



UNIVERSITY *of*
DENVER

STURM COLLEGE OF LAW

University of Denver Sturm College of Law

Legal Research Paper Series

Working Paper No. 17-05

ABOLISHING IMMIGRATION PRISONS

CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ

University of Denver Sturm College of Law

This paper can be downloaded without charge from the Social Science Research Network
Electronic Paper Collection

ABOLISHING IMMIGRATION PRISONS

CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ*

INTRODUCTION	246
I. IMMIGRATION IMPRISONMENT TODAY	251
A. <i>Defining Immigration Imprisonment</i>	252
B. <i>Pathways into Immigration Imprisonment</i>	253
C. <i>Lasting Power of Immigration Imprisonment</i>	257
II. ABOLITIONIST LEGACIES	260
A. <i>Defining Abolition</i>	262
B. <i>Abolition Past and Present</i>	265
III. IMMIGRATION IMPRISONMENT’S MORAL FOUNDATION	274
A. <i>Making Migrants</i>	275
B. <i>Creating Illegality</i>	278
C. <i>Deploying Security</i>	279
D. <i>Targeting Mexicans and Central Americans</i>	283
E. <i>Maintaining Racial Subordination</i>	285
IV. ALTERNATIVE MIGRATION ETHIC	292
A. <i>Migration Responsibility</i>	293
B. <i>Human Fallibility</i>	296
C. <i>Immigration Decarceration</i>	297
CONCLUSION	300

The United States has a long and inglorious history of coercive state practices of social control that are motivated, explicitly or implicitly, by race. From chattel slavery to modern incarceration, state actors have regularly marginalized, demonized, and exploited people racialized as nonwhite. Immigration imprisonment—the practice of confining people because of a suspected or confirmed immigration law violation—fits neatly into this ignoble tradition. The United States’ half million immigration prisoners, who are

*Assistant Professor, University of Denver Sturm College of Law. Author of *Crimmigration Law* and publisher of the crImmigration.com blog. For their comments on earlier drafts, special thanks are owed to Jason Cade, Ming Hsu Chen, Nancy Ehrenreich, Ian Farrell, Rashmi Goel, Geoffrey Heeren, Mary Holper, Sam Kamin, Margaret B. Kwoka, Christopher Lasch, Nancy Leong, Ian Haney López, Kevin Lynch, Peter Markowitz, Justin Pidot, Katie Tinto, and Lindsey Webb. I also appreciated the opportunity to present these ideas at the Critical Race Theory Seminar at the University of California, Berkeley, School of Law, the Emerging Immigration Law Professors Conference, LatCrit 2015, the University of Cincinnati School of Law, the Texas Southern University School of Law, and the Rocky Mountain Collective on Race, Place, and Law.

overwhelmingly Latino, were almost all pushed and pulled to leave their countries of origin in part by policies promoted or supported by the United States. Yet, once here, Latin American migrants are relegated to a legal system that treats them as confineable based merely on their status.

Even worse is that the practice of immigration imprisonment, as designed and operated, has stripped migrants of their inherent dignity as humans and has instead commodified them into a source of revenue. For immigration prisoners, the prison operates as a means of segregation and stigmatization: immigration prisoners are segregated from the political community and perceived to be dangerous. For other migrants who, for the time being at least, avoid imprisonment, the prison symbolizes the state's brute power. For the vast network of interested parties who have invested deeply in immigration imprisonment, the prison marks the location of production. Paid according to the number of people locked up, private prisons and local governments profit from human bondage. Meanwhile, opportunistic politicians reap political rewards by pointing to barbed wire perimeters and sizeable prison populations as evidence of their efforts to protect the nation.

This Article is the first to argue that immigration imprisonment is inherently indefensible and should be abolished. The United States should instead adopt an alternative moral framework of migrants and migration that is grounded in history and attuned to human fallibility. Doing so will help discourage harmful immigration rhetoric steeped in myths of migrant criminality and will foster better understanding of migrants and their reasons for coming to the United States.

INTRODUCTION

Imprisonment today is a central feature of immigration law enforcement.¹ It should not be. This Article details immigration imprisonment's reach, lays bare its origins and continued utility as a means of racial subordination, identifies its many adverse consequences, and calls for a wholesale reimagining of how the United States conceptualizes migration and regulates migrants' lives. In short, this Article is the first to call for the abolition of immigration imprisonment in the United States.²

Since 2008, approximately a half million people annually have spent time inside a jail, prison, or similarly secure immigration detention facility due to some legal transgression associated with migration. The largest numbers are

¹ Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATLANTIC Q. 621, 624 (2014); *id.* at 627 (“[A]ll viable reform proposals . . . assume the need for punitive detention for migrants . . .”).

² Immigration imprisonment is simply one aspect of the much broader incarceration phenomenon in the United States that many scholars and others have addressed. This Article's focus on abolishing immigration prisons, then, is simply part of a broader discussion of prison abolition. That broader conversation is beyond the scope of this Article.

under the control of Immigration and Customs Enforcement (“ICE”), a division of the Department of Homeland Security (“DHS”), which, in recent years, has detained over 400,000 people every year who are suspected or confirmed to have violated some provision of civil immigration law.³ But ICE is not the only immigration jailer. The Justice Department’s U.S. Marshals Service (“USMS”), the agency charged with detaining everyone charged with a federal crime, counted on its detention rolls for each of 2010, 2011, 2012, and 2013 more than 80,000 people facing prosecution for a federal immigration crime.⁴ After conviction—and almost everyone charged with a federal immigration crime is eventually convicted⁵—federal immigration offenders are transferred to the Bureau of Prisons (“BOP”), which imprisons roughly 14,800 to 23,700 people as a result of an immigration conviction on any given day.⁶ Meanwhile, a number of states rely on their own criminal policing powers to criminalize conduct inextricably linked to the act of migration or a person’s status as a migrant. This ranges from identity theft prosecutions based on nothing more than fraudulently using a social security number to obtain employment, to the variant of human smuggling known as “self-smuggling” that targets the person smuggled on equal grounds as the person doing the smuggling.⁷ Like other crimes, these state offenses involve confinement

³ See Chacón, *supra* note 1, at 621-22; John F. Simanski, *Immigration Enforcement Actions: 2013*, U.S. DEP’T OF HOMELAND SEC. ANN. REP. 1, 5 tbl.5 (2014).

⁴ See, e.g., MARK MOTIVANS, U.S. DEP’T OF JUSTICE, NCJ 248493, FEDERAL JUSTICE STATISTICS, 2011-2012, at 3 tbl.2 (2015); César Cuauhtémoc García Hernández, *Pretrial Immigration Prisoners, Part 2*, CRIMMIGRATION.COM (Sept. 20, 2016), <http://crimmigration.com/2016/09/20/pretrial-immigration-prisoner-trends-part-2/> [<https://perma.cc/4CSY-JGZS>].

⁵ See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2015, at 4 tbl.D-4 (2015), <http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-december-2015> [<https://perma.cc/4SVT-X674>] (noting that of 20,845 criminal defendants charged with an immigration offense in 2015, 20,321 were convicted).

⁶ See E. ANN CARSON, U.S. DEP’T OF JUSTICE, NCJ 247282, PRISONERS IN 2013, at 17 tbl.15 (2014) [hereinafter CARSON, PRISONERS IN 2013] (providing data about federal prisoners with sentences of more than one year, by offense, as of September 30 of each year from 2001 through 2013); E. ANN CARSON, U.S. DEP’T OF JUSTICE, NCJ 248955, PRISONERS IN 2014, at 30 app. tbl.5 (2015) [hereinafter CARSON, PRISONERS IN 2014]; E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, NCJ 243920, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991-2012, at 43 app. tbl.10 (2013) (providing year-end data on federal prisoners with sentences of more than one year).

⁷ See Chacón, *supra* note 1, at 625 (discussing how state and local criminal regulations such as document fraud provisions and human trafficking restrictions criminalize migrants); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1472 (2015) (describing self-smuggling as a “brand of human smuggling that equated the people who pay to be snuck into the United States with those who are paid”).

pending prosecution and after conviction. The individuals charged with these crimes represent our immigration prisoners.⁸

Despite being so common today, immigration imprisonment is a historical anomaly. After relying on confinement in the ugly years of the Chinese exclusion era,⁹ the United States did not lock up migrants for migration-related activities for much of the twentieth century.¹⁰ That historical norm shifted suddenly and radically in the mid-1980s. As part of the “War on Drugs,” Congress and various presidential administrations expanded the authority and capacity of immigration officials to detain migrants.¹¹ More recently, the federal government’s appetite for immigration imprisonment has been bolstered by fears of terrorism, first by the 1995 bombing of a federal building in Oklahoma City, and later by the September 11, 2001 attacks.¹² Whether motivated by fears of illicit drug activity or terrorism, there are few signs that this appetite for imprisoning migrants is abating. Indeed, under President Barack Obama, DHS shuttered facilities reserved for family units, only to open others five years later.¹³ States have followed suit in response to increasing concerns about growing migrant populations—in particular Latino migrants—by expanding the number of migration-related crimes and bases for imprisonment on the books.¹⁴

⁸ Throughout this Article, I use “immigration prisons” to refer to secure facilities in which migrants are confined due to a suspected or confirmed violation of immigration law. “Immigration prisoners” are those migrants forcibly confined in these locations. Neither “immigration prisons” nor “immigration prisoners” distinguishes migrants based on the nature of the legal power that authorizes government officials to confine migrants. On the contrary, these terms intentionally group migrants confined under civil legal powers, such as those assigned to ICE, and under criminal legal powers, such as those assigned to the BOP. When a distinction between civil and criminal confinement is necessary, this Article uses “civil immigration detention,” “criminal confinement,” or similar locutions.

⁹ See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889) (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.”).

¹⁰ See César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1372 (2014) (“Detention has long been part of the immigration law enforcement arsenal, but before the 1980s it was never a central feature of immigration policing.”).

¹¹ See *id.* at 1346, 1360-64.

¹² See *infra* Section III.E.

¹³ See LUTHERAN IMMIGRATION & REFUGEE SERV. & WOMEN’S REFUGEE COMM’N, LOCKING UP FAMILY VALUES, AGAIN 2 (2014) (“Part of a strategy to ‘stem the flow’ through detention and expedited removal and send a clear message of deterrence, the expansion of family detention continues even with a high percentage of families seeking protection and posing no flight or security risks.”); Julia Preston, *As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers*, N.Y. TIMES, Aug. 6, 2014, at A10.

¹⁴ See Chacón, *supra* note 1, at 625; García Hernández, *supra* note 7, at 1485 (identifying

While each of these instances of immigration imprisonment expansion arose from a different political, economic, and cultural context, they all share one salient feature: racism. To varying degrees, racist currents motivated immigration imprisonment's creation and each episode of its growth. In a pattern that has not abated since the 1980s, people racialized as nonwhite have consistently been imprisoned for migration-related activity. That history alone is sufficient to cast a shadow of immorality on a practice as widespread as immigration imprisonment now is, and as coercive as forcible confinement necessarily must be. But as is typical of other incidents where racism has turned into policy, immigration imprisonment does not exist in a vacuum. Immigration imprisonment responds to racialization as much as it produces racialization. Indeed, immigration imprisonment marginalizes migrants of color by rendering them vulnerable to physical and psychological abuse and demonizing them through the very act of confinement.¹⁵

Immigration imprisonment also operates as a means of class-based exploitation. The bodies of poor people surrounded by barbed wire are turned into sources of extraordinary financial and political benefits for scores of governmental and nongovernmental actors. From the politicians who point to the steel and concrete of secure facilities to tout their accomplishments, to the private prison corporations that earn millions of dollars for housing immigration prisoners on behalf of ICE, USMS, or the BOP, immigration imprisonment is propped up by a large number of diverse, highly invested individuals and organizations.¹⁶ The end result is that immigration imprisonment brings substantial material and political benefits to the most privileged members of our society while denying some of the least privileged members access to their basic liberties.¹⁷

The ignoble history and contemporary practice of immigration imprisonment demands a wholesale reevaluation of its wisdom as a central means of regulating migrants, migration, and conduct inextricably tied to migration.¹⁸ This Article performs that reevaluation and calls for abolishing

state pathways to immigration imprisonment).

¹⁵ See *infra* Section III.E.

¹⁶ See *infra* Section I.C.

¹⁷ See JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY 18 (2010) (contending that, with the passage of time, people acquire a greater "moral claim" to membership in a particular state regardless of legal authorization to be there in the first place); DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 352 (2012) ("[M]odern political rhetoric and bureaucratic logic . . . views each release as a 'defeat'—and each detainee released as a 'victor'—in the battle over unauthorized migration.").

¹⁸ In this way, this Article seeks to respond to Anil Kalhan's suggestion that "it may not be sufficient to focus exclusively on improving conditions of confinement." Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 58 (2010). Instead, "a more fundamental reconsideration of immigration control policies premised upon convergence with criminal enforcement" is needed. *Id.*

immigration imprisonment. Rather than advocate for reforming civil immigration detention, as several scholars,¹⁹ policy makers,²⁰ and advocates²¹ have done, I propose a vision of migration and migrants whereby deprivations of liberty are not simply unusual, but intolerable. By contextualizing immigration imprisonment—whether civil or criminal—within its racist origins and exploitative contemporary embodiments, I propose that imprisoning migrants should become taboo.²²

Building on the pioneering criminal law scholarship of Allegra McLeod, which proposes “a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement,” this Article offers an abolitionist vision of immigration imprisonment.²³ This vision is intended to gradually replace secure facilities and surveillance technologies with an alternative moral framing of migrants and migration that renders practices of control indefensible. Abolishing immigration prisons, then, is as much about closing prison doors as it is about creating a new moral framework for the regulation of migrants and migration.²⁴

¹⁹ See, e.g., Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 140 (2013) (critiquing information gathering and use in identifying people for civil immigration detention); García Hernández, *supra* note 10, at 1414 (calling for a “truly civil” type of immigration detention regime); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 605 (2010) (proposing various reforms of the civil immigration detention regime); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 70-71 (2012) (proposing that civil immigration detainees subject to mandatory detention be afforded counsel); Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of “Custody,”* 48 U. MICH. J.L. REFORM 879, 883 (2015) (proposing greater use of alternatives to civil immigration detention).

²⁰ See, e.g., Dora B. Schriro, *Improving Conditions of Confinement for Immigrant Detainees: Guideposts Toward a Civil System of Civil Detention*, in THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES 57, 58 (Daniel Kanstroom & M. Brinton Lykes eds., 2015).

²¹ See, e.g., CIVIL IMMIGRATION DET. STANDARDS intro., at 2 (AM. BAR ASS’N 2014) (offering “a blueprint for developing civil detention standards”).

²² See Michael Flynn, *The Hidden Costs of Human Rights: The Case of Immigration Detention* 11 (Glob. Det. Project, Working Paper No. 7, 2013) (“[M]igrant rights advocates arguably should consider de-emphasizing discourses that focus only on improving the situation of non-citizens in state custody and re-emphasizing the taboo against depriving anyone of his or her liberty without charge.”).

²³ Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161-62 (2015).

²⁴ See *id.* at 1161. In this way, abolitionists are not dissuaded by the impractical. Instead, “abolition is the creation of possibilities for our dreams and demands for health and

Clearly there remains a vast gulf between current reality and a future without immigration prisons. To begin to bridge that divide, this Article proceeds in four parts. Part I contextualizes the Article's analysis of immigration imprisonment as a preferred law enforcement tactic by describing the current state of immigration imprisonment. Part II adds theoretical context by presenting a working definition of abolition and situating it within a long tradition of abolitionist discourse in United States history. Building off of Part I's practical context and Part II's theoretical framework, Part III starts by examining immigration imprisonment's origins in a legislative milieu rife with fear of people of color that itself stems from economic exploitation of Latin Americans, and ends by revealing it for the project of racial subordination that it is. Lastly, Part IV proposes an alternative moral framework by which to view the act of migration and migrants themselves. It calls for a rejection of the historically decontextualized perspective that imagines migrants as outlaws and that privileges United States citizenship obtained through the accident of birth. Rather, the proposed alternative moral framework urges a reimagining of migration through the lens of United States economic and foreign relations and a dismantling of citizenship's lofty position in immigration law.

I. IMMIGRATION IMPRISONMENT TODAY

On February 20, 2015, inmates at the Willacy County Correctional Facility ("Willacy") in South Texas launched a strident protest against their living conditions that ultimately led federal officials to conclude that the facility was uninhabitable.²⁵ Owned by the county government, Willacy was operated by the private prison company Management and Training Corporation ("MTC") under a contract with the BOP.²⁶ Under purview of one of the BOP's Criminal Alien Requirement ("CAR") prisons—federal facilities increasingly used to punish immigration crime offenders—MTC was largely responsible for confining people who had been convicted of federal immigration crimes, typically illegal entry to the United States or illegal reentry after a previous deportation.²⁷ Years earlier, when I represented people held inside this facility

happiness—for what we want, not what we think we can get." THE CR10 PUBLICATIONS COLLECTIVE, ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX, at xii (2008).

²⁵ Daniel Blue Tyx, *Goodbye to Tent City*, TEX. OBSERVER (Mar. 26, 2015, 1:42 PM), <http://www.texasobserver.org/south-texas-prison-riot-willacy-county-economic-future/> [<https://perma.cc/86V5-5XVQ>] ("The prisoners—undocumented immigrants awaiting deportation while serving federal criminal sentences, many for illegally entering the U.S.—mutinied after years of built-up exasperation over inadequate medical care, filthy toilets and maggot-infested food.").

²⁶ See *id.*

²⁷ See Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 637-38 (2016) (discussing the "expansion in the use of [CAR] facilities"); Tyx, *supra* note 25.

as an attorney in private practice, MTC had done much the same: housed people on behalf of the federal government suspected of violating immigration laws.²⁸ Only instead of contracting with the BOP to confine people convicted of a crime, MTC did business with ICE. MTC helped ICE confine people whose cases regarding their right to remain in the United States were moving through the immigration court system, a network of administrative tribunals housed within the Department of Justice.²⁹ Because the migrants confined on behalf of ICE were not charged with or convicted of a crime, the facility had a slightly different name: the Willacy County Processing Center.³⁰ To the people sitting inside Willacy's dorm-like canvas tents, there was little to distinguish confinement under the BOP's authority to punish criminal immigration offenders from ICE's power to detain civil immigration law violators.³¹

A. *Defining Immigration Imprisonment*

The Willacy example illustrates the blurry boundary between civil detention and criminal confinement for migration-related activity. Migrants and family members see important similarities in the policy of choice for immigration law infractions.³² As Malik Ndaula succinctly explained after his release from ICE custody, “[t]hey call immigration detention civil confinement, but prison is prison no matter what label you use, and prison breaks people’s souls, hearts, and even minds.”³³

Similarities across immigration imprisonment led me, in prior work, to urge scholars to consider confinement related to migration as a single phenomenon. Instead of analyzing civil immigration detention separately from criminal confinement, I argued that “viewing the practice of locking up migrants as a single, multi-stranded phenomenon of immigration imprisonment better

²⁸ See Tyx, *supra* note 25.

