

# CIVIL DEATH BY A THOUSAND CUTS

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Commentators have leveled trenchant critiques of collateral consequences of criminal conviction, analogizing them to a form of “civil death.” This Essay develops the related concept of “civil death by a thousand cuts” in two senses. First, penalties such as voting bans or deportation after a conviction are often just the tip of the iceberg. Second, a system of far-flung, intertwined civil and criminal penalties portends the death of a civil society capable of recognizing and mediating excessive penalties. Recognizing how these penalties operate—and how difficult they can be to address—is a critical step toward creating a more proportionate criminal legal system.

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## INTRODUCTION

Commentators have leveled powerful critiques of “collateral consequences” of criminal conviction. Voting bans, deportation, or loss of a professional license after a criminal conviction can be experienced as nothing short of punishment. Scholars and policymakers alike have embraced labels such as “invisible punishment” and “civil death”<sup>1</sup> as a

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1. MARC MAURER & MEDA CHESNEY-LIND, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 16 (2002) (defining “invisible punishment” as the system of “laws and regulations that serve to diminish the rights and privileges of those convicted of crimes”); see Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) (analogizing the historical concept of “civil death” to the “substantial and permanent change in legal status [post-criminal conviction], operationalized by a network of collateral consequences”).

way of drawing much-needed attention to the formal nature of these penalties.

The literature on collateral consequences has done much to reconceptualize penalties as not just ancillary to punishment, but rather as punitive in their own right.<sup>2</sup> But because the “civil death” label tends to focus on the most severe consequences, it does not capture the impact of lower-level penalties. For many, penalties accrue well before a conviction, including from an arrest. These penalties may be incremental or uncertain. They may also aggregate over time. If civil death conveys the impact of life-long penalties triggered by felony convictions, the network of informal penalties operationalized by arrest or conviction could be understood as “civil death by a thousand cuts.”

This Essay develops the concept of “civil death by a thousand cuts” in two senses. First, penalties such as voting bans or deportation after a conviction are often just the tip of the iceberg. Many more penalties are triggered merely by contact with the criminal legal system. And efforts to reduce formally imposed collateral consequences might paradoxically contribute to a growing network of informal penalties. Precisely because these penalties may be perceived as a lenient counterpoint to life-long, formal bans on voting or serving on juries, they continue to be imposed with relatively little scrutiny. Meanwhile, these penalties impose enormous costs. The process of “marking” people with criminal records, disseminating those records, and monitoring them over time allows the government and private actors to develop a network of surveillance, which imposes costs regardless of whether more severe penalties follow.<sup>3</sup> The arrested individual faces a penalty well beyond that imposed through the formal criminal legal system.

Second, this system of far-flung, intertwined civil and criminal penalties is inconsistent with developing a civil society capable of recognizing and mediating excessive penalties. Formal collateral consequences were historically based in law.<sup>4</sup> But precisely because informal penalties arise from many different sources—penal, regulatory, or data-sharing that occurs through online access to criminal records—

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2. See, e.g., Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 679–80 (2008) (arguing that the collateral–direct distinction is “mythical” because certain penalties, such as civil commitment, are functionally indistinguishable from punishment).

3. For prior work discussing this dynamic in the context of immigration, see, for example, Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794, 1812–26 (2022) (discussing the impact of surveillance), Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 709 (2015) (conceptualizing “liminal” legal statuses), and 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, 1007–08 (2010).

4. Chin, *supra* note 1, at 1790.

disproportionate penalties have become extraordinarily difficult to recognize, much less address. These penalties systemically sideline lawyers, judges, and other institutions. The result is the erasure of a system capable of recognizing and addressing disproportionate penalties.

This Essay summarizes the literature relating to collateral consequences and discusses its impact. It then discusses how collateral consequences—in the form of severe, debilitating penalties imposed as the result of conviction—operate quite differently than informal penalties triggered by contact with the criminal legal system. The Essay develops the “civil death by a thousand cuts” metaphor and ultimately argues that it is critical to not only recognize how the criminal legal system has become more punitive, but also how society at large has lost key tools for mediating these penalties.

