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# Naturalizing Immigration Imprisonment

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## Naturalizing Immigration Imprisonment

César Cuauhtémoc García Hernández\*

*Only recently has imprisonment become a central feature of both civil and criminal immigration law enforcement. Apart from harms to individuals and communities arising from other types of immigration enforcement, such as removal, imprisonment comes with its own severe consequences, and yet it is relatively ignored. This Article is the first to define a new prison population as those imprisoned as a result of suspected or actual immigration law violations, whether civil or criminal—a population that now numbers more than half a million individuals a year. It is also the first to systematically map the many civil and criminal entryways into immigration imprisonment across every level of government.*

*Examining the population of immigration prisoners as a whole provides crucial insights into how we arrived at this state of large-scale immigration imprisonment. While political motivations similar to those that fueled the rapid expansion of criminal hyperincarceration may have started the trend, this Article demonstrates*

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*that key legal and policy choices explain how imprisonment has become an entrenched feature of immigration law enforcement. In fact, legislators and immigration officials have locked themselves into this choice: there are now billions of dollars, tens of thousands of prison beds, and hundreds of third parties invested in maintaining and expanding the use of immigration imprisonment. Using the literature on path dependence and legal legitimacy, this Article explains the phenomenon of immigration imprisonment as a single category that spans all levels of government. The Article concludes by suggesting that policy makers, rather than continuing further along this path, should seek a future that reflects immigration law enforcement's past—when imprisonment was the exception rather than the norm.*

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#### INTRODUCTION

Immigration law enforcement is a feature of both the civil administrative law process and the criminal justice system. On the civil side, federal

immigration officials in the Department of Homeland Security (DHS) use an array of initiatives, tens of thousands of personnel, and billions of dollars to enforce civil immigration law, which governs who can be admitted into the United States and what conditions they must meet to stay here.<sup>1</sup> In the criminal justice system, the same federal agencies that investigate and enforce all types of federal criminal laws also police suspected violations of federal immigration crimes, such as unauthorized entry and unauthorized reentry into the United States.<sup>2</sup> State and local counterparts often engage in similar activities, having vigorously turned to their traditional police powers to regulate unwanted activity related to migrant status.<sup>3</sup>

Whether characterized as a matter of civil or criminal law, and whether carried out by federal, state, or local officials, every type of immigration law enforcement shares a common central feature: imprisonment.<sup>4</sup> While differences exist, the government subjects all immigration prisoners to its coercive powers through forcible confinement in secure facilities where detainees are closely watched and access is limited. The vast majority of people detained due to immigration law violations are held in jails, prisons, or other secure facilities that are modeled on those designed for prisoners awaiting criminal proceedings or serving sentences. Not surprisingly, all of the criminal detainees are kept in jails and prisons. Roughly half of the approximately 250 facilities where DHS holds civil immigration detainees function as jails and prisons that do not purport to be anything but penal institutions. Most of DHS's remaining civil immigration detainees are confined in secure structures designed to include many of the hallmarks of prisons and jails: involuntary confinement, strictly controlled access, barbed wire, steel doors, closely watched movements, and more.<sup>5</sup>

Every year, these facilities house vast numbers of people. In the criminal context, the United States Marshals Service (USMS), the federal agency responsible for detaining people suspected of violating federal criminal law, arrested and booked 82,255 people for a suspected immigration offense in

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1. See *infra* Part II.A.

2. See *infra* Part II.B.

3. See *infra* Part II.C.

4. In this Article, “imprisonment” is an umbrella term that includes any form of secure confinement regardless of which governmental unit carries out the confinement, the legal authority that permits it, or the stringency of the conditions of confinement. See Matthew Groves, *Immigration Detention vs Imprisonment: Differences Explored*, 29 ALTERNATIVE L.J. 228, 229 (2004) (“The core elements of imprisonment are forced detention and coercive treatment.”). “Detention” and “immigration detention,” in contrast, refer to confinement through ICE’s civil administrative law enforcement powers. See Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, 1 J. ON MIGRATION & HUM. SECURITY 97, 99 (2013). I use “confinement” and “incarceration” interchangeably to signify the experience of forcible living in a secured environment where volitional entry and exit are not allowed.

5. DORA SCHRIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009).

fiscal year 2010, 83,206 in fiscal year 2011, and 85,458 in fiscal year 2012.<sup>6</sup> Though several immigration-related crimes exist, the most commonly prosecuted include unauthorized entry (a federal misdemeanor) and unauthorized reentry (a federal felony).<sup>7</sup>

Additionally, convicted immigration offenders have risen as a percentage of the federal prison population, hitting 12 percent in 2012 when 23,700 people convicted of an immigration crime spent time in a federal prison on a given day.<sup>8</sup> Some states have taken immigration law matters into their own hands by using purported state authority to imprison individuals who engage in specified immigration activity.<sup>9</sup>

Alongside criminal incarceration, DHS used its civil immigration detention authority to confine 477,523 people in fiscal year 2012<sup>10</sup>—the largest civil immigration detention population in modern times.<sup>11</sup> DHS confined these individuals for alleged violations of civil immigration law provisions (e.g., being physically present in the United States without authorization).<sup>12</sup> In total, hundreds of thousands of people are incarcerated each year for allegedly engaging in nonviolent immigration activity prohibited by state or federal civil or criminal law—or, in some instances, both. These violations range from entering the United States without the federal government’s permission to using an invented social security number to gain employment.

Evidence shows that migrants suffer unthinkable harms while imprisoned.<sup>13</sup> At the same time, policies regulating migration have not only remained indifferent to these realities, but have become increasingly punitive over the last thirty years.

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6. MARK MOTIVANS, U.S. DEP’T OF JUSTICE, NCJ 248493, FEDERAL JUSTICE STATISTICS, 2011–2012, at 3 tbl.2 (2015).

7. See Immigration and Nationality Act of 1952 (INA), 8 U.S.C. §§ 1325, 1326 (2012).

8. See 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 federal prison population data for individuals sentenced to more than one year imprisonment and incarcerated on December 31 of 2002, 2011, and 2012). On December 31, 2011, there were 22,043 people imprisoned because of a federal immigration crime and on that date in 2002 there were 15,628 such prisoners. *Id.*

9. See *infra* Part II.C.

10. JOHN F. SIMANSKI & LESLEY M. SAPP, U.S. DEP’T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2012, at 5 (2013).

11. This is likely the largest civil immigration detention population ever in the United States, but reliable data for the late-nineteenth century and much of the twentieth century are unavailable.

12. See INA § 212(a)(6) (rendering inadmissible any migrant who was not admitted or paroled into the United States); *id.* § 237(a)(1)(B) (rendering deportable any migrant present in the United States in violation of any INA provision).

13. As used in this Article, the term “migrant” refers to people who were not United States citizens when they physically entered the United States. See Nicholas De Genova, *The Legal Production of Mexican/Migrant “Illegality,”* in GOVERNING IMMIGRATION THROUGH CRIME 41, 41 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013). I use this term rather than “immigrant” because the latter has a specialized definition for purposes of immigration law that does not precisely conform to the individuals who this Article discusses. See INA § 101(a)(15).

Imprisonment, then, befalls people who engage in prohibited immigration-related conduct through both criminal- and civil-law processes. Because confinement in these instances turns on migrant status or on activity inextricably tied to being a migrant (e.g., hiring someone to transport you clandestinely into the United States), viewing the practice of locking up migrants as a single, multi-stranded phenomenon of immigration imprisonment better reflects the reality of immigration law enforcement today than demarcating distinctions based on criminal- or civil-law powers. As former immigration detainee Malik Ndaula put it, to those locked up—the nation’s immigration prisoners—“prison is prison no matter what label you use.”<sup>14</sup>

A number of explanations for immigration imprisonment’s remarkable scale pervade. Many commentators point to the 1996 amendments to the Immigration and Nationality Act of 1952 (INA) that dramatically expanded the so-called “mandatory detention” provision. Some point to the aftermath of the September 11, 2001, attacks on the United States.<sup>15</sup> Others argue that Congress’s insistence on a “bed mandate,” requiring DHS to pay for a specified number of detention beds every year, means DHS has no choice but to detain so many people.<sup>16</sup> Still others claim that lobbyists for private prison corporations promote legislation to expand detention.<sup>17</sup>

Though all of these explanations have some truth, none fully appreciate the depth, subtlety, and ingrained nature of the policy initiatives, legislative processes, statutory requirements, and administrative decisions that promote immigration imprisonment. As the first to systematically consider imprisonment as the defining feature of immigration law enforcement in the United States today, this Article provides the comprehensive picture of immigration imprisonment necessary to understand why so many people are confined for violating immigration laws. In doing so, it shows why and how

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14. Malik Ndaula & 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).

15. See, e.g., Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. CIV. RTS.–CIV. LIBERTIES L. REV. 601, 610–11 (2010) (explaining that the Anti-Terrorism and Effective Death Penalty Act of 1996 “toughened . . . immigration detention” and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 “expanded the scope of mandatory detention”); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 89–91 (2005) (discussing the federal government’s use of immigration detention after September 11, 2001).

16. David Brancaccio, “*Bed Mandate*” Ensures 34,000 Immigrants Are Detained Each Day, MARKETPLACE (Oct. 18, 2013, 7:54 AM), <http://www.marketplace.org/topics/economy/bed-mandate-ensures-34000-immigrants-are-detained-each-day>; Ted Robbins, *Little-Known Immigration Mandate Keeps Detention Beds Full*, NPR (Nov. 19, 2013, 3:05 AM), <http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full>.

17. See William Selway & Margaret Newkirk, *Congress's Illegal-Immigration Detention Quota Costs \$2 Billion a Year*, BLOOMBERG BUSINESSWEEK (Sept. 26, 2013), <http://www.bloomberg.com/bw/articles/2013-09-26/congresss-illegal-immigration-detention-quota-costs-2-billion-a-year>; Graeme Wood, *A Boom Behind Bars*, BLOOMBERG BUSINESSWEEK (Mar. 17, 2011), [http://www.bloomberg.com/bw/magazine/content/11\\_13/b4221076266454.htm](http://www.bloomberg.com/bw/magazine/content/11_13/b4221076266454.htm).

imprisonment has become a normal, routine, and self-replicating feature of immigration policing—that is, why and how immigration imprisonment has naturalized.

The growth in criminal incarceration is well-established in the academic literature of multiple disciplines.<sup>18</sup> In contrast, academic commentary, including legal scholarship, has largely failed to study the immigration prison population.<sup>19</sup>

This Article makes three unique contributions to the imprisonment literature. First, it spans civil and criminal confinement to define a new form of imprisonment—immigration imprisonment. Immigration imprisonment can be usefully conceptualized as a single policy choice and analyzed as a whole, regardless of the legal process or government action from which the imprisonment may result. Second, for the first time, this Article maps the full list of pathways through which migrants are imprisoned by federal, state, or local government laws and practices. Third, the Article argues that, beyond political forces, institutional decision-making processes and legal directives propel the growth of immigration imprisonment and make it a naturalized phenomenon.

To unravel imprisonment’s ingrained role in the modern immigration law enforcement regime, this Article proceeds in six parts. Part I lays out the personal and societal harms of imprisoning migrants for immigration-related activities that, unlike the conduct that drove criminal hyperincarceration,<sup>20</sup> are often not criminal transgressions at all (they are violations of civil law) and almost never involve an easily discernible harm. Despite this, federal, state, and local governments have come to rely on confinement as a central means of enforcing immigration law. In doing so, they have created a population of people conceptualized in Part II as immigration prisoners.

Part II identifies the civil and criminal powers federal and state governments wield to create the population of immigration prisoners. Federal, state, and local governments have used specific enforcement and prosecution

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18. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); STEPHEN RAPHAEL & MICHAEL A. STOLL, *WHY ARE SO MANY AMERICANS IN PRISON?* (2013).

19. For notable exceptions in the legal scholarship, see Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137 (2013); Heeren, *supra* note 15, at 610–11; Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42 (2010); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63 (2012). For my own earlier articulation of a theory of the political forces propelling immigration imprisonment’s growth, see generally César Cuahtémoc García Hernández, *Creating Crimmigration*, 2013 BYUL REV. 1457.

20. See Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74, 78 (contending that “hyperincarceration” better describes the modern use of imprisonment in the United States than the more common “mass incarceration” because hyperincarceration accounts for imprisonment that is overwhelmingly used against poor black men).

initiatives to develop numerous entryways into the immigration-imprisonment pipeline. Part III maps these entryways before explaining how intergovernmental law enforcement tactics, which blend criminal and civil immigration law into what scholars have recently begun to describe as “cimmigration” law, create large-scale incarceration.<sup>21</sup>

Part IV explains why immigration imprisonment became a central feature of civil and criminal immigration law enforcement. It did so, this Part contends, because immigration has become overrun by the rhetoric of criminality. Specifically, beginning in the 1980s, immigration came to be viewed as a security threat that needed to be managed alongside other dangers.

Grounded in the rhetoric of criminality, Part V explains how immigration imprisonment has become deeply entrenched in immigration policy making and enforcement. Legislators and officials have become so tied to earlier decisions to use imprisonment that they rely on it by default, even in the face of reasonable alternatives. In turn, reliance on imprisonment has fueled a host of third parties who have staked their economic well-being on this law-enforcement policy choice, and who have every reason to pressure government officials to maintain and expand immigration imprisonment.

Difficult as it is to see an alternative to the growing push to imprison more migrants because of immigration activity, Part VI posits an alternative paradigm rooted in immigration law’s past reluctance to rely on confinement and inspired by a recent contraction of the criminal prison population. Just as immigration imprisonment expanded, Part VI suggests that it can shrink if policy makers so choose.

## I.

### HARMS OF IMMIGRATION IMPRISONMENT

Immigration imprisonment is often considered a mere corollary to removal. However, in reality, it is so coercive, widespread, and racially skewed that it causes numerous independent harms—not only to migrants, but also to communities, and to the legitimacy of the immigration law system itself. These

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21. Legal scholar Juliet Stumpf coined the term “cimmigration” in a 2006 article. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006). Analysis of this area of law has expanded quite rapidly since then. *See, e.g.*, Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009), [http://www.columbialawreview.org/wp-content/uploads/2009/12/135\\_Chacón.pdf](http://www.columbialawreview.org/wp-content/uploads/2009/12/135_Chacón.pdf); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013); García Hernández, *supra* note 19, at 1457; Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31 (2010). For the first book-length collection of scholarly essays explicitly addressing cimmigration, see SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR (Maria João Guia et al. eds., 2013).



effects arise regardless of whether imprisonment stems from civil- or criminal-law powers, or from federal, state, or local law enforcement initiatives.

### A. Policy Failures

Measuring a law enforcement policy's performance is never straightforward.<sup>22</sup> While many factors play a role in how an imprisonment regime fares, two stand out as particularly salient to immigration imprisonment: effectiveness and efficiency.<sup>23</sup> First, we must consider whether confinement achieves the goals of the respective substantive legal regime. Second, to the extent imprisonment meets these goals, we must address whether alternative policies could reach a substantially similar result at a lower financial and social cost. A clear-eyed assessment indicates that the costs of immigration imprisonment far outweigh its benefits. This is true for three reasons: (1) detention is overbroad; (2) it results in immense damage to migrant communities; and (3) it imposes significant financial costs on the federal government, even in the face of dramatically less expensive and more effective alternatives.

Civil and criminal law authorize immigration imprisonment to promote a limited number of goals. First, in the civil context, unless a migrant is subject to mandatory detention, the migrant can only be confined while removal proceedings are pending if the migrant is either a flight risk or a danger to the community.<sup>24</sup> The INA's mandatory detention provision, section 236(c), suggests that, in Congress's view, everyone who has committed one of the many crimes that lead to mandatory detention presents a risk of absconding or endangering the public.<sup>25</sup> Thus, if an immigration judge orders a migrant removed from the United States, civil immigration detention is allowed to ensure that the government can locate the migrant when space on an outgoing bus or airplane becomes available. Second, in the penal context, confinement

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22. See, e.g., ARJEN BOIN, CRAFTING PUBLIC INSTITUTIONS: LEADERSHIP IN TWO PRISON SYSTEMS 196 (2001) ("Measuring the performance of criminal justice systems is, for an abundance of reasons, a problematic affair."); MARK H. MOORE & ANTHONY BRAGA, POLICE EXEC. RESEARCH FORUM, THE "BOTTOM LINE" OF POLICING 9 (2003) (acknowledging the difficulty of measuring the value of policing); BEN A. VOLLAARD, POLICE EFFECTIVENESS: MEASUREMENT AND INCENTIVES 1 (2006) (lamenting an "absence of good indicators of police performance").

23. See BOIN, *supra* note 23, at 197 tbl.7.1 (listing several standards by which to evaluate prison systems, including efficiency); John E. Eck & Dennis P. Rosenbaum, *The New Police Order: Effectiveness, Equity, and Efficiency in Community Policing*, in THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES 3, 5 (Dennis P. Rosenbaum ed., 1994) (positing that the public asks for three things from the police: effective, equitable, and efficient law enforcement). This Part discusses effectiveness and efficiency, while Part I.B discusses equity.

24. See Ellis, 20 I. & N. Dec. 641, 642 (B.I.A. 1993) (citing Patel, 15 I. & N. Dec. 666 (B.I.A. 1976)).

25. INA § 236(c), 8 U.S.C. § 1226 (2012); see also *Demore v. Kim*, 538 U.S. 510, 518–20 (2003) (explaining that Congress adopted section 236(c) "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens" who posed a public safety threat by committing more crimes and frequently absconding when released from civil immigration detention).

pending federal criminal proceedings (regardless of the offense) is allowed if the defendant is deemed at risk of absconding or endangering the public.<sup>26</sup> Upon conviction, U.S. courts permit incarceration as a means to punish the defendant and deter future violations.<sup>27</sup> Convicted migrants are then subject to the very real possibility of forcible removal from the United States.

Immigration imprisonment largely fails to accomplish these goals. To begin, many civil detainees present little if any risk of absconding or endangering the community if released.<sup>28</sup> A substantial portion have spent many years in the United States, during which time they have developed deep ties to the community, while others are coming or returning to join family members.<sup>29</sup> The more involved a person is with her community, the less likely she is to abscond.<sup>30</sup> Furthermore, the vast majority of detainees (89 percent in 2009) have never been convicted of a violent offense.<sup>31</sup> There is no reason to believe that a person who has not engaged in violent crime in the past will do so in the future. Moreover, the INA's mandatory detention provision does not even pretend to consider an individual's dangerousness or likelihood of absconding. Congress, the Supreme Court has explained, may subject migrants to civil immigration detention merely for having been involved in criminal activity in the past (or for possessing any other characteristics that Congress deems worthy of detention).<sup>32</sup> Congress has done just this through INA section 236(c).

This rationale applies to criminal pretrial detainees as well. Migrants are no less likely to have family members in the United States because they have been apprehended and prosecuted through the criminal immigration law enforcement system than through the civil system controlled by DHS. Furthermore, individuals with family members in the United States are more

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26. See 18 U.S.C. § 3142(e)(1) (2012); see also John Clark & D. Alan Henry, *The Pretrial Release Decision*, 81 JUDICATURE 76, 77 n.4 (1997) (noting that danger to the community became a standard feature of criminal pretrial detention processes beginning in 1970 in Washington, D.C.).

27. See *Wong Wing v. United States*, 163 U.S. 228, 235 (1896).

28. See Kalhan, *Rethinking Immigration Detention*, *supra* note 19, at 48.

29. See CITY BAR JUSTICE CTR., NYC KNOW YOUR RIGHTS PROJECT: AN INNOVATIVE PRO BONO RESPONSE TO THE LACK OF COUNSEL FOR INDIGENT IMMIGRANT DETAINEES 8 (2009) (noting that 85 percent of detainees interviewed at the Varick Federal Detention Center in New York City had been in the United States for more than five years); *How Often is the Aggravated Felony Statute Used?*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <http://trac.syr.edu/immigration/reports/158> (last visited Aug. 20, 2015) (explaining that people placed in removal proceedings on the basis of an alleged aggravated felony conviction have been in the United States for fifteen years on average).

