 66

The third is that the enemy criminal law suppresses procedural rights. Jakobs is demarcating a specific process whose principles are incompatible with citizen criminal law.[50] According to Austrian legal theorist Felix Golser, the enemy criminal law "should apply to anyone who is constantly denying the legal system of the state with their actions and is therefore a source of danger."[51] This different process exists because, according to Jakobs, enemies are not mere offenders. Whereas offenders (he mentions sex offenders and organized criminals) only partially challenge the system, enemies of the state deny the political and legal order. The consequence of this violation is to mark the violator as an enemy, as fundamentally foreign and antithetical to the legal order.

The enemy criminal law exists in contrast to what Jakobs calls *Bürgerstrafrecht* or the citizen criminal law. The basis for Jakob's concept is social contract theory, according to which breaking the law represents a breach of the contract.[52] For Jakobs, what underpins a legal order is the cognitive reassurance provided by shared normative expectations among citizens. What it means to take the legal system seriously and comply with it comes from the reassurance that other citizens also believe the law is legitimate and abide by it.[53] Citizens are so because they provide this cognitive reassurance to other citizens, and such reassurance gives the legal order its normative force. The citizen, though committing a crime, is held to account by a criminal legal system of which he is a co-author, to borrow Duffian language.[54] Even as an offender, he has a stake in the integrity of the process. As it regards a "partial challenge of the system," the citizen criminal has challenged said system only through the commission of a crime.

The enemy, in turn, challenges the order by just existing as such. The enemy, for Jakobs is someone who has "permanently turned away from the law and in this respect does not guarantee the minimum cognitive security of personal behavior and demonstrates this deficit by his behavior. Being an enemy is an irredeemable status, as Jakobs determines one to be someone who permanently has turned away from the law. Suzanne Krausman, in her discussion on Jakobs, writes that though offenders in the normal sense partially challenge the legal order, the terrorist denies that order and actively seeks to destroy it.[55]

Because enemies exist to challenge the order, enemy criminal law looks to punish them before they have a chance to attack the state. In his commentary on Jakobs,

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[50] Gómez-Jara Díez, *supra* note 13.

[51] Felix Golser, *The Concept of a Special Criminal Law as a Weapon Against "Enemies" of the Society* 67 STUDIA IURIDICA 65, 67 (2016).

[52] *Id*.

[53] Gómez-Jara Díez, *supra* note 13.

[54] R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001).

[55] Susanne Krasmann, *Enemy Penology, in* OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2 (2018).

Golser writes that enemy criminal law "does not look backwards at the crimes the offender committed but forward at the damage he is likely to cause in the future."[56] The enemy criminal law is an anticipatory mode of criminalization in which threats are recognized and neutralized before they materialize and attack the nation-state. The state cannot be sure that the noncitizen will not recidivate. Illegality becomes an indicator that an alien is about is a potential threat to the legal order. Jakobs writes that when a past act is punished, the criminal has culpably harmed the people and the people, through the punishment, are forcibly compensating themselves. When it comes to punishing future acts, the enemy criminal law is concerned with the "dubious figure against whom [the people] are securing [them]selves."[57]

Immigration enforcement practices like removal or exclusion, therefore, is not so much a punishment for past crime so much as it is a prophylactic against future crime. Carlos Gómez-Jara Díez writes,

> individuals who do not provide this minimum of cognitive reassurance (i.e., who do not generally abide by the rules) do not have access to the rights and duties that typically attach to those who do. Therein lies the reason why [enemy criminal law] is not directed toward persons—these, by definition, *do* provide the cognitive reassurance—but rather to those individuals who do not recognize the validity of the legal system.…to the extent that individuals do not provide this minimum level of cognitive reassurance, the legal system does not recognize them as persons (law-abiding citizens) but as sources of danger: in a nutshell, as enemies.

Personhood is conferred on those who provide this cognitive reassurance.The cognitive reassurance occurs through rule-following activity, which also reflects a recognition of the validity of the legal system. For those who provide the cognitive reassurance the law recognzizes them as persons. Citizens here are linked through rule-following behavior that also affirsm the validity of the legal system. Enemies on the other hand, cannot provide this cognitivive reassurance, but what does that mean? Lawbreaking among noncitizens is behavior that reflects a rejection of the legal system..