#### I. A BRIEF HISTORY OF THE COLLATERAL–DIRECT DISTINCTION AND THE “CIVIL DEATH” FRAMEWORK

As a doctrinal matter, the term “collateral consequences” distinguishes the formal sentence from other penalties associated with the criminal conviction. Courts have focused on the purpose of the penalty in fashioning a distinction between regulatory and punitive consequences. Only the latter counts as “punishment.”

An 1898 U.S. Supreme Court decision, *Hawker v. New York*,<sup>5</sup> set the framework for the collateral-direct distinction. In *Hawker*, the Court considered a law that retroactively stripped physicians of their ability to practice medicine after a felony conviction.<sup>6</sup> The defendant’s felony was based on his performing an abortion twenty years prior, and he had long since finished serving his sentence.<sup>7</sup> He argued that removing his ability to practice medicine functioned as “punishment” in violation of the Ex Post Facto Clause.<sup>8</sup>

The Court held that the bar on practicing medicine was a regulatory measure rather than punishment.<sup>9</sup> The criminal conviction was evidence of a characteristic that rendered the defendant unfit to practice medicine.<sup>10</sup>

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5. 170 U.S. 189 (1898).

6. *Id.* at 190–91.

7. *Id.*

8. *Id.* at 191.

9. *Id.* at 191, 200.

10. *Id.* at 196. The dissent found that this was an unconstitutional ex post facto law. *Id.* at 201 (Harlan, J., dissenting) (“[I]t would seem to be the necessary result of the opinion of the court in the present case, that a statute passed after the commission of the offence in 1877 and which, by its own force, made it a crime for the defendant *to continue* in the practice of medicine, is not an addition to the punishment inflicted upon him in

This decision established a fault line that would continue to shape the collateral consequences jurisprudence—one that the Court recognized as problematic even at the time. In fashioning a distinction between punishment and non-punishment, the Court candidly acknowledged that the defendant had already “suffered the punishment pronounced” after being duly tried and convicted for an offense.<sup>11</sup> The Court further recognized that he had a “valuable property right” in the ability to practice medicine.<sup>12</sup> Ultimately, however, the Court focused on the government’s need to regulate physicians and to establish credentials for practicing medicine.<sup>13</sup> In this framework, the conviction constitutes a heuristic, a way of proving that the defendant had in fact engaged in conduct that was proscribed.<sup>14</sup>

The dissent characterized the distinction as formalistic, and it criticized the majority’s reasoning for failing to account for the full experience of “punishment.”<sup>15</sup> Had the defendant been formally sentenced to a term of ten years and stripped of his ability to practice medicine, there would be no doubt that the defendant had experienced “punishment.”

Penalties such as lifetime voting bans, deportation of noncitizens, and civil commitment have all been conceptualized as civil or nonpunitive.<sup>16</sup> This approach has several problems. First, it develops an overly simplistic binary. Penalties can have a dual character—they can be punitive as well as regulatory. Second, a focus on the purpose of the punishment opens the door to mischaracterization. Some penalties may be appropriated by government actors as punitive, even if they are not formally categorized as punishment. This mischaracterization can also lead to procedural gamesmanship, when collateral consequences are deliberately sought out and imposed with the aim of evading procedural

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1878. I cannot assent to this view. It is, I think, inconsistent with the provision of the Constitution of the United States declaring that no State shall pass an *ex post facto* law.”).

11. *Id.* at 191.

12. *Id.*

13. *Id.* at 191–94.

14. See Eric S. Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1373, 1378–79 (2021).

15. See *Hawker*, 170 U.S. at 201 (Harlan, J., dissenting).

16. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (“[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . . .”); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (holding that “[an] order of deportation is not a punishment for crime”); *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (holding that civil commitment is non-punitive detention).

protections attendant with formal criminal punishment.<sup>17</sup> Third, unlike in the *Hawker* case, where there was arguably a nexus between the penalty and the conduct at issue, contemporary collateral consequences regularly reach well beyond any similar nexus. It might make sense to deprive a reckless driver of her license after a reckless driving conviction; it makes far less sense as a regulatory matter to strip someone of their driver's license for conduct unrelated to safe driving.