30. See, e.g., VERA INST. OF JUSTICE, FAIR TREATMENT FOR THE INDIGENT: THE MANHATTAN BAIL PROJECT: TEN-YEAR REPORT, 1961–1971 (1972), as reprinted in MARK L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 98–104 (4th ed. 2011); MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY 2 (2012) (“The Manhattan Bail Project showed that defendants with strong ties to the community would usually return to court without bail . . .”).

31. SCHRIRO, *supra* note 5, at 6.

32. See *Demore v. Kim*, 538 U.S. 510, 524–25 (2003).

likely to return after removal,<sup>33</sup> suggesting that many migrants have a strong desire to remain in locations where they are well-known and easily identifiable.

Even those individuals incarcerated for immigration crimes are not especially worthwhile candidates for detention. Neither illegal entry nor illegal reentry, the two most commonly prosecuted immigration crimes, represents a threat to the public.<sup>34</sup> Nor does punishment for engaging in this conduct appear to have a deterrent effect.<sup>35</sup> Counterintuitively, empirical data suggest that harsher immigration law enforcement measures do little to stop people from coming to the United States and “may even have increased the likelihood of continuing undocumented migration among experienced migrants.”<sup>36</sup> This is not surprising, given that many unauthorized migrants venture to the United States to unite with family, to search for opportunities they cannot find in their home country, or to escape violence.

In addition, immigration imprisonment fails to promote the goals of immigration law when it captures people who are undeniably outside its reach: U.S. citizens.<sup>37</sup> Though it is difficult to know precisely how many U.S. citizens have been incarcerated due to suspicion of violating an immigration law provision, what little empirical research has been done, supported by anecdotal information gleaned from judicial decisions, indicates that this is not an isolated occurrence.<sup>38</sup> Luis Fernando Juárez, for example, received concurrent sentences of thirty-six and forty-two months on two immigration crimes—illegal reentry and lying about being a U.S. citizen on an application to purchase a firearm—to which it was later discovered he had an absolute defense: he is a U.S. citizen.<sup>39</sup> James Azia Makowski, who was born in India and became a United States citizen as a one-year-old, was convicted of a low-

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33. MARK GRIMES ET AL., NAT'L CTR. FOR BORDER SEC. & IMMIGRATION, REASONS AND RESOLVE TO CROSS THE LINE: A POST-APPREHENSION SURVEY OF UNAUTHORIZED IMMIGRANTS ALONG THE U.S.-MEXICO BORDER 2 tbl.1 (2013) (reporting that migrants previously removed who had family members of any type in the United States were two to three times more likely than those without family members to attempt to return); see also Catalina Amuedo-Dorantes & Cynthia Bansak, *U.S. Border Control: Counterpoint*, in DEBATES ON U.S. IMMIGRATION 153, 159 (Judith Gans et al. eds., 2012) (suggesting family ties increase migrants' will to cross the border).

34. See INA §§ 275–276, 8 U.S.C. §§ 1325–1326 (2012).

35. See Emily Ryo, *Deciding To Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOC. REV. 574, 587 (2013).

36. Douglas S. Massey, *How Arizona Became Ground Zero in the War on Immigrants*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 40, 52 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014); see also Douglas S. Massey & Fernando Riosmena, *Undocumented Migration From Latin America in an Era of Rising U.S. Enforcement*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 294, 317 (2010).

37. OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., ANNUAL PERFORMANCE PLAN FOR FISCAL YEAR 2013, at 56, [http://www.oig.dhs.gov/assets/PDFs/OIG\\_APP\\_FY13.pdf](http://www.oig.dhs.gov/assets/PDFs/OIG_APP_FY13.pdf).

38. See, e.g., Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011) (claiming that as many as “4,000 U.S. citizens were detained or deported” in 2010, and more than 20,000 from 2003 to 2010).

39. *United States v. Juarez*, 672 F.3d 381, 383 (5th Cir. 2012).

level federal drug offense and sentenced to a seven-year prison term.<sup>40</sup> Instead of going to a boot camp, he was sent to a maximum-security federal prison because DHS's Immigration and Customs Enforcement (ICE) unit thought he was not a U.S. citizen, and lack of citizenship would have made him ineligible for the boot camp.<sup>41</sup> Examples, such as these, of U.S. citizens caught up in the immigration imprisonment network abound. Indeed, data obtained from ICE indicate that the Agency issued an immigration detainer—a request that a person detained by a law enforcement agency remain in detention for as many as five days to allow ICE time to decide whether to take custody—on at least 834 U.S. citizens from fiscal year 2008 to fiscal year 2012.<sup>42</sup> It is not clear how many of these were actually taken into ICE custody, but, like Makowski, undoubtedly some were.

Apart from the impact of a migrant's forcible removal, immigration imprisonment also disrupts countless communities. Migrants frequently participate in all manner of community affairs, from working, to political organizing, to attending religious services.<sup>43</sup> Detention necessarily removes them from these activities.<sup>44</sup> Detention also makes obtaining representation much more difficult. Since immigration law is simply too complicated for most migrants to adequately represent themselves in court, representation has a strong positive correlation with a migrant's likelihood of avoiding removal.<sup>45</sup> Relatedly, a study of cases in San Francisco Immigration Court found that represented detainees were much more likely to ultimately avoid removal than unrepresented detainees.<sup>46</sup>

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40. *Makowski v. United States*, 27 F. Supp. 3d 901, 907–08 (N.D. Ill. 2014).

41. *Id.* at 908. At sentencing, Makowski believed that he would be sent to a boot camp for 120 days in lieu of serving the seven-year term of imprisonment. *Id.* ICE believed he was not a U.S. citizen because neither it nor its predecessor, the Immigration and Naturalization Service, had updated Makowski's file in the more-than-two-decades since he had become a United States citizen. *Id.*

42. *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Feb. 20, 2013), <http://trac.syr.edu/immigration/reports/311>.

43. See ALEJANDRO PORTES & RUBÉN G. RUMBAULT, *IMMIGRANT AMERICA: A PORTRAIT* 66 (2d ed. 1996) (noting that migrants participate in the labor force at roughly the national average, though migrants from Latin America, Africa, and Asia participate at higher rates); *id.* at 139 (describing migrant participation in political activity); Frank Van Tubergen, *Religious Affiliation and Attendance Among Immigrants in Eight Western Countries: Individual and Contextual Effects*, 45 J. FOR SCI. STUD. RELIGION 1, 11 tbl.5 (2006) (finding that 35 percent of immigrants to the United States reported attending religious services at least once per week).

44. See TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 74 (2007) (contending that confinement “disrupts social networks and diminishes community stability”).

45. See *Representation Is Key in Immigration Proceedings Involving Women with Children*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Feb. 18, 2015), <http://trac.syr.edu/immigration/reports/377>.

46. See N. CAL. COLLABORATIVE FOR IMMIGRANT JUSTICE, *ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA* 18 (2014).

More perniciously, detention severely impacts migrants' families. In 2009, almost seventeen million children had at least one parent who was not a U.S. citizen, and roughly 5.1 million children, including four million U.S. citizens, had at least one parent who lacked authorization to be in the United States.<sup>47</sup> It is not clear how many children living in the United States have had a parent detained,<sup>48</sup> but the DHS Inspector General found that 108,434 parents of U.S.-citizen children were deported between fiscal years 1998 and 2007.<sup>49</sup> Presumably, most of these parents saw the inside of an immigration prison at some point. In some instances, parents suffering domestic violence have been detained, leaving their children with an abusive partner.<sup>50</sup> All of these effects are felt even if a migrant ultimately avoids removal, an outcome that is increasingly tenable for migrants with strong ties to the United States, as DHS has taken steps to deprioritize detention and removal of such individuals.<sup>51</sup>

Detention sometimes plays an even more disruptive role in family life when a single parent or both parents are confined. According to one advocacy group, in 2011, at least 5,100 children lived in foster care because their parents had been detained or deported.<sup>52</sup> A child's placement in foster care presents its own challenge when parents are detained. To be reunited with a child, a parent usually must comply with a reunification plan.<sup>53</sup> These plans often include requirements, such as regular phone calls and contact visits that detention makes impossible, or at best very difficult.<sup>54</sup> Many parents, therefore, lose

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47. See Jeanne Batalova & Aaron Terrazas, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INST. (Dec. 9, 2010), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

48. Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 114 (2011) (explaining that much of the reason for the lack of information about the number of children with detained parents arises from the fact that "[t]he child welfare system does not systematically collect this information," and noting that "ICE does not release information about the number of parents who are detained").

49. OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-09-15, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 5 (2009).

50. KAVITHA SREEHARSHA, REFORMING AMERICA'S IMMIGRATION LAWS: A WOMAN'S STRUGGLE 11 (2010).

51. Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enf't, to Field Office Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 4-5 (June 17, 2011) [hereinafter June 17 Morton Memo], <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (listing a large number of factors that ICE weighs in favor of exercising its prosecutorial discretion regarding removal proceedings).

52. APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 22 (2011).

53. WOMEN'S REFUGEE COMM'N, TORN APART BY IMMIGRATION ENFORCEMENT: PARENTAL RIGHTS AND IMMIGRATION DETENTION 2 (2010).

54. *Id.* at 2; Anita Ortiz Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 690 (2014). In 2013, DHS adopted a policy intended to ameliorate the impact that immigration law enforcement, including detention, has on parental custody rights. See U.S. IMMIGRATION & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., DIRECTIVE 11064.1, FACILITATING PARENTAL INTERESTS IN THE COURSE OF CIVIL IMMIGRATION ENFORCEMENT ACTIVITIES (Aug. 23, 2013), <http://www.ice.gov/doclib/detention-reform/pdf/parental>

custody of their children after being imprisoned.<sup>55</sup> As with migrants with strong ties to the United States, ICE favorably considers that a migrant has or will soon have children. Thus, a detained migrant parent could ultimately avoid removal.<sup>56</sup>

In addition to detrimental social effects, immigration imprisonment imposes a significant financial cost on government entities. Congress allocated \$2.8 billion to civil immigration detention and removal operations in the fiscal year 2014 budget alone.<sup>57</sup> In fiscal year 2015, USMS requested \$1.5 billion to house, transport, and care for pretrial federal detainees, almost half of whom it expects will be detained because of an immigration charge.<sup>58</sup> For its part, the Federal Bureau of Prisons (BOP) requested \$6.9 billion for salaries and expenses associated with inmate care and confinement.<sup>59</sup> In recent years, roughly 11 to 12 percent of BOP inmates were convicted of an immigration crime.<sup>60</sup>

While these dollar amounts are impressive by themselves, a better measure of their value comes only by considering the threat the people incarcerated pose and the ability to regulate that risk through alternative means. The vast majority of detained migrants are unlikely to endanger the public if released. At most, roughly 11 percent of detainees in civil immigration detention can be said to be dangerous.<sup>61</sup> Nothing about the commission of the leading federal immigration crimes—illegal entry and illegal reentry—suggests dangerousness, since these crimes consist of traveling to the United States without the government’s permission.<sup>62</sup> Despite their nonviolent nature, both carry potentially substantial sentences: up to two years imprisonment for a repeat illegal entry conviction and as much as twenty years for unauthorized reentry.<sup>63</sup>

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\_interest\_directive\_signed.pdf. Among other requirements, the policy instructs ICE to “arrange for the detained alien parent or legal guardian’s in-person appearance at family court or child welfare proceedings, if practicable.” *Id.* § 5.4.

55. See, e.g., *Adoption of C.M. v. E.M.B.R.*, 414 S.W.3d 622 (Mo. Ct. App. 2013) (recounting one migrant’s termination of parental rights after an arrest in an immigration raid at her workplace).

56. June 17 Morton Memo, *supra* note 51, at 4–5.

57. Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251.

58. U.S. MARSHALS SERV., DEP’T OF JUSTICE, FY 2015 PERFORMANCE BUDGET: PRESIDENT’S BUDGET SUBMISSION: FEDERAL PRISONER DETENTION APPROPRIATION 7–9 (2014) [hereinafter USMS, FY 2015 BUDGET].

59. FED. BUREAU OF PRISONS, DEP’T OF JUSTICE, FY 2015 BUDGET REQUEST AT A GLANCE 4 (2014), <http://www.justice.gov/jmd/2015summary/pdf/bop.pdf>.

60. See CARSON & GOLINELLI, *supra* note 8, at 43 app. tbl.11.

61. See SCHRIRO, *supra* note 5, at 2.

62. See INA §§ 275(a), 276(a), 8 U.S.C. §§ 1325(a), 1326(a) (2012). For a summary of other federal immigration crimes, see García Hernández, *supra* note 19, at 1471–72.

63. INA §§ 275(a), 276(b)(2).

Moreover, government agencies have plenty of other tools at their disposal to limit the risk of migrants absconding.<sup>64</sup> Penal and civil immigration law enforcement authorities regularly release detainees from confinement, sometimes under supervised release conditions and at other times without imposing even that level of oversight.<sup>65</sup> Though no studies track the appearance rates of people released from pretrial penal confinement while awaiting prosecution for an immigration crime, several studies indicate that appearance rates are quite high for participants in alternatives to civil immigration detention. ICE reported a 93.8 percent appearance rate for its alternative to detention (ATD) programs in fiscal year 2010.<sup>66</sup> This exceeds the greater-than-80-percent court appearance rate achieved by an intensive pilot program that the Vera Institute of Justice operated in the late 1990s at the request of the Immigration and Naturalization Service (INS).<sup>67</sup>

In addition to increased appearance rates, ATD programs have the added benefit of operating at a fraction of the cost of detention. ICE reports that each detention bed costs \$119 per day, but the Government Accountability Office reports that the true figure is \$158, including personnel costs.<sup>68</sup> Meanwhile, ICE currently funds one ATD program called the Intensive Supervision Assistance Program (ISAP) II, operated by a subsidiary of the private prison corporation GEO Group.<sup>69</sup> It has a capacity of approximately 22,000 people per day.<sup>70</sup> In fiscal year 2013, ISAP II cost ICE as little as \$0.30 per day for technological supervision and as much as \$8.49 per day for more intensive in-person supervision. Its cost per participant averaged \$4.73 per day.<sup>71</sup> Despite the success of ATD programs, however, the federal government continues to

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64. See, e.g., 18 U.S.C. § 3142(b)–(c) (2012) (describing alternatives to federal pretrial criminal detention); Sampson & Mitchell, *supra* note 4, at 105 (discussing the alternatives to civil immigration detention used in multiple countries).

65. See U.S. Dep't of Homeland Sec., *U.S. Immigration and Customs Enforcement: Salaries and Expenses, collected in CONGRESSIONAL BUDGET JUSTIFICATION FY 2015*, at 62 (2014) [hereinafter *ICE FY 2015 Budget Justification*], <http://www.dhs.gov/sites/default/files/publications/DHS-Congressional-Budget-Justification-FY2015.pdf> (describing the release options available for people in civil immigration proceedings).

66. U.S. DEP'T OF HOMELAND SEC., *U.S. Immigration and Customs Enforcement: Salaries and Expenses, collected in CONGRESSIONAL BUDGET JUSTIFICATION FY 2012*, at 44 (2011) [hereinafter *ICE FY 2012 Budget Justification*], <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>.

67. MEGAN GOLDEN ET AL., VERA INST. OF JUSTICE, *THE APPEARANCE ASSISTANCE PROGRAM: ATTAINING COMPLIANCE WITH IMMIGRATION LAWS THROUGH COMMUNITY SUPERVISION 14–15* (1998).

68. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 15-26, *ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS* 19 n.47 (2014); *ICE FY 2015 Budget Justification*, *supra* note 65, at 40.

69. *ICE FY 2012 Budget Justification*, *supra* note 66, at 44; see also LUTHERAN IMMIGRATION & REFUGEE SERV., *ALTERNATIVES TO DETENTION (ATD): HISTORY AND RECOMMENDATIONS 1* (2013), <http://lirs.org/wp-content/uploads/2014/01/LIRS-Background-on-Alternatives-to-Detention-12-6-13.pdf>.

70. *ICE FY 2015 Budget Justification*, *supra* note 65, at 60.

71. *Id.* at 62.

emphasize detention. President Barack Obama's fiscal year 2015 budget request, for example, asked for \$2.6 billion for all detention and removal operations, of which \$1.8 billion would go to custody costs and \$94 million to ATD costs.<sup>72</sup>

Such an emphasis on detention is neither surprising nor wise. Applying "the minimum degree of control sufficient to ensure security," argues sociologist Charles H. Logan, promotes "[t]he causes of justice, order, economy, and inmate welfare."<sup>73</sup> A proponent of private prisons, Logan nonetheless bemoans that prison officials often use more stringent security measures than needed for no better reason than because those resources are available and because over-securitization "decreases political costs by minimizing the risk of escapes or loss of control."<sup>74</sup>

With such high appearance rates and low costs compared to detention, the federal government's continued primary reliance on detention is unjustifiable. Add to this the harsh impact that immigration imprisonment metes out on communities, families, and individuals needlessly detained—sometimes unlawfully, as in the case of U.S. citizens—and the result is clear: immigration imprisonment is a harsh, expensive tactic used excessively in the face of less severe, less expensive, and more effective alternatives.

### B. Law Suffers

Aside from being poor policy, immigration imprisonment also threatens the legitimacy of the immigration law system as a whole. Legitimacy depends on the fairness of the procedures used to enforce the law.<sup>75</sup> People obey the law when they perceive the authority that enforces it as legitimate and when compliance comports with their sense of morality.<sup>76</sup> Morality plays an important role in compliance<sup>77</sup>—people are less likely to obey a law that they view as morally illegitimate.<sup>78</sup> Heavy-handed use of immigration imprisonment affects how migrants and their communities view the procedural fairness and morality of immigration law enforcement. This, in turn, undermines the legitimacy of the system.

Furthermore, immigration imprisonment falls most heavily on people of color, especially migrants from Mexico and other Latin American countries. In

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72. U.S. DEP'T OF HOMELAND SEC., *Total Budget Authority, in ICE FY 2015 Budget Justification*, *supra* note 65, at 5.

73. CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* 71 (1990).

74. *Id.*

75. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 63 (Princeton U. Press 2006) (1990).

76. See *id.* at 25. Other reasons why people obey laws include an individual's cost-benefit analysis of compliance and opportunity structures for noncompliance. See Emily Ryo, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 *LAW & SOC. INQUIRY* 109, 113–14 (2006).

77. See Ryo, *supra* note 76, at 127.

78. See *id.*



fiscal year 2012, for example, at least 92.7 percent of civil immigration detainees emigrated from Latin America, including 64.4 percent from Mexico alone.<sup>79</sup> Though comparable figures for the penal immigration population are unavailable, the federal government reported that, of the 47,551 federal prisoners in fiscal year 2010 who were not U.S. citizens, 33,600 were Mexican citizens, and another 6,002 were citizens of countries located in Central or South America.<sup>80</sup>

Such racially skewed enforcement may lead to the perception that immigration law enforcement targets people of color generally and Latinos specifically. This can lead to a delegitimation of immigration law enforcement in the eyes of Latino migrants, their friends, and their families.<sup>81</sup> Law enforcement processes perceived as racially skewed threaten to delegitimize immigration law. If migrants come to think that legal proceedings are stacked against them, they are less likely to abide by the rules of the proceedings.<sup>82</sup> This is an obviously undesirable outcome.

Moreover, immigration imprisonment's broad reach means that many people may view it as indiscriminate. Given that only a small percentage of people incarcerated for immigration law violations have committed a violent act,<sup>83</sup> sympathetic commentators frequently claim that migrants have done nothing worthy of detention. Indeed, a common refrain among immigrants' rights advocates is that migrants are not criminals and thus should not be treated as such.<sup>84</sup> Former Florida Governor Jeb Bush illustrated a variation of this framing recently, commenting that unauthorized migrants "crossed the border because they had no other means to work to be able to provide for their

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79. See SIMANSKI & SAPP, *supra* note 10, at 5 tbl.5. DHS enumerates specific detention data for the ten most common countries of origin only. *Id.* Together, citizens of these countries comprise 93.6 percent of the fiscal year 2012 detained population. Of these, all but Jamaica (0.5 percent of the total detained population) and China (0.4 percent of the total detained population) are in Latin America. See *id.*

80. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, NCJ 239913, FEDERAL JUSTICE STATISTICS, 2010, at 24 tbl.14 (2013).