²⁹ See *id.*; *About the Office*, U.S. DEP’T JUST., <https://www.justice.gov/eoir/about-office> [<https://perma.cc/6K8U-7CSH>] (last visited Oct. 15, 2016) (describing the structure of the immigration court system).

³⁰ See *Crossing the Border: Immigrants in Detention and Victims of Trafficking Part I and Part II: Hearing Before the Subcomm. on Border, Mar., and Glob. Counterterrorism of the H. Comm. on Homeland Sec.*, 110th Cong. 40 (2007) (statement of Christina Fflis, Member, Commission on Immigration, American Bar Association).

³¹ See Tyx, *supra* note 25 (describing reports of Willacy’s deplorable conditions, including that detainees were confined to overcrowded tents and sometimes subjected to solitary confinement).

³² See Schiro, *supra* note 20, at 57 (“[I]mmigration detainees and criminal inmates tend to be seen by the public as comparable, and both criminally and civilly confined populations are typically managed in strikingly similar ways.”).

³³ Malik Ndaula with Debbie Satyal, *Rafiu’s Story: An American Immigrant Nightmare*, in *KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY* 241, 250 (David C. Brotherton & Philip Kretsedemas eds., 2008).

reflects the reality of immigration law enforcement today.”³⁴ Whether acting under the authority of civil or criminal law, law enforcement officials at every level of government regularly take into custody people who are thought to have violated immigration laws. Many of these same individuals are then subjected to civil enforcement actions and criminal prosecutions that turn on those alleged immigration law violations. Regardless of the legal nature of the prosecutions, they frequently involve confinement.³⁵

B. *Pathways into Immigration Imprisonment*

Anyone who is not a United States citizen is potentially subject to immigration imprisonment. Migrants who come to the United States without the federal government’s permission, those who are authorized to live and work here indefinitely but are thought to have committed an immigration law infraction, and those who come seeking refuge from violence are among the many migrants who find themselves confined. Male adults make up the vast majority of immigration prisoners, but women, infants, toddlers, and even unaccompanied teenagers are not exempt.³⁶

Whether operating under cover of civil authority or through criminal processes, federal, state, and local governments collectively imprison well over 500,000 people every year. The federal government’s immigration prison population is easiest to measure. The number of people detained under ICE’s authority alone reached 477,523 in fiscal year 2012, a modern record.³⁷ The federal government’s criminal immigration prison population adds tens of thousands more to the total. In fiscal year 2012, for example, the USMS took into pretrial custody 85,458 people accused of a federal immigration crime.³⁸ Though already sizeable, this population is growing rapidly; the Justice Department explained, “[i]mmigration arrests doubled from 1994 to 1998, doubled from 1998 to 2004, and doubled again from 2004 to 2008.”³⁹ Indeed,

³⁴ García Hernández, *supra* note 34, at 1453; *see also* Galina Cornelisse, *Immigration Detention and the Territoriality of Universal Rights*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 101, 101 (Nicholas De Genova & Nathalie Peutz eds., 2010) (referring to secure centers in which migrants are forcibly confined as “immigration prison[s]”).

³⁵ Cf. Note, “A Prison Is a Prison Is a Prison”: *Mandatory Immigration Detention and the Sixth Amendment Right to Counsel*, 129 HARV. L. REV. 522, 524 (2015) (proposing that the Sixth Amendment right to counsel attach to all migrants subjected to mandatory civil immigration detention).

³⁶ As of 2009, ICE’s detention population was ninety-one percent male. DORA SCHIRO, U.S. DEP’T OF HOMELAND SEC., *IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS* 6 (2009).

³⁷ John F. Simanski & Lesley M. Sapp, *Immigration Enforcement Actions: 2012*, U.S. DEP’T OF HOMELAND SEC. ANN. REP. 1, 5 (2013).

³⁸ MOTIVANS, *supra* note 4, at 3 tbl.2.

³⁹ *Id.* at 4.

between 1994 and 2012, the number of immigration crime defendants booked into custody by the USMS grew by an astonishing 893%.⁴⁰ Compared to others arrested on suspicion of having committed a federal crime, immigration defendants are more likely to remain detained pending adjudication of the criminal charges.⁴¹ Like other federal inmates, immigration offenders are handed over to the BOP after conviction. On the last day of the 2012 fiscal year, the BOP held in its custody approximately 25,000 migrants convicted of an immigration crime.⁴²

Largely due to poorer reporting, it is more difficult to measure subfederal prison populations. States have adopted a variety of criminal offenses for migration-related activity that are punishable by imprisonment.⁴³ Some, for example, have penalized those using certain identification documents to conceal immigration status.⁴⁴ Most notably, Arizona uses a common human smuggling offense to prosecute migrants who are smuggled, a version of human smuggling crimes referred to as “self-smuggling.”⁴⁵ States have also adopted a variety of procedural innovations that increase the likelihood of migrants being, or remaining, confined in the course of criminal proceedings based on their migration status or activity.⁴⁶ Arizona, for example, also allows judges to keep witnesses in certain criminal cases confined if they are suspected of being in the United States without authorization.⁴⁷

Localities, meanwhile, have become key players in helping ICE move people into the civil immigration detention and removal pipeline. For years, sheriff’s offices and municipal police departments kept people behind bars whenever they received a request from ICE to do so.⁴⁸ In 2014, these requests for “immigration detainees” came under intense judicial scrutiny that exposed local governments to civil liability for detaining migrants in violation of the Fourth Amendment.⁴⁹ Though they are no longer used as frequently as they

⁴⁰ César Cuauhtémoc García Hernández, *Pretrial Immigration Prisoner Trends, Part I*, CRIMMIGRATION (Sept. 15, 2016), <http://crimmigration.com/2016/09/15/pretrial-immigration-prisoner-trends-1994-2012/> [https://perma.cc/3WTK-V754].

⁴¹ MOTIVANS, *supra* note 4, at 16 tbl.9.

⁴² *Id.* at 21 tbl.13.

⁴³ See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 190 (2015).

⁴⁴ See *id.* at 191-92 (“California, Oregon, and Wyoming criminalize using fraudulent citizenship or immigration documents, or genuine documents belonging to someone else.”).

⁴⁵ See *id.* at 190-91.

⁴⁶ See *id.* at 193-95.

⁴⁷ See *id.* at 193-94.

⁴⁸ Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, 675 (2013).

⁴⁹ See *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9 (D. Or. Apr. 11, 2014) (holding “that the ICE detainer is not mandatory” upon the county); see also *Galarza v. Szalczyk*, 745 F.3d 634, 642 (3d Cir. 2014) (holding that “detainers are not mandatory” for state and local law enforcement agencies); Lasch, *supra*

were before 2014, ICE was still issuing approximately 7000 detainees every month as of October 2015.⁵⁰ Separately, sheriff's offices and police departments participate in the State Criminal Alien Assistance Program ("SCAAP"), a Justice Department program that partially reimburses local and state governments for confining unauthorized migrants.⁵¹ Local law enforcement agencies have a financial incentive to coordinate with ICE to identify migrants in their custody, as doing so will facilitate reimbursement for imprisonment costs. In effect, then, SCAAP results in local law enforcement agencies referring large numbers of individuals to ICE for possible civil detention and potential removal.⁵²

To house so many people, government entities rely on a sprawling network of facilities. As of 2011, ICE used approximately 250 sites annually,⁵³ many of which were nothing more than jails and prisons from which the agency contracted bed space.⁵⁴ On the criminal side, the BOP relies heavily on twelve private facilities designed for low-security offenders that are part of its CAR initiative.⁵⁵ Likewise, state and local governments house immigration prisoners in their existing jails and prisons.⁵⁶ In addition to relying on state and local governments, the federal government also relies heavily on private prison contractors to meet its immigration prison bed needs. As many as sixty-five

note 48, at 696-98 (identifying a host of constitutional infirmities with detainees).

⁵⁰ *Detainer Use Stabilizes Under Priority Enforcement Program*, TRACIMMIGRATION (Jan. 21, 2016), <http://trac.syr.edu/immigration/reports/413/> [<https://perma.cc/A3UB-MCKF>].

⁵¹ See U.S. GOV'T ACCOUNTABILITY OFFICE, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS 1-2 (2011).

⁵² See Anjana Malhotra, *The Immigrant and Miranda*, 66 SMU L. REV. 277, 328 (2013).

⁵³ See HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 1 (2011).

⁵⁴ See *id.* at vi.

⁵⁵ ACLU, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM 16-17 (2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf> [<https://perma.cc/TS3P-S5SV>]. For a list of CAR facilities, see *Contract Prisons*, FED. BUREAU PRISONS, https://www.bop.gov/about/facilities/contract_facilities.jsp [<https://perma.cc/7D7Q-Z7FD>] (last visited Oct. 27, 2016). On August 18, 2016, Deputy Attorney General Sally Q. Yates announced that the Justice Department would begin to phase out its reliance on private prisons. Sally Q. Yates, *Phasing Out Our Use of Private Prisons*, DEP'T JUST. (Aug. 18, 2016), <https://www.justice.gov/opa/blog/phasing-out-our-use-private-prisons> [<https://perma.cc/32X3-799Q>]. Importantly, the Justice Department did not say that it would end the CAR initiative. *Id.* Migrants will therefore presumably remain imprisoned due to migration-related criminal activity.

⁵⁶ See AM. IMMIGRATION COUNCIL, THE CRIMINAL ALIEN PROGRAM (CAP) IMMIGRATION ENFORCEMENT IN PRISONS AND JAILS 5 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/cap_fact_sheet_8-1_fin_0.pdf [<https://perma.cc/948Q-K5PR>].

percent of civil immigration detainees are held in private facilities.⁵⁷ Reliable estimates of the proportion of public to private facilities used are unavailable for federal criminal immigration prisoners, but, at a minimum, all the BOP's CAR prisons are privately operated.⁵⁸

ICE's reliance on correctional agencies to fill its bed space requirements illustrates that the facilities used to house immigration prisoners—whether authorized by civil or criminal legal authorities—are very similar.⁵⁹ All of these facilities are surrounded by a secure perimeter within which freedom of movement⁶⁰ and access are restricted.⁶¹ Guards can impose solitary confinement as a means of disciplining inmates who disobey facility rules.⁶² To be sure, by the security standards applicable to violent criminal offenders, immigration prisoners tend to be housed in low-security institutions.⁶³ Confined, however, they surely are. As one recent detainee explained:

[Y]ou're locked down twenty-three hours per day They tell you when to take a shower, when to walk outside There was [sic] two stretches that I didn't see the day of light for, the first time was like nine days, and the second time was twelve days [Y]ou lose track of time."⁶⁴

No matter the security measures taken to confine them, immigration prisoners frequently face conditions reminiscent of the worst failures of penal facilities. Access to counsel, family members, and other support networks is difficult.⁶⁵ This difficulty is only augmented by the fact that many civil immigration detention centers are located in rural areas and that detainees can

⁵⁷ HOMELAND SEC. ADVISORY COUNCIL, REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 5 (2016).

⁵⁸ ACLU, *supra* note 55, at 16-17.

⁵⁹ SCHRIRO, *supra* note 36, at 4 ("Immigration Detention and Criminal Incarceration detainees . . . are typically managed in similar ways. Each group is ordinarily detained in secure facilities with hardened perimeters in remote locations at considerable distances from counsel and/or their communities." (footnote omitted)).

⁶⁰ *Id.* at 4, 21.

⁶¹ *See id.* at 23.

⁶² *See generally* U.S. IMMIGRATION & CUSTOMS ENF'T, NO. 11065.1, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES (2013), https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf [<https://perma.cc/5ERZ-G9EV>] (providing guidelines for use of segregation in civil immigration detention centers).

⁶³ *See* ACLU, *supra* note 55, at 16.

⁶⁴ Leif Reigstad, *Local Chef Wrongly Held in Immigration Detention Center for Two Months*, HOUSTON PRESS (Jan. 28, 2016), <http://www.houstonpress.com/news/local-chef-wrongly-held-in-immigrant-detention-center-for-two-months-8101913> [<https://perma.cc/H78X-UU2M>].

⁶⁵ Sharon Bradford Franklin & Karen S. Bloom, *Limiting Immigration Detention and Promoting Access to Counsel*, COMMUNITIES & BANKING, Winter 2011, at 11, 11-12.

be transferred anywhere within the country.⁶⁶ In addition, violence, including sexual assault of female detainees, is all too common.⁶⁷ Medical care is lacking.⁶⁸ Deaths are not unheard of.⁶⁹

C. *Lasting Power of Immigration Imprisonment*

Three features of immigration imprisonment's very design have allowed it to become embedded in contemporary policing practices. First, politicians and commentators have locked immigration law enforcement officials into practices that favor imprisonment even when reasonable alternatives are available.⁷⁰ Most empirical evidence finds no support for the proposition, voiced tirelessly by prominent politicians in recent years, that migrants are disproportionately prone to criminal activity.⁷¹ On the contrary, most evidence indicates an inverse relationship.⁷² Despite that, migrants have been discursively linked to criminality for roughly three decades.⁷³ As a result, immigration is now framed as a matter of national security rather than economic inequality, the reality and importance of cross-national families, cultural exchanges, or other possibilities.⁷⁴ Consequently, "immigration imprisonment has come to be seen as a necessary component of government operations."⁷⁵ No recent example illustrates this better than the Obama Administration's response to the increase in children and families seeking

⁶⁶ See César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 19-20 (2011).

⁶⁷ U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-38, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE 2-3 (2013).

⁶⁸ Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. REV. 167, 174-89 (2016).

⁶⁹ *Id.* ("[M]any detainees become sick and die without proper examination, diagnosis, and treatment.").

⁷⁰ García Hernández, *supra* note 7, at 1498.

⁷¹ Jacob I. Stowell & Stephanie M. DiPietro, *Ethnicity, Crime, and Immigration in the United States: Crimes by and Against Immigrants*, in THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION 505, 508 (Sandra M. Bucerius & Michael Tonry eds., 2014) ("[D]espite their 'relatively high levels of disadvantage' immigrants on the whole exhibit lower levels of crime, arrest, and violence than nonimmigrants." (citations omitted)).

⁷² *Id.*; cf. Ramiro Martinez, Jr., *Coming to America: The Impact of the New Immigration on Crime*, in IMMIGRATION AND CRIME: RACE, ETHNICITY, AND VIOLENCE 1, 10-12 (Ramiro Martinez, Jr. & Abel Valenzuela, Jr. eds., 2006) (identifying several scholars who have challenged "the contention that immigrants usually engage in more crime than the native born" and providing data of same).

⁷³ See García Hernández, *supra* note 7, at 1499.

⁷⁴ See *id.* at 1499-1500.

⁷⁵ *Id.* at 1500.

asylum in the United States beginning in the summer of 2014. Despite a drop in the overall number of apprehensions of unauthorized migrants by immigration authorities,⁷⁶ the sympathetic character of many of these entrants, and the fact that by requesting asylum from within the United States they were actually abiding by existing legal requirements, DHS quickly moved to boost its ability to confine thousands of mothers and their children, including infants and toddlers.⁷⁷ In public statements by high-level officials such as Secretary of Homeland Security Jeh Johnson, the Administration claimed imprisonment was necessary if the nation were to remain secure.⁷⁸

The second reason that immigration imprisonment is robust is that government officials have regularly interpreted their legal authority in ways that expand their confinement practices.⁷⁹ Writing about civil immigration detention, Juliet Stumpf explains, “[i]t was the accumulation of expansive interpretations of statutes accompanied by enhanced enforcement resources that has transformed detention practices to their current state.”⁸⁰ The nation’s highest immigration appellate administrative body, the Board of Immigration Appeals, illustrated Stumpf’s insight when it held that the word “custody” in a key statutory provision must be read to mean “detention” and nothing more than detention.⁸¹ It certainly could have relied on an ambiguous legislative record and longstanding legal tradition of interpreting “custody” as restraint on liberty, so as to read “custody” to include myriad forms of supervised release—from promises to appear for court dates to constant electronic monitoring through ankle bracelets.⁸² Similarly, Arizona prosecutors interpreted a human smuggling crime in such a way that the people who are

⁷⁶ LISA SEGHETTI & DANIEL DURAK, CONG. RESEARCH SERV., R43523, APPREHENSIONS OF UNAUTHORIZED MIGRANTS ALONG THE SOUTHWEST BORDER: FACT SHEET 1 (2014), <https://www.fas.org/sgp/crs/homsec/R43523.pdf> [<https://perma.cc/TP6T-Q6QR>] (showing that apprehensions by U.S. Border Patrol of unauthorized migrants along the southwest border decreased between fiscal year 2000 and fiscal year 2013).

⁷⁷ Press Release, U.S. Dep’t of Homeland Sec., Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Comm. on Appropriations (July 10, 2014), <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations> [<https://perma.cc/V5K7-6S33>].

⁷⁸ *E.g., id.*; see César Cuauhtémoc García Hernández, *Is DHS Admitting Immigration Detention Is Punishment?*, CRIMMIGRATION (Sept. 25, 2014), <http://crimmigration.com/2014/09/25/is-dhs-admitting-immigration-detention-is-punishment/> [<https://perma.cc/BE6S-93BS>] (noting that deterrence is an additional justification used by DHS officials to call for more aggressive detention policies).

⁷⁹ García Hernández, *supra* note 7, at 1505-07; see also Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN’S L.J. 55, 61 (2014) (“[T]he administrative agencies charged with implementing immigration law have overstepped by expansively interpreting their statutory immigrant detention authority . . .”).

⁸⁰ Stumpf, *supra* note 79, at 77-78.

⁸¹ García Hernández, *supra* note 7, at 1506.

