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Prosecutorial Discretion and Immigration Arrest: How Criminal Arrests Set Immigration Enforcement Priorities

EISHA JAIN[†]

Prosecutorial discretion is once again at the forefront of immigration enforcement debates. In June 2022, a federal district court effectively rescinded Executive guidelines for prosecutorial discretion in immigration enforcement. The court struck down these guidelines – longstanding as a means of establishing priorities for the arrest, detention, and removal of noncitizens – on the basis that they conflicted with provisions of the INA. According to the district court, the “core” of the legal dispute centered on “whether the Executive Branch may require its officials to act in a manner that conflicts with a statutory mandate imposed by Congress.”¹ The district court concluded that the Executive Branch overstepped its authority by implementing guidelines for issuing immigration detainers.² In July 2022, the U.S. Supreme Court denied to stay the federal district court’s order and granted certiorari on the issue of immigration enforcement guidance.³

In this essay, I seek to show that framing the debate as primarily a conflict between the President and Congress elides a core underlying issue: the extent to which domestic policing decisions set the agenda for immigration enforcement. As is now well known, immigration and criminal law are deeply intertwined fields.⁴ Criminal law plays a

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1. *Texas v. United States*, No. 6:21-CV-00016, 2022 WL 2109204, at *1 (S.D. Tex. June 10, 2022), cert. granted before judgment, No. (22A17), 2022 WL 2841804 (U.S. July 21, 2022).

2. *Id.*

3. *United States v. Texas*, No. (22A17), 2022 WL 2841804, at *1 (U.S. July 21, 2022).

gatekeeping role for immigration enforcement; certain criminal convictions render noncitizens subject to both mandatory detention and mandatory deportation. Yet well before any criminal conviction, domestic police exert a key influence over immigration enforcement policy decisions. With the emergence of universal jailhouse immigration screening⁵—which, for approximately the past decade, has made every custodial criminal arrest a site of immigration screening—changes in domestic policing practices necessarily also affect immigration screening practices. In this symposium essay, I make three points regarding the role of domestic police in immigration enforcement. First, domestic police establish the agenda for immigration enforcement; policing decisions determine who is subject to immigration enforcement in the first place.⁶ Second, immigration enforcement decisions, in turn, have a feedback effect on the criminal law enforcement system; they give domestic police and prosecutors more expansive power over civil outcomes like immigration detention. Third, a major consequence of this approach is not to reduce enforcement discretion, but rather to make the exercise of discretion less visible. These decisions, in turn, insulate immigration enforcement decisions from oversight and accountability.

1. DOMESTIC POLICE SET THE AGENDA

4. The literature is wide-ranging, and it focuses on border enforcement as well as interior enforcement. *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1420 (2011); Jennifer Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709 (2015); Ingrid Eagly, *The Movement to Decriminalize Border Crossing*, 61 BOSTON COLLEGE L. REV. 1967 (2020); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1053 (2022).

5. Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L. J. 1703 (2021) (discussing Secure Communities).

6. I have developed related ideas more fully in other work. *See* Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463 (2019); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L. J. 1206–07 (2016); Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. 162, 179 (2021); Eisha Jain, *Policing the Polity*, 131 YALE L. J. 1794 (2022).

How do domestic policing decisions affect immigration enforcement? “Immigration policing”—when policing is conducted by immigration agents in stated service of immigration control—and “domestic policing”—policing done by criminal law enforcement agents in stated service of local law enforcement needs—involve separate government agencies and serve separate institutional ends. Yet domestic policing practices also establish the agenda for immigration enforcement, well before any criminal conviction. With the emergence of universal jailhouse immigration screening through “Secure Communities,” every single custodial criminal arrest—regardless of whether that arrest results in conviction—triggers immigration screening.⁷

One consequence of this approach is that changes in policing practices affect immigration enforcement practices. When a locality reduces arrest rates, it also reduces the universe of people subject to jailhouse immigration screening. If a locality magnifies its arrest rates, that likewise magnifies the universe of people subject to screening. When a locality changes where police patrol—such as by stepping up enforcement of low-level arrests in immigrant neighborhoods—those changes are reflected in the pool of people subject to immigration screening. Domestic police—not just immigration police—select who is screened for potential removal from the United States.