81. See KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 38 (2004); Ryo, *supra* note 35, at 593.

82. See Das, *supra* note 19, at 154 ("People who are eligible for relief from removal have a stronger incentive to appear in immigration court to resolve their cases.").

83. See SCHRIRO, *supra* note 5, at 2.

84. See, e.g., Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 104 (2013) ("When citizenship is assessed with an ever-narrowing view of worthiness, many are left outside its frame."); Jodie M. Lawston & Ruben R. Murillo, *Policing Our Border, Policing Our Nation: An Examination of the Ideological Connections Between Border Vigilantism and U.S. National Ideology*, in BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 181, 183 (Jenna M. Loyd et al. eds., 2012) (noting the discursive criminalization of immigrants, since "immigration law falls under administrative law, not criminal law"). To be sure, some advocates—especially those among the more radical leftists—reject the discourse of criminality entirely. See Borderlands Autonomist Collective, *Resisting the Security-Industrial Complex: Operation Streamline and the Militarization of the Arizona-Mexico Borderlands*, in BEYOND WALLS AND CAGES, *supra*, at 193.

family—yes, they broke the law, but it’s not a felony . . . —it’s an act of love.”<sup>85</sup> A law enforcement regime that is perceived as punishing good-hearted people who seek only to provide for their families risks losing moral credibility.<sup>86</sup>

Finally, detention adversely affects rule-of-law norms. Since detention severely impacts a migrant’s ability to access counsel, it is impossible to know whether pro se migrants are removed because the law mandated that outcome or simply because no one was available to make the migrant’s case. Detention, therefore, indirectly diminishes the legitimacy of the outcome.

## II.

### IMMIGRATION PRISONERS

Despite the harms outlined above, immigration imprisonment is ubiquitous. Federal, state, and local government actors annually identify and detain more than five hundred thousand people allegedly involved in prohibited migration activity. These are the nation’s immigration prisoners—those most directly affected by the harms of imprisonment and the widespread use of incarceration to enforce immigration law. Though they may be confined by various actors—be they federal, state, or local authorities—the commonality among their experiences counsels for treating this as a single phenomenon. All of these individuals are incarcerated because of migration-related activity. They would not be detained but for the act of crossing the border or various actions necessary to survive. It is that activity that makes them susceptible to this type of confinement. In addition, while some immigration imprisonment is labeled civil and some criminal, the conditions of confinement in secure facilities are essentially identical. This Part identifies the immigration-related conduct that federal and state legislatures have deemed worthy of confinement, and explains how often confinement happens.

#### A. Federal Civil Immigration Prisoners

It is no surprise that the federal government regulates immigration through what we think of as our “immigration laws,” that is, the set of laws that determine who may be in the country. Yet, it is much less commonly understood that this civil system, in which no person is ever accused or convicted of a crime, also results in a vast network of immigration imprisonment. In reality, the federal government uses its extraordinary administrative powers to regulate migrants’ conduct by confining them. Indeed,

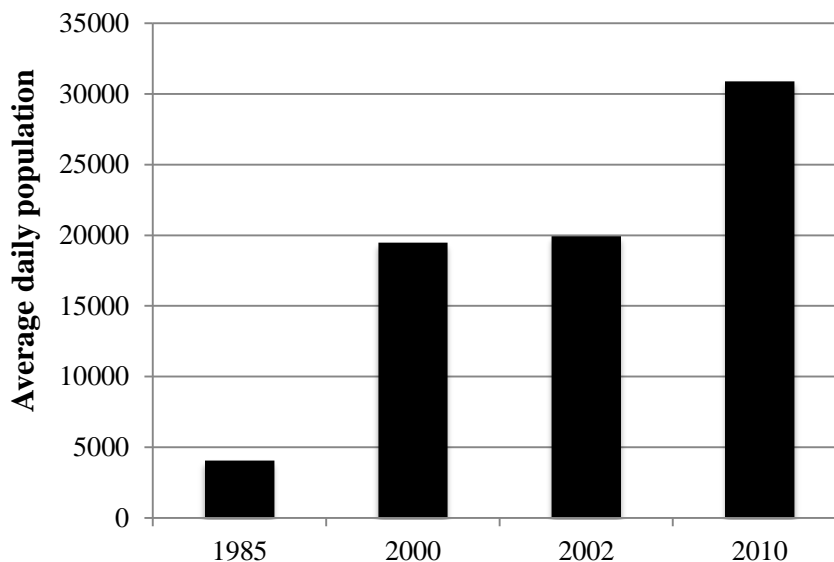
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85. Peter Moskowitz, *Jeb Bush Calls Illegal Immigration ‘An Act of Love,’ Riles Conservatives*, AL JAZEERA AM. (Apr. 6, 2014, 5:12 PM), <http://america.aljazeera.com/articles/2014/4/6/jeb-bush-calls-crossingtheborderanactofloverilesconservatives.html>.

86. Cf. Ryo, *supra* note 35, at 594.

as Figure 1 illustrates, the number of people confined has steadily grown in recent decades.<sup>87</sup>

FIGURE 1  
CIVIL IMMIGRATION DETENTION POPULATION



At the root of civil immigration detention is a single statutory provision, INA section 236, which provides two means through which DHS may detain migrants. One path obligates DHS to detain individuals who meet specified criteria, while the other provides a discretionary route.

Under INA section 236(c), DHS “shall take into custody” all migrants whom immigration officials have “reason to believe” are inadmissible or deportable on the bases enumerated in the statute, including almost all of the crime-based removal categories.<sup>88</sup> An individual convicted of a qualifying crime—ranging from offenses as minor as shoplifting to crimes as serious as murder—must be taken into DHS custody. That individual must be kept and remain in custody pending resolution of the immigration court process, until an immigration judge determines whether the individual may stay in the country.<sup>89</sup>

87. I have selected these dates to provide a consistent comparison to the post-conviction data reported in Figure 2. Data for other years are available and similarly show a growing population.

88. Joseph, 22 I. & N. Dec. 660, 662, 668 (B.I.A. 1999); *see also* INA § 236(c), 8 U.S.C. § 1226(c) (2012); Diop v. ICE, 656 F.3d 221, 230 (3d Cir. 2011).

89. Shoplifting and murder are both aggravated felonies, thus both fall within INA § 236(c). *See* INA § 101(a)(43)(G) (defining a theft offense with a term of imprisonment of at least one year as an aggravated felony); *id.* § 101(a)(43)(A) (defining murder as an aggravated felony); *id.* § 237(a)(2)(A)(iii) (providing that a migrant convicted of an aggravated felony is deportable); *id.* § 236(c)(1)(B) (providing that a person reasonably believed to be deportable pursuant to § 237(a)(2)(A)(iii) is subject to mandatory custody). Whether or not a specific state statute punishing shoplifting or murder constitutes a theft or murder offense, respectively, as defined for immigration

This mandatory-detention provision covers persons whom ICE agents reasonably believe are removable for having been convicted of a controlled substance offense—a category that, as the Supreme Court has put it, includes “virtually every drug offense except for only the most insignificant marijuana offenses.”<sup>90</sup> This category also includes anyone convicted of a crime involving moral turpitude and sentenced to at least one year in prison—qualifying crimes include animal fighting and indecent exposure.<sup>91</sup>

Though the mandatory custody statute is quite broad, only a small percentage of migrants detained by DHS fall within its reach. According to a study analyzing immigration court and DHS data, “at least three out of every five individuals detained by ICE who are put into removal proceedings could have been released.”<sup>92</sup> A second study found that, according to ICE’s own records, “only 9 [percent] of individuals are considered subject to mandatory detention.”<sup>93</sup> Under both studies, the conclusion is unmistakable: while many detained people fall within the mandatory custody provision, the vast majority do not.

As these numbers imply, migrants who are not caught in INA section 236(c)’s wide net are nonetheless detainable. Front-line immigration agents have remarkable authority to detain or release on bond anyone potentially subject to removal, even if section 236(c) does not apply.<sup>94</sup> One statutory section, for example, provides that “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”<sup>95</sup> Another grants immigration officers broad warrantless arrest powers

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law purposes, however, depends on the language of the state offense and, for theft offenses, the sentence imposed.

90. *Padilla v. Kentucky*, 559 U.S. 356, 359 n.1 (2010); INA § 236(c)(1)(B) (referencing INA section 237(a)(2)(B), which provides that a person convicted of a controlled substance offense, “other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable”).

91. INA § 236(c)(1)(C) (providing that a migrant reasonably believed to be deportable under INA section 237(a)(2)(A)(i) and sentenced to a term of imprisonment of at least one year is subject to mandatory custody); *id.* § 237(a)(2)(A)(i) (stating that a migrant convicted of a crime involving moral turpitude is deportable).

92. Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 374 (2011) (emphasis omitted). For an explanation of the study’s data and methodology, see *id.* at 408–09.

93. NYU SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC ET AL., INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRATION DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 10 (2012) [hereinafter INSECURE COMMUNITIES] (emphasis omitted). This report analyzed data obtained from ICE of all individuals apprehended by ICE’s New York City field office from October 2005 through December 2010. These individuals either received or requested a hearing but were not granted a hearing before an immigration judge. *Id.* at 1. Interestingly, this report and the New York Immigrant Representation Study Report differ dramatically from Schriro’s analysis of a narrower data set—the civil detainee population on September 1, 2009. SCHIRO, *supra* note 5, at 6. Unlike these reports, Schriro found that “[o]f the aliens in detention on September 1, 66 percent were subject to mandatory detention.” *Id.* at 2.

94. 8 C.F.R. § 236.1(c)(8) (2015).

95. INA § 236(a).

if an officer has reason to believe that a person is in the United States in violation of immigration law “and is likely to escape before a warrant can be obtained.”<sup>96</sup> Detained migrants can then seek “redetermination” of the front-line officer’s decision to detain by petitioning an immigration judge for bond.<sup>97</sup>

Unlike the mandatory custody provision’s specific directives, INA section 236(a) grants immigration judges wide latitude to make discretionary determinations about which migrants to detain, pending removal proceedings. In deciding whether to grant a bond, immigration judges typically focus on whether a migrant is a flight risk or a danger to the community.<sup>98</sup> If the immigration judge concludes that the migrant poses one of these threats, then continued detention is legally appropriate. Importantly, immigration judges “ha[ve] broad discretion in deciding the factors that [they] may consider” to determine whether a migrant is a flight or public safety risk.<sup>99</sup>

For example, the Board of Immigration Appeals (BIA) has upheld an immigration judge’s denial of bond when the immigration judge relied on facts and charges in a criminal complaint to which the migrant had pleaded not guilty, which the criminal court had found to merit a bond from criminal incarceration, and which had not yet resulted in a conviction.<sup>100</sup> Attorney General John Ashcroft upheld denial even when there was no indication that the detained migrant had been involved in criminal activity. In *D-J-*, the Attorney General found that it was permissible to detain an individual merely for arriving in the United States without authorization as part of a group of over two hundred Haitians on board an overloaded boat, some of whom had tried to evade the U.S. Coast Guard.<sup>101</sup>

Ashcroft’s decision in *D-J-* marked an important departure from the traditional inquiry regarding flight risk and public safety threat. A migrant may be detained pending civil immigration proceedings, he announced, if she poses a national security risk or her confinement would deter others from coming to the United States. The latter was a particularly striking justification, since it is a frequent reason given to impose criminal imprisonment, but not one that appears in civil detention norms. For a decade after its 2003 announcement, immigration judges used *D-J-* infrequently. However, during the summer of 2014, it played an important role in the federal government’s decision to detain children and mothers who began appearing in unusually large numbers. A federal court eventually stopped the government from using these criteria in this context.<sup>102</sup>

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96. *Id.* § 287(a)(2).

97. 8 C.F.R. § 236.1(d)(1).

98. *See* Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006).

99. *Id.* at 40.

100. *See id.* at 38–39.

101. *See* *D-J-*, 23 I. & N. Dec. 572, 577–79 (Att’y Gen. 2003).

102. *R.I.L-R v. Johnson*, No. 15-11 (JEB), 2015 WL 737117 (D.D.C. Feb. 20, 2015).

Unlike the penal context, there is no presumption that a migrant in civil immigration proceedings will be released.<sup>103</sup> Rather, the migrant carries the burden of showing that he is not likely to abscond and does not present a risk of endangering the community.<sup>104</sup> Migrants have a difficult time meeting this burden because they do not have a right to appointed counsel. Consequently, 44 percent of all migrants in removal proceedings, and an astonishing 84 percent of detained migrants in those proceedings, lack representation.<sup>105</sup> Even those who do obtain counsel frequently do so well after an ICE official has decided they merit detention. Obtaining bond is therefore a steep hurdle for migrants to overcome.

If the immigration judge concludes that a migrant does not pose a flight or safety threat, then the immigration judge should grant a bond. Actual release, however, is not guaranteed. The INA requires that any bond issued be at least \$1,500, and, unlike many criminal-law contexts, an immigration court bond must be paid in full. This is no small amount for migrants, especially given that, because of their incarceration, those who do receive bond have not had meaningful employment while detained. Even those who work inside the facility frequently earn as little as \$1.00 per day for up to forty hours of work per week.<sup>106</sup>

Moreover, when they do grant a bond, immigration judges frequently impose much higher amounts than the statutory minimum. A study of bond orders issued by New York immigration judges revealed that “[o]ver 75 [percent] of all bond settings are \$5,000 or more” and “35 [percent] of all bonds are \$10,000 and above.”<sup>107</sup> A migrant’s resources matter little in setting a bond amount. Indeed, an official guide for immigration judges advises that a migrant’s “[a]bility to pay is not dispositive” in setting a bond amount and is a “less significant factor” than whether the migrant has a fixed address, lawful immigration status in the United States, family ties, a criminal record, or other factors deemed “significant.”<sup>108</sup> With such high bond amounts and such little consideration of a migrant’s financial resources, it is not surprising that the

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103. See *D-J*, 23 I. & N. Dec. at 575, 581.

104. *Guerra*, 24 I. & N. Dec. at 40; see also *D-J*, 23 I. & N. Dec. at 581.

105. OFFICE OF PLANNING, ANALYSIS & TECH., U.S. DEP’T OF JUSTICE, FY 2012: STATISTICAL YEAR BOOK G1 fig.9 (2013); NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM 1 (2008).

106. See Varick Fed. Detention Facility, Detainee Handbook 10 (Jan. 11, 2010), <http://www.governmentillegals.org/2011FOIA13921SlaveLabor.pdf> (unpublished internal facility document describing the “Detainee Volunteer Work Program”). Employment of detained migrants is authorized by 8 U.S.C. § 1555 (2012).

107. INSECURE COMMUNITIES, *supra* note 93, at 11.

108. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, IMMIGRATION JUDGE BENCHMARK §§ I.H., I.I.2. (n.d.), [http://www.justice.gov/eoir/vll/benchmark/tools/Bond\\_Guide.pdf](http://www.justice.gov/eoir/vll/benchmark/tools/Bond_Guide.pdf).

New York bond study found that “55 [percent] of those who receive bond are unable to pay it.”<sup>109</sup> Those individuals consequently remain detained.

### B. Federal Criminal Immigration Prisoners

In addition to its expansive civil immigration powers, the federal government readily uses its criminal policing authority to imprison large numbers of migrants. The USMS is the federal policing agency responsible for pretrial custody of individuals suspected of all types of federal crimes, and a large portion of those within its custody are suspected of having committed a federal crime related to immigration activity.<sup>110</sup> These crimes include illegal entry, a misdemeanor punishable by up to six months imprisonment for a first offense, and illegal reentry into the United States, a felony punishable by as many as twenty years imprisonment.<sup>111</sup> The USMS expects to book 105,164 individuals for immigration crimes in fiscal year 2015 alone, just shy of half the 220,599 total people the Agency expects to take into custody that year, and almost double the 54,621 pretrial immigration detainees held in the 2007 fiscal year.<sup>112</sup> Federal prosecutors in U.S. Attorneys’ Offices then prosecute the detained individuals. In fiscal year 2010, U.S. Attorneys concluded 85,545 cases in which an immigration crime was the lead charge against the defendant.<sup>113</sup> These cases made up a remarkable 44.6 percent of total cases concluded by federal prosecutors that year, up from 25.9 percent four years earlier.<sup>114</sup> By fiscal year 2012, a remarkable 48 percent of all cases concluded were for immigration crimes.<sup>115</sup>

Upon conviction, most of these individuals were ordered into the custody of the BOP, the federal agency charged with maintaining custody of federal prisoners convicted of crimes. Given the growing number of immigration crime prosecutions, it is not surprising that the number of convicted offenders imprisoned in the federal prison system also grew, though relatively short prison sentences mean that they represent a lesser portion of the total convicted offender prison population. The percentage of immigration crime offenders in BOP’s custody rose from 10 percent in 2002 to 12 percent in 2010.<sup>116</sup> Figure 2

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109. INSECURE COMMUNITIES, *supra* note 93, at 11. Accounts of civil immigration detention in the 1980s suggest that migrants have long had difficulty meeting bond amounts. ROBERT S. KAHN, OTHER PEOPLE’S BLOOD: U.S. IMMIGRATION PRISONS IN THE REAGAN DECADE 72 (1996).

110. See MOTIVANS, *supra* note 6, at 3 tbl.2.

111. INA §§ 275(a), 276(a), (b)(2), 8 U.S.C. §§ 1325(a), 1326(a), (b)(2) (2012).

112. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 230889, FEDERAL JUSTICE STATISTICS, 2007—STATISTICAL TABLES tbl.1.1 (2010); USMS, FY 2015 BUDGET, *supra* note 55, at 7, 8.

113. MOTIVANS, *supra* note 80, at 12 tbl.6.

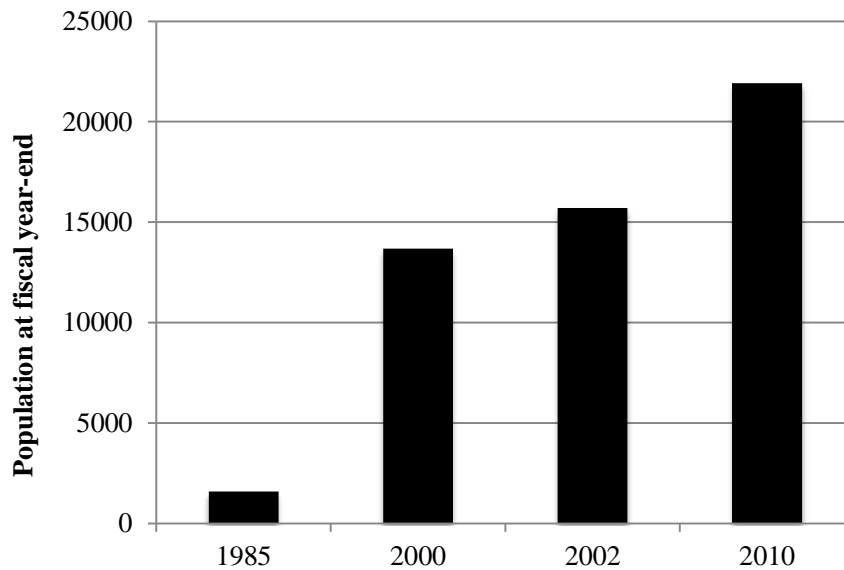
114. See *id.*

115. MOTIVANS, *supra* note 6, at 12 tbl.6.

116. MOTIVANS, *supra* note 80, at 23 (stating that 12 percent of federal prisoners in 2010 were immigration offenders); see *id.* at 22 tbl.13 (noting that 82.4 percent of people convicted of an immigration crime in FY 2010 and 91 percent convicted in 2006 were sentenced to prison);

shows that this growth is indicative of a much longer pattern of increased post-conviction imprisonment.<sup>117</sup>

FIGURE 2  
POST-CONVICTION IMMIGRATION OFFENDERS IN FEDERAL PRISON



### C. State Immigration Prisoners

Following the federal government’s model, some states—most notably Arizona—have also made frequent use of their criminal authority in ways that implicate immigration imprisonment. They have done this by creating substantive criminal laws and regulating criminal procedure.