It is not enough that the enemy criminal law is an alternative legal order, but it must also be a separate one. And emergency provides a justification for a separate response. The enemy becomes the reason for such an arrangement. Suzanne Krausman writes,

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[56] Golser, *supra* note 13 at 68

[57] Günther Jakobs, On the Theory of Enemy Criminal Law in FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 414, 421 (Markus Dubber, ed., 2014)

> It is…the irregular enemy who is loaded for whatever reason, that is constitutive for enemy criminal law's theoretical move to integrate the concept of war into the legal system and at the same time to segregate its logic from the [rationality] of citizen criminal law it would otherwise undermine.[58]

The enemy criminal law internalizes the logic of war because the enemy--i.e., the illegal alien--exists among the citizenry and can attack at any given moment. This state of exception, this state of war, requires a different rationality. Applying the logic of citizen criminal law would not merely be insufficient to respond to the emergency; it would undermine the legal order.

As the enemy is unpredictable and violent, the state responds through announcing states of emergency that require swift, preventive action. The enemy criminal law "[promotes] the transformation of the state not through law, but rather through the request for a new form of prevention."[59] The prophylactic response emphasizes the extent to which the state distrusts the noncitizen. The noncitizen is the enemy who stands outside the notion of citizenship as membership in a nation-state. "Noncitizens, as outsiders par excellence, are objects to be stopped, searched, and interrogated even before they reached the border. Those whose ethnicity, appearance, or [whose] documentation fails to provide countervailing reassurance are liable to be turned back, detained, or criminalized."[60] This is an important insight because it is not enough to say that programs that are examples of enemy criminal law are departures from values like due process in service of the rule of law. The enemy criminal law operates outside of the rule of law because the people who are the targets of programs like Streamline and Title 42 are enemies of the state and not people to whom the rule of law needs to be accountable.

Jakobs' work supports my argument because his theory provides insight into how the state sees itself existentially. By that I mean that his work answers the following four questions: First, what are the conditions for the existence of the state and its legitimacy? Second, what are the most serious threats to the state's legitimacy? Third, how does the state identify and respond to those threats? Lastly, how does the state justify its chosen response? Enemy criminal law answers these questions. Rule-following and the cognitive reassurance it provides are the conditions for the existence of the state and its legitimacy. Those deemed to be enemies are threats to the state. The state responds to enemies through prophylactic

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[58] Krassmann, *supra* note 55 at 3.
[59] Susanne Krassman, *The Enemy on the Border: Critique of a Programme in Favour of a Preventive State*, 9 PUNISHMENT & SOC'Y 301 (2007).
[60] Lucia Zedner, *Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment, in* THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION 42, 48 (Katja Franko Aas and Mary Bosworth eds., 2013).

exclusion or through other methods of removing the threat. Lastly, what justifies such a response is the existential nature of the threat and the necessity of protecting citizens, i.e., those who engage in rule-following behavior.

Friend and Enemy

The friend/enemy distinction is far from new, Jakobs' formulation of he distinction exists in the wake of Carl Schmitt's articulation of the distinction. According to Reinhart Mehring, Schmitt "found the rule of law under a liberal multi-party ststem ungovernable, weak, and inadequate to cope with its competences" and "pushed for a more executive-oriented and authoritarian transformation of the Weimar constitution."[61] In "Friend or Enemy: Reading Schmitt Politically" Mark Neocleous makes the argument that one cannot separate Schmitt's anti-semitism and fascism from his thought. It is Schmitt's desire that "only a Caesaristic dictatorship, committed to state power and substantial homogeneity willing to define its enemies and eliminate them should an emergency situation require it, can save democracy."[62] Though Schmitt's positions his account (as well as his fascism, anti-semitism, and Nazi adherence) as a critique of liberalism, Neocleous is right in that such a critique is misguided because liberal democracies often suspend the rule of law and move toward formal dictatorial rule in situations of emergency.[63]

In *The Concept of the Political*, Schmitt argues that the concept of the state presupposes the concept of the political. Within the political, the foundational distinction is that between friend and enemy.[64] Schmitt writes that "The political entity presupposes the real existence of an enemy and therefore coexistence with another political entity."[65] Quinta Jurecic argues that, far from the friend/enemy distinction being a quirk of the political, the distinction is the reason the state even exists. She adds that, for Schmitt, "not only [could] leaders thrive on the rhetoric and figment of the enemy, but that the very essence of the political rests on the powers required to detect such a foe."[66] Realism is a defining feature of the friend/enemy distinction, one based on an interpretation of political facts on the ground. And though the distinction is not a normative status, normativity can and often does play a role rhetorically in the determination of friend/enemy. The