In the criminal law context, policing decisions raise a host of questions: How is it that people are targeted for stops? What is the government’s stated rationale for intervention? How can we, as a society, ascertain whether or when government control in the form of a stop, status check, arrest, or detention is justified? Police discretion matters because expansive criminal codes target a wide range of behavior, and because, in many respects, the procedural protections offered for low level offenses are relatively weak.⁸ These questions

7. See generally, Jain, *supra* note 5.

8. See generally Alexandra Natapoff, *Misdemeanors*, 85 S. CAL L. REV. 1313 (2012); Irene Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011); Eisha Jain, *Proportionality & Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018); Issa Kohler-Hausman, *Managerial Justice*

related to enforcement discretion also extend to immigration enforcement decisions that occur post-criminal arrest. Out of millions of people who lack authorized immigration status in the United States, how are some selected for immigration arrest, detention, and removal? Domestic policing decisions play a key role in determining who is subject to immigration screening.

Police reform has been one of the foremost topics subject to public debate in recent years.⁹ Many of the debates surrounding policing relate to whether and how to make police more responsive to the needs of local communities.¹⁰ Yet the current regulatory framework renders invisible key consequences of a criminal record and its impact on immigration enforcement. Immigration enforcement decisions do not just have an impact on deportation. Criminal defendants who receive detainers face harsher post-arrest criminal process, such as through bail denial after a criminal arrest.¹¹

Public discourse surrounding the proper role of domestic policing and arrest often tends to focus on the most visible harms associated with over-policing, such as unjustified violence. Since immigration enforcement is designedly hidden behind jailhouse walls, it is often left out of discussions about police reform. Yet it is important to recognize that police reform and immigration reform are in many ways one and the same; any changes in policing practices will also have an integral effect on interior immigration enforcement.

2 IMMIGRATION ENFORCEMENT’S FEEDBACK EFFECT ON CRIMINAL LAW ENFORCEMENT

One feedback effect that arises from linking immigration enforcement to criminal law enforcement is more expansive, hidden prosecutorial discretion. Criminal prosecutors exercise charging

& *Mass Misdemeanors*, STAN. L. REV.; Andrea Roth, *The Lost Right to Jury Trial in “All” Criminal Prosecutions*, (forthcoming, Duke Law Journal).

9. See, e.g., Jessica Eaglin, *To “Defund” the Police*, 73 STAN. L. REV. 120, 122 (2021) (seeking to facilitate public discourse on the popular slogan “defund” the police).

10. See, e.g., Anthony O’Rourke, Rick Su, Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1357 (2021).

11. Jain, *supra* note 5.

discretion when pursuing criminal cases; in some cases, they may elect to pursue charges that may trigger immigration consequences – what I have elsewhere described as a “collateral enforcement” model.¹² Prosecutors who seek to maximize the likelihood of deportation exercise discretion, but this form of discretion is not visible to the public at large.

Second, the practice of coupling immigration enforcement to domestic policing may normalize policing practices aimed at keeping undesired people out of particular spaces. One critique of domestic policing practices is that overbroad criminal codes give police officers legal cover to selectively target people on the basis of characteristics such as race or disability.¹³

These same dynamics unfold in immigration policing as well as with domestic policing. But immigration enforcement conceptually broadens the legitimate rationales for arrest. In criminal law, punishment is often rationalized by retributive sentiment.¹⁴ Yet that is not always the case for immigration enforcement: certain U.S. residents are subject to arrest, detention, and deportation simply because they are not desired in the country. That dynamic, in turn, normalizes policing U.S. residents who are perceived as undesirable, rather than because the targeted resident has engaged in unlawful conduct. Justice Scalia’s concurrence and dissent in *Arizona v. United States*, which involved a legal challenge to Arizona’s SB 1070, “anti-illegal immigrant” policing law, offers a case in point.¹⁵ Justice

12. *Id.* at 1221.

13. Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L. J.* 2176 (2013); Jamelia Morgan, *Disability’s Fourth Amendment*, 122 *COLUM. L. REV.* 489 (2021).