Arizona’s experiment with human smuggling illustrates states’ reliance on substantive criminal lawmaking authority. In 2005, that State’s legislature criminalized “intentionally engag[ing] in the smuggling of human beings for

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MARK MOTIVANS, U.S. DEP’T OF JUSTICE, NCJ 238581, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010, at 34 tbl.13 (2012, rev. 2013) (stating that there were 15,711 immigration offenders in BOP custody in 2002); PAIGE M. HARRISON & JENNIFER C. KARBERG, U.S. DEP’T OF JUSTICE, NCJ 198877, PRISON AND JAIL INMATES AT MIDYEAR 2002, at 1 (stating there were 161,681 prisoners in BOP custody in 2002).

117. MOTIVANS, NCJ 238581, *supra* note 116 (stating that the number of post-conviction immigration offenders in federal custody was 15,711 in 2002 and 21,917 in 2010); JOHN SCALIA & MARIKA F.X. LITRAS, U.S. DEP’T OF JUSTICE, NCJ 191745, IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 2000, at 5 (2002) (stating that the number of post-conviction immigration offenders in federal prison was 1,593 in 1985 and 13,676 in 2000). Unfortunately, consistently tabulated data for other years are not publicly available.



profit or commercial purpose.”<sup>118</sup> Without question, the law was meant to sanction people who are paid to clandestinely bring migrants into Arizona. Even before this new anti-smuggling law went into effect, however, prosecutors in Maricopa County were creatively retooling it to target the migrants smuggled, as well.<sup>119</sup> The Maricopa County Attorney and Sheriff each created units within their offices to target this brand of human smuggling that equated the people who pay to be snuck into the United States with those who are paid. Within a few months, “hundreds of migrants were arrested in Maricopa County for smuggling themselves.”<sup>120</sup>

One early victory for this innovative self-smuggling strategy, for example, involved a man who had been riding under a piece of carpet in the bed of a pickup truck.<sup>121</sup> Maricopa County Sheriff’s Office deputies chased the truck at speeds in excess of one hundred miles per hour after noticing that it had a malfunctioning brake light. Though the driver was never caught, this migrant was arrested and convicted of conspiring to smuggle himself.<sup>122</sup> The law’s implementation criminalized certain behavior related to migration itself and, as such, resulted in the prosecution and conviction of migrants for offenses for which they were then subject to state incarceration.

Separately, Arizona elected officials adopted a series of criminal-procedure reforms targeted at keeping migrants charged with crimes in jail longer. First, the Arizona legislature enacted a statute requiring all state detention facilities to determine the citizenship status of all arrestees.<sup>123</sup> At the same time, they mandated that state judges consider a person’s immigration status when deciding whether to grant bail.<sup>124</sup> Second, voters amended the State Constitution to add a provision prohibiting judges from granting bail “[f]or serious felony offenses . . . if the person charged has entered or remained in the United States illegally.”<sup>125</sup> The State legislature subsequently defined “serious felony offense” for these purposes to include most state felonies.<sup>126</sup> While the underlying offenses in cases subject to these rules could be related to any type of crime, the salient feature of these detention measures is the identity and

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118. Act of Mar. 14, 2005, sec. 3, 47 Ariz. Sess. Laws 1st Reg. Sess. ch. 2 (codified as amended at ARIZ. REV. STAT. ANN. § 13-2319 (2015)).

119. Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1759 (2011). After legal challenges in state and federal courts spanning several years, a federal district court held that federal immigration law preempts section 13-2319. *We Are Am. v. Maricopa Cnty. Bd. of Supervisors*, 297 F.R.D. 373, 392 (D. Ariz. 2013).

120. Eagly, *supra* note 119, at 1762.

121. *See State v. Barragan-Sierra*, 196 P.3d 879, 882–83 (Ariz. Ct. App. 2008).

122. *See id.*

123. Eagly, *supra* note 119, at 1762 (discussing ARIZ. REV. STAT. ANN. § 13-3906 (2010)).

124. *Id.* (discussing ARIZ. REV. STAT. ANN. § 13-3967(B)(11)).

125. ARIZ. CONST. art. II, § 22(4).

126. Act of June 28, 2006, sec. 3, 47 Ariz. Sess. Laws 2d Reg. Sess. ch. 380 (codified as amended at ARIZ. REV. STAT. ANN. § 13-3961(A)(b) (2015)). Arizona recognizes six classes of felonies, ARIZ. REV. STAT. ANN. § 13-601(A), but only class 1 through class 4 felonies are included in the “serious felony offense” definition. *Id.* § 13-3961(A)(b).

immigration status of the criminal defendant, thus creating another form of immigration imprisonment. These defendants, because of their status, are likely to be detained when a similarly situated U.S. citizen defendant would not.

In a doubly harsh interaction of these two sets of laws, because human smuggling, including self-smuggling, is a felony, “[u]ndocumented immigrants charged with smuggling themselves could now be detained without any possibility of bond.”<sup>127</sup> After the Arizona Supreme Court ordered that defendants potentially subject to the no-bail provision receive a hearing with appointed counsel within twenty-four hours of their initial appearance in court, the state legislature gave courts up to seven days to schedule a no-bail hearing.<sup>128</sup> Meanwhile, “Maricopa County made a policy decision that indigent counsel could not be appointed until arraignment. As a result, defendants could remain detained for up to two weeks before obtaining a full [no-bail] hearing with counsel present.”<sup>129</sup> After these changes, few migrants charged with smuggling themselves into Arizona managed to get out of jail on bail.<sup>130</sup> In this case, the combination of the migration-related criminal activity and the migrant identity of the defendant led to immigration imprisonment.

Not content with its unprecedented self-smuggling prosecutions leading to nearly automatic detention and especially harsh bond requirements for migrants accused of any crime, Arizona adopted other substantive crimes and criminal procedure features intending to imprison unauthorized migrants. In 2005, the legislature criminalized aggravated identity theft, punishable by up to seven years imprisonment, and trafficking in identity documents, punishable by up to ten years imprisonment.<sup>131</sup> Both of these punishments target use of identifying information not belonging to the accused regardless of whether the identification information was fictitious or belonged to a real person. Two years later, in 2007, the Arizona legislature authorized law enforcement agencies to detain for up to seven days any witness who, “because of the immigration status of the person,” may not be available to testify at a human smuggling trial as a result of having been removed.<sup>132</sup> A year later, the legislature enacted a statute that allows judges to enhance a minimum or maximum sentence if the defendant is found beyond a reasonable doubt to be,

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127. Eagly, *supra* note 119, at 1763.

128. *See id.* at 1764–65.

129. *Id.* at 1765.

130. *Id.*

131. *See* Act of Apr. 25, 2005, sec. 3, 47 Ariz. Sess. Laws 1st Reg. Sess. ch. 190 (codified as amended at ARIZ. REV. STAT. ANN. §§ 13-2009, -2010). Aggravated identity theft is a class 3 felony, for which the maximum term of imprisonment is seven years. ARIZ. REV. STAT. ANN. § 13-702(d). Trafficking in identity documents is a class 2 felony, for which the maximum term of imprisonment is ten years. *Id.*

132. Act of May 4, 2007, sec. 1, § 13-4085(A), (E), 48 Ariz. Sess. Laws 1st Reg. Sess. ch. 178 (codified at ARIZ. REV. STAT. ANN. § 13-4085(A), (E)); *see also* Eagly, *supra* note 119, at 1766.

or admits to being, in the United States without authorization.<sup>133</sup> Again, these provisions either directly criminalize—and punish through imprisonment—migration-related activity on the state level or, alternatively, create mechanisms that result in the detention of migrants as a consequence of their status or migration-related conduct.

Arizona has undoubtedly taken the lead in states' contemporary efforts to use their criminal law and procedure to expand immigration imprisonment. It has not, however, been alone. Oklahoma, for example, imposes a minimum of one year of imprisonment for transporting, concealing, harboring, or sheltering anyone known to be present in the United States in violation of immigration law, or for doing so in reckless disregard of the fact that the person is present in the United States in violation of immigration law.<sup>134</sup> Florida<sup>135</sup> and Missouri<sup>136</sup> have similar statutes, both of which establish violations punishable by imprisonment.

At least three other states—California, Oregon, and Wyoming—“criminalize[] the use of false proof of citizenship or permanent residence documents.”<sup>137</sup> All three rely on imprisonment to sanction violations of these offenses, though they differ in severity quite dramatically. Wyoming punishes the intentional use of false documents to conceal citizenship or permanent resident status by as little as six months,<sup>138</sup> while California requires at least five years imprisonment for doing much the same.<sup>139</sup> Oregon imposes a maximum term of five years imprisonment for using someone else's citizenship status or “alien identification number,” a unique number assigned to all migrants who seek lawful immigration status.<sup>140</sup> Yet another state, Colorado, criminalizes human smuggling, but, unlike Arizona, appears not to apply this statute to the smuggled migrants.<sup>141</sup> Lastly, Missouri has a statutory no-bail

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133. Act of July 7, 2008, sec. 23, § 13-701(D)(21), 48 Ariz. Sess. Laws 2d Reg. Sess. ch. 301 (codified at ARIZ. REV. STAT. ANN. § 13-701(D)(21)) (referencing failure to comply with INA §§ 273, 274, 275, 276, 278, 8 U.S.C. §§ 1323, 1324, 1325, 1326, 1328 (2012)); *see also* Eagly, *supra* note 120, at 1766.

134. OKLA. STAT. ANN. tit. 21, § 466(A)–(B) (2015).

135. FLA. STAT. § 787.07 (2015) (classifying human smuggling as a third-degree felony); *id.* § 775.082(3)(e) (authorizing up to a five-year prison term); *id.* § 775.084(4)(a)(3) (authorizing as many as ten years imprisonment for habitual offenders).

136. MO. REV. STAT. § 577.675(1), (2) (2014) (imposing at least one year imprisonment in the version of the statute effective through December 31, 2016, and classifying the crime as a “Class D” felony, punishable by up to seven years imprisonment per MO. REV. STAT. § 558.011, in the version effective January 2, 2017).

137. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1599 (2008).

138. WYO. STAT. ANN. § 6-3-615(a) (2015).

139. CAL. PENAL CODE § 114 (West 2015).

140. OR. REV. STAT. § 165.800(2), (4)(b)(D) (2013) (defining terms related to identity theft); *id.* § 161.605(3) (setting a maximum imprisonment sentence of five years for a Class C felony).

141. COLO. REV. STAT. § 18-13-128 (2014); *see also* *People v. Fuentes-Espinoza*, No. 08CA1231, 2013 WL 174439 (Colo. Ct. App. Jan. 17, 2013) (upholding statute's constitutionality).

provision,<sup>142</sup> and a Texas legislator recently proposed a bill that would prevent unauthorized migrants from participating in community supervision programs.<sup>143</sup> Immigration imprisonment is thus a feature not only of federal but also of state criminal policing.

#### D. Federal-State Crossover Prisoners

In addition to federal and state reliance on their own lawmaking powers, for many years migrants were imprisoned in large numbers through an innovative type of intergovernmental cooperation. Until federal courts largely curtailed the practice due to concerns about its encroachment on the Fourth Amendment's probable cause requirement, ICE made ready use of immigration detainers (sometimes referred to as "immigration holds").<sup>144</sup> A detainer is a request by ICE to a law enforcement agency holding a potentially removable migrant already in its custody to postpone releasing the migrant for up to forty-eight hours after the criminal-law justification for the detention ends.<sup>145</sup> In the twenty-two months spanning October 2011 to August 2013, ICE issued 436,478 detainers.<sup>146</sup>

Stemming from the INA's instruction that immigration officials target migrants convicted of certain offenses for civil detention and removal,<sup>147</sup> detainers blend administrative and criminal confinement into immigration imprisonment. By design, detainers frequently extend immigration imprisonment. Migrants subject to a detainer are confined during the forty-eight hour window that ICE requests.<sup>148</sup> Sometimes judges view a detainer as a sign that the person will abscond if given the opportunity.<sup>149</sup> As a result, judges

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against preemption challenge), *cert. granted in part*, No. 13SC128, 2014 WL 1190061 (Colo. Mar. 24, 2014).

142. MO. REV. STAT. § 544.470 (2014).

143. S.B. 174, 84th Leg., Reg. Sess. (Tex. 2015).

144. See Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, 634, 676 (2013); see also Complaint at 1, *Roy v. Cnty. of Los Angeles*, No. CV-12-9012-RGK (FFMx) (C.D. Cal. Oct. 19, 2012), [http://legalactioncenter.org/sites/default/files/Roy v. County of Los Angeles--Complaint.pdf](http://legalactioncenter.org/sites/default/files/Roy%20v.%20County%20of%20Los%20Angeles--Complaint.pdf) (noting that "immigration detainer" and "immigration hold" are often used interchangeably); Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 173–74 (2008) (describing detainers as central to CAP).

145. 8 C.F.R. § 287.7(d) (2015); see also *Galarza v. Szalczyk*, 745 F.3d 634, 642 (3d Cir. 2014).

146. *Targeting of ICE Detainers Varies Widely by State and by Facility*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Feb. 11, 2014), <http://trac.syr.edu/immigration/reports/343>. The report notes that it does not include data for February, April, or September 2013, during this twenty-two month period. *Id.* Fifty percent of migrants had a conviction of some type on their records, while the rest did not. *Id.*

147. See Lasch, *Enforcing the Limits*, *supra* note 144, at 183.

148. 8 C.F.R. § 287.7(d) (authorizing detention in the custody of jail or prison officials for up to forty-eight hours to allow DHS to take the arrestee into civil immigration detention).

149. See *State v. Fajardo-Santos*, 973 A.2d 933, 940 (N.J. 2009) ("[T]he lodging of a detainer marks a change in circumstances that can affect whether a defendant will fail to appear.

deny bail or set it at an amount too high for migrants with a detainer to meet.<sup>150</sup> At other times, arrestees subject to an immigration detainer remain imprisoned even when a court has granted bail.<sup>151</sup> Maria Miranda-Olivares, for example, could not get out of jail because guards told her she would not be allowed to leave even if she posted the bond amount set by a judge.<sup>152</sup> Similarly, officials at the Lehigh County Prison in Pennsylvania refused to release Ernesto Galarza even after he posted bail, simply because ICE had issued a detainer against him.<sup>153</sup>

Furthermore, at times, detainers work to exclude migrants from jail diversion programs, into which migrants would otherwise stand a good chance of admission.<sup>154</sup> Diversion programs such as drug rehabilitation are frequently credited with reducing recidivism and prison costs.<sup>155</sup> In a review of immigration detainers lodged against inmates at New York City's Rikers Island jail, however, the New York City Bar Association noted that, instead of leaving jail to enter into a diversion program, "immigrants with detainers remain at Rikers until the criminal case is adjudicated in the traditional manner, which, if a sentence results or no bail is paid, may result in days or months of incarceration before transfer to an immigration facility."<sup>156</sup>

Any of these events effectively prolongs a migrant's criminal incarceration. A study of four years of detention data from Travis County, Texas, which includes Austin, revealed that inmates subject to a detainer remained imprisoned prior to trial almost three times longer than those without a detainer—from sixty-five to seventy-six days for inmates with a detainer compared to twenty-two to twenty-six days for those without.<sup>157</sup> With some

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Judges may therefore consider that development in deciding whether to modify bail.”). Though *Fajardo-Santos* is, to date, the only State supreme court decision to address a detainer's impact on bail, advocates regularly claim that judges see detainers as an adverse factor in bail determinations. See, e.g., IMMIGRANT LEGAL RES. CTR., REVISED 2012 ICE DETAINER GUIDANCE: WHO IT COVERS, WHO IT DOES NOT, AND THE PROBLEMS THAT REMAIN 6–7 (2012), [http://www.ilrc.org/files/documents/detainer\\_guidance\\_plus\\_addendums.pdf](http://www.ilrc.org/files/documents/detainer_guidance_plus_addendums.pdf).

150. See AARTI SHAHANI, JUSTICE STRATEGIES, NEW YORK CITY ENFORCEMENT OF IMMIGRATION DETAINERS: PRELIMINARY FINDINGS 4 (2010) (noting that, of noncitizens held in New York City jails on criminal charges, 35.8 percent of those without a detainer were released on bail, while only 7 percent of those with a detainer were able to make bail).

151. *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*3–4 (D. Or. Apr. 11, 2014); see also Complaint, *Roy v. Cnty. of Los Angeles*, *supra* note 144, at 1, 2, 3 (alleging that the Los Angeles County jail regularly denies migrants release after the forty-eight hour window expires and subjected 19,725 people to this practice in 2011 alone).

152. *Miranda-Olivares*, 2014 WL 1414305, at \*4.

153. *Galarza v. Szalczyk*, 745 F.3d 634, 637 (3d Cir. 2014).

154. See COMM. ON CRIMINAL JUSTICE OPERATIONS, N.Y.C. BAR, IMMIGRATION DETAINERS NEED NOT BAR ACCESS TO JAIL DIVERSION PROGRAMS 3 (2009).

155. See Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 NYU REV. L. & SOC. CHANGE 235, 243–44 (2009).

156. COMM. ON CRIMINAL JUSTICE OPERATIONS, N.Y.C. BAR, *supra* note 154.

157. ANDREA GUTTIN, IMMIGRATION POLICY CTR., THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS 12 fig.5 (2010).

variation, this trend holds true for all but the most minor misdemeanor offenses.<sup>158</sup> An analysis of detainees in New York came to a similar conclusion. It found that “noncitizens charged with drug crimes and with an ICE detainer spend [seventy-three] days longer in jail before being discharged, on average, than those without an ICE detainer,” even after controlling for race and offense level.<sup>159</sup>

Until recently, detainers often prolonged detention because many law enforcement agencies believed that detainers were obligatory.<sup>160</sup> In practice, this means that police departments and sheriff’s offices regularly extended confinement beyond a migrant’s criminal release date for no reason other than the ICE detainer.<sup>161</sup> After previously taking the position that detainers were mandatory,<sup>162</sup> federal officials are now clear that detainers are merely requests to keep the arrestee imprisoned. Indeed, the standard detainer form that ICE used for years explicitly noted, “**IT IS REQUESTED THAT YOU: Maintain custody of the subject for a period NOT TO EXCEED 48 HOURS, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody.**”<sup>163</sup> A few lines later, the form adds, “**you are not authorized to hold the subject beyond these 48 hours.**”<sup>164</sup> The only federal circuit to have addressed whether detainers are mandatory takes the position that they are not.<sup>165</sup>

Immigration detainers suffered a heavy blow in 2014 when a federal court concluded that they violate the Fourth Amendment.<sup>166</sup> To avoid civil liability for illegally detaining individuals, law enforcement agencies nationwide quickly changed their detainer practices by limiting the extent to which they

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158. *Id.*

159. SHAHANI, *supra* note 150, at 3.

160. *E.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2014) (noting Lehigh County, Pennsylvania’s position that detainers are mandatory obligations on local law enforcement agencies); *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*5 (D. Or. Apr. 11, 2014) (recording county jail officials’ argument that they were required to maintain a woman in custody because ICE had issued a detainer against her); *see also* Lasch, *Enforcing the Limits*, *supra* note 144, at 174 (describing local law enforcement agencies’ willingness to comply with detainer requests). *But see* Lasch, *Federal Immigration Detainers*, *supra* note 144, at 678 (describing budding opposition to detainers).

161. *See, e.g.*, *Miranda-Olivares*, 2014 WL 1414305, at \*5 (explaining that jail officials kept the arrestee, against whom ICE had lodged an immigration detainer, in jail for nineteen hours after she should have been released at the completion of her sentence).

162. Lasch, *Federal Immigration Detainers*, *supra* note 144, at 676.

163. DEP’T OF HOMELAND SEC., DHS FORM I-247 (12/12), IMMIGRATION DETAINER—NOTICE OF ACTION (2012), <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.

164. *Id.*

165. *Galarza*, 745 F.3d at 642.