⁸² García Hernández, *supra* note 10, at 1408-11.

smuggled into the United States can be and are prosecuted for conspiring to smuggle themselves, thereby expanding the pool of people subject to confinement.⁸³

The third and final reason that immigration imprisonment has had a lasting presence is that third parties have become financially and politically invested in its maintenance and expansion. In turn, these invested actors maintain pressure on policy makers to support policies that identify more people for confinement.⁸⁴ Private prison corporations such as MTC and its much larger competitors, the Corrections Corporation of America (soon to be named CoreCivic⁸⁵) and GEO Group, are the most visible third party actors. But they are far from alone.⁸⁶ Just as private prison corporations are financially invested in keeping beds filled, local governments like Willacy County are just as dependent.⁸⁷ Without migrants identified for imprisonment, DHS, USMS, and the BOP would have no reason to contract with private prison corporations that operate the facilities that local governments often own. And without those contracts, neither the private corporations nor the public entities receive the revenue that has become a perilous lifeline for many cash-strapped jurisdictions.⁸⁸ As the former mayor of Raymondville, a city in Willacy County, put it in the days following the February 2015 prisoner rebellion at Willacy: “If we lose our prisoners, the income comes down. . . . We need everybody to be employed We need those prisoners.”⁸⁹

This constellation of interests connected to immigration prisons has become so entrenched that it is difficult for policy makers or advocates to imagine a functioning legal regime without it.⁹⁰ Civil immigration detention “has been a cornerstone of” the Obama Administration’s immigration enforcement efforts.⁹¹ Republican critics, meanwhile, accused the Administration of endangering the nation when DHS announced a small-scale release of

⁸³ GARCÍA HERNÁNDEZ, *supra* note 43, at 190-91.

⁸⁴ García Hernández, *supra* note 7, at 1508.

⁸⁵ Bethany Davis, *Corrections Corporation of America Rebrands as CoreCivic*, CCA (Oct. 28, 2016, 11:00 AM), <http://www.cca.com/insidecca/corrections-corporation-of-america-rebrands-as-corecivic> [https://perma.cc/LZY3-7HPK].

⁸⁶ *See* García Hernández, *supra* note 7, at 1508-10.

⁸⁷ *Id.* at 1508-09.

⁸⁸ *See id.* at 1509 (discussing how various cities view immigration detention facilities as important “revenue streams” and as a means of “economic rebirth”).

⁸⁹ Tiffany Huertas, *After Prison Riot, Raymondville Worried About Economic Impact*, VALLEYCENTRAL (Feb. 23, 2015), <http://www.valleycentral.com/news/story.aspx?id=1168534#.VO6ci8a7JsR> [https://perma.cc/R7E9-9FQH].

⁹⁰ García Hernández, *supra* note 7, at 1496-97.

⁹¹ Emily Cadei, *President Obama’s Border Disorder*, NEWSWEEK, July 24, 2015, at 20, 21.

detainees.⁹² Migrants' advocates, who might be expected to take a starkly different position, usually do not.⁹³ Instead, advocates tend to focus on reforming the confinement regime's harshest features.⁹⁴ Almost none call for its dismantling.⁹⁵

II. ABOLITIONIST LEGACIES

In the midst of Gerald Ford's presidency, a little-known project manager at a Kentucky social services nonprofit named Calvert Dodge compiled an impressive collection of essays with a title that, to readers today, likely sounds fantastical: *A Nation Without Prisons*.⁹⁶ Consisting primarily of essays written by academics and social service leaders, it also contained one contribution by a judge and another by the National Advisory Commission on Criminal Justice Standards and Goals, a board appointed by Ford's disgraced predecessor, Richard Nixon.⁹⁷

To the authors of the book's twelve chapters, "a nation without prisons" was not an exercise in delusion or even a mere idealistic indulgence. It was a topic worthy of serious consideration grounded in the political possibilities of that historical moment.⁹⁸ The president of the National Council on Crime and

⁹² See, e.g., Jordy Yager, *GOP Blasts Decision to Release Illegal Immigrants Due to Sequester*, THE HILL (Feb. 26, 2013, 11:27 PM), <http://thehill.com/homenews/house/285035-decision-to-release-illegal-immigrants-because-of-sequester-slammed-by-gop> [<https://perma.cc/CDP5-PS9C>].

⁹³ See, e.g., HUMAN RIGHTS FIRST, HOW TO REPAIR THE U.S. IMMIGRATION DETENTION SYSTEM: BLUEPRINT FOR THE NEXT ADMINISTRATION 1 (2012), https://www.humanrightsfirst.org/wp-content/uploads/pdf/asylum_blueprint.pdf [<https://perma.cc/8AD8-6XH8>].

⁹⁴ *Id.*; MIGRATION & REFUGEE SERVS./U.S. CONFERENCE OF CATHOLIC BISHOPS & THE CTR. FOR MIGRATION STUDIES, UNLOCKING HUMAN DIGNITY: A PLAN TO TRANSFORM THE U.S. IMMIGRANT DETENTION SYSTEM 5-6 (2015), <http://www.usccb.org/about/migration-and-refugee-services/upload/unlocking-human-dignity-report.pdf> [<https://perma.cc/SC9C-K62S>] (calling for reduced reliance on detention); Reform Enf't Caucus, *10 Principles for Ensuring Fair and Humane Immigration Policy*, NAT'L NETWORK FOR IMMIGRANT AND REFUGEE RTS., <http://www.nnirr.org/~nnirrorg/drupal/sites/default/files/10principlesfulltext.pdf> [<https://perma.cc/C286-GAX3>] (last visited Oct. 11, 2016) (calling only for no detention "without access to individual custody determinations and constitutionally adequate bond hearings").

⁹⁵ For an important exception, see Bethany N. Carson, *The Myth of "Civilizing" Civil Immigration Detention*, GRASSROOTS LEADERSHIP (Dec. 5, 2014), <http://grassrootsleadership.org/blog/2014/12/myth-civilizing-civil-immigration-detention> [<https://perma.cc/94ET-MNHU>].

⁹⁶ See generally A NATION WITHOUT PRISONS: ALTERNATIVES TO INCARCERATION (Calvert R. Dodge ed., 1975).

⁹⁷ *Id.* at vii-viii.

⁹⁸ Calvert R. Dodge, *A Nation Without Prisons: Dream or Reality?*, in A NATION

Delinquency, a staid professional organization closely linked to the Department of Justice, opened the book by positing that “there [is] reason, then, for hope that America might lead the world away from the use of cages for criminals.”⁹⁹ The Nixon-created National Advisory Commission on Criminal Justice Standards and Goals unambiguously stated that the prison could not protect the public.¹⁰⁰ In the next sentence, the Commission added a strident declaration that few besides the radical leftist intellectual Angela Davis have been willing to pick up on since: “[The prison] is obsolete, cannot be reformed, should not be perpetuated through the false hope of forced ‘treatment’; it should be repudiated as useless for any purpose other than locking away persons who are too dangerous to be allowed at large in free society.”¹⁰¹ Maintaining that certitude of vision, Dodge concluded “that the use of imprisonment as a primary sanction ought to be eliminated.”¹⁰²

Clearly, the United States veered in a different direction. Instead of “lead[ing] the world away from the use of cages[,]”¹⁰³ it showed to what extremes a people might be willing to tap confinement to address social ills. Despite what has come to pass, *A Nation Without Prisons* shows that prison abolition was being taken seriously at one time.¹⁰⁴ As Loïc Wacquant explains, “[i]n short, by the mid-1970s a broad consensus had formed among state managers, social scientists, and radical critics according to which the future of the prison in the United States was anything but bright.”¹⁰⁵ Though important, the 1970s were neither the first nor the last instance in which abolition of state-run coercion has risen to prominence. From the early decades of the republic when opponents of chattel slavery opposed that institution as immoral and irreparable, to more recent attacks on the use of capital punishment, the United States has a long and vibrant history of demanding the abolition of regimes of social control. This Part explores this history to contextualize and problematize the abolition of immigration prisons.

WITHOUT PRISONS: ALTERNATIVES TO INCARCERATION, *supra* note 96, at 233, 233.

⁹⁹ Milton G. Rector, *Introduction* to A NATION WITHOUT PRISONS: ALTERNATIVES TO INCARCERATION, *supra* note 96, at xvii, xvii.

¹⁰⁰ Corrs. Task Force, Nat’l Advisory Comm’n on Criminal Justice Standards and Goals, *Major Institutions*, in A NATION WITHOUT PRISONS: ALTERNATIVES TO INCARCERATION, *supra* note 96, at 3, 22.

¹⁰¹ *Id.* at 22-23; *see also* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 20-21 (2003) (“The most difficult and urgent challenge today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor.”).

¹⁰² Dodge, *supra* note 98, at 247.

¹⁰³ Rector, *supra* note 99, at xvii.

¹⁰⁴ Indeed, the American Bar Association Journal described *A Nation Without Prisons* as “of benefit to judges, probation officers, and defense attorneys.” *Books for Lawyers*, 61 A.B.A. J. 1318, 1322-24 (1975).

¹⁰⁵ LOÏC WACQUANT, PRISONS OF POVERTY 135 (expanded ed. 2009).

A. *Defining Abolition*

Abolitionist social movements in the United States have taken various forms. Some have proposed reforming the procedures by which state violence is distributed. Others view certain forms of state-sanctioned violence as inherently immoral instances of social control rather than as practices carried out unjustly. For the latter, the immorality that various forms of violence mete out is constitutive of the violence. Unable to be divorced from the violent act, such immorality can only be eliminated by dismantling the violent act itself. Given the United States' long history of racial subordination, it is no surprise that prominent abolitionist movements have sought to dismantle institutions, the immorality of which is inextricably tied to racial oppression: slavery,¹⁰⁶ the death penalty,¹⁰⁷ and criminal incarceration.¹⁰⁸ Importantly, the justifications for seeking abolition of these institutions—rather than mere reform—are based upon the impossibility of divorcing them from their entwined racist projects.¹⁰⁹ Instead of merely creating disparate impacts on racial groups as a result of implementation failures, these institutions have been critiqued for their racist underpinnings.¹¹⁰ Reform simply cannot address this immoral root.

Race is central to crafting all three identities at the heart of these targeted institutions—the slave, the death row inmate, and the prisoner—as morally deviant¹¹¹ or economically exploitable.¹¹² The slave could be worked and, for women, raped into old age, despite the Declaration of Independence's proclamation that “all men are created equal.”¹¹³ This was because the

¹⁰⁶ *E.g.*, DAVIS, *supra* note 101, at 25 (“U.S. chattel slavery was a system of forced labor that relied on racist ideas and beliefs to justify the relegation of people of African descent to the legal status of property.”).

¹⁰⁷ *See* Justin Hayford, *American Apartheid*, CHI. READER (July 27, 1995), <http://www.chicagoreader.com/chicago/american-apartheid/Content?oid=888051> [<https://perma.cc/46XL-K9HB>] (“Without its racist underpinnings, the death penalty might just dry up and blow away.”).

¹⁰⁸ *See, e.g.*, DAVIS, *supra* note 101, at 25 (“[P]rison reveals congealed forms of antiblack racism that operate in clandestine ways.”).

¹⁰⁹ *See* Hayford, *supra* note 107.

¹¹⁰ *See id.*

¹¹¹ Southerners “portrayed slaves’ behavior and condition as the product of their inherent nature. Accordingly, race marked blacks as flawed in character and dishonored.” Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1327 (2000) (footnote omitted). After the end of slavery, this moral deviance transferred from slaves to modern day inmates when white Southerners’ primary control mechanism over blacks shifted from slavery to criminal justice. DAVIS, *supra* note 101, at 26-39 (“[B]oth prisoners and slaves were considered to have pronounced proclivities to crime. People sentenced to the penitentiary in the North, white and black alike, were popularly represented as having a strong kinship to enslaved black people.”).

¹¹² DAVIS, *supra* note 101, at 25, 31-39.

¹¹³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Constitution rendered black men and women not men and women in the juridical sense.¹¹⁴ The institution of slavery denied them inherent worth: Black men's value was, in one respect, in their productive labor and black women's, in their productive and reproductive labor.¹¹⁵ In another respect, black men and women were equally useful as symbols to those not enslaved of what might come. Similarly, death row inmates can be killed physically because they have already been killed civilly. Finally, prisoners can be segregated physically and excluded from the political community because the criminal process has stripped their identity of inherent worth and left only vessels valued for their redemptive potential to the rest of us. The fates available to the prisoner on death row and the prisoner not on death row signal the state's power to incapacitate and even disembody either literally, as through capital punishment, or symbolically, as through civil death. All of these effects are possible because the objects of these totalizing regimes were or are largely people of color whose inherent dignity as persons, if viewed at all, is viewed askance.

Reforms, no matter how radical, that fail to grapple with this underlying moral perspective cannot successfully dismantle the violence at the heart of each of these institutions. On the contrary, reform is tied to each of these violent institutions.¹¹⁶ Given that the objects of this violence lack inherent dignity because of the manner in which they have been racialized, successive efforts to reform state violence have presented confinement as an improvement. In the late eighteenth century, before the prison gained a strong foothold in the United States, critics of the commonplace corporal punishment regime campaigned, with a fair amount of success, to replace physical violence with imprisonment.¹¹⁷ Roughly a century later, after the Civil War's end and Reconstruction's collapse, slavery's demise fueled the prison's growth.¹¹⁸ A century later, a lifetime of confinement is now often offered as a suitable alternative to capital punishment. On the civil side of the legal ledger, immigration detention today is often touted as a humanitarian measure that

¹¹⁴ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1857) (ruling that the Constitution did not give rights to African Americans), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹¹⁵ See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 142 (1956) ("A master valued each slave not only on the basis of his physical condition and proficiency as a worker but also in terms of mutual compatibility.").

¹¹⁶ E.g., DAVIS, *supra* note 101, at 40 ("If the words 'prison reform' so easily slip from our lips, it is because 'prison' and 'reform' have been inextricably linked since the beginning of the use of imprisonment as the main means of punishing those who violate social norms.").

¹¹⁷ See *id.* at 68.

¹¹⁸ See *id.* at 29 ("In the immediate aftermath of slavery, the southern states hastened to develop a criminal justice system that could legally restrict the possibilities of freedom for newly released slaves.").

saves migrants from hunger, violence, and privation.¹¹⁹ Meanwhile, prison reforms further entrench the multitudinous body of actors—public and private, individual and organizational—invested in maintaining a large prison population.¹²⁰ Moreover, because each reform is framed as a step along a progressive policing trajectory, resisters are easily derided as ungrateful.¹²¹ Accordingly, abolitionist arguments are at their strongest when focused on institutions of racial oppression because reform is an inadequate tool to stamp out that racist core.

In addition to showing theoretical frameworks centered on the impact of state violence, abolitionist movements frequently extend “beyond mere resistance” by proposing an alternative ordering that may not currently exist.¹²² Without proposing alternatives, abolition risks leaving a void that equally corrupt and immoral institutions may fill.¹²³ In this sense, an abolitionist discourse is essentially a sustained conversation about the future based on past and present experiences of dehumanizing regimes of social control. This cross-temporal analysis seeks not to fix—because institutional violence that dehumanizes cannot be remedied—but to replace.¹²⁴ As the concept of replacement suggests, abolition can do more than eliminate the sources of that violence.¹²⁵ Abolitionist interventions can instead propose inclusive,

¹¹⁹ See Press Release, The White House, Letter from the President—Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border (June 30, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle> [<https://perma.cc/WWC6-CGWL>] (“Part of this surge will include detention of adults traveling with children, as well as expanded use of the Alternatives to Detention program, to avoid a more significant humanitarian situation.”).

¹²⁰ For an example of prison reforms leading to a larger, more diverse body of actors invested in keeping prisons open, see MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 66 (2015). For a discussion of the many parties invested in maintaining a large immigration prison regime, see García Hernández, *supra* note 7, at 1507-11.

¹²¹ Cf. MAURIZIO ALBAHARI, CRIMES OF PEACE: MEDITERRANEAN MIGRATIONS AT THE WORLD’S DEADLIEST BORDER 55-56 (2015) (discussing how migrants at Italian facilities are seen as ungrateful or deserving of punishment if they are unhappy with what they are given).

¹²² Liat Ben-Moshe, *The Tension Between Abolition and Reform*, in THE END OF PRISONS 83, 92 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013).

¹²³ See ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 73 (2005) (“[W.E.B.] DuBois pointed out that in order to fully abolish the oppressive conditions produced by slavery, new democratic institutions would have to be created. Because this did not occur[,] black people encountered new forms of slavery . . .”).

¹²⁴ See DAVIS, *supra* note 101, at 20 (stating that activists should focus on prison abolition rather than prison reform).

¹²⁵ THE CR10 PUBLICATIONS COLLECTIVE, *supra* note 24, at 5 (contending that abolition is “not simply about tearing down prison walls, but [rather] about building alternative

democracy-enhancing alternatives that prevent the creation of a policy vacuum.¹²⁶ To Davis, prison abolition can only succeed if abolitionists foster an ethic and institutional framework of what she terms “abolition democracy.”¹²⁷ In her words, “prison abolition . . . involves re-imagining institutions, ideas, and strategies, and creating new institutions, ideas, and strategies that will render prisons obsolete.”¹²⁸

Accordingly, two salient features define the abolitionist framework utilized in this Article. First, an abolitionist discourse becomes necessary when reform cannot address the inherent immorality of an institution. The institution’s inherent immorality lies in its origins as a means of racial subordination and its contemporary manifestation as a source of racial oppression. Second, to succeed, rather than to merely take down the current social order, abolitionist movements must provide alternative moral frameworks upon which a democratic institutional structure can be built. To better harness these powerful lessons, the next Section details how these two features have operated in three prominent abolitionist movements in the United States: (1) the abolition of slavery, (2) the movement to abolish the death penalty, and (3) the case for abolishing criminal incarceration.

B. *Abolition Past and Present*

Rejecting mere reform and constructing alternative moral visions have been at the center of major abolitionist movements throughout United States history: efforts to end slavery, efforts to end capital punishment, and efforts to end “hyperincarceration.”¹²⁹ The common features shared by each abolitionist movement are important because, although the coercive practices that these movements resisted were born of different circumstances, they share an ethic of social control rooted in a cheapened view of its targets’ humanity. Through slavery, writes Christopher Tomlins, blacks were offered “an alternative to death” consisting of “as absolute a degree of control as (humanly) possible.”¹³⁰

formations that actually protect people from violence”); see DAVIS, *supra* note 123, at 73.

¹²⁶ E.g., DAVIS, *supra* note 123, at 73, 96 (“DuBois . . . argues that a host of democratic institutions are needed to fully achieve abolition . . .”); see also THE CR10 PUBLICATIONS COLLECTIVE, *supra* note 24, at 5 (describing abolition as “building alternative formations that actually protect people from violence, that crowd out the criminalization regime”).