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[61] Reinhard Mehring, *Carl Schmitt's Friend-Enemy Distinction Today*, 28 FILOZOFIJA I DRUŠTVO 304, 304 (2017)
[62] Mark Neocleous, *Reading Schmitt Politically*, 079 RADICAL PHIL. 13, 15 (1996)
[63] *Id*. at 21
[64] SCHMITT, *supra* note 8, at 27-28.
[65] *Id*. at 53.
[66] Quinta Jurecic, *Donald Trump's State of Exception*, LAWFARE (Dec. 14, 2016, 1:01 PM) https://www.lawfareblog.com/donald-trumps-state-exception.

political has no innate substance but that of what is capable of grouping people along the friend/enemy distinction.

It is important to go into what the powers required to detect an enemy are, who gets to decide when there exists a situation that requires these powers, and who gets to decide who the enemy is. The sovereign not only has control over the exception, but also is able to develop a conception of normalcy that fits the exception. Schmitt argues that, in a state of exception, the sovereign goes above the legal order in the name of the public good. Within this framework, the sovereign decides in the name of the public good when it deems that the public's way of life is under threat. The sovereign uses the immense power of the state to extinguish perceived threats from within and without. The effective use of such a power requires a total readiness on the part of subjects to die as well as a total readiness to kill enemies,[67] even if such exercise requires an antidemocratic seizure of power.[68]

To bolster the existential stakes of the friend/enemy distinction, Schmitt argues that it is significant because it refers to the "very real possibility of physical killing."[69] The enemy is on the same level as the friend insofar as they are in battle or in a state of war, and, from the vantage of the state, the enemy is seen as capable of being a threat to it. Take the War on Terror; perhaps It is not just that one entity implies another; given the stakes inherent in the political, the existence of a political entity requires the existence of an enemy characterized as capable of destroying it. The friend/enemy distinction is significant within the political because it presents the stakes of war as existential and its combatants as in some way coequal. The exception—the situation that brings about emergency—is premised on the idea that the state is exposed to potentially lethal force. As a result, the state must be ready to defend itself.

Though Schmitt introduces the friend/enemy distinction in *The Concept of the Political*, it is in his *Theory of the Partisan* that he explicates the notion of the enemy.[70] Schmitt writes:

> The ultimate danger lies then not so much in the living presence of the means of destruction and a premeditated meanness in man. It consists in the inevitability of a moral compulsion. Men who turn these means against others see themselves obliged/forced to annihilate their victims and objects even morally. They have to consider the other side as entirely criminal and inhuman, as totally worthless. Otherwise, they are themselves criminal and human. The

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[67] SCHMITT, *supra* note 8, at 46.

[68] Lars Vinx, *Carl Schmitt,* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Aug. 29, 2019) https://plato.stanford.edu/entries/schmitt/.

[69] SCHMITT, *supra* note 8, at 33.

[70] CARL SCHMITT, THEORY OF THE PARTISAN 60-65 (G. L. Ulmen, trans.,Telos Press, 2007) (1963).

> logic and value, and its obverse, worthlessness, unfolds its annihilating consequence, compelling ever new, ever deeper discriminations, criminalizations, and devaluations to the point of annihilating all of unworthy life.[71]

The friend/enemy distinction allows for a seamless transition between rhetorical frames while still retaining conditions of enmity. Instances of emergencies are those in which the sovereign brings to bear the primacy of the political, and the invocation of the people in this war serves to entrench the enemy as an existential. I must note that the enemy does not have to be a specific enemy. The enemy just must have enough capacity to be an existential threat; rather than it being an enemy from X nation, for example, instead the enemy simply must be "not from here." I believe that the illegal alien (not legal) is instructive. That the deportee is labeled as an enemy and are expelled because of it is as important, if not more so, than their being sent back to their country of origin.

In the next section, I delve into the idea of a state of emergency, which is a particular policy within the state of exception. The exception also includes a particular conception of normalcy, and the state of emergency is when the sovereign determines that there exists a departure from such normalcy that requires suspension of the legal order. The substance of a declaration of emergency cannot be guided by existing law.[72] Schmitt argues that it is impossible to create institutions that deal with emergencies. The best that a legal order can do is determine *who* is best suited to respond to an emergency. There needs to be, as a matter of fact, an entity capable of deciding on the exception.[73] The power to decide on the response to emergency is the power to decide on the exception.[74]

States of Emergency

In this section, I examine the legal and social consequences of the putative inimical relationship between procedure and emergency response. The social consequences of this opposition between deliberate action and emergency response allow for the abrogation of legal protections that set the stage for illegalization. Equality (or, rather, equivocation) manifests itself in a state of exception in which the immigration apparatus exists to detect and neutralize threats to the nation. And illegal aliens are painted and treated as threats to the nation, and therefore face the punitive end of this state of exception. Thus, I argue that the immigration

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[71] *Id.* at 67.
[72] Vinx, *supra* note 18, at 6.
[73] *Id.* at 7.
[74] *Id.*

enforcement apparatus exists for the maintenance of sovereignty, realized through the elimination of those who do not belong.