166. *See Miranda-Olivares*, 2014 WL 1414305, at \*9–11.

abide by detainers or by prohibiting compliance entirely.<sup>167</sup> A few months later, DHS itself announced a change to its detainer practice. Instead of issuing requests for detention, ICE now issues only “requests that state or local law enforcement notify ICE of a pending release during the time that person is otherwise in custody under state or local authority.”<sup>168</sup> This likely cures any Fourth Amendment concern, but it does not alter the detainer’s utility in identifying individuals to imprison by pairing state and local police work with ICE investigative abilities. All it does is shift the inquiry forward in time.

### III.

#### THE IMMIGRATION-IMPRISONMENT PIPELINE

Immigration imprisonment clearly occupies a prominent role in contemporary immigration law enforcement policies and results in the confinement of upwards of half a million people annually. Under the current state of criminal and civil immigration law enforcement, imprisonment for allegedly violating laws regulating migration can result from a variety of policing initiatives. Some are unquestionably features of the criminal justice system, while others are unmistakably part of the federal government’s civil law enforcement regime. Still others are creatures of a different ilk, making their categorization into one of these two traditional areas of law rather difficult. Whether they are civil or criminal law enforcement tactics, or something more difficult to classify, they all share one key characteristic: formal boundaries are becoming increasingly less relevant as criminal tactics reflect civil norms and vice versa. Consequently, the pathways to immigration imprisonment emblemize the burgeoning crimmigration law enforcement regime. To understand the immigration-imprisonment pipeline, this Part undertakes the first systematic mapping of the many ways migrants are and have been incarcerated due to migration activity.

#### A. *Federal Civil Immigration Imprisonment*

The nation’s civil-immigration detainees are apprehended through the efforts of two principal units within DHS: Customs and Border Protection (CBP), in particular its Border Patrol division, and ICE. Both Agencies are charged with identifying and apprehending potentially removable

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167. Am. Civil Liberties Union, *Recent Federal Court Decision Finding It Unlawful for a Sheriff’s Department to Honor ICE Detainer Requests* (May 2, 2014), [http://www.ilrc.org/files/documents/letter\\_to\\_counties\\_re\\_miranda-olivares.pdf](http://www.ilrc.org/files/documents/letter_to_counties_re_miranda-olivares.pdf).

168. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t et al., *Secure Communities 2* (Nov. 20, 2014) [hereinafter Johnson Memo], at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

individuals.<sup>169</sup> With more than forty thousand agents between the two Agencies,<sup>170</sup> both have done so with immense frequency. Combined, they apprehended 662,483 individuals in fiscal year 2013.<sup>171</sup> ICE places these individuals in custody when its Enforcement and Removal Operations division decides that continued detention is appropriate.<sup>172</sup>

Initial detention at the time that immigration authorities charge a migrant as removable is not the only route to civil immigration detention. ICE also maintains a specialized law enforcement program whose mission is to identify, locate, and arrest migrants with an outstanding removal order, migrants who returned to the United States without authorization after having been removed, or migrants who have been convicted of a crime.<sup>173</sup> This initiative, the National Fugitive Operations Program (NFOP), has 129 “fugitive operations teams” (an increase of twenty-five teams from recent years)<sup>174</sup> and is supported by a “fugitive operations” support center.<sup>175</sup> ICE claims that NFOP has “dramatically expand[ed]” its ability to “locate, arrest and remove” migrants who “ha[ve] failed to depart the United States based upon a final order of removal, deportation or exclusion; or who ha[ve] failed to report to [ICE] after receiving notice to do so.”<sup>176</sup> The former ICE Director John Morton explained NFOP’s role in the Agency’s enforcement strategy: “[T]he sound administration of the nation’s immigration system depends on an efficient, fair, and meaningful removal process,” thus “final orders of removal should be enforced and . . . those who knowingly disobey or evade a final order of removal should be apprehended and removed.”<sup>177</sup>

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169. JOHN F. SIMANSKI, U.S. DEP’T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 1–2 (2014), [https://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf).

170. CONGRESSIONAL BUDGET JUSTIFICATION FY 2015, *supra* note 65, at CBP-14, ICE-87.

171. *See* SIMANSKI, *supra* note 169, at 3 tbl.1.

172. *Id.* at 2.

173. *See* Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enf’t, to Field Office Directors and All Fugitive Operation Team Members, National Fugitive Operations Program: Priorities, Goals, and Expectations 1 (Dec. 8, 2009), [http://www.ice.gov/doclib/detention-reform/pdf/nfop\\_priorities\\_goals\\_expectations.pdf](http://www.ice.gov/doclib/detention-reform/pdf/nfop_priorities_goals_expectations.pdf) [hereinafter NFOP Memo].

174. *See* MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., CRS REPORT R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 17 (2013). The program counted fifty teams in October 2006. OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-07-34, AN ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT’S FUGITIVE OPERATIONS TEAMS 1 (2007) [hereinafter FOT ASSESSMENT], [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_07-34\\_Mar07.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_07-34_Mar07.pdf).

175. *Fugitive Operations*, U.S. IMMIGRATION & CUSTOMS ENF’T, <http://www.ice.gov/fugitive-operations> (last visited Mar. 7, 2014).

176. U.S. IMMIGRATION & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., FACT SHEET: ICE FUGITIVE OPERATIONS PROGRAM (2007), <http://www.colliergov.net/Modules/ShowDocument.aspx?documentid=15660>.

177. NFOP Memo, *supra* note 173, at 1.



Since 2003, when Congress first funded NFOP,<sup>178</sup> the program has, with few exceptions, steadily resulted in more arrests year after year.<sup>179</sup> NFOP agents search for suspects “at worksites, in residential areas, and at other locations.”<sup>180</sup> In fiscal year 2003, for example, NFOP claimed 1,900 arrests.<sup>181</sup> The next year, NFOP operations resulted in 6,584 arrests.<sup>182</sup> By fiscal year 2013, however, NFOP officers made 31,222 arrests, including 23,504 migrants with a criminal record.<sup>183</sup> Surely this impressive growth is at least in part attributable to the remarkable budget increases the program has seen since its launch in 2003 with a \$9 million budget.<sup>184</sup> “By FY 2010, its budget had grown to \$230 million,” though that dropped to \$132.9 million in fiscal year 2013.<sup>185</sup>

Though NFOP teams are supposed to target migrants who pose a public safety risk,<sup>186</sup> there is reason to doubt that actually occurs. From June 2004 to January 2006, the Agency required that only 75 percent of people apprehended by each NFOP team be migrants with a criminal history.<sup>187</sup> Even if teams met this goal, a quarter of arrestees would have no criminal history. NFOP apprehension data analyzed by the department’s inspector general suggests that many teams did not meet this goal. From the 2003 to 2006 fiscal years, the inspector general found that NFOP teams reported apprehending 16,712 non-criminals and 13,661 criminals.<sup>188</sup> NFOP teams continue to capture non-criminals. Only 9 percent of NFOP arrests in 2007, for example, involved fugitive migrants with criminal convictions.<sup>189</sup> Similarly, according to ICE, fewer than half the people arrested by an NFOP team during the fourth quarter of the 2010 fiscal year had any criminal history.<sup>190</sup>

Even considering only those migrants with a conviction, not all pose a public safety risk. DHS does not provide data about how many of the migrants apprehended through NFOP with a criminal history had been convicted of a violent crime. An independent review of 2007 NFOP arrest data, however,

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178. Though Congress created NFOP in fiscal year 2002, it did not receive its own appropriations until the following year. See FOT ASSESSMENT, *supra* note 174, at 5, 8.

179. See ROSENBLUM & KANDEL, *supra* note 174, at 21 tbl.6.

180. *Id.* at 17.

181. DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 102 (2013).

182. ROSENBLUM & KANDEL, *supra* note 174, at 21 tbl.6.

183. U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2015, at 61 (2014) [hereinafter DHS BUDGET-IN-BRIEF FY 2015].

184. See MEISSNER ET AL., *supra* note 181, at 102.

185. *Id.*; ROSENBLUM & KANDEL, *supra* note 174, at 19 tbl.5.

186. NFOP Memo, *supra* note 173, at 2.

187. FOT ASSESSMENT, *supra* note 174, at 8.

188. *Id.* at 9 tbl.2.

189. MARGOT MENDELSON ET AL., MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE’S FUGITIVE OPERATIONS PROGRAM 3 (2009).

190. U.S. IMMIGRATION & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., SECURE COMMUNITIES: QUARTERLY REPORT—FISCAL YEAR 2010 REPORT TO CONGRESS, FOURTH QUARTER 13 (2011), [http://www.ice.gov/doclib/foia/secure\\_communities/congressionalstatusreportfy104thquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy104thquarter.pdf).

indicated “aliens posing a threat to the community or with a violent criminal conviction represented just 2 percent of all [NFOP team] arrests.”<sup>191</sup>

Whether arrested because of an outstanding removal order, entry into the United States without authorization, or a conviction, individuals taken into custody by an NFOP team spend time in immigration imprisonment. Those with an outstanding removal order are likely removed rather quickly without any additional immigration court process. Individuals who entered without authorization can be placed in removal or criminal proceedings at the federal government’s election, and those who have already been convicted are placed in removal proceedings where they are almost always subject to mandatory detention.

Another program known as the “Criminal Alien Removal Initiative” (CARI) adds to the array of immigration-imprisonment entry points. Not much is known about CARI; indeed, its very existence appears to have been discovered accidentally by New Orleans immigrants’ rights advocates.<sup>192</sup> Like NFOP, CARI appears to target migrants with a criminal record.<sup>193</sup> Though advocates claim that CARI operations have resulted in detention of migrants without a criminal record, no systematic examination of the initiative has occurred, so it is impossible to verify these claims.<sup>194</sup> At this time, it is equally impossible to determine how many people have been detained through CARI. The recent revelation of its existence at the very least indicates that the full extent of federal programs in this area is not publicly known.

### *B. Federal Criminal Immigration Imprisonment*

To identify, apprehend, and confine tens of thousands of criminal immigration law offenders, the federal government relies on prosecutorial and judicial initiatives that single out migrants for expedited treatment in the criminal justice system. This allows the federal government to move more people through federal prisons. One prosecutorial innovation in particular, known as fast-track plea agreements, has significantly raised the stakes for migrants who interact with the criminal justice system. Fast-track pleas offer immigration-crime defendants a reduced sentence in exchange for the migrant’s quick consent to removal.<sup>195</sup> Alan D. Bersin was the U.S. Attorney

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191. MENDELSON ET AL., *supra* note 189, at 13.

192. SAKET SONI ET AL., NEW ORLEANS WORKERS’ CTR. FOR RACIAL JUSTICE, THE CRIMINAL ALIEN REMOVAL INITIATIVE IN NEW ORLEANS: THE OBAMA ADMINISTRATION’S BRUTAL NEW FRONTIER IN IMMIGRATION ENFORCEMENT 5 (2013).

193. See Katie Rucke, *ICE Hunts Immigrants in New Orleans*, MINTPRESS NEWS (Jan. 31, 2014, 5:00 AM), <http://www.mintpressnews.com/178507/178507>.

194. See SONI ET AL., *supra* note 192, at 7.

195. See Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 301 (1998); Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, to All U.S. Attorneys, Department Policy on Early Disposition or “Fast-Track” Programs 3–4 (Jan. 31, 2012) [hereinafter Cole Memo], [www.justice.gov/dag/fast-track-program.pdf](http://www.justice.gov/dag/fast-track-program.pdf).

for the Southern District of California when fast-track plea agreements emerged and later the Commissioner of CBP. He has documented how these agreements came into being. He notes that the federal government began to devote considerable resources to immigration law violations along the nation's southwest border in the mid-1990s and gave the Border Patrol in particular more staff, more surveillance equipment, and, most importantly, a new computerized database with which to track every person apprehended entering the United States clandestinely.<sup>196</sup>

This computerized tracking system positioned immigration officials quite well to identify individuals for prosecution for the federal crime of illegal reentry after removal, an offense that is quite difficult to defend against and that authorizes as much as twenty years imprisonment (though few receive that much).<sup>197</sup> Realizing that the local federal criminal justice system “was ill equipped to handle the large number of additional criminal alien cases,” Bersin and his staff launched “a ‘fast-track’ system whereby discovery was provided, and a pre-indictment plea offer made, within [twenty-four] hours of arraignment.”<sup>198</sup> Defendants could usually plead to the misdemeanor federal crime of illegal entry, which caps imprisonment at six months for a first-time offense and two years for subsequent offenses.<sup>199</sup>

This practice spread like wildfire. Initially limited to the San Diego area, by the end of May 2009 there were twenty-seven fast-track programs in seventeen judicial districts. On March 1, 2012, it became available for use in any jurisdiction in which felony illegal reentry offenses are prosecuted.<sup>200</sup> A 2013 analysis of immigration prosecutions nationwide between fiscal years 2006 and 2009 indicates that 38.1 percent of immigration prosecutions in districts that had a fast-track program were fast-tracked.<sup>201</sup> Most judicial districts that regularly use a fast-track program experienced an increase in the number of immigration criminal prosecutions alongside increased reliance on

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196. Bersin & Feigin, *supra* note 195, at 299–300.

197. INA § 276, 8 U.S.C. § 1326 (2012); *see also* Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 ARIZ. ST. L.J. 517, 521 (2006). The average sentence for illegal reentry offenders between 2008 and 2012 was nineteen months. U.S. SENTENCING COMM’N, QUICK FACTS: ILLEGAL REENTRY OFFENSES 1 (undated), [http://www.usc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Illegal\\_Reentry.pdf](http://www.usc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Illegal_Reentry.pdf).

198. Bersin & Feigin, *supra* note 195, at 300–01. Civil immigration authorities in South Texas created a conceptually similar initiative in the late 1980s to process a sudden large increase in asylum applications. KAHN, *supra* note 109, at 210. INS officials sought to decide 96 percent of asylum applications within three hours of interviewing the applicant. *Id.*

199. Bersin & Feigin, *supra* note 195, at 301; *see also* INA § 275.

200. *See* KIDEUK KIM, THE URBAN INST., ORGANIZATIONAL EFFICIENCY AND EARLY DISPOSITION PROGRAMS IN FEDERAL COURTS xii (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/244386.pdf>; Cole Memo, *supra* note 195, at 3–4.

201. KIM, *supra* note 200, at 40 exhibit 6.

fast-track pleas.<sup>202</sup> As Bersin put it, “[t]he fast track system allowed this explosion in filings.”<sup>203</sup>

The fast-track program directly increases immigration imprisonment in two ways. First, by raising the stakes of contesting prosecutors’ charges, fast-track plea agreements have not only hastened the pace of prosecutions but also increased the number of criminal immigration cases that prosecutors can lodge.<sup>204</sup> The U.S. Attorneys’ Office that Bersin oversaw, for example, went from filing 240 illegal reentry cases in 1994 to 1,334 in 1995.<sup>205</sup> By 2001, roughly five thousand immigration prosecutions were fast-tracked.<sup>206</sup> Given that most immigration offenders are detained before and after conviction (and almost all are convicted), increasing the number of prosecutions means increasing the number of migrants confined in a given year. Second, the fast-track program applies only to migrants taken into federal custody. The enormous increase in prosecutions that the policy allows, therefore, also increases the number of migrants confined.

Specialized federal criminal procedures involving migrants, like the fast-track program, do not end there. Despite the requirement in Rule 11 of the Federal Rules of Criminal Procedure that “the court must address the defendant personally in open court” before accepting a plea of guilty or nolo contendere,<sup>207</sup> another initiative relaxes procedural protections afforded migrants by altering judges’ conduct. Through Operation Streamline, immigration defendants regularly appear en masse.<sup>208</sup> Rather than process each defendant’s case individually, federal judges address multiple defendants simultaneously. In some instances, a judge might go through the plea colloquy with as many as seventy defendants at once.<sup>209</sup> Bending normal federal criminal procedures allows federal prosecutors and judges to move substantial numbers of immigration defendants through the court system.

Though Operation Streamline allows judicial efficiency to rise, it does so at an important and obvious cost: comprehension. A judge speaking to a courtroom full of immigration defendants at the same time cannot be sure that they understand what is happening. Indeed, a judge cannot be sure what every defendant is saying or even whether every defendant is saying something. As the Ninth Circuit put it, Operation Streamline proceedings result in “an

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202. *Id.* at 34.

203. Bersin & Feigin, *supra* note 195, at 302.

204. Thomas E. Gorman, Comment, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. REV. 479, 485 (2010).

205. Bersin & Feigin, *supra* note 195, at 302.

206. Gorman, *supra* note 204, at 486.

207. FED. R. CRIM P. 11(b)(1).

208. See Joanna Jacobbi Lydgate, Comment, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 532 (2010).

209. See *United States v. Escamilla-Rojas*, 640 F.3d 1055, 1058 (9th Cir. 2011).

indistinct murmur or medley of yeses.”<sup>210</sup> The Ninth Circuit is an outlier in its resistance. Operation Streamline proceedings regularly operate in federal district courts throughout the Southwest.<sup>211</sup> Even in the Ninth Circuit, Operation Streamline continues, though in a slightly modified fashion; judges now accept pleas individually or in small groups while the rest of the plea colloquy can still be performed en masse.<sup>212</sup>

### C. State Immigration Imprisonment

Other programs have moved and continue to move migrants into jails and prisons as a result of state or local officers’ efforts. No initiative better reflects this practice than the much-discussed “287(g) program.” Under the presidencies of George W. Bush and Barack Obama, DHS relied heavily on intergovernmental law enforcement initiatives authorized by INA section 287(g). That statutory provision allows DHS to enter into agreements with local law enforcement agencies to essentially deputize local police officers to conduct their own investigations of violations of federal immigration law.<sup>213</sup> Though ICE has significantly scaled down its reliance on 287(g) programs to identify potentially removable individuals, the Agency continues to operate thirty-six 287(g) programs throughout the United States.<sup>214</sup> ICE claims that 287(g) has identified 373,800 potentially removable migrants since January 2006.<sup>215</sup> Though this figure does not indicate how many of those migrants were detained, there is reason to believe that 287(g) has resulted in hundreds of

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210. *United States v. Roblero-Solis*, 588 F.3d 692, 700 (9th Cir. 2009).

211. *See* Fernanda Santos, *Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border*, N.Y. TIMES, Feb. 12, 2014, at A12.

212. *See* *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1135 (9th Cir. 2013) (“[C]onclud[ing] that, although the court did not err by advising the defendants of their rights *en masse*, it erred by not questioning Arqueta-Ramos individually to ensure that she understood her rights.”); *United States v. Diaz-Ramirez*, 646 F.3d 653, 658 (9th Cir. 2011) (upholding an Operation Streamline proceeding after *Roblero-Solis*).

213. *See* INA § 287(g)(1), 8 U.S.C. § 1357(g)(1) (2012).

214. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENF’T, <http://www.ice.gov/factsheets/287g> [hereinafter *287(g) Fact Sheet*] (last visited Aug. 21, 2015); *FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources*, U.S. IMMIGRATION & CUSTOMS ENF’T (Dec. 20, 2012), <http://www.ice.gov/news/releases/1212/121221washingtondc2.htm#statement> (“ICE has also decided not to renew any of its agreements with state and local law enforcement agencies that operate task forces under the 287(g) program.”). One group of researchers noted that the task force model that DHS ended in 2012 is less efficient than the jail enforcement model that the department continues to use. RANDY CAPPS ET AL., *MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT* 29–30 (2011). In fact, DHS has increased the number of jail enforcement 287(g) agreements in place since 2012. *See id.* (noting that ICE maintained thirty-two jail enforcement agreements in December 2012); *287(g) Fact Sheet, supra* (stating that ICE currently operates thirty-four jail enforcement programs).

215. *287(g) Fact Sheet, supra* note 214.

thousands of detentions, because at least 108,000 detainers were issued as a result of 287(g) investigations during the 2009 and 2010 fiscal years alone.<sup>216</sup>

Meanwhile, a similar phenomenon has occurred at the state level. The one section of Arizona's Senate Bill 1070, the so-called "show-me-your-papers" law, that survived constitutional challenge requires state or local police officers to check the immigration status of people they suspect lack authorization to be present in the United States.<sup>217</sup> Though it raises important practical questions of how well-equipped police officers are to gauge whether a person is "unlawfully present" in the United States,<sup>218</sup> this requirement leaves little doubt that state and local police are to become central figures in regulating migration. Moreover, by converting police into immigration law investigators, the law forces officers to depart from the typical practice of investigating state criminal conduct. In the process, it increases the contact points through which immigration imprisonment might result.