14. Scholars of mass incarceration have challenged this rationale. Professor Alice Ristroph has argued that this framing is historic and contributes to expanding the carceral state. See Alice Ristroph, *The Curriculum of the Carceral State*, 120 *COLUM. L. REV.* 1631, (2020). See also Shaun Ossei-Owusu, *Criminal Legal Education*, 58 *AM. CRIM. L. REV.* 413 (2021) (expanding on how criminal law curricula plays a role in contributing to mass incarceration); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 *MICH. L. REV.* 259, 266–74 (2018) (distinguishing between “over” and “mass” critiques and criminal law reforms); Benjamin Levin, *Criminal Law Exceptionalism* (forthcoming Virginia Law Review), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4098101.

15. *Arizona v. United States*, 567 U.S. 387, 392–93 (2012).

Scalia’s opinion invoked the concept of state sovereignty to argue for upholding the challenged law. He criticized the majority’s opinion for “depriv[ing] States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign’s territory people who have no right to be there.”¹⁶ His opinion framed SB 1070 as motivated by “citizens [who] feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy.”¹⁷ By rationalizing the law as a means of identifying and removing people from the country, this framing treated simply being present in a particular place as a “property invasion.” This framework encourages U.S. residents who perceive other residents as outsiders to feel entitled to use criminal law enforcement as a means of keeping out undesired people.

Of course, any police officer who employs his discretion to target a particular person for a low-level stop or arrest has no idea what any given person’s immigration status is at the beginning of the interaction. When police officers target certain U.S. residents on the basis that they are perceived as foreign-born, police officers—whether they are immigration police or domestic police officers—rely on an underlying assumption that they can meaningfully identify who belongs in the United States and who does not. When immigration enforcement is linked to criminal law enforcement, police officers who make criminal arrests may be seeking to trigger immigration enforcement, regardless of whether or not criminal charges are ultimately pursued.

The concept of “immigration policing” reveals a baseline doctrinal incoherence—one that reflects a long history of using express racial proxies to target people suspected of not belonging. During the period of Chinese Exclusion, the government expressly justified race-based domestic policing under the guise of immigration enforcement. Today, courts continue to justify stops of people who are suspected of being

16. *Id.* at 416–17.

17. *Id.* (Scalia, J., concurring and dissenting).

foreign-born on the basis of racial constructs of belonging.¹⁸ Policing practices that are justified by immigration enforcement reveal the slipperiness of a status/conduct distinction; it is impossible to police immigration status unless one adopts the underlying assumption that there is a meaningful way to identify who lacks status in the United States.

Due to the close connection between immigration control and criminal law control, retributive and exclusionary rationales operate interchangeably to expand and reframe the government's rationale for surveillance. This approach matters not only because it subordinates people considered outsiders, but also because it entrenches racialized notions of belonging.

3. INVISIBLE DISCRETION

Ending prosecutorial guidelines for immigration enforcement will not end the practice of exercising discretion. With a large long-term population of undocumented residents living in the United State, discretion will continue to be a key aspect of how immigration enforcement unfolds.¹⁹ One immediate consequence of removing federal immigration enforcement guidelines is that discretion will operate less visibly to the public at large.

Legal regulation operates in a world where we assume that lawmakers and the public at large can understand and respond to the full consequences of a criminal arrest. Yet one consequence of linking immigration enforcement to criminal arrest decisions is that we insulate both criminal law enforcement and immigration enforcement from full accountability. If we examine whether criminal arrests result in conviction –without attention to civil enforcement actions such as jailhouse immigration screening, immigration detention, and possible deportation – we take too limited a view of the impact of a criminal

18. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L. J. 1005, 1009 (2010).

19. See Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 INDIANA L. J. 1325, 1328 (2021) (arguing that immigration enforcement discretion does not disappear, but instead migrates).

arrest. And if we evaluate immigration enforcement in terms of numbers deported, we miss how immigration enforcement practices magnify the carceral impact of a criminal arrest. To engage in a meaningful discussion of police reform, it is important to recognize how immigration control works in tandem with criminal law control to conceal key aspects of both regulatory systems.