¹²⁷ DAVIS, *supra* note 123, at 73, 95-96.

¹²⁸ *Id.* at 75.

¹²⁹ Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74, 78. Wacquant proposes “hyperincarceration” as a corrective to the more common “mass incarceration,” claiming the latter is misleading for three reasons. *Id.* First, despite its size, incarceration in the United States encompasses only a small fraction of the country’s total population. *Id.* Second, incarceration barely affects most segments of the population, but deeply impacts poor African American males. *Id.* Third, incarceration practice exists as it does precisely because it does not reach the masses. *Id.*

¹³⁰ CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN

Through capital punishment, writes Bryan Stevenson, we “condemn . . . the most vulnerable among us.”¹³¹ Through the modern “carceral archipelago” epitomized by the prison, writes Wacquant, “dispossessed and dishonored populations” are “manag[ed].”¹³²

Of the efforts to abolish these regimes of social control, none is more palpable than the sustained struggle to abolish the nation’s most heinous embrace of the commodification of human bodies: chattel slavery. Built on an explicitly racist ideology that nonetheless was sufficiently flexible to be deployed through gendered violence as well, slavery hinged on converting black bodies into economically quantifiable values, and little more. Black men were valued for their productive capacities, while black women were valued for both their productive and reproductive capacities.¹³³ To beneficiaries of the institution of slavery, little else mattered.¹³⁴ Constructed by law as outsiders to the polity,¹³⁵ physical and psychological violence were wielded against enslaved Africans to marginalize them into maximum vulnerability.¹³⁶ Imprisonment was a core component of slavery’s means of racial and social control.¹³⁷ As Taja-Nia Henderson recently explained, jails in the antebellum South were an important site of corporal control where law enforcement personnel regularly meted out legally sanctioned physical violence wholly unrelated to any alleged criminal activity.¹³⁸

To be sure, slaves were not passive objects.¹³⁹ Resistance was commonplace and diverse, ranging from single incidents of slaves fleeing¹⁴⁰ to large-scale

COLONIZING ENGLISH AMERICA, 1580-1865, at 507 (2010).

¹³¹ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 14 (2014).

¹³² Wacquant, *supra* note 129, at 79-80 (emphasis omitted).

¹³³ See *supra* Section II.A.

¹³⁴ As Justice Taney infamously wrote, “[the black man] had no rights which the white man was bound to respect.” *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹³⁵ KUNAL M. PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600-2000*, at 6 (2015).

¹³⁶ TOMLINS, *supra* note 130, at 508 (“Slavery regimes established the means by which that category of humans named as slaves might be placed uniquely and absolutely at the disposition of that category named masters (or mistresses or owners).”). To say that slaves were outside the polity is not to say that they were irrelevant to the polity or irrelevant to the creation of legal practices and traditions in the United States. On the contrary, as Taja-Nia Henderson writes, the control of black bodies through law enforcement institutions “catalyzed the emergence of the administrative state in the South.” Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 *STAN. J. C.R. & C.L.* 177, 179 (2016).

¹³⁷ See Henderson, *supra* note 136, at 182.

¹³⁸ *Id.* at 182-88.

¹³⁹ For an excellent account of resistance by slaves, see MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 381-420 (2016).

¹⁴⁰ See *id.* at 382.

violent rebellions.¹⁴¹ No matter the form that resistance to slavery took, it always emanated from a view of slaves that contrasted sharply with that of the institution's proponents: that slaves were humans with an innate dignity that could not justifiably be stripped.¹⁴² Slaves, former slaves, and abolitionists frequently paired this moral view with a constructive vision of alternative institutions that could fill the void left by slavery's fall. Indeed, W.E.B. DuBois forcefully advocated for reparations in the form of capital resources that ought to be distributed to former slaves as a way of incorporating them into the new society.¹⁴³

When slavery finally fell, that alternative moral vision failed to carry the day.¹⁴⁴ In the Civil War's aftermath, few economic resources were actually redistributed to the newly emancipated. Freed from the formal restraints of slavery, the white supremacists who had previously invested so much in that institution retooled their sentiments and energies toward other forms of exploitation.¹⁴⁵ Blacks in the late-nineteenth and early-twentieth centuries found that slavery's demise created a vacuum in the regime of racist social control that was quickly filled by other dehumanizing institutions.¹⁴⁶ Whether through sharecropping, violence, or imprisonment under a newly invigorated criminal law regime, black people in the United States were systematically targeted by an array of old and new social institutions centered on a similar morality to that of the "peculiar" institution only just abolished.¹⁴⁷ They continued to be treated as barely human creatures whose greatest value lay in

¹⁴¹ See *id.* at 548-49 (describing violent resistance in Kansas led by John Brown).

¹⁴² See Ira Berlin, *246 Years a Slave*, N.Y. TIMES, Feb. 28, 2016, at BR 21 (reviewing SINHA, *supra* note 139) (explaining that early abolitionists "[e]mbrac[ed] the Declaration of Independence and the notion that all were equal in the sight of God").

¹⁴³ See, e.g., W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 123 (David W. Blight & Robert Gooding-Williams eds., 1997) (1903) ("What did such a mockery of freedom mean? Not a cent of money, not an inch of land, not a mouthful of victuals,—not even ownership of the rags on his back. Free!").

¹⁴⁴ See SINHA, *supra* note 139, at 4-5.

¹⁴⁵ Henderson, *supra* note 136, at 209.

¹⁴⁶ See *id.* ("[P]enal facilities throughout the South became synonymous with the egregious exploitation of ostensibly 'free' black labor through convict lease and peonage regimes.").

¹⁴⁷ See generally STAMPP, *supra* note 115. In his towering *Slavery and Social Death*, Orlando Patterson contests slavery's characterization as "peculiar," writing "[t]here is nothing notably peculiar about the institution of slavery." ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH*, at vii (1982). In a similar vein, Wacquant identifies "several 'peculiar institutions' [that] have operated to define, confine, and control African-Americans in the history of the United States": chattel slavery, Jim Crow, the urban ghetto, and the prison. Loïc Wacquant, *The New 'Peculiar Institution': On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 378 (2000). For a more nuanced discussion of slavery's alleged peculiarity, see generally Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009 (1993).

their exploitability. Reflecting on that history with the perspective that only time offers, abolitionist Liat Ben-Moshe argues that slavery's replacement by other means of social control illustrates the failures and risks of an abolitionist ethic that seeks to destroy levers of exploitation without proposing an alternative morality.¹⁴⁸

Critics of some strains of contemporary death penalty abolitionism raise a similar concern. Many of the leading academics calling for an end to the United States' capital punishment regime build their arguments on narrow procedural complaints. These abolitionist discourses urge an end to state-run death as a form of criminal punishment because it is applied arbitrarily, discriminatorily, or without sufficient precision.¹⁴⁹ As the advocacy group Death Penalty Information Center put it, "[t]he arbitrariness of the death penalty means that it is applied inconsistently and randomly despite similarities or dissimilarities in crimes [Instead, a] high degree of consistency should be expected when the nature of the punishment is so grave and irreversible."¹⁵⁰

To be sure, these are empirically sound analyses. Capital punishment as applied is notoriously problematic: the victim's race has a substantial impact on the likelihood that a defendant will face the death penalty¹⁵¹ (with higher likelihood of receiving the death penalty for crimes against white people¹⁵²), and hundreds of people have been released from death rows due to revelations that they were wrongfully convicted.¹⁵³

Because these and many other concerns are fundamentally about capital punishment procedures, they are answerable by procedural reforms. The criticism that juveniles should not be put to death because their brains have not developed sufficiently to hold them accountable for their actions to the

¹⁴⁸ See Ben-Moshe, *supra* note 122, at 83-85.

¹⁴⁹ See, e.g., *State v. Cobb*, 743 A.2d 1, 136-37 (Conn. 1999) (Berdon, J., dissenting) (concluding that Connecticut's capital punishment regime is built on legal standards that shift with "changes in the personnel of the court or as a result of justices who revise their positions" and "embodies an arbitrariness that cannot be tolerated when the state determines who should live and who should die" (footnote omitted)); STEVENSON, *supra* note 131, at 256-74 (describing various legal challenges to death sentence procedures).

¹⁵⁰ *Arbitrariness*, DEATH PENALTY INFO. CTR. (July 16, 2015), <http://www.deathpenaltyinfo.org/arbitrariness> [<https://perma.cc/KGL4-2H27>].

¹⁵¹ GOTTSCHALK, *supra* note 120, at 124 (citing a study that concluded that "the race of the victim is a far more significant factor than the race of the defendant in determining who is spared the death penalty and who is not").

¹⁵² Since 1976, victims in murder cases where the death penalty has been carried out have been 75.6% white. *National Statistics on the Death Penalty and Race*, DEATH PENALTY INFO. CTR. (Oct. 19, 2016), <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976> [<https://perma.cc/QT4Z-L8HQ>].

¹⁵³ See, e.g., BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 5 (2011) (analyzing cases of the first 250 death row inmates exonerated through DNA evidence).

ultimate degree was remedied by reading the Eighth Amendment as not allowing juveniles to be put to death.¹⁵⁴ Similarly, the problem of judges making the final decision about whether a convicted offender ought to be sentenced to life imprisonment rather than death was corrected by interpreting the Sixth Amendment as prohibiting this practice.¹⁵⁵ Other problems with death penalty administration might also be corrected through procedural reforms. Without question, doing so would meaningfully impact people whose lives would be protected by these changes. It would be foolish to claim otherwise, and I do not attempt to do so.

But procedural reforms, for all their empirical soundness, do not grapple with the violent racist ethos at the core of capital punishment. Instead of contending directly with the nation's history of racialized violence that continues in today's criminal justice regime through forms such as capital punishment, "[l]iberal abolitionists framed their opposition in conditional administrative terms rather than unconditional anti-violence terms," writes Naomi Murakawa.¹⁵⁶ "In so doing, abolitionists left open pathways for implementation of a new, improved, routinized death penalty."¹⁵⁷ To put Murakawa's insight another way, the death penalty has become more efficient—reforms may lead to fewer innocent people put to death, for example—but the practice of state-run killing has not ended.¹⁵⁸

As with slavery, the morality that permits the state to take a person's life as punishment for crime is one that devalues all that makes life meaningful. To the state, the bodies of people sentenced to death, disproportionately men of color,¹⁵⁹ are stripped of their inherent worth as humans¹⁶⁰ and converted into

¹⁵⁴ See *Roper v. Simmons*, 543 U.S. 551, 570-71 (2005) ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.").

¹⁵⁵ See *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016).

¹⁵⁶ NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 131 (2014).

¹⁵⁷ *Id.*

¹⁵⁸ Murakawa is unclear about whether capital punishment's newfound routinization might be a narrowing step on the road to its eventual demise. To be fair, that is a question that only time can answer.

¹⁵⁹ Matt Ford, *Racism and the Execution Chamber*, ATLANTIC (June 23, 2014), <http://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081/> [<https://perma.cc/PV5D-8XH8>] ("The national death-row population is roughly 42 percent black, while the U.S. population overall is only 13.6 percent black, according to the latest census."). In 2013, 904 out of every 100,000 males in the United States were imprisoned by state or federal authorities, whereas the rate for females was 65 out of 100,000. CARSON, *PRISONERS IN 2013*, *supra* note 6, at 7 tbl.6. That year, the imprisonment rate per 100,000 residents for black males was 2805; Latinos was 1134; white males was 466; black females was 113; Latinas was 66; and white females was 51. *Id.* at 9 tbl.8.

¹⁶⁰ *Cf.* DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 198 (2001) ("The continued enjoyment of market-based personal

vessels of atonement. Like slaves, death row inmates are important because of their productive capacity. What they produce, though, is not tangible or material; it is sentiment. The value that remains in people once subjected to death is in their ability to make the state whole again—or at least move it in that direction—after having lost one of its members who, unlike the condemned, remains valued as a person. The state atones for its failure to protect the valued victim by taking the life of a person who has lost all other meaning—a person who is represented only by a body, breath, and blood. Indeed, the power to kill another human without risk of punishment highlights slavery’s dehumanization of blacks in the service of white supremacy¹⁶¹ and continues in capital punishment’s use of violence to create and recreate racial subordination.¹⁶² As Dorothy Roberts put it, “state executions . . . have supported white supremacy by effectively reinstating blacks’ slave status and by reinforcing the myth of inherent black criminality.”¹⁶³ Today, states may “sanitize” capital punishment through institutionalization that pushes killing toward the realm of banality, but even that routinization of death cannot erase capital punishment’s “long and deep connection” with “this country’s racial politics and its uses of the killings of African Americans.”¹⁶⁴ Procedural reforms that fail to grapple with this morality stand little chance of avoiding one morally skewed practice replacing another. It is possible, as Justice Blackmun famously wrote about the death penalty, to “tinker with the machinery of death” in the hope of “lend[ing] more than the mere appearance of fairness to the death penalty endeavor”; that hope, however, is nothing more than “delusion.”¹⁶⁵

Indeed, in failing to tackle the death penalty’s violent, racially skewed core, the “liberal abolitionists” that Murakawa criticizes left open the possibility that capital punishment could be replaced with other forms of state violence, including state violence that especially affects people of color.¹⁶⁶ Just that

freedoms has come to depend upon the close control of excluded groups who cannot be trusted to enjoy these freedoms.”).

¹⁶¹ Take, for example, the North Carolina Supreme Court’s declaration that “[t]he power of the master must be absolute, to render the submission of the slave perfect.” *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829).

¹⁶² See Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1054 (2010) (positing that violence “creates and defines social categories, in this case race itself”).

¹⁶³ Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 267 (2007).

¹⁶⁴ *Id.* at 273 (quoting Charles J. Ogletree, Jr. & Austin Sarat, *Introduction to FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 1* (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006)).

¹⁶⁵ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

¹⁶⁶ Life imprisonment is one alternative form of state violence. As Marie Gottschalk notes, “[n]early half of the lifers are African American, and one in six is Latino.” See

possibility has transpired. In particular, reformist capital punishment opponents frequently tout life imprisonment without parole in maximum security facilities as a suitable replacement for death.¹⁶⁷ Confinement in cages with only minimal access to recreation, human contact, or even sunlight, as is the case for many people sentenced to life without parole, is surely a form of violence. It is violence short of death, no doubt, but state-administered violence all the same.¹⁶⁸ That life without parole can be seen by death penalty abolitionists as an improvement is an indication only that the death penalty has swayed criminal punishment's moral center in the direction of extreme violence.

The history of criminal incarceration in the United States illustrates this phenomenon as well. Excluding ICE's civil immigration detainees, more than 1.5 million people were in prison on any given day in the United States in 2014.¹⁶⁹ This volume makes the United States the nation most likely to deprive its members of their liberty.¹⁷⁰ In their careful study of the United States' penal regime, Steven Raphael and Michael Stoll posit that contemporary penal practices "are essentially political and have little to do with the actual threat of crime."¹⁷¹ This conclusion resonates with Malcolm Feeley's claim that, as originally conceived in the United States, the prison as a space for long-term punishment of convicted offenders was intended to "exploit prisoners' labor."¹⁷² Wacquant adds that "penal bondage developed, not to fight crime, but to dramatize the authority of rulers, and to repress idleness and enforce morality among vagrants, beggars, and assorted categories cast adrift by the advent of capitalism."¹⁷³

Viewed in this light, prisons are not primarily vehicles to promote public safety, but instead methods of social control.¹⁷⁴ They serve a disciplinary

GOTTSCHALK, *supra* note 120, at 176.

¹⁶⁷ *Id.* at 170, 191-93.

¹⁶⁸ Gottschalk notes that because life without parole excludes the possibility of state-administered death, it is "easier" to mete out. *See id.* at 172-73. Courts do not scrutinize life sentences nearly to the extent they do capital punishment, and many legal services agencies that provide postconviction assistance focus exclusively on death cases. *See id.*

¹⁶⁹ CARSON, PRISONERS IN 2014, *supra* note 6, at 1.

¹⁷⁰ *See* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 36-37 (Jeremy Travis et al. eds., 2014) ("The historically high U.S. incarceration rate . . . is unsurpassed internationally.").

¹⁷¹ STEVEN RAPHAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? 120 (2013).

¹⁷² Malcolm M. Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 4 PUNISHMENT & SOC'Y 321, 326 (2002).

¹⁷³ Wacquant, *supra* note 129, at 80.

¹⁷⁴ *See* GARLAND, *supra* note 160, at 199-200 ("Imprisonment has emerged in its revived, reinvented form because it is able to serve a newly necessary function in the workings of late modern, neo-liberal societies: the need for a 'civilized' and 'constitutional' means of segregating the problem populations created by today's economic and social

function in which the “dispossessed and dishonored populations” are literally corralled and figuratively marked with the stigma of indignity.¹⁷⁵ Developed throughout centuries filled with racial violence, race is no footnote in the story of incarceration in the United States.¹⁷⁶ On the contrary, racially disparate confinement has become a core characteristic of incarceration.¹⁷⁷ Indeed, as Michelle Alexander wrote in her hugely influential book *The New Jim Crow*, “the American penal system has emerged as a system of social control unparalleled in world history” in which “the primary targets of its control can be defined largely by race.”¹⁷⁸

Class- and race-based critiques of the United States’ enormous prison population are not confined to scholars. Many politicians and political commentators have lodged similar complaints, especially in recent years.¹⁷⁹ Where these often fall short, however, is in focusing on the impact of penal incarceration on class and race and ignoring its classist and racist foundation. In the popular discourse that has dominated politically liberal discussions for decades and reverberated in politically conservative circles more recently, class and race are framed as having a problematic presence in penal confinement only insofar as they are considered superfluous considerations.¹⁸⁰ To remedy this problematic consideration, all that is needed, this reasoning follows, is to create more rigid decision-making regimes that focus on less problematic—or, in the words of criminal law, more objective—considerations, namely evidence of criminal activity.

Abolitionist critiques of criminal incarceration find fault with such analyses because race is easily and frequently concealed within putatively objective assessments of guilt and punishment. Pleas to objectivity that are blind to race’s hidden role in selecting both what is criminalized and who is policed thus bolster, inadvertently perhaps, white supremacy. It is easy, for example, to ignore the racial dimensions of criminal law’s privileging of private spaces over public spaces by—as with Colorado’s experiment in marijuana

arrangements.”).

¹⁷⁵ See Wacquant, *supra* note 129, at 80 (emphasis omitted).