At times, state governments and localities participate in moving individuals into immigration imprisonment by responding to financial incentives offered by the federal government. The State Criminal Alien Assistance Program (SCAAP) taps state and local criminal law enforcement processes to move migrants into immigration imprisonment by offering to pay part of the cost of confinement.<sup>219</sup> Created by a provision of the Violent Crime Control and Law Enforcement Act of 1994 and run by the Justice Department, SCAAP reimburses state and local governments "for a portion of the correctional officer salary costs associated with incarcerating"<sup>220</sup> unauthorized migrants who have been convicted of either one felony or two misdemeanors, and "were incarcerated for [four] or more consecutive days."<sup>221</sup>

To determine who fits the SCAAP eligibility criteria, the federal government requires that local law enforcement agents "us[e] 'due diligence' to identify and report eligible undocumented individuals to ICE," which determines whether they lack authorization to be in the United States.<sup>222</sup> By conditioning reimbursement on a requirement that police officials help identify potentially removable individuals, SCAAP widens the net of immigration law

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216. CAPPS ET AL., *supra* note 214, at 18.

217. *Arizona v. United States*, 132 S. Ct. 2492, 2509–10 (2012).

218. *Id.*

219. See Anjana Malhotra, *The Immigrant and Miranda*, 66 SMU L. REV. 277, 328 (2013) (describing SCAAP as "the central referral tool for incorporating local law enforcement agencies into civil and criminal immigration enforcement").

220. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-187, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS AND COSTS 1–2 (2011).

221. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, STATE CRIMINAL ALIEN ASSISTANCE PROGRAM (SCAAP) 2 (2014), [https://www.bja.gov/Funding/14SCAAP\\_Guidelines.pdf](https://www.bja.gov/Funding/14SCAAP_Guidelines.pdf) (guidelines for Fiscal Year 2014); see also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20301, 108 Stat. 1796, 1823–24 (codified at INA § 242, 8 U.S.C. § 1252 (2012)).

222. Malhotra, *supra* note 219, at 329.

screening—all while individuals are firmly within the custody of state or local officials.<sup>223</sup> After examining SCAAP's operations across several years, legal scholar Anjana Malhotra concluded that "SCAAP and ICE statistics suggest that local agencies are referring large numbers of individuals that could be subject to civil or criminal violations through SCAAP."<sup>224</sup> Malhotra found that, under the aegis of SCAAP, "local agencies referred more than 660,000 eligible criminal alien inmates to ICE" from 2004 to 2011, all of whom were potentially removable under civil immigration law.<sup>225</sup> Meanwhile, police agencies identified approximately another 162,000 detained migrants who "had been previously arrested at least once for a criminal or civil immigration offense prior to their referral," meaning they were likely eligible for criminal prosecutions for illegal reentry.<sup>226</sup>

#### D. Federal-State Crossover Immigration Imprisonment

While criminal and civil administrative law provide the legal basis justifying detention, the federal government has crafted an important set of initiatives designed to ensure that any migrant interacting with law enforcement who has engaged in unauthorized conduct remains within the control of policing authorities, which is to say, imprisoned. These initiatives meld criminal justice and administrative processes while simultaneously tapping the resources of federal, state, and local law enforcement agencies. Chief among these are the Criminal Alien Program (CAP) and Secure Communities.

CAP increases the government's ability to detain more people, with the goal of removing the maximum number of migrants who engage in criminal activity, regardless of whether that activity is directly related to immigration.<sup>227</sup> To achieve this objective, CAP depends on close collaboration between criminal law enforcement agencies and ICE.<sup>228</sup> Its sizeable dedicated staff—approximately 1,250 ICE officers—is assigned to jails and prisons nationwide as well as to off-site videoconferencing sites.<sup>229</sup> The ICE officers screen for removability of people arrested upon suspicion of committing a crime or incarcerated after conviction.<sup>230</sup> A specialized initiative within CAP provides additional resources to law enforcement agencies in the Phoenix area. Under this initiative, CAP personnel must respond to law enforcement requests about

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223. *See id.*

224. *Id.* at 331.

225. *Id.*

226. *See id.*

227. *See* Lasch, *Enforcing the Limits*, *supra* note 144, at 166–67. The CAP combines two initiatives launched in the 1980s, the Alien Criminal Apprehension Program (ACAP) and the Institutional Hearing Program (later dubbed the Institutional Removal Program (IRP)), to target migrants who come into contact with state or local criminal law enforcement authorities. *Id.*

228. *See* ROSENBLUM & KANDEL, *supra* note 174, at 14.

229. *See id.*

230. *See id.*

an arrestee's immigration status around-the-clock. In fiscal year 2011, this initiative alone resulted in more than 1,700 arrests.<sup>231</sup>

Another specialized CAP component, the Violent Criminal Alien Section (VCAS), flags for federal prosecutors individuals who have allegedly committed federal immigration crimes. In fiscal year 2013 alone, VCAS helped produce 7,650 criminal indictments.<sup>232</sup> To make this work possible, Congress has supported CAP with approximately \$1.4 billion between the 2004 and 2013 fiscal years, including a significant jump from \$6.6 million in 2004 to \$137.5 million in 2007.<sup>233</sup>

CAP has been quite successful with respect to the number of people taken into ICE custody. Between 2004 and 2011, the Agency arrested 1,116,877 people through CAP, making this the ICE program that led to most arrests during this eight-year period.<sup>234</sup> In New York, CAP is responsible for 77 percent of all ICE apprehensions, including almost 6,500 arrests in 2008.<sup>235</sup> Importantly, many of these individuals are not prosecuted or convicted of a crime. A study of CAP arrests in New York City, for example, showed that 37 percent of migrants taken into ICE custody through CAP had no criminal history; New York Police Department officers merely arrested and booked them and then transferred them to ICE.<sup>236</sup> Overall, then, CAP has expanded the federal government's practice of imprisoning migrants like no other single policy innovation.

Another DHS initiative, the Secure Communities program, likewise demonstrates the federal government's willingness to blur the criminal and civil law enforcement distinction to expand its ability to detain migrants. Launched in just six counties and Boston in 2008, the program was active in every jurisdiction in the United States by January 22, 2013.<sup>237</sup> Where CAP places ICE officers in jails and prisons throughout the country to gather the information necessary to determine whether an arrestee is potentially removable, Secure Communities relies on the state and local police officers who are already in those jails and prisons to gather that information and electronically forward it to DHS.<sup>238</sup> Even prior to this program, law

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231. *Id.*

232. DHS BUDGET-IN-BRIEF FY 2015, *supra* note 183, at 61.

233. ROSENBLUM & KANDEL, *supra* note 174, at 19 tbl.5.

234. *Id.* at 21 tbl.6.

235. INSECURE COMMUNITIES, *supra* note 94, at 6.

236. *See id.* at 5.

237. U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., SECOND CONGRESSIONAL STATUS REPORT COVERING THE FOURTH QUARTER FISCAL YEAR 2008 FOR SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 8 (2008) [hereinafter DHS STATUS REPORT]; U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., ACTIVATED JURISDICTIONS (2013) [hereinafter ACTIVATED JURISDICTIONS].

238. *See* Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1126 (2013) (explaining that



enforcement officers at various levels shared investigative information. When police officers across the country make arrests in furtherance of their traditional public safety functions, they routinely send fingerprint data to their state's criminal records repository.<sup>239</sup> Those state agencies then forward the fingerprint data to the Federal Bureau of Investigation (FBI) for criminal background checks.<sup>240</sup> Secure Communities builds on that time-tested practice by instructing the FBI to share the fingerprint data it receives from the local police with DHS, which then runs the data through its massive immigration-specific databases.<sup>241</sup> DHS then determines which arrestees are potentially removable from the United States for a civil violation of immigration laws.<sup>242</sup> Either before or after conclusion of the criminal process resulting from the migrant's arrest, ICE agents frequently take custody of migrants flagged through the Secure Communities database queries, and begin the removal process.<sup>243</sup> Indeed, ICE agents frequently take identified migrants into custody even when no criminal process follows the arrest, either because criminal charges were not filed or were dropped soon after filing. In this way, Secure Communities "has transformed the landscape of immigration enforcement by allowing ICE to effectively run federal immigration checks on every individual booked into a local county jail, usually while still in pretrial custody."<sup>244</sup>

Though it relies on the policing work of criminal justice actors, Secure Communities has had an enormous impact on civil immigration imprisonment. In 2009, the first full fiscal year after the program's launch, ICE removed 10,688 individuals who had been convicted of some crime.<sup>245</sup> ICE did not report how many were detained pending removal proceedings, but, given their criminal histories, the likelihood is that most spent time in an immigration prison. Indeed, 3,368 of these individuals were convicted of an aggravated felony or at least two felonies, making them subject to mandatory custody under INA section 236(c) or high-priority candidates for detention.<sup>246</sup> Four

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Secure Communities "seek[s] to establish . . . a 'virtual presence in every jail' at the moment that every arrestee nationwide is booked").

239. *Id.* at 1127.

240. TASK FORCE ON SECURE CMTYS., U.S. DEP'T OF HOMELAND SEC., FINDINGS AND RECOMMENDATIONS 4 (2011); *see also* Kalhan, *Immigration Policing*, *supra* note 238, at 1127.

241. TASK FORCE ON SECURE CMTYS., *supra* note 240, at 4; *see also* Kalhan, *supra* note 238, at 1127. According to Kalhan, the DHS database "holds records on over 148 million subjects who have had any contact with DHS, other agencies, and even other governments." *Id.*

242. TASK FORCE ON SECURE CMTYS., *supra* note 240, at 4-5; *see also* Kalhan, *supra* note 238, at 1128.

243. *See* Kalhan, *supra* note 238, at 1128.

244. AARTI KOHLI ET AL., THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1 (2011).

245. U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES: IDENT/IAFIS INTEROPERABILITY MONTHLY STATISTICS THROUGH SEPTEMBER 30, 2011, at 2 (2011).

246. *See id.* at 2, 83.

years later, in fiscal year 2013, Secure Communities identified “190,951 . . . individuals charged with or convicted of Level 1 offenses, which include violent crimes . . . and other aggravated felonies.”<sup>247</sup> An analysis of Secure Communities’ operations as of January 31, 2010, indicated that 83 percent of people identified through Secure Communities were booked into ICE custody, compared to 62 percent of all people apprehended by DHS.<sup>248</sup> Overall, according to a separate report analyzing data between the program’s launch in October 2008 and May 31, 2011, “more than 260,000 people were . . . booked into ICE custody as a result” of a Secure Communities database hit.<sup>249</sup> Importantly, at its highest point during the time span covered by this study, Secure Communities was active in roughly 45 percent of jurisdictions in the United States,<sup>250</sup> a far cry from the 100 percent coverage it later claimed,<sup>251</sup> suggesting that many more people were eventually identified and detained pursuant to this initiative.

Moreover, it seems that few are able to get out of detention on bond while removal proceedings are ongoing. ICE granted bond to a mere 2 percent of people taken into custody under Secure Communities, while only slightly more—6 percent—received bond redetermination hearings before an immigration judge.<sup>252</sup> On average, migrants detained through Secure Communities spent twenty-eight days confined, though researchers identified one person whom ICE had detained for more than five hundred days.<sup>253</sup>

In a rather extraordinary turn of events, Secure Communities came under intense criticism even as it was rolled out. Activists, advocates, law enforcement officials, and several prominent elected officials complained that the program drove an unnecessary and unwanted wedge between police agencies and migrant communities.<sup>254</sup> Responding to that criticism, on November 20, 2014, Secretary of Homeland Security Jeh Johnson announced that DHS would terminate Secure Communities.<sup>255</sup>

Whatever victory critics might have declared was short-lived. In the very memorandum in which Johnson declared Secure Communities’ demise, he

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247. DHS BUDGET-IN-BRIEF FY 2015, *supra* note 183, at 61.

248. KOHLI ET AL., *supra* note 244, at 7, 14.

249. NAT’L IMMIGRATION FORUM, SECURE COMMUNITIES (July 11, 2011), <http://immigrationforum.org/blog/secure-communities-2>.

250. *Id.* (stating that Secure Communities was active in 1,417 jurisdictions in June 2011). According to DHS, there are 3,181 jurisdictions in the United States. ACTIVATED JURISDICTIONS, *supra* note 237.

251. ACTIVATED JURISDICTIONS, *supra* note 237; DHS STATUS REPORT, *supra* note 237, at 8.

252. KOHLI ET AL., *supra* note 244, at 8.

253. *Id.* at 7.

254. See Julia Preston, *States Resisting Program Central to Obama’s Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18.

255. Johnson Memo, *supra* note 168, at 2.

announced its replacement: the Priority Enforcement Program (PEP).<sup>256</sup> As with Secure Communities, DHS officers following the PEP protocol will take fingerprint data obtained by state or local police officers and sift it through DHS immigration databases. Because DHS claims it will only take custody of individuals who meet its top civil immigration enforcement priorities, PEP is more narrowly tailored than Secure Communities. Though this will likely affect the specific characteristics of the people taken into ICE custody, it is unlikely to affect how many people are moved into immigration imprisonment, because there is no shortage of people who meet the department's highest enforcement priorities. Moreover, PEP does not fundamentally alter the process for identifying and moving such people into immigration imprisonment. Like Secure Communities, it uses the resources of the state criminal justice system to identify individuals for civil immigration detention.

On the whole, this panoply of initiatives creates a broad net that leads hundreds of thousands of people into jails, prisons, or immigration detention centers annually for allegedly having engaged in prohibited migration-related activity. This is not a reality to be taken lightly. Part IV explains why this reality came to be.

#### IV.

##### RHETORIC OF CRIMINALITY

Immigration law has been subsumed under a rhetoric of criminality that frames migrants as the specter of dangerousness.<sup>257</sup> Legislators and government bureaucrats, disinclined to release ostensibly dangerous individuals onto the streets, have every incentive to favor imprisonment.<sup>258</sup> Being able to point to the steel and concrete of prison walls and the annual statistics of an ever-greater number of people incarcerated because of a suspected or confirmed immigration law violation gives political actors the proof they need to show the public that they are doing something about the danger in our midst.<sup>259</sup>

##### A. *Migrant Vilification*

In the 1980s, law and politics in the United States began to focus more on the threat of crime and the danger migrants pose. This new focus accompanied

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256. *Id.*

257. See Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENVER U. L. REV. 1081, 1106 (2001) (explaining that Latina/o immigrants have been constructed as criminals and that this framing has been applied to immigration law enforcement); see also DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 275 (2012) (“[S]ecuritizing migration can be self-defeating for ‘the more migration is feared as a security threat, the more of a security threat it becomes.’” (quoting CONTROLLING A NEW MIGRATION WORLD 21 (V. Guiraudon & C. Joppke, eds., 2001))); Johnson Memo, *supra* note 168, at 11, 19.

258. See LOGAN, *supra* note 73.

259. See ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 80 (2010).

a greater desire to punish. Among the most influential examples of this legal and political shift is the “broken windows” theory popularized in an influential *Atlantic Monthly* article by James Q. Wilson and George L. Kelling. The article posited that minor crime would progressively lead to more serious crime if not quashed.<sup>260</sup> The push to “crack[] down on crime” quickly led to the massive and racially skewed criminal incarceration growth that legal scholar Michelle Alexander has dubbed the “new Jim Crow”<sup>261</sup> and sociologist Loïc Wacquant refers to as “hyperincarceration.”<sup>262</sup>

Following in that vein, for roughly the last thirty years, public discussions of immigration and migrants have frequently included references to crime and dangerousness. Cubans who left the island from the port of Mariel in the early 1980s were thought to have been the cast-offs from Castro’s prisons and, as the title of a 1984 *U.S. News & World Report* article put it, represented “Castro’s ‘Crime Bomb’ Inside [the] U.S.”<sup>263</sup> Perhaps the most memorable example of this linkage between Cuban migrants and crime comes from the 1983 Hollywood thriller *Scarface*, in which Al Pacino stars as a young Cuban migrant who becomes a violent drug trafficker in Florida.<sup>264</sup> Like the Cubans, the Haitians who arrived in large numbers in the early 1980s were also linked to crime. Reflecting their racialization as black, they were viewed as having melded into the allegedly rampant drug activity carried out by African Americans.<sup>265</sup> Much the same goes for Jamaican migrants. As Republican Congressman Lamar Smith claimed in 1987, “Jamaicans, mostly illegal aliens, have developed a massive criminal organization that imports and distributes narcotics.”<sup>266</sup> More recently, another Republican Congressman, Steve King from Iowa, dismissed efforts to provide a legalization path for unauthorized migrants brought to the United States as children by alleging, “For every one who’s a valedictorian, there’s another 100 out there who weigh 130 pounds and

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

261. ALEXANDER, *supra* note 18, at 42.

262. Wacquant, *supra* note 20.

263. John S. Lang et al., *Castro’s “Crime Bomb” Inside U.S.*, U.S. NEWS & WORLD REP., Jan. 16, 1984, at 27; *see also* MARK S. HAMM, THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE 51 (1995); 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://ssrn.com/abstract=1867366>.

264. *See* STEVEN BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 28–29 (2003); *see also* Ediberto Román, *Who Exactly Is Living La Vida Loca?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER, RACE & JUST. 37, 42–43 (2000).

265. *See* Teresa A. Miller, *The Impact of Mass Incarceration on Immigration Policy*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 214, 232 (Marc Mauer & Meda Chesney-Lind eds., 2002); Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 593–94 (1998); Silverman, *supra* note 263, at 9.

266. 133 CONG. REC. 28840 (1987) (statement of Rep. Smith).

they've got calves the size of cantaloupes because they're hauling 75 pounds of marijuana across the desert."<sup>267</sup>

This rhetoric has fundamentally changed the discursive boundaries about migration. Rather than viewing migrants as deserving individuals in need of safe harbor in the United States or as morally upright people coming to the United States to work and perhaps reunite with family, migrants are frequently portrayed as criminals.<sup>268</sup> And as criminals, they are thought to be enemies of the law-abiding public.<sup>269</sup> Once migrants were framed this way, it became logical for legislators to turn to strong-armed restrictive policies intended to curtail this threat.<sup>270</sup>

### B. Migrant Penalization

In a long series of statutes, Congress and multiple presidential administrations enacted legislation that unmistakably linked immigrants with criminality and, by extension, dangerousness. The Anti-Drug Abuse Act of 1986, for example, authorized state and local law enforcement agencies to request that the INS detain people believed to lack authorization to be in the United States and who had been arrested on suspicion of having violated a controlled substance offense.<sup>271</sup> Less than two weeks later, the Immigration Reform and Control Act of 1986, best known for its amnesty provisions allowing millions of unauthorized migrants to regularize their status, statutorily defined a "Marielito Cuban" as a Cuban national convicted of a felony and sentenced to a term of imprisonment, and required the Justice Department to reimburse states for incarcerating them.<sup>272</sup> Two years later the Anti-Drug Abuse Act of 1988 funded INS agents' involvement in a multiagency task force "combating illegal alien involvement in drug trafficking and crimes of

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267. Traci G. Lee, *GOP's Steve King on DREAMers: For Every Valedictorian, There Are 100 Drug Smugglers*, MSNBC (July 23, 2013, 1:58 PM), <http://www.msnbc.com/martin-bashir/gops-steve-king-dreamers-every>.

268. See TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME* 87 (1996); JOSEPH NEVINS, *OPERATION GATEKEEPER AND BEYOND: THE WAR ON "ILLEGALS" AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY* 97 (2d ed. 2010).