Relatedly, a focus on the purpose leaves out the experience of punishment. Scholars writing in the field of collateral consequences have argued that far from being ancillary, collateral consequences are experienced as integral to punishment. They have also argued that this experiential focus should be reflected in doctrine. In this approach, what matters is how people experience penalties such as lifetime voting bans after a criminal conviction, rather than on whether the penalty is formally included in the sentence.

Legal scholars have employed a broad range of analogies in seeking to capture the impact of collateral consequences. Michelle Alexander famously argued that mass incarceration operates as a system of “racialized social control,” and that penalties such as voting bans after conviction replicate the biases of the old system of Jim Crow.<sup>18</sup> James Forman, Jr., while deeply critical of the Jim Crow analogy, recognized that collateral consequences function to make “permanent outcasts of convicted criminals while stigmatizing other poor blacks as potential threats [and has] had devastating effects on low-income black communities.”<sup>19</sup> Michael Pinard has also analyzed collateral consequences through the lens of race and dignity, employing a comparative analysis to show that “the legal stigma that attaches to a criminal record in the United States is more permanent” than in comparable legal systems.<sup>20</sup>

Immigration law scholars—often writing in the merged field of “crimmigration”—have conceptualized immigration enforcement as magnifying the punitive impact of criminal arrests and convictions.

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17. See generally David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012) (criticizing the instrumental use of immigration enforcement). See Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1267–68 (1998) (describing the Court's numerous decisions in the area of collateral consequences as an “incoherent muddle”).

18. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (2010).

19. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 31–33 (2012).

20. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 471 (2010) (analyzing how the U.S. approach to collateral consequences leads to excessive penalties when placed in an international comparative perspective).

Noncitizens often face deportation as well as formal punishment after conviction.<sup>21</sup> Not only can deportation be experienced as punishment, particularly for those with deep ties to the United States, but criminal and immigration penalties can operate in tandem.<sup>22</sup> The interconnections between immigration and criminal law—which begin from the moment of arrest—can lead to cascading penalties that are not adequately addressed by either criminal procedure or by the procedure in immigration removal proceedings.<sup>23</sup>

A number of commentators have argued for a functional, or anti-formalist, approach to understanding penalties. Jenny Roberts, for instance, argues that the collateral-direct distinction is “mythical” because certain penalties, such as civil commitment, are functionally indistinguishable from punishment.<sup>24</sup> And writing in the context of navigating the job search after contact with the criminal legal system, Devah Pager and James Jacobs analogize having a criminal record to having a “negative” resume.<sup>25</sup> It operates as the opposite of an educational credential; rather than creating opportunity, it removes it.

Jack Chin has conceptualized collateral consequences as akin to a form of punishment called “civil death.” Chin writes that while civil death as an institution “faded away in the middle of the twentieth

21. SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 45–53 (2015); Juliet P. Stumpf, *Crimmigration and the Legitimacy of Immigration Law*, 65 ARIZ. L. REV. 113, 120 (2023); Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1052–55 (2022); Ingrid V. Eagly, *The Racism of Immigration Crime Prosecution*, 109 IOWA L. REV. ONLINE 27, 27–32 (2023), <https://ilr.law.uiowa.edu/online/volume-109-response-pieces/10/racism-immigration-crime-prosecution> [https://perma.cc/7RWG-JD64].

22. Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1469–71 (2019).

23. See, e.g., Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1305–08 (2010); Jain, *supra* note 22, at 1470–72; Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433, 439, 441–42 (2021); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1419–21 (2011).