¹⁷⁶ See GARLAND, *supra* note 160, at 136 (explaining that the face of criminal activity is the “young minority male[]” and “[t]he only practical and rational response to such types . . . is to have them ‘taken out of circulation’ for the protection of the public”).

¹⁷⁷ See MURAKAWA, *supra* note 156, at 5-6; NAT’L RESEARCH COUNCIL, *supra* note 170, at 56 (“[T]he rise in incarceration rates has had a disproportionately large effect on African Americans and Latinos.”).

¹⁷⁸ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8 (rev. ed. 2012).

¹⁷⁹ See, e.g., David Dagan & Steven M. Teles, *The Conservative War on Prisons*, WASH. MONTHLY, Nov.-Dec. 2012, at 25, 25-26 (“Discovering that the nation’s prison growth is morally objectionable by their own, conservative standards, [evangelicals and libertarians] are beginning to attack it . . .”).

¹⁸⁰ See *id.*

legalization—requiring that some activity be performed in public if it is to be considered criminal.¹⁸¹ Likewise, it is easy to overlook the privileging of white spaces, such as college campuses or financial services firms, over spaces dominated by people of color, in choosing where to deploy police resources. Unless race is divorced from substantive criminal law as well as from choices about how and where to deploy police, asking only whether there exists enough evidence of criminal activity to prove guilt beyond a reasonable doubt will continue to ignore the vast trove of criminal activity that is not investigated or prosecuted. In effect, the particular activities that are criminalized and the ways in which policing operates can and do conceal racist and classist considerations that, to date, the United States seems incapable of shedding. Little hope exists that this will change until the prisoners in the criminal justice system are reconceived as full members of the political community. At the moment, and indeed for the entirety of the nation's history, prisoners are and have been anything but that. Instead, the confined are pushed, figuratively and literally, to the margins of communities.¹⁸² They are stigmatized as criminals, marked as wrongdoers, stripped of a host of features of participation in a civic community (from voting to employment), and physically removed in chains to steel and concrete silos.¹⁸³

All of this is possible because, like the slave and the death row inmate, the criminal is framed as morally deviant. Prison architecture and nomenclature in the United States illustrates this deviant framing. Philadelphia's Eastern State Penitentiary, one of the nation's first stand-alone prisons intended for long-term confinement of convicted offenders, was designed as an institution of total surveillance in which inmates were constantly watched. While isolated in single-person cells, they could interact only with the guard, their conscience, and their god.¹⁸⁴ The facility's name also intimates a need for inmates to undergo moral self-discovery: the word "penitentiary" stems from the Latin "paenitentia" meaning "penitence."¹⁸⁵ The penitentiary, then, was thought to be

¹⁸¹ See, e.g., COLO. CONST. art. XVIII, § 16, para. 3.

¹⁸² JOY JAMES, *RESISTING STATE VIOLENCE: RADICALISM, GENDER, AND RACE IN U.S. CULTURE* 34 (1996) ("American prisons constitute an 'outside' in U.S. political life."); see also GARLAND, *supra* note 160, at 199 (describing the prison as a means of "segregating the problem populations").

¹⁸³ See, e.g., JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 4 (2006) ("In the United States today, by far the largest group of citizens who are denied the right to vote are those who have received a felony conviction.").

¹⁸⁴ See Chai Woodham, *Eastern State Penitentiary: A Prison with a Past*, SMITHSONIAN.COM (Sept. 30, 2008), <http://www.smithsonianmag.com/history/eastern-state-penitentiary-a-prison-with-a-past-14274660/?no-ist> [<https://perma.cc/X67D-RJPL>]. For a description of the prison's interior, see G.W.S., *A VIEW AND DESCRIPTION OF THE EASTERN PENITENTIARY OF PENNSYLVANIA* 5 (Philadelphia, C. G. Childs Engraver 1830).

¹⁸⁵ *Penitential*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

a place where moral deviants could atone for their moral transgressions through isolated contemplation.

Moreover, corporal punishment through imprisonment has, since its inception, been conceived as a work in progress. The character and composition of prisons and the means through which imprisonment is meted out are regularly debated—excesses are expected, and flaws are accepted. In sum, the prison is conceived of as a humanitarian response to more egregious types of corporal punishment, but one that is perpetually evolving as new flaws develop and are discovered. To Michel Foucault, that the prison is conceived as always in need of reform means that the prison's failings are actually part of what makes the prison as an institution so successful. In Foucault's estimation, "[i]s not the supposed failure part of the functioning of the prison?"¹⁸⁶ Though posed as a question, there is little doubt in his answer: "Prison 'reform' is virtually contemporary with the prison itself: it constitutes, as it were, its programme."¹⁸⁷ Understood in these terms, to reform the prison is to perpetuate it and the violence it inflicts.¹⁸⁸ To find fault in imprisonment is to see imprisonment as it has always operated and, to paraphrase Foucault, as it is intended to. Viewed in this light, the prison's faults are not failings; they are design features.¹⁸⁹

Erected within a racially subordinating political context and, in turn, utilized as a means of marginalizing people racialized as nonwhite into a position of easy exploitability, abolitionists describe slavery, capital punishment, and prisons as beyond reform. Though each follows a different path, all spring from a thorough denial of the inherent worth of certain humans, largely based on how they are racialized. Immigration prisons follow that model.

III. IMMIGRATION IMPRISONMENT'S MORAL FOUNDATION

Writing about prisons as a means of criminal punishment, Feeley wrote: "The prison was not at all obvious. . . . [I]t was not always a foregone conclusion."¹⁹⁰ Indeed, as Raphael and Stoll conclude about criminal incarceration, people are imprisoned "because we are choosing through our

¹⁸⁶ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 271 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

¹⁸⁷ *Id.* at 234.

¹⁸⁸ See DAVIS, *supra* note 123, at 116 ("Legal challenges have indeed enabled at various moments specific reforms of the prison, but more frequently than not, these reforms have ultimately solidified the institution.").

¹⁸⁹ As if to illustrate the point that the prison's faults are design features, Jonathan Simon notes that the widespread overcrowding that characterized California prisons in the closing years of the twentieth century and the first decade of the twenty-first century "was clearly foreseen, as the new prisons were designed with plumbing and electrical capacity for up to double the normal population." JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* 6 (2014).

¹⁹⁰ Feeley, *supra* note 172, at 333.

public policies to put them there.”¹⁹¹ To be sure, policing initiatives and criminal laws that dictate who is surveilled and what kind of punishment is meted out also fall within this framework. Abolitionists, however, cast a wider net. It is not enough simply to consider the direct legal means through which people are locked up. It is just as essential to consider the economic and political conditions that push certain people toward a position of legal marginality.¹⁹² In effect, prison abolitionism extends far beyond prisons.

The same can be said of immigration imprisonment. Confinement has not always been a major part of the nation’s regulation of migration.¹⁹³ It is today because, to paraphrase Raphael and Stoll, we have chosen to make it so.¹⁹⁴ This Part places immigration prisons in the same political trajectory as slavery, the death penalty, and mass incarceration, and identifies the moral taint that accompanies that lineage.

A. *Making Migrants*

For generations, United States economic and military relations with other nations have altered the lives of people like those who today fill immigration prisons. In fact, of the groups most frequently imprisoned today because of migration-related activity, Mexicans in particular have long been exploited and their bodies commodified for the benefit of the United States. During the period of the United States’ westward expansion, Mexicans were regularly murdered through extralegal means, including lynching, and stripped of rightful claims to property through legal processes.¹⁹⁵ In the mid-twentieth century, they were valued for their manual labor and encouraged to come to the United States en masse through the Bracero Program, an agricultural guest worker initiative that was so rife with abuse that, for a time, the Mexican government actually barred any employer in Texas from participating.¹⁹⁶ Even

¹⁹¹ RAPHAEL & STOLL, *supra* note 171, at 27.

¹⁹² See DAVIS, *supra* note 123, at 72 (“[P]rison abolition is a way of talking about the pitfalls of the particular version of democracy represented by U.S. capitalism.”).

¹⁹³ Daniel Kanstroom & M. Brinton Lykes, *Introduction: Migration, Detention, and Deportation: Dilemmas and Responses*, in THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES, *supra* note 20, at 1, 20 (“Detention . . . had been largely abolished by INS in 1954 . . .”).

¹⁹⁴ See RAPHAEL & STOLL, *supra* note 171, at 27 (“[I]n both systems legislatively driven policy changes have driven incarceration growth. In other words, so many Americans are in prison because we are choosing through our public policies to put them there.”).

¹⁹⁵ See DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986, at 27-34 (1987); Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 299-303 (2009); Antonio Ríos-Bustamante, *The Barrioization of Nineteenth-Century Mexican Californians: From Landowners to Laborers*, in EN AQUEL ENTONCES 72, 76-79 (Manuel G. Gonzales & Cynthia M. Gonzales eds., 2000).

¹⁹⁶ See Manuel García y Griego, *The Importation of Mexican Contract Laborers to the*

when abuse was not so harsh, Mexicans were conceived of as inexpensive, disposable labor. In the stark words of President Truman's Commission on Migratory Labor, the Bracero Program envisioned Mexican labor as "ready to go to work when needed; to be gone when not needed."¹⁹⁷ When they did not leave, they were further marginalized by law through loss of their lawful immigration status¹⁹⁸ and were marginalized in popular discourse through common epithets such as "wetback."¹⁹⁹ Later, the Mexican government promoted export processing plants called *maquiladoras* in cities along the border with the United States, promising manufacturers quick access to the United States market at low cost.²⁰⁰ *Maquiladoras* attracted Mexicans from the country's southern regions to ramshackle cities in view of the United States.²⁰¹ Not surprisingly, many eventually continued north.²⁰² In January 1994, the North American Free Trade Agreement ("NAFTA"),²⁰³ a pact between Canada, México, and the United States, went into effect, and was quickly followed by a major economic crisis in México spurred in part by United States investors' NAFTA-induced speculation.²⁰⁴ That crisis, in turn, contributed to renewed migration north.²⁰⁵ A bailout led by the United States focused on protecting major financial institutions; meanwhile, the Mexican economy tanked, "pummel[ing]" the country's poor and middle class.²⁰⁶

Other migrant groups that comprise substantial portions of the current immigration prison population have likewise been exploited for the benefit of the United States. For generations, Guatemala, Honduras, El Salvador, and

United States, 1942-1964, in BETWEEN TWO WORLDS: MEXICAN IMMIGRANTS IN THE UNITED STATES 45, 61 (David G. Gutiérrez ed., 1996).

¹⁹⁷ CYBELLE FOX, THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE, FROM THE PROGRESSIVE ERA TO THE NEW DEAL 275 (2012).

¹⁹⁸ See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 261 (2004).

¹⁹⁹ See, e.g., STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 120-21 (2003); Note, *Wetbacks: Can the States Act to Curb Illegal Entry?*, 6 STAN. L. REV. 287, 287 (1954).

²⁰⁰ See DAVID BACON, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS 70-71 (2008).

²⁰¹ See *id.* at 71.

²⁰² See Kathryn Kopinak, *How Maquiladora Industries Contribute to Mexico-U.S. Labor Migration*, 96 PAPERS 633, 643 (2011) ("While maquiladoras do not overtly encourage international labor migration, they also do not embed their employees in Mexico. Instead, they are a training ground and staging area for those who migrate.").

²⁰³ North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

²⁰⁴ See BACON, *supra* note 200, at 61; BILL ONG HING, ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION 43 (2010).

²⁰⁵ See BACON, *supra* note 200, at 60-64.

²⁰⁶ See HING, *supra* note 204, at 44-45.

other countries in Central America served United States' financial and political interests. During World War II, for example, the United States secured agreements with most Central American countries to supply it with rubber, even at the expense of hindering domestic development.²⁰⁷ Later, Central America became the site of Cold War proxy battles leading President Bill Clinton to acknowledge that the United States' "support for military forces or intelligence units which engaged in violent and widespread repression . . . was wrong."²⁰⁸ The United States' economic influence in some Central American countries was so dominant that these countries were referred to using the trite moniker of "banana republics."²⁰⁹ In return, those countries' leaders received robust financial, military, and political support from the United States.²¹⁰

Moreover, as with México, Central American labor markets have been upended in recent years by trade agreements with the United States as well as technological innovations that allow United States deportees to Central America to function as low-cost laborers who directly service United States consumer industries, primarily by working in telephone call centers.²¹¹ In addition, Central America has been wracked by violence that government authorities seem incapable of stopping and, in fact, which may have been fanned through hardline policing initiatives. El Salvador's El Plan Mano Dura and El Plan Super Mano Dura, for example, were modeled on zero tolerance policing strategies in the United States and introduced to Salvadoran officials through exchanges sponsored by the United States government.²¹² Rather than dampen gang violence, these initiatives instead made gangs in El Salvador "much more sophisticated and now clandestine operations."²¹³ This violence, in turn, has increased the number of Central Americans, especially children and families, seeking safe haven in other parts of Latin America as well as in the United States.²¹⁴

²⁰⁷ See WADE DAVIS, *ONE RIVER: EXPLORATIONS AND DISCOVERIES IN THE AMAZON RAIN FOREST* 332 (1996).

²⁰⁸ Charles Babington, *Clinton Regrets Support for Guatemala; U.S. Backed Forces of Former Regime in 36-Year War*, WASH. POST, Mar. 11, 1999, at A1.

²⁰⁹ See Joseph Nevins, *A Right to Stay Home, a Right to Move, a Right to the World*, NACLA (Jan. 5, 2016), <https://nacla.org/news/2016/01/04/right-stay-home-right-move-right-world> [<https://perma.cc/6ZZ8-M734>].

²¹⁰ See, e.g., *id.* (recounting the military and political support that the United States gave to Honduras during the twentieth century in exchange for control of key industries like agriculture and mining).

²¹¹ See Katie Dingeman-Cerda & Rubén G. Rumbaut, *Unwelcome Returns: The Alienation of the New American Diaspora in Salvadoran Society*, in *THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES*, *supra* note 20, at 227, 240-41.

²¹² See ELANA ZILBERG, *SPACE OF DETENTION: THE MAKING OF A TRANSNATIONAL GANG CRISIS BETWEEN LOS ANGELES AND SAN SALVADOR* 171 (2011).

²¹³ *Id.* at 177.

²¹⁴ See M. Brinton Lykes et al., *Participatory Action Research with Transnational and*

Importantly, that violence is itself linked to an earlier generation of youth that was deported from the United States to countries just exiting decades of civil war, and to which that generation had few positive social ties.²¹⁵ Instead of engaging in productive ventures, “[m]any took to the streets, where they encountered local gangsters who admired their style and mannerisms” and “attained elevated status” within gangs.²¹⁶ Others found that they could not tread a different path; they became trapped by the stigma of gang affiliation. As one Los Angeles gang member turned peace activist, who was later deported to El Salvador, said: “You go down there to live a different life, but you can’t. You get put in a position where you have to defend yourself. If not you get killed.”²¹⁷

To many Latin American migrants, there is a direct link between their past experiences of exploitation in Central America and México and today’s immigration enforcement policies in the United States. They frequently view enforcement policies through a historical lens that contextualizes their presence in the United States within earlier experiences of suffering economic and political repression in their countries of origin. One migrant living in New England, for example, told researchers, “[w]e are here because of all the wars in our countries . . . [T]he U.S. has sent the arms to our country which the military has used to kill the indigenous people. . . . [A]nd that is the reason we are here.”²¹⁸ Relatedly, others note that the violence that was rampant in the 1980s led to poverty from which they sought to escape by coming to the United States.²¹⁹

B. *Creating Illegality*

Despite its role in creating the conditions that led many Mexicans and Central Americans to migrate, since the 1960s, the United States has also created a legal regime in which migration is perilous and migrants are marginalized. After decades in which migration from México and Central

Mixed-Status Families: Understanding and Responding to Post-9/11 Threats in Guatemala and the United States, in *THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES*, *supra* note 20, at 193, 201 (“Despite cessation of the armed conflict, current economic conditions, drug trafficking, ongoing gang violence, and impunity continue to create conditions in the twenty-first century that push an ever-increasing number of Guatemalans and Salvadorans north.” (citations omitted)).

²¹⁵ See Dingeman-Cerda & Rumbaut, *supra* note 211, at 236.

²¹⁶ *Id.*

²¹⁷ ZILBERG, *supra* note 212, at 152 (quoting Alex Ríos, who subsequently returned to the United States without authorization, was confined as a result of his immigration law violations, and eventually obtained asylum).

²¹⁸ Lykes et al., *supra* note 214, at 210. Priest Antonio Rodríguez remarked that “[t]he greatest achievement of free trade is the exportation of people.” ZILBERG, *supra* note 212, at 200.

²¹⁹ See Lykes et al., *supra* note 214, at 207.

America was lightly regulated, the United States shifted course in 1965. That year, Congress enacted the Hart-Celler Act which, for the first time, imposed caps on the number of migrants who could lawfully come to the United States in a given year from each country.²²⁰ The quotas were set at 20,000 per year per country (applied to México in 1976), and there was little question from the start that this amount would vastly underserve the amount of Mexican migration happening at the time.²²¹ Before Hart-Celler's enactment, more than 200,000 Mexicans were coming to the United States with authorization to work.²²² Capping Mexican migration did not stop Mexicans from coming to the United States.²²³ It simply stripped them of their authorization to do so. As the immigration historian Mae Ngai put it, the per-country ceilings "recast Mexican migration as 'illegal.'"²²⁴ By the late 1970s and into the 1980s, Mexicans were not the only people coming to the United States in large numbers in violation of Hart-Celler's restrictions. Central Americans fleeing civil war and political unrest appeared in large numbers along the southwest border.²²⁵ Large groups of Haitians and Cubans floated ashore in Florida.²²⁶

C. Deploying Security

Cast as unwanted, these migrants quickly became the target of security-focused law enforcement efforts. Following the model of the policy reforms shaping criminal law and procedure in the late 1970s and 1980s—best illustrated by the "broken windows theory" of criminal policing²²⁷—the regulation of migrants and migration took a punitive bent. Security became the prism through which migration was examined, and policing became the key

²²⁰ See Immigration and Nationality Act Amendments of 1965 (Hart-Celler Act), Pub. L. No. 89-236, 79 Stat. 911 (codified in scattered sections of 8 U.S.C.); NGAI, *supra* note 198, at 258.

²²¹ See NGAI, *supra* note 198, at 261.

²²² See *id.* at 261 ("When one considers that in the early 1960s annual 'legal' Mexican migration comprised some 200,000 braceros and 35,000 regular admissions for permanent residency, the transfer of migration to 'illegal' form should have surprised no one.").