269. See DUNN, *supra* note 268, at 162-63.

270. See Lawston & Murillo, *supra* note 85, at 183 ("The use of the language 'criminal' and 'lawbreakers' effectively justifies the bellicose posturing of anti-immigrant discourses and practices."); see also Alissa R. Ackerman et al., *The New Penology Revisited: The Criminalization of Immigration as a Pacification Strategy*, 11 JUST. POL'Y J. 1, 12 (2014) ("[T]he demonization of immigration . . . creates a cultur[e] of perceived violence, where good 'law' abiding citizens feel that their very lives are placed at risk by these 'illegal alien[s]'. The discourse dehumanizes undocumented immigrants, making it easier [to] afford them fewer 'human rights.'").

271. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207, 3207-47 to -48 (codified at INA §§ 212(a)(23), 241(a)(11), 287, 8 U.S.C. §§ 1182(a)(23), 1251(a)(11), 1357 (2012)).

272. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 501, 100 Stat. 3359, 3443-44 (codified at 8 U.S.C. § 1365 (2012)).

violence.”<sup>273</sup> That statute also introduced the “aggravated alien felon” into the immigration law lexicon, referring to a type of crime committed, according to U.S. Senator Alfonse D’Amato, by “a particularly dangerous class.”<sup>274</sup> Originally defined as a conviction for murder, illicit trafficking in firearms, or drug trafficking, the “aggravated felony” concept has since expanded to include twenty-one categories of crimes, some of which include subparts, that range from the most serious offenses to crimes as banal as mutilating a passport.<sup>275</sup>

The immigrant-crime entanglement continued unimpeded through the 1990s. President George H.W. Bush launched that decade’s version of the immigration-crime rhetoric by describing the Immigration Act of 1990 as important to his administration’s “war on drugs and violent crime,” in part because “it provides for the expeditious deportation of aliens who, by their violent criminal acts, forfeit their right to remain in this country.”<sup>276</sup> These are people, he added, who “jeopardize the safety and well-being of every American resident.”<sup>277</sup> In 1994, President Bill Clinton signed the Violent Crime Control and Law Enforcement Act of 1994, a bill that, among other things, created the SCAAP, which continues to fund state and local expenses incurred incarcerating migrants.<sup>278</sup> Two years later, Congress sent President Clinton a pair of well-known bills, which he signed, that dramatically expanded the immigration-crime nexus and, most pertinent here, the use of imprisonment. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) expanded the federal government’s administrative immigration detention authorization.<sup>279</sup> The Illegal Immigration Reform and Immigrant Responsibility Act, enacted a few months after AEDPA, created the 287(g) programs that DHS continues to use to identify and detain potentially removable migrants. It also expanded the federal government’s computerized database of immigration status information, which is at the heart of the Secure Communities program.<sup>280</sup>

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273. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6151, 102 Stat. 4181, 4342.

274. 134 CONG. REC. 32649 (1988) (statement of Sen. D’Amato).

275. Anti-Drug Abuse Act of 1988 § 7342, 102 Stat. at 4469–70 (codified at INA § 101(a), 8 U.S.C. § 1101(a) (2013)); *see also* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012).

276. President George Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), <http://www.presidency.ucsb.edu/ws/index.php?pid=19117>.

277. *Id.*

278. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130007, 108 Stat. 1796, 2029 (codified at 8 U.S.C. § 1252 note (2013)).

279. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1214, 1277 (codified at INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (2013)).

280. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-546, 3009-563 to -564 (codified at 8 U.S.C. § 1357 (2013)) (regarding section 287(g) programs); *id.* at § 112, 110 Stat. at 3009-559 (codified at 8 U.S.C. § 1221) (regarding the computerized database system known as IDENT); *see also* U.S. IMMIGRATION & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., SECURE COMMUNITIES: IDENT/IAFIS INTEROPERABILITY MONTHLY STATISTICS THROUGH OCTOBER 31, 2009 (Dec. 4, 2009), [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interoperability\\_stats-fy2009.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2009.pdf) (explaining the IDENT database’s importance to Secure Communities).

Though there has not been much immigration legislation enacted in the twenty-first century, the few pieces that have made it through Congress and past the President have continued the trend of framing immigration as a threat. The Real ID Act of 2005, for example, placed special emphasis on terrorist activity performed by migrants.<sup>281</sup> A year after Congress passed the Real ID Act, the House of Representatives approved a bill that would have made unauthorized presence in the United States, with nothing more, a federal crime.<sup>282</sup> The bill ultimately failed in the Senate after massive immigrants' rights protests, but not before it entrenched the impression that unauthorized immigration was socially deviant.<sup>283</sup>

### C. Migrant Institutionalization

Prison, of course, is not inevitable.<sup>284</sup> There is nothing natural about forcibly losing one's liberty at the hands of the state. As legal scholar Malcolm Feeley noted in his study of the growth of prisons, "The prison was not at all obvious. Despite the fact that the prison is now so much taken for granted that it has become synonymous with punishment, it was not always a foregone conclusion."<sup>285</sup> Instead, it "was a product of the imagination of the late 18th century," conceived and disseminated in large part by a distinct set of people Feeley describes as "entrepreneurs" who touted the prison as a means of punishing offenders and offering them the opportunity to repent (hence the term "penitentiary") "at no or low cost to the state."<sup>286</sup> This rationalization quickly took root in the United Kingdom and the United States, and the prison as an institution took on a life of its own. "[W]ithin 50 years," Feeley writes, "the prison was so well inscribed in public imagination and so well established on the landscape, that it was impossible to envision criminal punishment in its absence. The prison had become synonymous with punishment."<sup>287</sup> Eventually, in Feeley's view, rationalization gave way to inertia. "[O]nce established, conscience gave way to convenience"—that is, the prison continued to exist because it was the most obvious answer to the difficult question of what to do with criminals.<sup>288</sup>

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281. Real ID Act of 2005, Pub. L. No. 109-13, div. B, §§ 103, 105, 119 Stat. 302, 306–09, 309–10 (codified at 8 U.S.C. §§ 1182, 1227 (2013)).

282. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 203 (2005).

283. See ALFONSO GONZALES, REFORM WITHOUT JUSTICE: LATINO MIGRANT POLITICS AND THE HOMELAND SECURITY STATE 43 (2013).

284. See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 57 (2006); Malcolm M. Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 4 PUNISHMENT & SOC'Y 321, 333 (2002).

285. Feeley, *supra* note 284, at 333.

286. *Id.* at 328, 329, 333; see also Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 452 (2005).

287. Feeley, *supra* note 284, at 330.

288. *Id.*

Though imprisonment became a core component of criminal punishment, it was by no means the default sanction for criminal offenses in the United States.<sup>289</sup> Well into the second half of the twentieth century, “the main official objective of criminal justice was correction.”<sup>290</sup> Imprisonment was an available option, but conviction frequently resulted in community supervision rather than incarceration.<sup>291</sup> “[P]enal confinement,” writes sociologist Bruce Western, “was reserved for the most dangerous and incorrigible.”<sup>292</sup>

Beginning in the 1970s, the state and federal criminal justice systems altered course from a focus on rehabilitation to a desire for punishment.<sup>293</sup> Through a series of cultural and legal shifts that legal scholar and sociologist David Garland has dubbed the “culture of control,”<sup>294</sup> the well-known era of mass incarceration was born.

As with the inevitability of the prison in Feeley’s account, there is certainly nothing preordained about migrants losing their liberty behind barbed wire and under the watchful eyes of security personnel. Though the first statute authorizing detention of migrants for immigration-related activity was enacted in 1891, imprisonment as a feature of immigration law enforcement is a historical anomaly.<sup>295</sup> With a few notable exceptions—Ellis Island on the East Coast and especially Angel Island on the West Coast<sup>296</sup>—governments in the United States have rarely detained individuals suspected of violating immigration law. Indeed, from 1954 to 1980, the INS followed an internal policy of not detaining except in unusual circumstances.<sup>297</sup> That historical practice changed suddenly in the early 1980s in response to the arrival of large numbers of Cubans, Haitians, and Central Americans who were depicted as dangerous and undeserving of the United States’ hospitality.<sup>298</sup> In reaction to this influx, Congress and multiple presidential administrations worked together

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289. WESTERN, *supra* note 284, at 58.

290. *Id.* at 57.

291. *Id.*

292. *Id.* at 58.

293. *Id.*

294. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 75–102 (2001).

295. See Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085–86. Before then, the federal government relied principally on shipping companies to detain passengers not immediately allowed to enter. See WILSHER, *supra* note 257, at 11, 19. At first, shipping companies kept migrants on board, but after that became infeasible, they turned to on-shore detention facilities that the companies operated. *Id.*

296. See David Manuel Hernández, *Undue Process: Racial Genealogies of Immigrant Detention*, in *CONSTRUCTING BORDERS/CROSSING BOUNDARIES: RACE, ETHNICITY, AND IMMIGRATION* 59, 73–74 (Caroline B. Brettell ed., 2007).

297. See MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 7 (2004); DUNN, *supra* note 268, at 46.

298. See DOW, *supra* note 297, at 7; Miller, *supra* note 265, at 225; Silverman, *supra* note 263, at 9.



to vastly expand and fund statutory authorizations to detain in the course of enforcing immigration law.<sup>299</sup>

Despite the relatively recent entry of large-scale immigration imprisonment on the scene, politicians, bureaucrats, and advocates have now largely accepted imprisonment's central role in immigration policing. Few people of any political persuasion publicly question the need to detain migrants. In fact, many speak of imprisonment as a necessary component of a "common sense" approach to immigration law reform.<sup>300</sup> Without detention, it would seem, there cannot be deportation and without deportation there is no enforcement of immigration law.<sup>301</sup> Detention came to be viewed as a natural and required feature of effective immigration law enforcement policy.<sup>302</sup>

Emblematically, the disputes about the immigration-imprisonment system focus on the scope of detention and the particulars of detention conditions, which only highlight the lack of serious disagreement about the basic need for such a system at all. Some members of Congress, for example, insist on requiring ICE to pay for thirty-four thousand prison beds each night, while DHS officials think that ICE should detain only those assessed as a flight risk or public safety threat.<sup>303</sup> Advocates frequently decry the use of criminal

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299. See César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1360–72 (2014).

300. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, FISCAL YEAR 2015 BUDGET OF THE U.S. GOVERNMENT 34 (2014) (advocating "common sense immigration reform"); *ICE FY 2015 Budget Justification*, *supra* note 65, at 4 (requesting funding for 30,539 DHS immigration detention beds); *id.* at 87 (explaining that the fiscal year 2015 White House budget proposal focuses resources on detaining migrants with specified characteristics); *id.* at 156 (requesting funding for the State Criminal Alien Apprehension Program); see also GONZALES, *supra* note 283, at 43–44 (quoting statements by two members of Congress frequently considered to be "pro-immigrant," Gene Green and Sheila Jackson Lee, in which they implicitly accept that detention is a necessary part of immigration law enforcement); NAT'L CTR. FOR TRANSGENDER EQUALITY, FACT SHEET: IMMIGRATION REFORM (2013), [http://transequality.org/Resources/Factsheet\\_ImmigReformMay2013\\_FINAL.pdf](http://transequality.org/Resources/Factsheet_ImmigReformMay2013_FINAL.pdf) (calling for less detention as part of "common sense immigration reform" but not asking for no detention).

301. See Rutvica Andrijasevic, *From Exception to Excess: Detention and Deportations Across the Mediterranean Space*, in THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT 147, 148 (Nicholas De Genova & Nathalie Peutz eds., 2010) (positing that detention "immobilizes" and the deportation that follows "expunges"); Galina Cornelisse, *Immigration Detention and the Territoriality of Universal Rights*, in THE DEPORTATION REGIME, *supra*, at 101, 116 ("[D]etention—like deportation—is a necessity for states that want to be seen by their own populations to be in control of their borders."); Nicholas De Genova, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, in THE DEPORTATION REGIME, *supra*, at 33, 55 ("[T]he deportation regime must finally be situated alongside other prospective resources of state power and sovereignty, including mass incarceration and even extermination. Deportability would therefore have to be seen in a continuum with 'detainability.'").

302. See William Walters, *Deportation, Expulsion, and the International Police of Aliens*, in THE DEPORTATION REGIME, *supra* note 301, at 69, 95; see also MARY BOSWORTH, *INSIDE IMMIGRATION DETENTION* 36 (2014) (making a similar point about British practices).

303. *ICE FY 2015 Budget Justification*, *supra* note 65, at 4; Michelle Ye Hee Lee, *Clinton's Inaccurate Claim that Immigrant Detention Facilities Have a Legal Requirement to Fill Beds*, WASH.

prosecutions and incarceration to punish immigration law violations, seeking to keep immigration enforcement formally civil. Academics and advocates, meanwhile, criticize DHS's continued reliance on correctional norms to detain migrants, insisting that civil immigration detention should not resemble penal confinement.<sup>304</sup> But it is the rare politician, government official, academic, immigrants' rights advocate, immigration restriction proponent, or even activist who challenges the premise that the United States ought to maintain an immigration-detention system in the first place.<sup>305</sup> At some point, then, the use of imprisonment to enforce immigration law came to be seemingly beyond question—that is, immigration imprisonment became so ordinary that it became difficult to imagine a world without it.

That imprisonment is now viewed as normal represents the triumph of a particular political project. Political scientist Alfonso Gonzales refers to this project as the “anti-migrant bloc,” while others, including sociologist Tanya Golash-Boza and political scientists Roxanne Lynne Doty and Elizabeth Shannon Wheatley, describe it as the “immigration industrial complex.”<sup>306</sup> To Gonzales, the anti-migrant bloc consists of “a contradictory and fluid constellation of forces composed of elected officials, state bureaucrats, think tanks, intellectuals, and charismatic media personalities who, under the influence of strategic fractions of global capital, have set the boundaries of the immigration debate around narrow questions of criminality and anti-terrorism.”<sup>307</sup> Golash-Boza explains that “[t]he immigration industrial complex refers to the public and private sector interests in the criminalization of undocumented migration, immigration law enforcement and the promotion of ‘anti-illegal’ rhetoric.”<sup>308</sup> For their part, Doty and Wheatley claim that “the contemporary immigration industrial complex is a massive, multifaceted, and

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POST (May 15, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/05/15/clintons-inaccurate-claim-that-immigrant-detention-facilities-have-a-legal-requirement-to-fill-beds>.

304. See, e.g., AM. BAR ASS'N, ABA CIVIL IMMIGRATION DETENTION STANDARDS 1 (2012) (explaining that ICE's civil immigration detention system is based on correctional norms, then explaining that the guidelines “set forth below are intended to provide a tool that will guide DHS in the transition to a comprehensive civil detention system that does not primarily make use of jails and jail-like facilities”); Mark Noferi, *New ABA Civil Immigration Detention Standards: Does “Civil” Mean Better Detention or Less Detention?*, CRIMMIGRATION (Aug. 28, 2012, 9:00 AM), <http://crimmigration.com/2012/08/28/new-aba-civil-immigration-detention-standards-does-civil-mean-better-detention-or-less-detention.aspx> (noting that ICE's 2011 detention standards “while still citing model jail standards . . . were a step forward,” then proceeding to identify numerous shortcomings in the 2011 standards).

305. See Cornelisse, *supra* note 301, at 101 (arguing that most critics of immigration detention in Europe attack the conditions of confinement but not the use of detention itself). The collection of essays in *BEYOND WALLS AND CAGES*, *supra* note 85, is an important exception.

306. GONZALES, *supra* note 283, at 5; Roxanne Lynne Doty & Elizabeth Shannon Wheatley, *Private Detention and the Immigration Industrial Complex*, 7 INT'L POL. SOC. 426, 427 (2013); Tanya Golash-Boza, *The Immigration Industrial Complex: Why We Enforce Immigration Policies Destined to Fail*, 3 SOC. COMPASS 295, 296 (2009).

307. GONZALES, *supra* note 283, at 5.

308. Golash-Boza, *supra* note 306, at 296.

intricate economy of power, which is composed of a widespread, diverse, and self-perpetuating collection of organizations, laws, ideas, and actors” that “mutually reinforce one another and expand the realms of authority to which people are subjected.”<sup>309</sup> Though each of these scholars presents a different analysis of contemporary immigration law enforcement, they all identify a broad array of actors that have collectively framed discussions of immigration around notions of danger. These actors have then used that discursive framework of danger to promote legislation and policy initiatives intended to contain the danger. Part V identifies the actual actors, policy choices, and legal directives that have converted the rhetoric of criminality into the practice of immigration imprisonment.

## V.

### ENTRENCHING IMMIGRATION IMPRISONMENT

Immigration imprisonment is undoubtedly rooted in political responses to the rhetoric of migrant criminality. In this Part, I show that immigration imprisonment has become embedded in the practices of numerous governmental and nongovernmental institutions, as well as in interpretations of statutory directives and ambiguities.

There are three primary phenomena that constantly drive immigration imprisonment. First, having thoroughly embraced the rhetoric of criminality and its view of migrants as threatening, government authorities have repeatedly adopted policy choices that expand imprisonment even in the face of reasonable alternatives. They have become locked into imprisonment as a policy. Second, immigration-policing agencies, as institutions are prone to do, consistently interpret imprisonment imperatives in a way that expands their own power. Federal and state authorities have created an immigration imprisonment dragnet out of a modicum of statutory authority to imprison. Third, a host of third parties have developed to facilitate immigration imprisonment. In their own way, each of these institutions pressures legislators to maintain and expand imprisonment.

#### A. *Path Dependence*

“Institutions,” wrote the political scientist Claus Offe in his study of decision making within political institutions, “can breed conservatism.”<sup>310</sup> The institutions involved in immigration imprisonment are no exception. Whether at the federal, state, or local level, people operating within larger institutional cultures make the myriad decisions that affect imprisonment. The values and

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309. Doty & Wheatley, *supra* note 306, at 438.

310. See Claus Offe, *Political Institutions and Social Power: Conceptual Explorations*, in *RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE* 9, 18 (Ian Shapiro et al. eds., 2006).

processes of the existing institutional culture constrain the choices available to each of these individuals.<sup>311</sup>

One of the most poignant features of any institutional culture is the effect of previous policy decisions on future decisions.<sup>312</sup> A truly naturalized policy choice reinforces itself by, in part, determining future policy developments.<sup>313</sup> Referred to as the theory of “path dependence,” this phenomenon suggests that some “decision[s] limit[] the range of available options at subsequent points and, in so doing, encourage[] continuity in the form of a retention of the original choice.”<sup>314</sup> In effect, the actions of government actors—whether elected politicians or employed civil servants—are limited by what those actors envision possible.<sup>315</sup> As political scientist R. Kent Weaver explains, governmental policies become “‘sticky,’ if not ‘locked in’ . . . . [O]nce policy regimes have become deeply embedded, policy change should be primarily within the parameters of that regime.”<sup>316</sup> This is not to say that policy shifts are impossible, only that “reversal may be rendered more difficult by the path-dependent effect.”<sup>317</sup> To gauge whether institutions have adopted a path-dependent policy-making approach, political scientist and historian Randall Hansen argues that it is necessary to examine whether “policy divergence was considered and rejected for reasons that cannot be explained without reference to the structure of costs and incentives created by the original policy choice.”<sup>318</sup>

The discursive link between crime and immigration suggests that path-dependence theory can help explain the evolution of immigration-imprisonment practices. For the last thirty years or so, the culture of governmental discussions on immigration has portrayed migrants as deviants.<sup>319</sup> The rhetoric of criminality that now pervades has not always framed immigration law. Importantly, it only came to be this way through deliberate choices by key actors in and out of government.<sup>320</sup> As a result,

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311. See John Ferejohn, *Practical Institutionalism*, in RETHINKING POLITICAL INSTITUTIONS, *supra* note 310, at 72, 79.

312. See Stephen D. Krasner, *Sovereignty: An Institutional Perspective*, 21 COMP. POL. STUD. 66, 67 (1988).

313. RANDALL HANSEN, CITIZENSHIP AND IMMIGRATION IN POST-WAR BRITAIN: THE INSTITUTIONAL ORIGINS OF A MULTICULTURAL NATION 30 (2000); Krasner, *supra* note 312, at 71.

314. HANSEN, *supra* note 313, at 31; see also Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1281 (2004) (“[O]nce random historical events set the market on a particular path, the choice may become locked-in, regardless of the advantages of the alternatives.”).