24. Roberts, *supra* note 2, at 679–80.

25. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 2 (2015) (comparing a criminal record to a “negative curriculum vitae” that “contains only disreputable information”); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 177 & n.3 (2008); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 939, 942 (2003). See generally DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007) (discussing the mark of an arrest or conviction and its impact on obtaining entry level work); Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162 (2021), <https://www.stanfordlawreview.org/online/the-mark-of-policing/> [https://perma.cc/C538-85XV] (arguing that criminal records should receive greater attention in debates about police reform).

century,” it has “surreptitiously reemerged” and is “meted out to persons convicted of crimes in the form of a substantial and permanent change in legal status, operationalized by a network of collateral consequences.”<sup>26</sup> Chin persuasively argues that as a result of collateral consequences that operationalize a “substantial and permanent change” in legal status, every penalty functionally carries the following “unwritten term”:

The law regards you as having a “shattered character.” Therefore, in addition to any incarceration or fine, you are subject to legal restrictions and limitations on your civil rights, conduct, employment, residence, and relationships. For the rest of your life, the United States and any State or locality where you travel or reside may impose, at any time, additional restrictions and limitations they deem warranted. Their power to do so is limited only by their reasonable discretion. They may also require you to pay the expense of these restrictions and limitations.<sup>27</sup>

## II. THE IMPLICATIONS OF A MORE EXPANSIVE UNDERSTANDING OF PUNISHMENT

The political and legal movement towards recognizing collateral consequences has had far-reaching implications. For one, there is now greater awareness of penalties that might be triggered outside of the formal sentence. Far from being invisible, these penalties are commonly the subject of discussion and of policy debates. Defense lawyers as well as defendants are often keenly aware of them, even if they are uncertain about their precise contours.

A cornerstone of “holistic” defense is to center penalties that matter most to any individual defendant, regardless of whether it is a formal part of the sentence. Holistic defenders describe themselves as focusing on identifying and meeting the needs of clients after an arrest—regardless of whether those needs arise from within or outside of the formal criminal sentencing process. As one major study on holistic defense put it:

[T]he key insight of holistic defense is that to be truly effective advocates for their clients, defenders must adopt a broader understanding of the scope of their work with their clients. Defenders must address both the enmeshed, or collateral, legal consequences of criminal justice involvement (such as loss of employment, public housing, custody of one’s children, and immigration status), as well as underlying nonlegal issues that

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26. Chin, *supra* note 1, at 1790.

27. *Id.* at 1790–91 (footnote omitted).

often play a role in driving clients into the criminal justice system in the first place.<sup>28</sup>

The Supreme Court's 2010 decision in *Padilla v. Kentucky*<sup>29</sup> recognized the impact of enmeshed penalties arising from criminal convictions. There, the Court held that in order to comply with their Sixth Amendment obligations and provide effective assistance of counsel, defense attorneys must advise defendants if their plea agreement will trigger mandatory deportation.<sup>30</sup>

The theory underlying *Padilla* reflected a deeper shift in defense attorney practices. It reflected a shift in orientation, one aimed at recognizing that the penalties that matter the most after an arrest will differ for different people. Some noncitizens may well want to avoid deportation at all costs, such as those with deep ties to the United States. Other noncitizens—such as those with deep ties to their countries of origin—may take a different approach. A holistic defense attorney may seek out and provide accurate information about the likely consequences of different approaches. The arrested individual would then make the ultimate determination informed both by advice about likely outcomes as well as her own experiences and choices.

In addition to advising defendants about the full range of penalties triggered by guilty pleas, commentators have also argued for heightened procedural protections before collateral consequences are imposed. Chin, for instance, draws a helpful distinction between individual collateral consequences and more systemic consequences that trigger a change in status. He writes that “[i]ndividual collateral consequences are not necessarily punishment; if the only collateral consequences of a drug conviction, for example, were that the defendant lost her driver’s license, then perhaps it would be appropriate to treat that loss as completely separate from the criminal case.”<sup>31</sup> On the other hand, when “convicted persons suffer a general loss of legal personality and status . . . [one] which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities . . . [then] the overall susceptibility to collateral consequences is punishment.”<sup>32</sup> In Chin’s view, “[t]his is the case at least when, as now, there is a vigorous, existing network of collateral

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28. James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 821 (2019).