²²³ See Marcela Cerrutti & Douglas S. Massey, *Trends in Mexican Migration to the United States, 1965 to 1995*, in CROSSING THE BORDER: RESEARCH FROM THE MEXICAN MIGRATION PROJECT 17, 18-19 (Jorge Durand & Douglas S. Massey eds., 2004).

²²⁴ NGAI, *supra* note 198, at 261.

²²⁵ See Dingeman-Cerda & Rumbaut, *supra* note 211, at 230 (observing that a large number of Salvadorans migrated to the United States in the 1980s due to the Salvadoran Civil War); Nevins, *supra* note 209.

²²⁶ See Stephanie J. Silverman, *Immigration Detention in America: A History of Its Expansion and a Study of Its Significance* 10 (Univ. of Oxford, Working Paper No. 80, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1867366 [<https://perma.cc/8357-7YZC>].

²²⁷ See generally James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, at 29.

response of choice.²²⁸ Military personnel began to be assigned on a regular basis to various points along the United States' border with México.²²⁹ Meanwhile, the federal government's principal border policing agency during the 1980s and 1990s, the now defunct Immigration and Naturalization Service ("INS"), saw its funding and law enforcement responsibilities increase substantially.²³⁰

Congress busied itself amending existing statutes and enacting others that had the effect of treating more harshly migrants caught in the immigration law or criminal justice systems. For its part, immigration law and procedure began to adopt features emblematic of criminal policing and punishment. Immigration judges saw their authority to make individual civil detention decisions undermined by legislative decrees mandating that whole classes of people be held in federal government custody.²³¹ As Teresa Miller explains, this trend in immigration law adjudications "directly reflected a transformation within the criminal justice system known as 'penal severity,' resulting in a convergence of immigration control and crime control policies."²³²

On the flipside, criminal law and procedure began taking on the relaxed character of administrative immigration law norms. Through initiatives such as fast-track pleas and Operation Streamline, criminal prosecutions of immigration crime defendants now resemble the limited procedural protections that characterize civil immigration court adjudications.²³³ Fast-track pleas require immigration crime defendants to waive a host of rights afforded criminal defendants in exchange for quick adjudication of their criminal case.²³⁴ Operation Streamline features simultaneous hearings of dozens of immigration crime defendants who are moved through federal courts en

²²⁸ See TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992*, at 104 (1996); TONY PAYAN, *THE THREE U.S.-MEXICO BORDER WARS: DRUGS, IMMIGRATION, AND HOMELAND SECURITY* 12 (2006).

²²⁹ See DUNN, *supra* note 228, at 112-38 (recounting the deployment of military resources to aid local law enforcement along the United States-México border as part of the War on Drugs).

²³⁰ See JOSEPH NEVINS, *OPERATION GATEKEEPER AND BEYOND: THE WAR ON "ILLEGALS" AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY* 84 (2d ed. 2010) (describing the agency's funding and staff increases from 1980 to 1988); Rebecca Bohman & Naomi Murakawa, *Remaking Big Government: Immigration and Crime Control in the United States*, in *GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX* 109, 116 (Julia Sudbury ed., 2005) (explaining that the Border Patrol, then a unit within INS, was tasked with anti-drug enforcement).

²³¹ See 8 U.S.C. § 1226(c), (e) (2012).

²³² Teresa A. Miller, *A New Look at Neo-Liberal Economic Policies and the Criminalization of Undocumented Migrants*, 61 *SMU L. REV.* 171, 173 (2008).

²³³ See GARCÍA HERNÁNDEZ, *supra* note 43, at 230-37.

²³⁴ See *id.* at 233-34.

masse.²³⁵ More pertinently, these initiatives vastly increased the number of people who can be imprisoned prior to and after conviction for a federal immigration crime.²³⁶

These developments have created a modern lawmaking and law enforcement regime that in recent years scholars have dubbed “cimmigration law.”²³⁷ Substantive and procedural boundaries have blurred so much that it is difficult to know where criminal law ends and immigration law begins, or vice versa. As Stumpf wrote in her article coining the term “cimmigration,” immigration law and criminal law have “grown indistinct” such that today, the two “are merely nominally separate.”²³⁸

Imprisonment takes center stage in this doctrinal blending.²³⁹ The former INS launched the era of civil immigration mandatory detention in response to the arrival of Cubans—people who the INS thought of as “hard-core criminals”²⁴⁰—from the Port of Mariel beginning in 1979 and 1980 by quickly establishing stand-alone camps (including in Miami’s Orange Bowl football stadium)²⁴¹ as well as using space in existing federal penitentiaries.²⁴² A few years later, Attorney General William French Smith explained the Reagan Administration’s desire to use detention as a means of deterring other would-be migrants. “Detention of aliens seeking asylum,” French Smith said, “was necessary to discourage people like the Haitians from setting sail in the first place.”²⁴³ Detention of Central American migrants was so common in South Texas, meanwhile, that sociologist Timothy Dunn described it as a virtual “detention zone.”²⁴⁴ Indeed, the federal government prepared to establish what

²³⁵ See *id.* at 230-31.

²³⁶ See *id.* at 229.

²³⁷ See generally *id.* (mapping the doctrine of cimmigration law within the United States).

²³⁸ Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

²³⁹ See Stumpf, *supra* note 79, at 85.

²⁴⁰ MARK S. HAMM, THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE 51 (1995). Jorge Duany reports that fewer than two percent of the migrants from the Port of Mariel had criminal records for offenses not associated with political beliefs or homosexuality. JORGE DUANY, BLURRED BORDERS: TRANSNATIONAL MIGRATION BETWEEN THE HISPANIC CARIBBEAN AND THE UNITED STATES 45 (2011).

²⁴¹ HAMM, *supra* note 240, at 53.

²⁴² See Stephanie J. Silverman, *Immigration Detention in America: A History of Its Expansion and a Study of Its Significance* 9 (Univ. of Oxford, Working Paper No. 80, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1867366 [<https://perma.cc/EU8U-W3DV>].

²⁴³ MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 7 (2004).

²⁴⁴ DUNN, *supra* note 228, at 75.

it called—ominously and without definition—a “Federal Reservation” in the area for unauthorized migrants.²⁴⁵

Legislative changes facilitating immigration imprisonment soon followed in a political atmosphere dominated by newfound concern about illicit drug activity. Beginning with the Anti-Drug Abuse Act of 1988,²⁴⁶ Congress limited immigration judges’ power to release migrants from detention by enacting a provision that requires people who meet broad statutory definitions to remain in government custody pending removal proceedings.²⁴⁷ By relying on categorical, rather than individualized assessments, immigration law reflects the growing use of mandatory minimum sentences imposed by statute that caught favor during this period as a response to drug activity.²⁴⁸ In 1996, Congress adopted two acts, the Antiterrorism and Effective Death Penalty Act²⁴⁹ and the Illegal Immigration Reform and Immigrant Responsibility Act,²⁵⁰ which created the mandatory civil immigration detention statutory scheme currently in place.²⁵¹ It took time, but these policies developed into the legislative architecture upon which today’s immigration imprisonment practice rests.²⁵²

The very fact of imprisonment creates a perception of dangerousness from which it is difficult to escape. Immigration prisoners are thought to pose a public safety threat not because of any characteristics unique to them as individuals, but because they are imprisoned. For one, prisons segregate behind barbed wire. They restrict movement and, in so doing, satisfy what Hannah Arendt described as “the precondition for enslavement.”²⁵³ Often, prisons isolate prisoners in rural settings, thereby separating those inside from those outside through geography and the hard financial realities of traveling to distant sites. That isolation, compounded by tightly regulated access, creates a physical and psychological separation that effectively obscures much of what happens inside the prison’s enclosures.²⁵⁴ Prisons also stigmatize; they mark inmates as deviant and dangerous. All the while, they create value that is

²⁴⁵ *Id.* at 91-92.

²⁴⁶ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

²⁴⁷ *See* García Hernández, *supra* note 10, at 1366-67 (discussing legislative changes adopted through the Anti-Drug Abuse Act of 1988).

²⁴⁸ *Id.* at 1372-79.

²⁴⁹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

²⁵⁰ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

²⁵¹ GARCÍA HERNÁNDEZ, *supra* note 43, at 99-102 (describing mandatory detention doctrine as it currently stands); García Hernández, *supra* note 10, at 1369-71.

²⁵² *See* García Hernández, *supra* note 10, at 1414.

²⁵³ HANNAH ARENDT, *MEN IN DARK TIMES* 9 (1968).

²⁵⁴ *See* O’Lone v. Estate of Shabazz, 482 U.S. 342, 358 (1987) (Brennan, J., dissenting) (“Prisons are . . . often shielded from public view . . .”).

capitalized on by various governmental and nongovernmental actors carrying out the exploitation that Arendt's reference to chattel slavery suggests.²⁵⁵

Comments from prominent members of Congress illustrate this phenomenon well. When ICE announced in 2013 that it planned to release a small number of detainees, Speaker of the House of Representatives John Boehner complained that this action amounted to "letting criminals go free."²⁵⁶ Interestingly, Boehner never claimed to have had information about particular individuals to support his sweeping categorization of them as criminals. Without specific information, such a declaration is absurd. Many people held in ICE's custody have no record of criminal activity.²⁵⁷ Boehner either ignored or never contemplated that fact. To him, being imprisoned must be a sign of criminality. If they are imprisoned, his remark implies, they must be dangerous; why else would they be there?

D. *Targeting Mexicans and Central Americans*

Though it does not have to be so, immigration prisons are filled with Mexicans and Central Americans.²⁵⁸ Over ninety percent of civil immigration detainees in fiscal years 2012 and 2013 came from countries whose citizens are almost exclusively racialized as nonwhite in the United States.²⁵⁹ In each of those years, roughly ninety percent came from México, Guatemala, Honduras, and El Salvador alone.²⁶⁰ While this is partly attributable to the source countries from which migrants come, two recent analyses suggest a more sinister phenomenon. DHS authored a first-of-its-kind report about migrants who enter the United States with the federal government's permission but fail

²⁵⁵ See ARENDT, *supra* note 253, at 9 (discussing the limitation of free movement as the basis of slavery); Feeley, *supra* note 172, at 326 ("A campaign, beginning in the late 18th century, to build prisons in which contractors would exploit prisoners' labor to reduce or off-set public cost, helped make the idea of the prison palatable. At a time when the very idea of prisons could arouse deep resentment, the claim that they could be run as businesses by private contractors at no or little cost to the state helped soften opposition.").

²⁵⁶ Lindsey Boerma, *Reason for Mass Release of Illegal Immigrants "Hard to Believe," Boehner Says*, CBS NEWS (Feb. 26, 2013, 6:55 PM), <http://www.cbsnews.com/news/reason-for-mass-release-of-illegal-immigrants-hard-to-believe-boehner-says/> [<https://perma.cc/T4CB-ZMGE>].

²⁵⁷ See, e.g., David Noriega & John Templon, *Immigration Authorities Are Far More Likely to Jail You if You're Mexican*, BUZZFEED NEWS (Aug. 25, 2015, 11:47 AM), <http://www.buzzfeed.com/davidnoriega/vast-disparities-by-nationality-in-immigration-jailings> [<https://perma.cc/SB4E-76TA>] (stating that three-quarters of Mexicans awaiting deportation based on noncriminal grounds are held in detention centers).

²⁵⁸ Simanski, *supra* note 3, at 5 tbl.5 (observing that Mexicans and Central Americans took up over seventy-five percent of the ICE detention population between 2011 and 2013).

²⁵⁹ *Id.*

²⁶⁰ See *id.* (indicating that 90.1% of detainees were nationals of one of these four countries in fiscal year 2012 and 89.5% in fiscal year 2013).

to leave when that permission expires (called “overstaying” one’s visa).²⁶¹ It revealed that these types of civil immigration law violations are most commonly committed by Canadians—at just shy of 100,000 people per year, representing almost twenty percent of the annual total.²⁶² More than 125,000 Europeans (twenty-four percent of the total) do the same.²⁶³ Combined, Canadian and European immigration law violators could fill half of ICE’s detention population every year, but they do not.²⁶⁴ While Canadians and Europeans appear to benefit from immigration imprisonment enforcement practices, an analysis of a decade of ICE detention data reached a troubling conclusion regarding Mexicans and Central Americans: immigration officials are more likely to detain Mexicans and Guatemalans.²⁶⁵ Three-quarters of Mexicans and sixty-one percent of Guatemalans encountered by ICE during its first ten years in existence were detained, suggesting a systemic predisposition to confine citizens of these countries.²⁶⁶ The leniency offered immigration law violators from countries whose citizens are largely racialized as white, paired with the severity with which migrants of color are treated, illustrates racially disparate policing. Another reason civil immigration detention centers are so heavily filled with Latinos is that the mandatory civil immigration detention statute that requires confinement of people convicted of a large number of crimes itself masks racialized fears of criminality by people of color.²⁶⁷

²⁶¹ U.S. DEP’T OF HOMELAND SEC., ENTRY/EXIT OVERSTAY REPORT: FISCAL YEAR 2015, at 15 tbl.3 (2016).

²⁶² *Id.* (stating that 99,906 Canadians overstayed in fiscal year 2015). DHS reported that, in fiscal year 2015, 527,127 people who were admitted on nonimmigrant visas for business or pleasure overstayed. *Id.* at iv.

²⁶³ *See id.* at 8-9 tbls.1 & 2, 13-14 tbl.2 (calculated by subtracting non-European countries from the table 1 total and adding data about Poland and Romania listed in table 2).

²⁶⁴ *See* Simanski, *supra* note 3, at 5 tbl.5; U.S. DEP’T OF HOMELAND SEC., *supra* note 261, at 8-9 tbl.1, 13-14 tbl.2, 15 tbl.3.

²⁶⁵ *See* Noriega & Templon, *supra* note 257.

²⁶⁶ *See id.* To be sure, ICE officials are hamstrung by mandatory detention laws that require confinement of many people convicted of crimes. *See* 8 U.S.C. § 1226(c) (2012). However, the laws do not cover migrants entering the United States without authorization or overstaying. *Id.*

²⁶⁷ *See* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1511 (explaining that the modern practice of mandatory civil immigration detention began with forced confinement of Central Americans, Haitians, and Cubans in the early 1980s); García Hernández, *supra* note 10, at 1367-68 (describing the birth of mandatory immigration detention as part of legislation enacted to assist with the early War on Drugs); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 998 (2016) (“[R]acial profiling in criminal law enforcement . . . combined with removal efforts increasingly directed at noncitizens who have had encounters with the criminal justice system . . . has had devastating effects on immigrants of color across the United States.”).

Even though there are many non-Latino immigration law violators in the United States, federal immigration crimes target the type of immigration law violation primarily committed by people of color—coming to the United States without the federal government’s permission. Consequently, Latinos occupy the bulk of people confined due to suspected or confirmed federal immigration criminal activity, with Mexicans leading the way. More than three-quarters of immigration offenders charged in federal district courts in fiscal year 2010 were Mexican citizens.²⁶⁸ Not surprisingly, Mexican citizens constituted about eighty percent of all federal prisoners serving a term after having been convicted of an immigration crime.²⁶⁹ As a whole, Latinos comprised ninety-two percent of immigration offenders in BOP custody that year.²⁷⁰ Local policing practices also skew the racial composition of the immigration prison population. Racially biased policing and prosecutorial practices greatly affect immigration imprisonment. This is because the same communities of color that have felt most severely the heavy hand of traditional criminal policing and prosecutions contain migrants who, after arrest or conviction, are brought to ICE’s attention. Immigration detainers offer a helpful example. Detainers are issued only after street-level work by municipal police officers, sheriff’s deputies, and other local law enforcement officers. Any racial bias that finds its way into their policing efforts will inevitably reverberate in the detainers issued.²⁷¹ As a result, almost all immigration detainers issued between October 2011 and August 2013 targeted Latin Americans, Asians, or citizens of Caribbean nations, with Mexican citizens making up the vast majority.²⁷²

E. *Maintaining Racial Subordination*

Immigration prisons convert migrants, who have been exploited in their home countries and pushed to migrate, into commodities that are capitalized and quantified.²⁷³ Since the mid-1980s, private prison corporations have been involved in detaining migrants on behalf of, first, the INS and, now, ICE.²⁷⁴ More recently, they have taken on that task on behalf of the federal

²⁶⁸ MARK MOTIVANS, U.S. DEP’T OF JUSTICE, NCJ238581, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010, at 33 tbl.12 (2012, rev. 2013).

²⁶⁹ *Id.* at 23 fig.17.

²⁷⁰ *Id.* at 34.

²⁷¹ See Christopher N. Lasch, *Redress in State Postconviction Proceedings for Ineffective Crimmigration Counsel*, 63 DEPAUL L. REV. 959, 966-68 (2014).

²⁷² *Surprising Variability in Detainer Trends by Gender, Nationality*, TRACIMMIGRATION (Jan. 22, 2014), <http://trac.syr.edu/immigration/reports/340/> [<https://perma.cc/LNH2-NETH>].

²⁷³ See Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 1027 (2016) (“The social and political subordination of immigrants, who embody the marginalized identities of criminals, non-citizens, and persons of color, feed the profit-seeking carceral machine.”).

²⁷⁴ See *id.* at 985-90.

government agencies responsible for housing immigration prisoners awaiting criminal prosecution as well as convicted offenders.²⁷⁵ Today, private prison corporations derive hundreds of millions of dollars in revenue from immigration imprisonment annually, making this an important component of their “profit streams,” especially as states reduce their public prison populations.²⁷⁶ Once inside the prison, migrants pad the prison operator’s bottom line by working for thirteen cents an hour, a wage that Anita Sinha refers to as “slavery by another name” in an explicit reference to the postemancipation exploitation of blacks.²⁷⁷ While private prison corporations are the most dominant actors financially invested in immigration prisons, they are far from alone. Other financially invested actors include those third parties that service prisons, from financial services companies to construction firms and food vendors, all of which are similarly dependent on migrant prisoners for revenue. Similarly, many local governments have come to rely on money that the federal government is willing to pay for immigration prisons as a vital component of their budgets.²⁷⁸

Policy makers’ willingness to rely heavily on immigration imprisonment suggests an inclination to use incarceration to methodically exploit oppressed racial groups. In Sinha’s estimation, “[i]mmigrant detainee labor is a continuation of the American practice of exploiting labor through incarceration.”²⁷⁹ Mariela Olivares adds that this new exploitation paradigm is possible only “because ‘the immigrant’ in the United States occupies the most marginalized of identities—that of perceived criminals, non-citizens, and persons of color.”²⁸⁰ It is “this intersectionality of identity [that] allows monied interests to benefit off the imprisonment of the oppressed and to help perpetuate their continued incarceration.”²⁸¹

The rhetoric framing immigration prisoners as criminals disassociates prisoners from those who may influence their wellbeing, leading to treatment of confined migrants as dangerous and disposable.²⁸² Advocates and

²⁷⁵ See Seth Freed Wessler, *Separate, Unequal, and Deadly: How the US Let Dozens of Immigrants Die in Segregated, Privatized Prisons*, NATION, Feb. 15, 2016, at 12, 13 (describing how private prison facilities came to hold “noncitizens convicted of federal crimes”).