Elaine Scarry argues that a certain conception of emergency, salient in current discourse, relies on two "seductions" (her term): one, that there is an opposition between thinking and acting, and second, an opposition between thinking and rapid action.[75] Deliberation, an ostensibly important part of democracy, becomes the very thing that puts democracy at risk. World leaders use the specter of emergency to enter armed conflict without the imprimatur of the legislature, or to detain "enemy combatants" at Guantanamo Bay for indefinite periods without charge. The idea here is that due process in accordance with the rule of law is inimical to emergency response. If we focus on procedure, on deliberation, the emergency to which such deliberation aims to respond may very well become impossible to handle.. If one knows that there is a time at which an emergency becomes unmanageable, yet at the same time does not know when the emergency arrives at that point, deliberation becomes very expensive if not fatal.

Process seems to rely on the notion of time, a concept that is antithetical to emergency. The exception explains this insistence on scope. Emergency requires a swift response. When the stakes are existential against an enemy with the capacity to destroy the citizenry, the presence of process is the endangerment of sovereignty.

The social consequences of this false opposition between deliberate action and emergency response allow for the abrogation of legal protections. Though the false dichotomy risks the abrogation of everyone's rights, I argue that noncitizens—in particular unauthorized persons—become the target class for test-case for these abrogations.[76]

Another dimension of appeals to emergency becomes clear: not only do procedures take time, but they can also invite skepticism, which is said to hamper responses to emergency. Ordinary political division and discussion, otherwise taken to be the mark of a healthy and active democracy, become yet another way democracy may be threatened during a state of emergency. As such, the time required to enact procedures and sustain critical conversations concerning legislative choices is taken to be too hefty a risk. In other words, protecting the continued existence of a democracy requires suspending central components of the democratic procedure. Appeals to emergency, the argument proceeds, have the further consequence of weakening the populace's capacity to acutely respond to such emergencies. And, as Scarry explicates, such appeals have a directed political purpose: to dull "the very skepticism that enables resistance.[77]

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[75] SCARRY, *supra* note 9, at 15.
[76] Unsure as to whether to class groups like "enemy combatants" in Guantánamo.
[77] SCARRY, *supra* note 9, at 14.

Skepticism within the political is significant in that it calls into question the unilateral power of the sovereign. Skepticism and deliberation are inimical to emergency response and, by extension, inimical to whomever helms the response. Should such skepticism arise from within the nation-state, I argue that the skeptics are among the internal enemies Schmitt would say that the sovereign should eliminate. If Scarry is right that constant appeals to emergencies have such deleterious effects for the populace and the state of democracies, then such appeals to emergencies concentrate power to the sovereign given that they require quick, unilateral, and total action. Such emergencies, it seems to be, serve only to erode the foundations of democratic procedures even if they are claimed to save democracy itself.

Giorgio Agamben's work on emergency more directly engages with this point. For Agamben, emergency is far from being a rare occasion; it is the foundation on which modern statehood rests. Emergency represents a process by which the state decides on who is human, as opposed to who merely bares life. For Agamben, the politicization of bare life as such "constitutes the decisive event of modernity and signals a radical transformation of the political-philosophical categories of classical thought."[78] And this modernity exists in an interplay of various concepts paired off in an adversarial relation.

Though influenced by Schmitt, Agamben's account of what he calls the "fundamental categorical pair of Western politics" marks a departure from the German jurist. Rather than that of friend/enemy, the fundamental distinction is "that of bare life/political existence, zoē/bios, exclusion/inclusion."[79] What makes the move to politics possible is the distinction between voice, a capacity all animals have, and language, a distinguishing capacity of humans. Language is important because it facilitates exclusion by concretizing an us/them dichotomy.