29. 559 U.S. 356 (2010).

30. *Id.* at 360. For an empirical assessment of *Padilla*, see generally Ingrid Eagly, Tali Gires, Rebecca Kutlow & Eliana Navarro Gracian, *Restructuring Public Defense After Padilla*, 74 STAN. L. REV. 1 (2022).

31. Chin, *supra* note 1, at 1825.

32. *Id.* at 1825–26 (quoting *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting), *overruled by Carafas v. LaVallee*, 391 U.S. 234 (1968)).

consequences.”<sup>33</sup> This approach recognizes the systemic nature of penalties arising from collateral consequences.

### III. “CIVIL DEATH BY A THOUSAND CUTS”

The “civil death” metaphor, as well as other interventions that focus on the severe, systemic penalties linked to criminal convictions, has done much to change defense practices and how society at large conceptualizes punishment.

But precisely because the concept of civil death focuses on these formal penalties, it risks understating the full reach of government-imposed penalties connected to punishment. It is not just the most serious penalties that trigger civil disabilities. Minor encounters with police also trigger penalties—and these penalties may not be visible to a prosecutor or defense attorney, and much less to the arrested individual herself. These penalties could be difficult to characterize as a general loss of status, in the civil death framework. As a result, even when members of the polity tap into the democratic process to reduce formal collateral consequences, they face barriers to recognizing and addressing the full range of low-level penalties.

First, penalties materialize in different places and at different points in time. The bulk of the literature on collateral consequences begins with formally imposed penalties that are triggered after conviction. In this framework, the criminal conviction comes first, and penalties come after, including after the defendant has been convicted and served his time. But penalties today come from many different sources. As I have discussed in other work, arrests alone can trigger penalties.<sup>34</sup> So can mere stops that do not rise to the level of arrest.<sup>35</sup>

Given that the vast majority of people who encounter the criminal legal system do so through “petty” arrests,<sup>36</sup> even low-level arrests or stops can have lasting consequences. As Alexandra Natapoff writes, the “massive, influential” misdemeanor justice “apparatus does not obey the

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33. *Id.* at 1826.

34. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015); Eisha Jain, *Arrest Unbound*, 111 IOWA L. REV. 213, 214–15 (2025) [hereinafter Jain, *Arrest Unbound*]; Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1703 (2021).

35. Eisha Jain, *Policing in the Age of Criminal Records*, 103 N.C. L. REV. 1441, 1453–57 (2025).

36. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2 (2018); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 2, 270 n.5 (2018).

standard rules of criminal law and procedure.”<sup>37</sup> One of the reasons that misdemeanors are, in Natapoff’s terms, “sloppy” and “informal” is because courts assume the stakes are lower, in the sense that defendants do not face hefty prison sentences.<sup>38</sup> However, informal penalties arising from misdemeanors can be wide-ranging—and they can be indeterminate.

Penalties also flow in many different ways. Legal scholar Dorothy Roberts, in a large and impactful body of work, has documented how contact with the family welfare system can lead to criminal law penalties.<sup>39</sup> And Lisa Washington has written about how “[t]he interplay between the family regulation and immigration systems produces intersystemic harms through the marking and subordination of noncitizen and mixed-status families.”<sup>40</sup>

In some cases, it may make sense to have multiple regulatory systems involved. As the *Hawker* opinion acknowledged, penalties can serve different aims.<sup>41</sup> But penalties can snowball. And often, people who seek to fully restore their status prior to the arrest or conviction face serious barriers. In the *Hawker* decision, the defendant was aware this much: He had lost his ability to practice medicine as the result of a particular action.<sup>42</sup> But today, people who experience penalties due to their criminal record might not be aware that the record is creating barriers to accessing work.