²⁷⁶ See Alissa R. Ackerman et al., *The New Penology Revisited: The Criminalization of Immigration as a Pacification Strategy*, 11 JUST. POL’Y J. 1, 4 (2014).

²⁷⁷ Anita Sinha, *Slavery by Another Name: “Voluntary” Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. C.R. & C.L. 1, 6 (2015) (describing how detainee labor allows prisons to maximize profits).

²⁷⁸ See, e.g., Huertas, *supra* note 89.

²⁷⁹ Sinha, *supra* note 277, at 23.

²⁸⁰ Olivares, *supra* note 273, at 991.

²⁸¹ *Id.*

²⁸² See Susan Bibler Coutin, *Exiled by Law: Deportation and the Inviability of Life*, in THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT, *supra*

imprisoned migrants routinely criticize the conditions of confinement. Health care is notoriously shoddy²⁸³ and, for many years, ICE failed even to track how many people died in its custody and resisted journalists' efforts to report the same.²⁸⁴ Moreover, guards mistreat confined migrants by physically abusing them.²⁸⁵ Further, children are routinely imprisoned.²⁸⁶ That children are held behind barbed wire in remote facilities for engaging in nothing more sinister than coming to the United States without the federal government's permission and for requesting asylum itself shows lack of concern for their wellbeing. More telling, however, is the way in which these children have been described by high-ranking government authorities. In public statements and court filings, Justice Department officials have claimed that these children needed to be imprisoned because they were the first wave of an unsupportable tide.²⁸⁷ Little regard was given to the psychological trauma that children inevitably suffer from incarceration.²⁸⁸

After simmering under the influence of the War on Drugs throughout the 1980s and early 1990s, immigration imprisonment was easily deployed in response to the terrorism events of 1995 in Oklahoma City and, with renewed vigor, those on September 11, 2001. In those tense periods, fear was augmented and reactions were as swift as they were racially skewed.²⁸⁹ In the

note 34, at 351, 353 (describing migrants associated with criminality as "expendable"). For a detailed first-person account of the dissociation between confined migrants and security personnel, see generally TONY HEFNER, *BETWEEN THE FENCES: BEFORE GUANTÁNAMO, THERE WAS THE PORT ISABEL SERVICE PROCESSING CENTER* (2010).

²⁸³ See Tovino, *supra* note 68, at 174-89.

²⁸⁴ Nina Bernstein, *Officials Obscured Truth of Migrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1.

²⁸⁵ See *supra* Section I.B.

²⁸⁶ See Stumpf, *supra* note 79, at 56, 61.

²⁸⁷ See *id.* at 56-57 (explaining that the motivation to detain families is to deter future families from thinking about migrating to the United States); Press Release, U.S. Immigration & Customs Enf't, ICE to Open Additional Facility in South Texas to House Adults with Children (Sept. 21, 2014), <https://www.ice.gov/news/releases/ice-open-additional-facility-south-texas-house-adults-children> [<https://perma.cc/36F8-VPJQ>]; Declaration of Philip T. Miller, Assistant Dir. of Field Operations, Enf't & Removal Operations, U.S. Immigration & Customs Enf't (Aug. 7, 2014) (on file with author).

²⁸⁸ See, e.g., AUSTRALIAN HUMAN RIGHTS COMM'N, *THE FORGOTTEN CHILDREN: NATIONAL INQUIRY INTO CHILDREN IN IMMIGRATION DETENTION* 58-62 (2014) (describing the mental toll on children in Australian immigration detention centers); JON BURNETT ET AL., "STATE SPONSORED CRUELTY": CHILDREN IN IMMIGRATION DETENTION 37-41 (2010) (describing trauma caused by immigration detention in the United Kingdom); JESUIT REFUGEE SERV., *BECOMING VULNERABLE IN DETENTION* 98-99 (2010) (describing the impact of detention on children in several European Union member states).

²⁸⁹ See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295 (2002) (explaining the intense investigations following the events on September

frenzy to respond forcefully to fears of lurking threats, law enforcement officials turned to the flexibility of immigration imprisonment to do what they could not do using traditional criminal incarceration powers.²⁹⁰ Within months of the September 11 attacks, for example, the FBI had arrested and turned over to INS more than 700 migrants, had placed them on a special terrorism watch list, and had detained them in facilities throughout the United States, ranging from INS detention centers to maximum security federal penitentiaries. They were detained not because they were suspected of criminal activity, but because they were suspected of being in the United States in violation of civil immigration law.²⁹¹ Beginning in December 2002, local INS (later ICE) offices required certain male citizens of twenty-five predominately Arab or Muslim countries who were already in the United States to appear in person.²⁹² Within four months, INS detained 2034 migrants who appeared for registration, resulting in widespread fear among targeted communities.²⁹³ Though INS abandoned these and similar initiatives within a few years,²⁹⁴ the effect was unmistakable. The Arab and Muslim populations that bore the brunt of post-September 11 reactions could not help but feel the trauma of race-based fear. Hate crimes rose and Arabs and Muslims transformed into the new demons of the post-Communist era.²⁹⁵ Recent calls by prominent politicians to exclude all Muslims from the United States suggest that this vilification has not subsided.²⁹⁶

By confining migrants of color, especially Latinos, immigration imprisonment perpetuates their subordinated status. Through its power of physical isolation and symbolic stigmatization, imprisonment marks the immigration prisoner as an undesirable “criminal alien” who can be punished

11, many of which “racial[ly] profil[ed]” Arabs and Muslims).

²⁹⁰ *Id.* at 327-38 (discussing the actions of law enforcement after September 11 in “round[ing] up” Arab and Muslim noncitizens and detaining them for “minor immigration violations”).

²⁹¹ See U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1-2 (2003).

²⁹² See Maia Jachimowicz & Ramah McKay, “Special Registration” Program, MIGRATION INFO. SOURCE (Apr. 1, 2003), <http://www.migrationpolicy.org/article/special-registration-program> [<https://perma.cc/ZS4E-3T3U>].

²⁹³ See *id.*

²⁹⁴ See Muzaffar Chishti & Claire Bergeron, *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape*, MIGRATION INFO. SOURCE (Sept. 8, 2011), <http://www.migrationpolicy.org/article/post-911-policies-dramatically-alter-us-immigration-landscape> [<https://perma.cc/ZPQ2-98ME>].

²⁹⁵ See Akram & Johnson, *supra* note 289, at 296, 298-300, 311 n.89.

²⁹⁶ See, e.g., Charlie Savage, *Trump’s Plan to Bar Foreign Muslims Might Survive a Lawsuit*, N.Y. TIMES, Dec. 9, 2015, at A12.

like a “criminal” and therefore excluded like an “alien.”²⁹⁷ Through the rhetoric of migrant criminality, and the authority granted by legislation that responds to this rhetoric, migrants are imprisoned “on account of what they are”—criminals and aliens forced into the “legal limbo” of confinement.²⁹⁸ It is precisely migrants’ vulnerability to deportation that perpetuates their stature as disposable labor.²⁹⁹ When migrants from El Salvador and Guatemala arrived in the United States in the early 1980s seeking refuge, they were confined at immigration detention sites, subjected to pressure tactics intended to convince them to give up their claims to apply for asylum in the United States, and, when they managed to pursue their legal claims as they were entitled to do, they were “almost universally denied” asylum.³⁰⁰ More recently, in 2007, indigenous Maya K’iche’ and their families who fled widespread bombing by the Guatemalan military in the early 1980s were raided by ICE officers in a factory in New Bedford, Massachusetts where many worked.³⁰¹ In the raid’s immediate aftermath, many K’iche’ were imprisoned.³⁰²

Viewed through the prism of the United States’ centuries-old embrace of racism, the immigration prison functions to strip migrants of legal visibility.³⁰³ It simultaneously conscripts the migrant’s body into “the everyday mandates of capital accumulation.”³⁰⁴ This juridical process “plainly serves to radically enhance the preconditions for [the migrant’s] routinized subordination within the inherently despotic regime of the workplace.”³⁰⁵

²⁹⁷ Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 640 (2015).

²⁹⁸ See Nathalie Peutz & Nicholas De Genova, *Introduction to THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT*, *supra* note 34, at 1, 11-12; see also WILSHER, *supra* note 17, at 15, 56.

²⁹⁹ See Nicholas De Genova, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT*, *supra* note 34, at 33, 47; see also TANYA MARIE GOLASH-BOZA, *DEPORTED: IMMIGRANT POLICING, DISPOSABLE LABOR, AND GLOBAL CAPITALISM* 5 (2015) (describing deportees as “the latest version of disposable workers”).

³⁰⁰ Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT’L J. REFUGEE L. 347, 349 (1991).

³⁰¹ See Lykes et al., *supra* note 214, at 200-02, 214.

³⁰² See *id.* (stating that over 360 “unauthorized migrants” were arrested as part of the raid).

³⁰³ See César Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L.J. 869, 871 (2014). See generally NAT’L IMMIGRANT JUSTICE CTR. & PHYSICIANS FOR HUMAN RIGHTS, *INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION* (2012) (using the language of “invisibility” to describe ICE detainees subjected to solitary confinement).

³⁰⁴ De Genova, *supra* note 299, at 47.

³⁰⁵ *Id.* (citations omitted).

By relying on fear of and actual infliction of state violence through forcible confinement, immigration prisons are conceptually linked to violent political repression and economic exploitation in migrant-sending countries.³⁰⁶ When a Guatemalan woman named Julia, for example, was detained by ICE, the resulting separation from her child was like a “second war” because she had a similar experience during the Guatemalan Civil War, from which she had sought safety in the United States.³⁰⁷ When immigration officials imprisoned the husband of another woman, and she was unable to acquire any information about his whereabouts or condition, she “re-experience[d] the ‘disappearance’ of a family member” during Guatemala’s civil war.³⁰⁸ Both past and present circumstances are characterized by coercion, surveillance, family separation, and powerlessness.³⁰⁹

Following that historical thread, immigration prisons do not simply immobilize migrants’ bodies; they immobilize migrants’ “freedom to ‘escape’ their particular predicaments” through the search for greater opportunities elsewhere.³¹⁰ What agency migrants exercised in leaving one country for another, then, is regulated by the immigration prison’s disciplinary function. It stands as a perpetual signal of the possibility that loved ones will vanish incommunicado, that families will be separated, and that it is the state, not the individual, that determines where the migrant is located: here, there, or “drag[ged] mercilessly to the ends of the earth and back again.”³¹¹

Pushed towards the margins of survival for generations, Latin Americans have consistently turned toward the United States only to find themselves struggling to hold onto a legal and moral right to remain in this country. Their quest to be treated as legal subjects routinely giving way to de facto and de jure positioning as law enforcement objects³¹² has meant that, once in the United States, Latin American migrants remain easily exploitable. They are objectified into the specter of dangerousness, marginalized into disposability, and

³⁰⁶ See Lykes et al., *supra* note 214, at 206.

³⁰⁷ See *id.* at 207.

³⁰⁸ *Id.*; see also Kalina M. Brabeck et al., *Immigrants Facing Detention and Deportation: Psychosocial and Mental Health Issues, Assessment, and Intervention for Individuals and Families*, in *THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES*, *supra* note 20, at 167, 172-73 (noting that the “sudden ‘disappearance’ of a family member [detained due to suspected immigration law violations] can be particularly traumatic for migrants who experienced state-sponsored kidnapping and murders in their countries of origin”).

³⁰⁹ See Lykes et al., *supra* note 214, at 207-08.

³¹⁰ De Genova, *supra* note 299, at 58 (citation omitted).

³¹¹ *Id.*

³¹² See J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 *YALE L.J.* 105, 106 n.1 (1993) (describing a legal subject as “a person who attempts to understand the law, legal doctrine, and the legal system” and explaining that those inanimate concepts are legal objects).

commodified into value propositions.³¹³ Though they remain at the foundation of economic activity “toil[ing] in service to global capitalism as janitors, pieceworkers in the garment industry, cooks, nannies, gardeners, and day laborers,”³¹⁴ they have been pushed to the margins of law’s protective capacity. Migrants aren’t treated as humans whose inherent dignity and worth are recognized, but rather are surveilled, confined, and counted in the service of an economic regime that uses race as a measure of worth.

The modern immigration law enforcement apparatus, with its fetishizing of bondage, fits neatly into this historical pattern. Migrants’ bodies, almost always brown or black, are converted into capital for public and private actors invested in the immigration prison practice.³¹⁵ Through imprisonment and the threat of imprisonment, migrants who are confined, as well as those who are not, are disciplined within today’s political economy in ways similar to how other peoples rendered disposable by earlier economic orders were.³¹⁶ The slave, the death row inmate, the incarcerated criminal, the immigration prisoner: all people denied essential ingredients of citizenship, all framed as dangerous to the political community, all exploited for labor, all marked by race.³¹⁷ To paraphrase Darryl Pinckney’s assessment of African Americans, the bodies of immigration prisoners are not fully their own; they are not secure.³¹⁸ They can, have been, and continue to be destroyed—sometimes psychologically, sometimes physically—by a racialized social order without anyone being held responsible.³¹⁹

³¹³ See De Genova, *supra* note 299, at 47 (describing the exploitation of migrants in the workforce).

³¹⁴ ZILBERG, *supra* note 212, at 148.

³¹⁵ See *supra* Sections II.A, III.A.

³¹⁶ See GOLASH-BOZA, *supra* note 299, at 168 (explaining that stories of immigration detention help “regulate how migrants move through public spaces”); Victor Talavera et al., *Deportation in the U.S.-Mexico Borderlands: Anticipation, Experience, and Memory*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT*, *supra* note 34, at 166, 166-71 (noting that “deportability is a powerful presence” in the “everyday lives” of many migrants in part because of the fear that contemporary immigration law enforcement tactics create).

³¹⁷ This characterization draws on Edward Said’s description of the “Oriental” as “linked thus to elements in Western society (delinquents, the insane, women, the poor) having in common an identity best described as lamentably alien. Orientals were rarely seen or looked at; they were seen though, analyzed not as citizens, or even people, but as problems to be solved or confined or . . . taken over.” EDWARD W. SAID, *ORIENTALISM* 207 (Vintage Books ed. 1979).

³¹⁸ See Darryl Pinckney, *The Anger of Ta-Nehisi Coates*, N.Y. REV. BOOKS, Feb. 11, 2016, at 28, 30.

³¹⁹ See *id.*

IV. ALTERNATIVE MIGRATION ETHIC

The case for abolishing immigration imprisonment requires revealing the imprisonment practice's racist moral foundations and racially disparate practical implications, as the previous Parts have done. But that is not enough. It is also necessary to craft an alternative moral framing of migrants and migration from which democratic institutions can rise that do not use state violence as a means of social control.³²⁰ Without reimagining the people targeted for confinement and the processes by which they arrive in the United States, critiques might lead to reforms—admittedly, some of which are much-needed³²¹—but they are unlikely to cast doubt on the very legitimacy of this form of state violence.³²² The result might be a nicer, smaller immigration imprisonment regime, but the violence at the heart of confinement and its role as a means of racial subordination will not end by attempting to dismantle prison walls alone.

This Part endeavors to outline a moral framework regarding migrants and migration that stands at odds with the rhetoric of migrant criminality that led to large-scale immigration imprisonment.³²³ By shifting the moral center of conversations about migration, this discussion attempts to alter the dialectic about migrants and migration to “elicit different analytical and political responses” to people who cross borders.³²⁴ It does so in two ways. First, by “attempt[ing] to trace a line through the shadows of history,” this Part

³²⁰ See DAVIS, *supra* note 123, at 96 (“In thinking specifically about the abolition of prisons using the approach of abolition democracy, we would propose the creation of an array of social institutions that would begin to solve the social problems that set people on the track to prison, thereby helping to render the prison obsolete.”). The need for an alternative moral framework governing migration is influenced by McLeod’s call for a “prison abolitionist ethic” rooted in a “moral orientation . . . committed to ending the practice of confining people in cages and eliminating the control of human beings through imminently threatened police use of violent force.” McLeod, *supra* note 23, at 1161-62.

³²¹ For examples of meaningful reforms proposed by scholars, policy makers, and advocates, see *supra* notes 19-21 and accompanying text. See also García Hernández, *supra* note 66, at 56-59 (“Systemic policy changes and individualized due process-based challenges could introduce reason into immigrant detention.”); García Hernández, *supra* note 10, at 1405-13 (advocating for recreating immigration detention as civil confinement through “extensive statutory reform” and “tailored administrative reform”); García Hernández, *supra* note 303, at 898 (positing that, among other things, DHS “could adopt a policy of terminating contracts with private prison companies that regularly violate its detention standards”).

³²² See Cornelisse, *supra* note 34, at 105 (describing immigration detention as a “form of state violence”).

³²³ See McLeod, *supra* note 23, at 1164 (arguing that abolition “entails a rejection of the moral legitimacy of confining people in cages”).

³²⁴ ALBAHARI, *supra* note 121, at 20.

reconceives the United States as an active participant in migratory patterns.³²⁵ Second, by recognizing migrants as the complicated, imperfect yet engaged residents of the United States that they are, it focuses attention on the artificiality of linking a person's moral worth to their geographic location vis-à-vis an international boundary and their legal position vis-à-vis immigration law.³²⁶ This Part closes by offering concrete options for decarceration.