He arrives to his conclusion through his analysis of the National Socialist regime, which in 1940 issued measures authorizing "the elimination of life unworthy of being lived" with a special focus on the "incurably mentally ill."[80] Agamben, in explicating the circumstances and dimensions of said measures, finds a peculiarity which illuminates a powerful conclusion. The peculiarity inheres in the fact that the euthanasia program killed children and the elderly who were mentally ill; these two groups could not have reproduced, so there is no prima facie eugenicist logic for their systematic killing (since what is important is not the elimination of the phenotype but the elimination of the genetic set).[81] From this discovery, he draws what he considers to be the only plausible conclusion, which argues,

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[78] AGAMBEN, *supra* note 10, at 7.
[79] *Id*. at 10.
[80] This is Agamben's terminology.
[81] AGAMBEN, *supra* note 10, at 117.

> The only explanation left is that the program, in the guise of a solution to a humanitarian problem, was an exercise of the sovereign power to decide on bare life in the horizon of the new biopolitical vocation of the National Socialist state. The concept of "life unworthy of being lived" is clearly not an ethical one, which would involve the expectations and legitimate desires of the individual. It is, rather, a political concept in which what is at issue is the extreme metamorphosis of sacred life—which may be killed but not sacrificed—on which sovereign power is founded.[82]

In the context of Agamben's thought more generally, the above brings into context his thesis that the contemporary iteration of the camp such as Guantanamo Bay and the camps at the U.S.'s Southern Border—and the refugees that inhabit them—is the "biopolitical paradigm of the modern."[83] The state does not merely take part in humanitarian responses; it creates the geopolitical context in which certain state actions can be deemed humanitarian in the first place.

In order to properly explain how Agamben figures into discussions of violence *in extremis*, I begin by focusing on Agamben's discussion of bare life, otherwise described as "life that does not deserve to live."[84] As mentioned previously, the determinations of who lives and who is deemed bare life happen in the context of emergency, as does the determination of who is objectified (that is, who turned into what) as the imminent threat. For Agamben, the ubiquity of emergency is encapsulated in the state of exception. Agamben, for example, centers the refugee and contends that the refugee ought to be "the central figure of our political history" as the figure of the refugee dismantles "the old trinity of nation-state-territory."[85]

I worry that the valences that the term "refugee" carries can be particularly limiting, since the term denotes only those who have left their home country and crossed an international border due to a "well-founded fear of persecution" (cite to UN Refugee Convention definition of a refugee). Further the figure of the refugee is limiting even for Agamben's purposes as, in my estimation, the refugee can be a particularly sympathetic figure because they are not seen as entering for so-called "economic reasons." Thus, though I can agree with Agamben that the refugee can be a particular instantiation of *homo sacer*, I resist the implication that the refugee cannot be the fullest instantiation of *homo sacer*. The determination of whether one is a "refugee" or is instead an "economic migrant" is a matter of redefinition, and

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[82] *Id*. at 117.
[83] Giorgio Agamben, *Beyond Human Rights*, *in* RADICAL THOUGHT IN ITALY: A POTENTIAL POLITICS, (Paolo Virno and Michael Hardt eds., 2010).
[84] AGAMBEN, *supra* note 10, at 113.
[85] *Id*. at 93

that redefinition occurs vis-à-vis a *homo sacer* that is far more foundational than the refugee—the illegal alien.

Emergency and Enmity

Emergency provides the urgency that makes the friend/enemy distinction significant. Though the fact of the enemy does not change, the threat the enemy can pose does change and, correspondingly, the form of the response to the threat.[86] Officials on the ground then have the authority, exercised through discretion, to respond to the threat however they see fit. This logic also reflects Schmitt's point that the constitutional legal order cannot predict emergencies. The best it can do is propose who has the power to declare the emergency that justifies the state of exception. Even then, the facts may require that some other entity determine the fact of emergency and set out the form of its response. It is this fungibility that makes politics somewhat fundamentally unstable; it is an instability with the real potential for lethality.

Because the friend/enemy distinction operates on existential terms, i.e., the border becomes significant in that it is the site that the enemy can infiltrate the nation-state. Examples of this occur within official legal promulgation. On January 25, 2017, President Trump issued an executive order expanding the federal government's immigration enforcement powers against "aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety."[87] Though the executive order states that it places a heightened focus on "aliens who engage in criminal conduct in the United States", it is not too long until this pretense toward priority is discarded. The executive order defines as deportable those who:

> have been convicted of any criminal offense; have been charged with any criminal offense, where such charge has not been resolved; have committed acts that constitute a chargeable criminal offense; have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency; have abused any program related to receipt of public benefits; are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; *or in the judgment of an*

[86] Whether any one individual gets legally categorized as a "refugee" or an "illegal alien" depends on many contingencies, so while these categories exist as stable categories, whether any one individual occupies the category of "refugee" or "illegal alien" is highly contingent (e.g., which jurisdiction they're making their asylum claim in).