“Civil death by a thousand cuts” reflects the experience of people who encounter uncertain or escalating penalties. There is not always single government action that can be isolated as the basis for a penalty. The informal nature of penalties makes them particularly difficult to address through procedure. Our legal system largely assumes that an individual has knowledge of a penalty and is able to make the case that it is unjust or unfair. But when penalties unfold just by virtue of having been marked with the record of an arrest, a conviction, or some type of contact with social services or a school official, those penalties are far more tenuous and harder to predict.

The problem can be understood as one of legal legibility. Political scientist James Scott developed the concept of legibility to show how governments work. When the government creates a map, it creates a tool

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37. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015).

38. *See id.* at 1063–64.

39. *See* DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 28 (2022) (describing the “symbiotic relationship between family policing and criminal law enforcement”).

40. S. Lisa Washington, *Fammigration Web*, 103 B.U. L. REV. 117, 123 (2023).

41. *Hawker v. New York*, 170 U.S. 189, 196, 200 (1898).

42. *Id.* at 196.

for governance. The map displays only those aspects of the land that matter for purposes of administration: where roads are located, for instance, or where tracts start and end. The map necessarily oversimplifies. As Scott notes, maps do not include the location of every tree or streetlight.<sup>43</sup> Tracing a path on a map will not convey the actual experience of walking the terrain. Just as a map is an abstraction, so is law. The language of criminal law provides a conceptual framework for understanding how the government is regulating citizens: for what purposes, and according to what procedure. When members of the polity ask whether an arrest is lawful, whether it was fair, or whether it was justified, they operate within a familiar legal framework—one where criminal procedure traces a path between arrest and conviction, and where only the conviction triggers punishment.

Just as there is a difference between seeing a road on a map and walking the road in person, there's a difference between understanding the law relating to arrest and the experience of arrest itself. Understanding that someone has a prior arrest will not capture the full experience of custody, including the discretion given to police to employ force, or to require "every arrestee entering a jail to be required to strip, open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals to enable officers to search for scars, tattoos, and contraband, regardless of the risk he may pose."<sup>44</sup> A term of years does not capture the discretion given to prison officials to create a particular "aesthetic of incarceration—orange jumpsuits, cell blocks, bars, barbed wire."<sup>45</sup>

A term of punishment does do this: It gives members of the polity a metric—a common benchmark that can be used to assess who is imposing penalties, what those penalties are, and what end the penalty is supposed to serve. It can provide a way to see if people who commit similar offenses are being treated similarly. This assessment is key to managing the impact of an arrest or conviction. It creates the framework for engaging with questions of proportionality and fairness. The same is true for formal penalties imposed after conviction, such as deportation or voting bans. Formal penalties open the door to arguments that severe, lifelong penalties undercut penal aims because they offer no possibility for redemption or reintegration.

But with penalties that arise from many different points in time, it becomes difficult, if not impossible, for voters or defendants to calculate the reach of the penalty, much less address it. Two examples illustrate

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43. See JAMES C. SCOTT, *SEEING LIKE A STATE* 2 (1998).

44. Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 326–27 (2016) (discussing *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318 (2012)).

45. Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 237 (2009).

this trend: immigration consequences stemming from arrest and the restoration of voting rights.

In the immigration context, the federal government has increased the number of deportations, with 500,000 deportations in the past year.<sup>46</sup> These removals have been the subject of widespread scrutiny, with advocates asking who is being targeted, how they are being treated, and where they are being removed.<sup>47</sup> Precisely because deportation and detention are widely recognized as severe, they also trigger responses in the form of mass protests and legal challenges.