A. *Migration Responsibility*

Though migrant-receiving nation-states such as the United States are often described as passive vessels—victims even—of migration, they are in fact anything but. The history briefly recounted in Part III evidences that United States involvement in México and Central America, the region from which many migrants of the last decades, and almost all of today's immigration prisoners, hail is long and entrenched. That involvement has been bloody and profitable. And it goes a long way to explain why Mexicans and Central Americans leave their countries of origin for the United States. As Saskia Sassen explains: “[M]igrations do not simply happen. They are produced. And migrations do not involve just any possible combination of countries. They are patterned.”³²⁷ At various points throughout the nineteenth and twentieth centuries, Mexicans and Central Americans were directly recruited to come to the United States to work.³²⁸ In other instances, United States foreign and economic policy choices created the conditions in which migration to the United States was the logical—even necessary—choice.³²⁹ While many of those migrants subsequently returned to their countries of origin, enough did not. Eventually families and entire communities became transnational. Having spouses, children, or neighbors span borders became so commonplace that it developed into the fabric of social life. Thus far, the twenty-first century has not been much different: Mexicans and Central Americans continue coming to the United States.³³⁰ Many also return to their countries of origin.³³¹

³²⁵ See SASKIA SASSEN, *GUESTS AND ALIENS*, at x (1999).

³²⁶ See ALBAHARI, *supra* note 121, at 14-15.

³²⁷ SASSEN, *supra* note 325, at 155-56.

³²⁸ See *supra* Section III.A.

³²⁹ See, e.g., Nancy Ehrenreich & Beth Lyon, *The Global Politics of Food: A Critical Overview*, 43 U. MIAMI INTER-AM. L. REV. 1, 13-14 (2011) (linking various United States domestic policies and international trade agreements to migration within México and from México to the United States); Carmen G. Gonzalez, *Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage*, 17 BERKELEY LA RAZA L.J. 65, 87-88 (2006) (positing that World Bank policies will result in intracountry migration that will eventually lead to international migration to the United States and other countries in the northern hemisphere).

³³⁰ See Jie Zong & Jeanne Batalova, *Central American Immigrants in the United States*, MIGRATION INFO. SOURCE (Sept. 2, 2015), <http://www.migrationpolicy.org/article/central-american-immigrants-united-states#Immigration%20pathways> [https://perma.cc/27BF-

An alternative moral vision of migrants would require that imprisonment for migration-related activity turn on a person's participation in immoral conduct rather than on her citizenship status. Most United States citizens obtain their privileged legal status through birth within the nation's territorial boundaries rather than through any active acceptance of the responsibilities of membership in the political community. While there is much to be said for such a broad approach to birthright citizenship, there is no doubt that citizenship obtained in this manner is not earned by the infant who receives her citizenship passively through happenstance: her mother happened to be in the United States. There is nothing about passive conveyance of citizenship that renders the recipient morally superior to others. The corollary is likewise true: there is nothing morally inferior about lacking status as a United States citizen.

Rather than reflecting a person's moral character, recognition as a United States citizen is a clearer indicator of the country's dominant norms regarding privilege. For much of the nation's history, the legal distinction between a citizen and someone who is not a citizen of the United States has been fluid. People have moved from one category to another, either voluntarily or forcibly, and the concept of citizenship has not always carried the privileges it does today—the right to travel and live wherever in the United States one chooses, for example.³³² Across eras and generations, a person's ability to claim the title of United States citizen is tied more closely to one's race, gender, or class than to the moral righteousness of one's conduct.³³³ As if illustrating citizenship's troubling underbelly, in the aftermath of independence, citizenship conveyed upon birth in the United States was commonly qualified by other indicia of suitability for citizenship. Women, blacks, and Native Americans were excluded, while white men were

HKX6] (indicating that forty-three percent of Central Americans in the United States in 2013, or 1.38 million people, arrived in 2000 or later); Jie Zong & Jeanne Batalova, *Mexican Immigrants in the United States*, MIGRATION INFO. SOURCE (Mar. 17, 2016), <http://www.migrationpolicy.org/article/mexican-immigrants-united-states#Immigration%20Pathways%20and%20Naturalization> [https://perma.cc/B7VN-HQQL] (indicating that thirty-seven percent of Mexicans in the United States in 2014, or 4.33 million people, arrived in 2000 or later).

³³¹ In recent years, more Mexicans have left the United States than have come. See ANA GONZALEZ-BARRERA, PEW RESEARCH CTR., MORE MEXICANS LEAVING THAN COMING TO THE U.S. 5 fig.1 (2015) (explaining that from 2005 to 2010, approximately 20,000 more Mexicans left the United States than arrived and that from 2009 to 2014, that number rose to 140,000). Even then, several hundred thousand Mexicans continue arriving in the United States annually. See *id.* at 11 (explaining that “between 2009 and 2014 the number of Mexican immigrants heading to the U.S. was about 870,000” or, on average, 145,000 per year).

³³² See PARKER, *supra* note 135, at 225, 228.

³³³ See *id.* at 149 (“[I]mmigrants had to demonstrate their ‘whiteness’ as a prerequisite to obtaining citizenship . . .”).

included.³³⁴ As Part III illustrated, throughout the twentieth century and into the twenty-first century, migration and a person's ability to comply with United States immigration laws continue to turn on factors usually out of the control of the people who become migrants, such as macroeconomic conditions and civil war. Except in rare circumstances, neither migrants nor their children nor their children's children can be blamed or credited for the economic and political decisions that have convinced untold numbers of people over the ages to head to a different shore—often without complying with legal requirements such as entry taxes,³³⁵ medical screenings,³³⁶ or bars against the poor.³³⁷

To allow immigration imprisonment to turn on a person's citizenship, then, is effectively to incarcerate because of one's outsider status, a characteristic that ought to be morally irrelevant.³³⁸ Take, for instance, the plight of migrants to the United States who admit to engaging in a type of activity that has become commonplace and lost much of its social stigma: consuming small amounts of marijuana. Even without a conviction, marijuana use can result in a migrant's confinement and removal.³³⁹ Most surprising to many people is that state efforts to legalize marijuana sale and use apply differently to United States citizens than migrants.³⁴⁰ The story of Chilean citizen Claudia provides a suitable illustration: While visiting her United States citizen boyfriend in Colorado, Claudia, together with her boyfriend, bought marijuana from a dispensary as allowed by Colorado law.³⁴¹ All was uneventful until Claudia returned to the United States on a separate occasion to see her boyfriend. This

³³⁴ See *id.* at 60-63.

³³⁵ See *id.* at 76.

³³⁶ See Paul Finkelman, James Anaya & Gabriel J. Chin, *Parents, Children and Citizenship by Birth*, HUFFINGTON POST: THE BLOG (Aug. 19, 2010, 2:29 AM), http://www.huffingtonpost.com/paul-finkelman/parents-children-and-citi_b_687223.html [<https://perma.cc/FLJ6-AVJW>].

³³⁷ See Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 10 (2009) (describing how the poor are often excluded from the U.S. under the "public-charge exclusion").

³³⁸ See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 318, 321 (2004) (arguing that "moral desert is . . . a necessary condition for legitimate punishment" and that, in the Rawlsian theory of liberal justice, there is an important distinction made between morally arbitrary "attributes" and morally relevant "actions").

³³⁹ See 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2012).

³⁴⁰ See Jordan Cummings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 531-48 (2015); Karl W. Krooth & Julian Sanchez Mora, *Up in Smoke: The Struggle for Recreational Marijuana Decriminalization and Means to Advance Marijuana-Related Mitigation of Immigration and Criminal Consequences*, 20 BENDERS IMMIGR. BULL. 1195, 1196 (2015).

³⁴¹ See COLO. CONST. art. XVIII, § 16, para. 1.

time, a Customs and Border Protection officer flipped through the photographs on her phone and asked about the images of a dispensary. Knowing that marijuana purchase and use was legal in Colorado, but not knowing that it remains a basis for exclusion from the United States (and confinement while the exclusion process is underway), Claudia admitted to buying and using marijuana. She was immediately given the option of remaining detained for weeks or months or getting on the next flight to Chile. She chose the latter. Had she been a United States citizen, however, her Colorado adventure would have remained a thing of the past, as it did for her boyfriend who subsequently visited her in Chile and returned to the United States without incident.³⁴²

B. *Human Fallibility*

Despite the myriad reasons Latin Americans migrate to the United States, they are all united by their common fallibility. Migrants are imperfect human beings. Though this is little more than stating the obvious, it is not the perspective that immigration law generally adopts. On the contrary, immigration law (and the related area of naturalization law) is largely constructed around a moral framework that rejects most migrants who are not extraordinary. Pursuant to core components of current immigration law, migrants are advantaged if they have achieved advanced formal education, obtained large amounts of wealth, or have specified familial relationships with United States citizens or lawful permanent residents already in the United States.³⁴³ The less education, money, or family ties migrants have, the more difficult it is for them to gain admission to the United States. The same goes for migrants with criminal histories.³⁴⁴ A large array of statutory provisions makes it very difficult to be admitted into or remain in the United States after engaging in criminal activity.³⁴⁵ Anything from smoking marijuana occasionally, even if it does not lead to a criminal investigation or prosecution, to conviction for a much more serious offense, such as rape, can lead to imprisonment followed by exclusion or deportation.³⁴⁶

³⁴² The experience of Claudia described in this paragraph is derived from Joel Warner, *Marijuana Is Legal in Colorado—But Only If You’re a U.S. Citizen*, WESTWORD (Sept. 13, 2016), <http://www.westword.com/news/marijuana-is-legal-in-colorado-but-only-if-youre-a-us-citizen-8304837> [<https://perma.cc/WN4C-VNSF>].

³⁴³ See *The Immigrant Visa Process*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/visas/en/immigrate/immigrant-process.html> [<https://perma.cc/2ECM-T6KE>] (last visited Oct. 19, 2016) (explaining that most immigrant visas are based on family or employment).

³⁴⁴ See 8 U.S.C. § 1182(a)(2)(A) (stating that migrants who have committed or been convicted of certain crimes are ineligible for visas or admission into the United States); *id.* § 1227(a)(2)(A) (stating that migrants who have been convicted of certain crimes are deportable).

³⁴⁵ See, e.g., 8 U.S.C. § 1182(a)(2)(A).

³⁴⁶ *Id.* (stating that a conviction of, or admitting to having committed, “a crime involving

An alternative moral perspective on migrants would shift the expectation that migrants be extraordinary to an understanding that migrants are the mixed bag that humans typically are. The United States is no stranger to crime. United States citizens commit vast amounts of crime every day, including the most heinous of mass murders. Moreover, a great deal of crime is not even prosecuted.³⁴⁷ Instead, prosecutors regularly exercise discretion to decline to lodge or pursue criminal charges.³⁴⁸ According to one study, federal prosecutors declined to pursue as many as one-quarter to one-third of matters referred for prosecution during the years 1994 to 2000.³⁴⁹

An alternative moral framing of migration would hold migrants themselves to the same standards of acceptable behavior to which United States citizens are held. Migrants, like citizens, must comport with general standards of decency encapsulated in laws ranging from ancient tort to modern criminal law. Failure to do so should carry the consequences built into those legal regimes. But migrants should not be held to the higher standard imposed by contemporary immigration law, which augments the consequences of transgression solely on the basis of citizenship. They should not be imprisoned and ejected from the United States solely on the basis of the accident of birth. In this way, immigration law should revert to the historical norm when imprisonment and removal were the exception.

C. *Immigration Decarceration*

If the United States is to shift away from immigration law enforcement's imprisonment focus, it will not happen in a policy vacuum. Nor should it. Instead, conversations about abolishing immigration prisons should occur within a broad reimagining of immigration law that begins with replacing the current rhetoric of migrant criminality with an alternative moral vision such as I outlined above, but which does not end there. Immigration prison abolitionists must offer constructive alternative policy responses to "decarceration," or "reform in pursuit of abolition."³⁵⁰ As the prison abolitionist Andrea Smith counsels: "When we think about the prison abolitionist movement . . . it's not 'Tear down all prison walls tomorrow,' it's

moral turpitude" will result in ineligibility for admission into the U.S. or ineligibility for visas).

³⁴⁷ See Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1440 (2004) ("[T]he various U.S. Attorneys' Offices enjoy considerable autonomy in deciding whether to bring a federal prosecution.").

³⁴⁸ See *id.* at 1439.

³⁴⁹ See *id.* at 1445 tbl.1.

³⁵⁰ MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN'T WORK—AND HOW WE CAN DO BETTER 119 (2014).

‘crowd out prisons’ with other things that work effectively and bring communities together rather than destroying them.’³⁵¹

In devising alternative policy responses, the role of prosecutors is vital. As with attempts to alter the racially skewed character of criminal sentencing through intensive training,³⁵² attorneys who represent ICE in immigration court could be encouraged to steer away from prosecutions that have an unseemly impact—perhaps because they target children, parents of United States citizens, or similar groups. United States Attorneys and Assistant United States Attorneys might be encouraged to return to the historical norm of viewing unauthorized migration as a civil matter best left to the immigration courts, rather than a criminal matter best pursued first in federal district courts, then in immigration courts. Prosecutors might be pressured to scale back the pace of prosecutions and, where prosecution nonetheless occurs, may limit confinement only where required by law. Public pressure, meanwhile, should also target legislators to reduce punishment ranges for federal immigration crimes and repeal mandatory civil immigration detention statutes. More fundamentally, advocates should continue to pressure local, state, and federal officials to limit the role of local and state law enforcement officers in policing immigration law violations.³⁵³

Despite the availability of these policy choices, the greatest potential for a future without immigration prisons, however, does not lie with the three branches of government. It instead lies in the power of storytelling outside the strictures of legislatures, law enforcement, and courtrooms.³⁵⁴ Paired with a transformative justice ethic of collective community healing and accountability, sharing stories of one’s life helps humanize the storyteller and identify common bonds between speaker and listener.³⁵⁵ Numerous examples exist of such strategies working to repair or create bonds between victims, perpetrators, and other community members, even in instances of violence.³⁵⁶ In the immigration context, such conversations could begin by identifying the harms suffered by migrants and citizens, whether here or abroad. They could discuss subsistence, displacement, discomfort, and other reasons why people came to the United States and how that has affected those who were already here. On the southern Italian island of Lampedusa, for example, the Porta di Lampedusa—Porta d’Europa sculpture fosters solidarity, despite European calls for confinement, by guiding visitors’ eyes from Europe’s territorial end to

³⁵¹ *Id.* at 159.

³⁵² See GOTTSCHALK, *supra* note 120, at 267.

³⁵³ See *id.* at 226 (describing how the localization of immigration enforcement has “contributed to the corrosion of trust ‘between immigrant communities and local law enforcement’” and has led to unreported crime in immigrant communities because individuals fear deportation).

³⁵⁴ See SCHENWAR, *supra* note 350, at 135.

³⁵⁵ See *id.* at 142, 152.

³⁵⁶ See *id.* at 135-83.

Libya's coastline as a reminder that the small North African coastal town in the distance was once the site of brutal Italian colonialism and is now the embarkation point for northward migration.³⁵⁷ In the Pacific island nation of Papua New Guinea, the country's highest court ordered the closure of an immigration prison paid for and operated on behalf of Australia because the court treated the imprisoned migrants as legal subjects imbued with "the rights and dignity of mankind" regardless of their immigration or citizenship status.³⁵⁸ Moreover, in the United States, the advocacy group Community Initiatives for Visiting Immigrants in Confinement launched a storytelling project intended to allow people outside immigration prisons to "experience the similarities between oursel[ves] and others."³⁵⁹

By following these models, the people of the United States might begin to identify "[n]ew 'ways of thinking' . . . transforming our perceptions, our definitions, our experiences of justice, and our understandings of how to live together in the world."³⁶⁰ To be sure, this proposal represents a radical transformation, but it is not without precedent. The public's shift away from slavery was no less radical. Importantly, it was preceded by gruesome slave narratives that graphically recounted slavery's violent core.³⁶¹ Likewise, public awareness of the deadly nature of convict labor, the corrupt politicians who frequently profited from it, and important links to broader social justice struggles pushed legislators in the early- and mid-twentieth century to impose substantial limits on the use of prisoners for profit.³⁶² Both changes occurred because the "invisibility" that frequently pervades slavery and prisons collapsed.³⁶³

Instead of denying prisoners their humanity and their "right to democratic accountability,"³⁶⁴ those outside prison walls have sometimes found common cause in the pursuit of justice with those inside prison walls. Immigration prison abolition is only possible with that type of common foundation. Only then can the major governmental and nongovernmental actors that influence immigration imprisonment's existence—academics, advocates, judges, legislators, prison officials, prisoners, prosecutors, and others—"buy into the goal of major reductions in the prison population and to coordinate their behavior to achieve that end. Without that coordination, attempts to reduce the prison population will remain a complex and often futile game of Whack-a-

³⁵⁷ See ALBAHARI, *supra* note 121, at 189-93.

³⁵⁸ *Namah v. Pato* [2016] PGSC 13; SC1497 (26 April 2016), ¶ 54 (Papua New Guinea), <http://www.pacii.org/pg/cases/PGSC/2016/13.pdf> [<https://perma.cc/L9XC-6UQY>].

³⁵⁹ *Storytelling Gallery*, CIVIC, <http://www.endisolation.org/storytelling> [<https://perma.cc/RB7K-D2E8>] (last visited Oct. 16, 2016).

³⁶⁰ SCHENWAR, *supra* note 350, at 157.

³⁶¹ See GOTTSCHALK, *supra* note 120, at 274.

³⁶² See *id.* at 58-59.

³⁶³ See *id.* at 274.

³⁶⁴ *Id.* at 268.

Mole.”³⁶⁵ Put another way, attempts to close immigration prisons that lack a common foundation of shared concern for migrants’ humanity will simply result in reshaping the violent ethos at the heart of the prison regime—they will not end the violence.

CONCLUSION

Every year hundreds of thousands of people are confined because of migration-related activity. Some are held under the power of criminal law, others under the auspices of civil law, and many under one legal regime and then the other. Despite being so commonplace now, immigration imprisonment as a major feature of law enforcement is relatively new. It does not, however, serve a new political function. On the contrary, this Article places immigration imprisonment alongside other instances in which race-based social control facilitated economic exploitation. As it originated and as it now operates, immigration imprisonment targets migrants, largely those racialized as Latinos, which renders them vulnerable to physical and psychological violence, and stigmatizes them as dangerous outsiders. Immigration imprisonment, then, is constitutive of racial subordination. In place of the dehumanizing vision of migrants that drives immigration imprisonment, this Article proposes a new moral vision of migrants and migration that is rooted in history and attuned to the ordinariness of human fallibility. The logical conclusion of this narrative is that, as a modern addition to the United States’ long history of racialized policy making, immigration imprisonment is indefensible and, as such, should be abolished. Reaching that outcome, to be sure, will take time, but then again “lasting, evolving justice” always does.³⁶⁶

³⁶⁵ *Id.*

³⁶⁶ SCHENWAR, *supra* note 350, at 157.