[87] Exec. Order No. 13767, *Border Security and Immigration Enforcement Improvements*, THE WHITE HOUSE, (Jan. 25, 2017) https://www.whitehouse.gov/presidential-actions/executive- order-border-security-immigration-enforcement-improvements/.

immigration officer, otherwise pose a risk to public safety or national security.[88]

Though the executive order spends time gesturing at a definition of "criminal immigrants" as a select few with high deportability, the final clause of this excerpt, for all intents and purposes, invalidates all that precedes it by giving complete deference to the immigration officer. If a person of interest does not fit into the stated categories of having a chargeable criminal offense or being a ward of the state, for example, the immigration officer is allowed—even implored—to use his judgment to characterize the illegal alien as a threat to public security. When all else fails, the immigration officer becomes an enforcer, a soldier in the manufactured war against the illegal alien enemy. The immigration officer's most dangerous weapon is his discretion, his ability to determine what it is about the illegalized alien before him that constitutes a threat to public safety. That is, even though the illegalized immigrant has crossed the physical border, the immigration officer's judgement as a backstop makes it such that he always stands at the borderspace, particularly situated to meet and exclude the illegalized alien.

In this section I have explained Schmitt's notion of the political, the friend/enemy distinction that is at the heart of the political, as well as the states of exception and emergency that make such a distinction salient. Using Scarry and Agamben, I argue that within the state of exception, process and emergency exist in an inimical relationship whereby immigration is an emergency that must be dealt with swiftly, and process impinges on sovereignty by leaving the state exposed. And this is where emergency becomes significant. Emergency leads to the suppression of process. Not only do legal processes take time, but they also introduce humanity, which can contradict the enmity on which the immigration emergency rests and risks making the state's border enforcement apparatus indefensible.

So far, my argument has established creation of the emergency, the resulting declaration of the state of emergency, and the isolation of an enemy. The enemy is someone who is positioned as threatening the state and correspondingly as someone the state decides as unworthy of life. In response to the enemy, the state constructs a separate legal order designed to neutralize the enemy. In the next section I argue that Günther Jakobs' account of the enemy criminal law provides a foundation for understanding this alternative legal order.

Schmitt's conceptions of sovereignty, the state of exception, and the state of emergency are important in how I set up the problematic of the paper. Schmitt argues that the political is the essence of the state, and that the friend/enemy contrast

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[88] *Id*. Emphasis mine.

is the main distinction within the political.[89] The sovereign uses the immense power of the state to extinguish enemies of the state. I then use the work of Elaine Scarry, who makes explicit the link between sovereign claims of emergency and corresponding suppression of procedure.[90] When emergency is mobilized against enemies of the state, a new legal regime is built to deal with them. I also utilize Agamben's discussion of bare life, elsewhere described as "life that does not deserve to live."[91] The determinations of who lives and who is deemed bare life happen in the context of emergency, as does the determination of who is objectified (that is, who turned into what) as the imminent threat. For Agamben, the ubiquity of emergency is encapsulated in the state of exception.

II. THE EMERGENC(E/Y) OF ILLEGALIZATION

In the previous section, I utilize the work of Schmitt and Scarry to establish that there is an essential political struggle between friend and enemy. Because such a struggle is an existential one, it sets the stage for emergency and its responses, which often involve the suppression of process. What I will explain is how practices of criminalization and the use of immigration enforcement depend on and facilitate the exclusion of the enemy. The state's desire to identify and neutralize an enemy can be seen in the similar form and tactics in both criminal law and immigration enforcement.

My objective in this section is to apply the above framework that utilizes Schmitt, Scarry, Agamben, and Jakobs to the topic of illegality. From that, I argue that illegality is the paradigmatic contemporary example of the states of exception and emergency as well as the concept of enmity that animates both concepts. What does Schmitt's analysis of enmity say about the apparatus of immigration enforcement? Immigration enforcement relies on a dual nature of extreme punitive treatment of noncitizens and positioning of the illegal alien as outside the law, as coequal in the sphere of war, as prophylactic in the surveillance form of many of the elements of this apparatus. Social theory is important because it provides insight into the conditions that motivate anti-immigrant sentiment and policies. To wit, one of the dimensions of contemporary politics is the manufacturing of crises to make palatable policies that detain and deport "illegal aliens."