By contrast, lower-level changes in the apparatus of immigration enforcement can also be deeply impactful, but far less scrutinized. The Laken Riley Act triggered a sea of change in immigration enforcement practices by mandating “immigration detention of every person arrested for ‘burglary, theft, larceny, or shoplifting’ if the arrested individual ‘is unlawfully present in the United States or did not possess the necessary documents when applying for admission.’”<sup>48</sup> The Laken Riley Act may be perceived as merely the first step in the path toward eventual deportation. But it has a far broader impact, precisely because it attaches significant consequences to low-level arrest, including for those who will not be subject to deportation. It also introduces new possibilities for error. The underlying arrest might be reasonable, but inaccurate. Or the record of a prior arrest might be inaccurate, but it could nonetheless trigger downstream immigration penalties.<sup>49</sup> Notably, these penalties are imposed without the involvement of any criminal prosecutor. This cuts out one of the key actors responsible for making discretionary decisions in the criminal legal system.<sup>50</sup> And because detention is imposed immediately,<sup>51</sup> it will necessarily be overbroad—it will affect people who are neither guilty nor removable.

46. Luis Ferré-Sadurní, *A Year into Trump’s War on Immigration, Images of an Altered America*, N.Y. TIMES (Dec. 30, 2025), <https://www.nytimes.com/interactive/2025/12/29/nyregion/nyregionspecial/trump-immigration-crackdown-first-year.html>.

47. See Albert Sun, *Most Immigrants Arrested in City Crackdowns Have No Criminal Record*, N.Y. TIMES (Dec. 4, 2025), <https://www.nytimes.com/interactive/2025/12/04/us/ice-arrests-criminal-records-data.html>.

48. Jain, *Arrest Unbound*, *supra* note 34, at 224 (first quoting Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025); and then quoting S.5 - Laken Riley Act, CONGRESS.GOV, <https://www.congress.gov/bill/119th-congress/senate-bill/5> (last visited Mar. 5, 2026)).

49. See Deborah N. Archer & Daniel S. Harawa, *False Criminalization and the Erosion of Community Equity*, 103 N.C. L. REV. 1347, 1358 (2025) (discussing inaccuracy in records).

50. Prosecutors play a key role in determining pleas, and they also play an important role in deferred prosecution. See, e.g., Shima Baradaran Baughman, *Prosecution Deferred*, 77 FLA. L. REV. 1139, 1145–46 (2025) (discussing the history of deferred prosecution).

51. See Jain, *Arrest Unbound*, *supra* note 34, at 220–21.

One upshot of attaching penalties to arrest is that it creates uncertainty about what types of conduct might trigger adverse action. The stakes are particularly high with the possibility of immigration detention, given that those in detention face significant and well-documented barriers to accessing counsel, as well as harsh conditions of confinement.<sup>52</sup> Moreover, the use of rapid deportation can lead to people being removed without any meaningful opportunity to consult with counsel.<sup>53</sup>

Immigration lawyers Michael K.T. Tan and Michael Kaufman recently observed:

The arbitrary detention of people due to their poverty causes tremendous hardship. As the Supreme Court has recognized, “[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. . . . The time spent in jail is simply dead time.” Moreover, detention significantly prejudices individuals’ access to and exercise of legal rights, hindering their “ability to gather evidence, contact witnesses, or otherwise prepare [their] defense.” The vast majority of detainees—between 79–86% nationally—lack counsel in immigration proceedings.<sup>54</sup>

Rapid removals create severe barriers to even raising arguments related to deficiencies of process. And they also normalize the erosion of procedural safeguards for everyone who might come into contact with the criminal legal system.

These dynamics show that developing immigration enforcement policy is far more complex than simply determining what noncitizens ought to be removed. The erosion of process, along with profound uncertainty about the reach and impact of an arrest, in and of itself creates the potential for disproportionate penalties.

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52. See Jennifer J. Lee, *Immigration Disobedience*, 111 CALIF. L. REV. 71, 79 (2023) (“Detention takes a grave psychological toll on immigrants, who face social isolation and debilitating uncertainty. A 2017 Office of Inspector General report identified a range of serious human rights violations in detention, such as delayed and inadequate medical care, unauthorized strip searches, unsafe food handling, and limited hygienic supplies.” (footnote omitted)).

53. See Stephen Manning & Kari Hong, *Getting it Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 699–701 (2018); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 2, 18 (2014).

54. Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor: Hernandez v. Sessions*, 21 CUNY L. REV. 69, 76 (2017) (footnotes omitted) (quoting *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972)).

Immigration enforcement is a particularly important example of this dynamic, but it is far from the only one. In a very different context, efforts to restore voting rights after a felony conviction provides another illustrative example of the reach of uncertain government penalties tied to the criminal legal system. A number of states have adopted measures to restore the right to vote to people who have felony convictions.<sup>55</sup> These measures could be understood as a check on the practice of “civil death,” and a movement towards restoring rights. The experience with Florida voters seeking to end felony-based disenfranchisement shows, however, how difficult it can be to actually open the door to the restoration of rights. After Florida voters passed a constitutional amendment to restore voting rights to those with felony convictions, the Florida legislature passed a law stating that voting rights restoration would be contingent on satisfying all of the terms of the sentence, including payment of all outstanding legal financial obligations.<sup>56</sup>

There are, of course, massive differences between immigration and voting rights—but the parallel is this: Restoring rights was not a simple matter of voters determining whether felony convictions ought to bar access to the ballot. In the Florida example, while the law was widely understood through the lens of felony convictions, low-level penalties—the unpaid fines that could have stemmed from any number of encounters with the criminal legal system—also created a barrier to voting. Ability-to-pay determinations compounded the uncertainty.<sup>57</sup> After a trial, the district court observed:

Determining how much a person convicted of a felony in Florida was ordered to pay as part of a criminal sentence is not as easy as one might expect. It is sometimes easy, sometimes hard, sometimes impossible. Determining how much a person has paid, especially given the State’s byzantine approach to calculating that amount, is more difficult, but this, too, is sometimes easy, sometimes hard, sometimes impossible.<sup>58</sup>

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55. *Restoration of Voting Rights for Felons*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 19, 2025), <https://www.ncsl.org/elections-and-campaigns/felon-voting-rights>.

56. *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1051–52 (11th Cir. 2020) (Lagoa, J., concurring); FLA. STAT. § 98.0751 (2025).

57. *See Jones*, 975 F.3d at 1070–71; *see also* § 98.075(5)(a) (stating the review process for determining voting rights of felons).

58. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1208 (N.D. Fla. 2020), *rev’d and vacated*, 975 F.3d 1016 (11th Cir. 2020).

The risks of error are high—in Florida, citizens who thought they were eligible to vote were arrested for fraudulently seeking to vote.<sup>59</sup>

For those who served their sentence, and who thought they were eligible to vote, the risk of re-arrest creates enormous stress and uncertainty related to voting. More broadly, systemic uncertainty stems from a host of interactions with police. It is always possible that the record will appear in a database, come up during a job search, or lead to harsher penalties down the road in the case of a re-arrest. In both immigration and the restoration of rights context, low-level contact with the criminal legal system can create a blanket potential for escalating penalties.

Understanding how these penalties operate—as well the very real limits in our capacity as a society to check them—is a persistent challenge in the age of ubiquitous criminal records.

#### CONCLUSION

There is a growing consensus that lifelong penalties after a felony conviction can constitute too much punishment. But precisely because so many penalties arise from low-level encounters with the criminal legal system, we should understand formally imposed penalties as merely the tip of the iceberg. “Civil death by a thousand cuts” matters not only because of the enormous toll that penalties can take, but also because they stem from multiple sources. These penalties are particularly difficult to address through law reform. Relatively minor, uncertain penalties should thus not be routinely regarded as a less severe alternative to more formal collateral consequences. Rather, they create serious harm in their own right.

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59. Casey Smith, *Florida’s Statewide Prosecution of Voting with a Past Conviction Is Unlawful*, ACLU (Sep. 26, 2023), <https://www.aclu.org/news/voting-rights/floridas-statewide-prosecution-of-voting-with-a-past-conviction-is-unlawful> [https://perma.cc/AT67-BYUM].

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