Drawing on my discussion of Schmitt, etc. this section offers a conception of illegalization. As immigration becomes more like an operationalization of a state of exception, there are social dimensions within illegality that set a pretext for more

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[89] CARL SCHMITT, THE CONCEPT OF THE POLITICAL 27-28 (1932).
[90] ELAINE SCARRY, THINKING IN AN EMERGENCY (2012).
[91] GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 113 (1995).

drastic action against those rendered alien. Therefore, illegality has also come to encompass those who "appear" illegal both inside and outside a nation-state (such as those who have yet to enter but are regarded as potentially clandestine entrants as well as those who are already inside and possess the status of citizenship but appear illegal on account of their race). Worse yet, given that it is increasingly more difficult to secure authorization to enter wealthy liberal democratic countries, it means that much of the world unwittingly possesses the presumption of illegality, especially as it relates to certain powerful countries. One important thing I want to highlight here as well is that, given that illegality possesses a racialized history, illegality is not only about the legal status of citizenship but also about race, national origin, and class; it tracks more and more to a phenotype than to the lack of status per se. It often attaches to the body. And most often in the U.S., that body happens to be a Latinx one. The racialized politics of immigration is such that it is not merely those who lack legal status who are presumed illegal but also those of particular racial and ethnic backgrounds.

But though "illegal" can locate those who are outside the law, it cannot explain why they remain there. Harald Bauder rightly notes that language matters, and that terminology can "imply causality, generate emotional responses, and transmit symbolic meanings."[92] The notion of "illegal", with its limited focus on the status of the immigrant, obscures the role that the law continuously plays in creating and maintaining the illegalized alien. And though academics might theorize using the term "illegal" with the kind of conceptual rigor that is ostensibly divorced from its politicized connotations to the extent that scholarship aims to engage with the wider world, it is dangerous to treat "illegal" as fully describing those who are outside of the law and as an analytical framework to understand the lived experience of those to whom the label attaches. Thus, I contend that the framework of illegalization more accurately describes the epistemic and political situation of those who are outside of it.

Illegalization is the product of the enemy criminal law being used to enforce the border. Nicholas De Genova and Ananya Roy write that "immigration law renders certain migrants extraordinarily vulnerable to the recriminations of the law and allows for that condition of illegality to be continually revised in a way that multiplies the punitive ramifications of that condition of illegality."[93] Criminal law and criminal punishment play a role in the production of illegality, creating "classificatory schemes [that make] certain categories of people as illegal or even criminal."[94] Important to understanding illegalization is understanding its *dynamic*

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[92] Harald Bauder, *Why We Should Use the Term 'Illegalized' Refugee or Immigrant: A Commentary*, 26 INT'L J. REFUGEE L. 327, 329 (2014).
[93] Nicholas P. De Genova and Ananya Roy, *Practices of Illegalisation,* 52 ANTIPODE 352, 354 (2020).
[94] *Id*. at 358.

quality. Illegalization operates through the (re)production of a subjugated class of people who are excluded constantly, swiftly, and without process. De Genova writes that the increasing militarization of the border is "the beginning of the process of creating and cultivating a lifelong condition of migrant illegality, deportability precarity, and disposability."[95]

Illegalization is also a product of the commingling of criminal law and immigration law, and my analysis of the concept draws from legal scholarship on crimmigration. As David Alan Sklansky writes, the commingling of criminal law and immigration law has occurred mainly through a phenomenon he calls "ad hoc instrumentalism," which is "a particular way of thinking about law and legal institutions, a way of thinking marked both by skepticism of formal legal categories and skepticism of the idea that official discretion needs to be, and can be, cabined and controlled."[96] Sklansky argues that ad hoc instrumentalism is related to yet goes further than more familiar kinds of decentralized enforcement authority in the criminal law. Ad hoc instrumentalism "is related to prosecutorial discretion: the widespread and widely accepted practice of trusting prosecutors to decide whether particular charges, although legally justified, should nonetheless not be brought, or should be bargained away as part of a plea agreement."[97] Prosecutors are given tools and see immigration enforcement as one tool among many. "Law enforcement agents, prosecutors, and immigration officials are encouraged to see criminal law and immigration law simply as different kinds of tools and to use whichever tool works best against a particular offender or suspect."[98]

The normative stakes in Sklansky's argument are that crimmigration has "blurred not only the boundary line between criminal justice and immigration enforcement but also the lines of responsibility within the new, merged field of governance."[99] Ad hoc instrumentalism has developed the general sense that "the bounds of the criminal law should be set pragmatically, not philosophically."[100] The consequences of this merged field of crimmigration, I argue, serve to create an environment in which so-called criminal aliens are continuously marginalized. Sklansky entertains an "escalating cultural obsession with crime and security"[101] as the explanatory basis for crimmigration. Though such a basis not only exists but also has been operationalized through efforts in state legislatures to crack down on

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[95] *Id*. at 355.
[96] David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 197 (2012).
[97] *Id*. at 197.
[98] *Id*. at 202. Here the tools of criminal law and civil law, which if we used Legomsky's typology we would think that criminal legal enforcement has more stringent adjudication norms than civil legal enforcement, are commensurate with each other in a prosecutor (or enforcer's) decision set.
[99] *Id*. at 163.
[100] *Id*. at 198.
[101] *Id*. at 195.

illegal immigration, Sklansky contends that such an explanation is, at bottom, incomplete. He writes:

> But [a tendency to view everything through the lens of crime control] is not the whole story—not even in combination with the rise in anti-immigrant sentiments. It does not explain the way the 'criminal alien' has been targeted: the way that rapidly proliferating deportations for criminal activity have been matched by skyrocketing immigration prosecutions; the way that local police have become enlisted in immigration work, drawing them away from time they could be spending on violent offenses; the growth of a parallel system of jails and lockups for noncitizens suspected of immigration violations. Nor does it help us understand the double-barreled nature of the crimmigration system, the way that criminal process and immigration process continue to function as separate tracks, even as they seem increasingly focused on the same objectives, and even as the choice between the tracks in each situation seems increasingly arbitrary.[102]

For Sklansky, ad hoc instrumentalism raises genuine questions about the limits of the criminal law and about the rule of law and political accountability.[103] Those subject to the law cannot have a say in the central values that have authority over them if they cannot identify or hold accountable the institution that is responsible for their plight. This lack of accountability stems from two reasons, according to Sklansky: the enforcement of immigration is carried about by low-level officials, and the opacity of the crimmigration system makes it difficult to determine which agency is responsible for a particular policy or action.[104] When the bounds of the criminal law are set pragmatically, constitutional protections become roadblocks. The lack of process in immigration enforcement, I contend, reflects a larger rationale where there is a negative correlation between immigration and the integrity of the nation-state through the diminishing of sovereignty.

Rather than suggest that the illegal alien's position outside criminal law is a purely descriptive and historicized matter, the point is to show that to be illegalized is for the state to regard the alien as an enemy, fundamentally foreign in a normative sense. The enemy criminal law amplifies this alienage and expands the border almost limitlessly. This happens in a mutually reinforcing way: on the one end, the person is foreign they cannot be held accountable in the same way citizens can be, and on the other end, the process of making (or enforcing) fundamental foreignness requires that an alternative criminal law exist to deal with noncitizens as offenders of some kind.

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[102] *Id*. at 196.
[103] *Id*. at 157-223.
[104] *Id*. at 217.

CONCLUSION

Markus Dubber writes that the paradigmatic noncitizen in our time is the "illegal immigrant." With this is mind, the rise of an enemy criminal law is one that has legal and philosophical importance. The value of this argument is manifold. For one, the enemy criminal law provides an account of the precariousness that is built into noncitizen status of any kind. Such precariousness arises from, among other things, the increased opportunities to be subject to removal as well as the (lack of) procedure that removal often involves. Placing aliens outside the bounds of personhood legitimizes an enemy criminal law, seemingly unabated in its ruthlessness of action. It is the criminal law that drives the liminality inherent in noncitizenship. A state of exception analysis helps us understand the logic that undergirds certain omissions within the immigration enforcement process. This includes things like group trials, the lack of a guaranteed right to counsel for indigent detainees, etc. An account of immigration enforcement as enemy penology allows us to isolate questions of exactly why criminal law has placed noncitizens and methods of enforcement outside the ambit of constitutional protections.

As immigration law and criminal law begin to resemble each other in form and function, this development behooves us to think about the point of the criminal law as well as the point of immigration enforcement. The creation of the illegal, I argue, is a downstream effect of the state's desire to have wide, if not untrammeled, scope in exercising its right to control its borders. And so long as the enemy criminal law is a part of our world, it is impossible to argue for protections, constitutional or otherwise, for people who are not regarded as such by the system that effects the violent arm of the state upon them.