315. See Krasner, *supra* note 312, at 83.

316. R. Kent Weaver, *Government Institutions, Policy Cartels, and Policy Change*, in RETHINKING POLITICAL INSTITUTIONS, *supra* note 310, at 216, 223.

317. HANSEN, *supra* note 313, at 31; see also Brant T. Lee, *supra* note 314, at 1282 (noting that investment in a particular standard creates “switching costs” that make adopting an alternative course more difficult).

318. HANSEN, *supra* note 313, at 32.

319. See *supra* Part IV.A.

320. See *id.*

immigration law enforcement, including imprisonment, is now conceived of as a security issue.<sup>321</sup> Viewed as part of the state's efforts to keep the public safe, immigration imprisonment has come to be seen as a necessary component of government operations. Without strenuously wielding the power of imprisonment, the government would be thought to fail its essential duty of ensuring public safety.<sup>322</sup>

A prime example of this discursive phenomenon publicly manifested itself in February 2013. That month, ICE officials released 2,228 detainees due to budget cuts resulting from Congress's failure to enact an appropriations bill. Before releasing these individuals, ICE conducted public safety and flight risk assessments and released only those presenting a low probability of both risks. Despite that, prominent members of Congress illustrated how the rhetoric of criminality locks legislators into favoring imprisonment. Speaker of the House of Representatives John Boehner said that ICE's actions "let[] criminals go free."<sup>323</sup> His Republican colleague Bob Goodlatte, chairman of the House Judiciary Committee, added, "By releasing criminal immigrants onto the streets, the administration is needlessly endangering American lives."<sup>324</sup> Boehner, Goodlatte, and others who made similar claims did so despite the fact that approximately half of all detainees have not been convicted of any crime and of those that have been, few have been convicted of a violent offense.<sup>325</sup> Critically, these legislators view migrants as dangerous and thus believe it appropriate for the government to mitigate this risk through imprisonment. Having thoroughly subscribed to the rhetoric of criminality and the policy choice of incarceration, they view a failure to keep these migrants confined as synonymous with failing to protect the public.

The rhetoric of criminality has similarly locked DHS into viewing its immigration law enforcement efforts—among which imprisonment stands out—as critical to public safety, and therefore necessary. As DHS Secretary Jeh Johnson put it, "Homeland security *is* the most important mission any government can provide to its people."<sup>326</sup> Two of the five operational areas that the department lists as its "core missions" concern immigration-related activities that subject substantial numbers of people to immigration

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321. WILSHER, *supra* note 257, at 207; *see also* Borderlands Autonomous Collective, *supra* note 84, at 196.

322. *See* Lawston & Murillo, *supra* note 84 183 ("The use of the language 'criminal' and 'lawbreakers' effectively justifies the bellicose posturing of anti-immigrant discourses and practices.").

323. 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>.

324. Kirk Semple, *Mass Release of Immigrants is Tied to Cuts*, N.Y. TIMES, Feb. 27, 2013, at A1.

325. SCHRIRO, *supra* note 5, at 6.

326. DHS BUDGET-IN-BRIEF FY 2015, *supra* note 183, at n.p. (Secretary's Message) (emphasis in original).

imprisonment.<sup>327</sup> In addition to operating the nation's civil immigration-detention system, DHS's ICE and CBP units identify and apprehend the bulk of people incarcerated due to alleged immigration law violations. Like their parent department, both Agencies view their work as critical to public safety. ICE, the principal Agency that pushes people into civil immigration detention, claims that its "primary mission is to promote homeland security and public safety."<sup>328</sup> For his part, the CBP commissioner claims that the Agency's mission is "keeping dangerous people and dangerous things away from the American homeland."<sup>329</sup> CBP agents identify most of the migrants who are placed in criminal immigration detention.

Viewing its work as essential to the nation's security, DHS has implemented a series of initiatives that have dramatically increased the number of people detained on suspicion of immigration law violations. Reflecting a path-dependent course, most of these efforts have been created on the department's initiative, suggesting an unwillingness to diverge from the immigration-imprisonment policy choice.<sup>330</sup> For one, DHS created Secure Communities, one of the programs most responsible for the size of today's migrant prisoner population, without any obvious external impetus to do so. Indeed, it remains unclear what, if any, legal authority DHS has to run this program.<sup>331</sup> As legal scholar Anil Kalhan explains, "No statute unquestionably authorizes the program or mandates state and local participation, and no regulations specifically govern its operations."<sup>332</sup> The department created Secure Communities after Congress gave DHS money to "improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable."<sup>333</sup> Given the broad congressional command to "improve and modernize" identification measures, DHS could have created a program that led to little detention. It could, for example, have followed the congressional directive to focus on migrants who have previously been convicted of crimes, rather than almost everyone who comes into contact with police officers. In addition, DHS could have elected to track potentially deportable migrants through alternatives to detention. Instead, DHS took this

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327. See, e.g., *Our Mission: Overview*, U.S. DEP'T OF HOMELAND SEC., <http://www.dhs.gov/our-mission> (last visited Sept. 10, 2015) (explaining that two of what the department describes as its five "core missions" concern immigration: border security and immigration-law enforcement).

328. *What We Do*, U.S. IMMIGRATION & CUSTOMS ENF'T, <http://www.ice.gov/overview> (last visited Aug. 21, 2015).

329. U.S. BORDER PATROL, U.S. CUSTOMS & BORDER PROT., 2012–2016 BORDER PATROL STRATEGIC PLAN 4 (2012).

330. See HANSEN, *supra* note 313, at 32.

331. See Kalhan, *supra* note 238, at 1130.

332. See *id.*

333. U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., *SECURE COMMUNITIES: CRASH COURSE 4* (2009), in *SECURE COMMUNITIES PROGRAM: PRESENTATIONS 2* (2010) [hereinafter *CRASH COURSE*], [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiespresentations.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf).

vague congressional instruction to improve and modernize identification processes and launched a law enforcement program that identifies migrants well before a conviction and sentence could possibly be imposed—at the point when a migrant is booked into police custody.<sup>334</sup> By checking the immigration status of every person taken into police custody whose identification information has been sent to the FBI, Secure Communities allows DHS to limit the possibility that a migrant will be released from incarceration.<sup>335</sup> In effect, Secure Communities paves the road from penal to civil confinement for no reason except that the department is unable or unwilling to imagine policies that diverge from its focus on imprisonment.

Likewise, the former INS created another key imprisonment program, CAP, in response to statutory language that was anything but a clear mandate to imprison. As part of the Immigration Reform and Control Act of 1986 (IRCA), Congress instructed the INS to “expeditiously” begin deportation proceedings against migrants convicted of deportable offenses.<sup>336</sup> Two years later, the INS established a pair of programs—the Institutional Removal Program (IRP) and the Alien Criminal Apprehension Program (ACAP)—that would eventually become CAP.<sup>337</sup> The IRP and ACAP both sought to remove people who were already incarcerated as a result of a criminal conviction.<sup>338</sup> Nothing in the statutory text requires more, but that is exactly the path that immigration law enforcement officials followed. Today, CAP operates much more expansively than IRCA commanded. Instead of waiting for a conviction, CAP targets migrants as soon as they are booked into police custody—well before a conviction is possible—and sometimes earlier in the law enforcement process.<sup>339</sup> Its broader reach means that CAP frequently leads to arrests and criminal indictments.<sup>340</sup> CAP therefore demonstrates how the choice to perceive immigration enforcement as a security concern means that every immigration violator is a threat, and so a violation—without anything more—justifies detention.

Similarly, DHS’s approach to a law enforcement program authorized by statute, the 287(g) agreement initiative, suggests a solitary policing focus that relies ever-more heavily on imprisonment. The statute allows DHS to enter into agreements with local law enforcement agencies through which local officers are granted the power to investigate, apprehend, or detain migrants.<sup>341</sup> Though

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334. ROSENBLUM & KANDEL, *supra* note 174, at 13.

335. *See* CRASH COURSE, *supra* note 333, at 7.

336. *See* ROSENBLUM & KANDEL, *supra* note 174, at 12 (discussing Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 701, 100 Stat. 3359, 3445 (codified as amended at 8 U.S.C. § 1252 (2012))).

337. *Id.* at 13.

338. *See id.* at 12.

339. *See id.* at 13, 17 tbl.4.

340. *See id.* at 14.

341. INA § 287(g)(1), 8 U.S.C. § 1357(g)(1).

detention is one of the powers available, the statute does not require DHS to take priority over investigation or apprehension. It could have used the 287(g) program to identify potentially removable individuals and initiate removal proceedings without emphasizing detention. Instead, the department chose to harness 287(g)'s detention potential. As then-ICE Assistant Secretary John Morton explained in 2009, 287(g) allows the Agency to better accomplish its "key enforcement priorities—the arrest and detention of criminal aliens who pose the greatest threat to the public safety or danger to the community."<sup>342</sup>

Given the securitization prism through which DHS officials see their work, they are not likely to alter the practices that lead hundreds of thousands of people into the detention and deportation pipeline each year.<sup>343</sup> Indeed, with immigration framed as a threat, scaling back enforcement tactics to any significant degree would be tantamount to DHS abdicating its responsibility to protect the homeland. Secretary Johnson's comments about the number of people that constitute "public safety, national security, [or] border security threats" and therefore merit placement in civil immigration detention, illustrate this point. According to Johnson, DHS needs to accommodate 30,539 migrants who fit this risk assessment.<sup>344</sup> That is a reduction of 3,461 beds from the thirty-four thousand beds Congress currently requires it to maintain.<sup>345</sup> Though notable, this reduction represents a mere 10 percent of the federal government's daily capacity for civil immigration detention. Moreover, Johnson did not explain why DHS needed to hold almost 31,000 migrants in detention given that only a small number of the people it currently detains have been convicted of a violent crime.<sup>346</sup> Nor did he address why migrants convicted of a violent offense or otherwise could not be supervised through alternative means.

Relatedly, the department has steadfastly failed to expand its use of ATD despite repeated calls by internal and external observers to do so.<sup>347</sup> In 2009, for example, ICE's ATD programs had the capacity to supervise eighteen thousand people.<sup>348</sup> By fiscal year 2014, the Agency's ATD capacity had

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342. CAPPS ET AL., *supra* note 214, at 6 n.6.

343. Cf. OTTO SANTA ANA, BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY AMERICAN PUBLIC DISCOURSE 35 (2002) ("Replacement of a dominant metaphor involves overcoming a great deal of inertia. . . . [P]eople are extremely resistant to changes, and often will not even temporarily entertain alternative perspectives.").

344. Johnson reportedly said that the department "asked for something like 30,600 beds to detain who we believe needs to be detained." Esther Yu-Hsi Lee, *Homeland Security Head Insists "Bed Mandate" Is Not a Quota to Fill Detention Centers*, THINKPROGRESS (Mar. 12, 2014, 4:42 PM), <http://thinkprogress.org/immigration/2014/03/12/3391911/jeh-johnson-bed-mandate-quota>. The actual number of beds that DHS has asked Congress to fund is 30,539. *ICE FY 2015 Budget Justification*, *supra* note 65, at 40.

345. Lee, *supra* note 344.

346. SCHRIRO, *supra* note 5, at 6.

347. See, e.g., *id.* at 20–21 (recommending that ICE "develop a nationwide implementation plan for the ATD program plan this fall" and noting that more people would be good candidates for ATD programs if ICE partnered with community organizations).

348. See *id.* at 20 (providing ATD data).



grown only slightly to twenty-two thousand.<sup>349</sup> The Agency's ATD options vary in their restrictiveness of migrants' movements, but all impose significantly fewer restrictions than detention and have an impressive rate of success at encouraging migrants' appearance at court hearings—a 93.8 percent appearance rate in fiscal year 2010 according to ICE.<sup>350</sup> These alternatives could help DHS reach its goal of ensuring that migrants depart the United States if ordered to do so and at a fraction of the cost.<sup>351</sup> Despite that, DHS has never placed much emphasis on growing its ATD capacity, again suggesting that it is locked into its imprisonment focus.<sup>352</sup>

The department's position on a congressional requirement to maintain thirty-four thousand detention beds suggests a similar path-dependent approach to imprisonment. The appropriations act President Obama signed into law in January 2014 provides that DHS "shall maintain a level of not less than 34,000 detention beds."<sup>353</sup> Budget bills stretching back to 2010 have included similar language.<sup>354</sup> DHS has consistently taken the position that this language requires it to detain thirty-four thousand migrants each day. The text, however, does not reference the number of detainees. Instead, the text merely requires DHS to pay for the specified number of beds. DHS Secretary Johnson recently acknowledged this alternative reading of the budget's text,<sup>355</sup> but the department has not acted on this recognition by shifting away from detention. That the department interprets the congressionally authored text in a way that leads to mass imprisonment suggests that Agency actors have locked themselves into this position and struggle to follow other possibilities, even possibilities written into the statute.

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349. *ICE FY 2015 Budget Justification*, *supra* note 65, at 60.

350. *See* SCHRIRO, *supra* note 5, at 20; *ICE FY 2012 Budget Justification*, *supra* note 66, at 44.

351. *See supra* notes 66–72 and accompanying text.

352. *See supra* note 73 and accompanying text.

353. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251.

354. *See* Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, div. D, tit. II, 127 Stat. 198, 347 (using identical language); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. D, tit. II, 125 Stat. 786, 950 (same); Continuing Appropriations Act, 2011, Pub. L. No. 111-242, 124 Stat. 2607 (codified at scattered sections of 5, 20 & 42 U.S.C.) (continuing appropriations enacted for the 2010 fiscal year); Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, tit. II, 123 Stat. 2142, 2149 (providing "[t]hat funding made available under this heading shall maintain a level of not less than 33,400 detention beds"). None of the appropriations bills enacted for the 2009 fiscal year include similar language. *See* Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524; American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, tit. VI, 123 Stat. 115, 163; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, div. D, tit. II, 122 Stat. 3574, 3659 (codified at scattered sections of 26 & 49 U.S.C.). The Consolidated Appropriations Act of 2008 also lacks language requiring a specific number of detention beds. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. E, tit. II, 121 Stat. 1844, 2051.

355. *Lee, supra* note 344.

Diverging from immigration imprisonment would require DHS to overcome the values and processes that lead to its large-scale civil immigration detention practice.<sup>356</sup> The path-dependent choices department officials have made for years, however, make reversal all the more difficult.<sup>357</sup> For one, shifting away from imprisonment would require that DHS empty thousands of prison beds that Congress currently requires it to pay for and that it has made a habit of filling. Without question, this would create an unpleasant public-relations affair for department officials because of the widespread belief that detention is needed to ensure public safety and migrants' appearances at court hearings. It would also require a fundamental reimagining of how immigration officials view available prison beds. ICE officers view unused prison beds as beds that need to be filled.<sup>358</sup> At times, they even gauge their enforcement measures based on available detention space, an NFOP practice verified by the department's inspector general.<sup>359</sup> DHS, therefore, is quite unlikely to diverge from its profound commitment to imprisonment as a key immigration law enforcement tool.

Instead of diverging from their practice of heavily using imprisonment as a means of enforcing immigration law, DHS officials debate the contours of detention. They regularly consider the conditions of confinement, the most suitable locations for prisons, the cost of detention, and even the best number of people to confine. This constant reexamination of detention gives Agency officials the aura of self-critique. To be sure, these are important issues that deserve attention. What this line of inquiry does not do, however, is challenge the presumption that imprisonment is necessary.

#### B. Institutional Auto-Expansion

Relatedly, institutions tend to take an expansive view of their own authority—that is, once they acquire power, they are prone to try to hold onto it.<sup>360</sup> This phenomenon appears repeatedly in the immigration-imprisonment context, in which both federal agencies and state governments have taken expansive views of their own authority, even in the face of statutory language indicating that is not required.<sup>361</sup>

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356. See Ferejohn, *supra* note 311, at 79.

357. See Lee, *supra* note 314, at 1282.

358. See CAPPS ET AL., *supra* note 214, at 3 (“287(g) officers and ICE supervisors report that ample ICE detention capacity . . . allows officials to place detainees on as many Level 3 and traffic offenders as they encounter.”); Sarah Gryll, Comment, *Immigration Detention Reform: No Band-Aid Desired*, 60 EMORY L.J. 1211, 1232 (2011) (“ICE officers likely would have detained those women and children if, when encountered, adequate detention space had been available for them.”).

359. FOT ASSESSMENT, *supra* note 174, at 13–14.

360. See Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 992 (1999).

361. For a similar argument in the United Kingdom, see BOSWORTH, *supra* note 302, at 25.

First, ICE and its predecessor, the INS, have taken a broad view of their detention authority; this view has manifested itself in ways Congress did not require. For example, the INS took the position—since rejected by the Supreme Court—that the INA allowed it to indefinitely detain migrants deemed a flight or safety risk after they had been ordered removed.<sup>362</sup> ICE continues to take the position that it can detain any migrant indefinitely before the migrant has been ordered removed, though a growing number of courts have disagreed.<sup>363</sup> The Agency also takes the view that Congress requires it to detain thirty-four thousand people per day, though the text enacted into law actually references a certain number of beds that it must pay for each day and says nothing about people.<sup>364</sup>

Second, the Justice Department has likewise taken a broad view of the statutory power to detain migrants. In a 2009 decision, the Justice Department's BIA held that the INA's command that DHS "take into custody" anyone subject to a broad range of removal grounds cannot be satisfied by anything short of detention.<sup>365</sup> By interpreting Congress's use of the term "custody" as synonymous with "detention," the BIA adopted only one of multiple reasonable interpretations of the statute.<sup>366</sup> It could just as reasonably have concluded that detention is merely one among many forms of custody.<sup>367</sup> Though it was presented with this option, it instead took a route that results in more detention.<sup>368</sup> The extraordinariness of the BIA's use of imprisonment as an option of choice is illustrated by the stance of another Justice Department unit, the INS, twenty years earlier. In the late 1980s, when immigration imprisonment was just emerging as a central tool of immigration law enforcement, an INS spokesman explained, "To be in detention doesn't mean that you have to be behind a fence."<sup>369</sup> Now that BIA has naturalized decades

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362. *Zadvydas v. Davis*, 533 U.S. 678, 688–89 (2001) (discussing government's argument about application of INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2000)).

363. *See, e.g., Rodriguez v. Robbins*, 715 F.3d 1127, 1131 (9th Cir. 2013) (upholding a preliminary injunction requiring bond hearings before an immigration judge of all detainees held longer than six months); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 229–35 (3d Cir. 2011) (disagreeing with "[t]he Government[']s assert[ion] that [the INA's mandatory detention provision] says that aliens can be detained for as long as removal proceedings are 'pending,' even if they are 'pending' for prolonged periods of time"); *Reid v. Donelan*, 297 F.R.D. 185, 187 (D. Mass. 2014) (certifying a class of individuals who are detained by ICE in Massachusetts for over six months without an individualized bond determination); *Reid v. Donelan*, 991 F. Supp. 2d 275, 280–82 (D. Mass. 2014) (holding that individuals detained more than six months are entitled to a bond hearing before an immigration judge).

364. *See Lee, supra* note 344.

365. *Aguilar-Aquino*, 24 I. & N. Dec. 747, 752 (B.I.A. 2009) (discussing INA § 236, 8 U.S.C. § 1226 (2008)).

366. *See García Hernández, supra* note 299, at 1408–10.

367. *See id.*

368. *See Aguilar-Aquino*, 24 I. & N. Dec. at 752.

369. *KAHN, supra* note 109, at 204.

of immigration imprisonment, the position taken by the INS of 1989 seems a long way away.

Third, states have at times exercised their detention power broadly to reach a broader range of migrants. Arizona, for example, not only took the unusual step of prosecuting migrants under the State's human-smuggling provision but also sought to limit the ability of migrants imprisoned on suspicion of violating a serious felony (which the legislature defined to include human smuggling) to leave jail.<sup>370</sup> Numerous other states have also adopted substantive laws and procedural rules that have expanded the possible bases for incarceration due to immigration-related activity.<sup>371</sup>

### C. Third Party Pressure

Having locked itself into the policy choice of using imprisonment to enforce immigration law, the federal government has—perhaps inadvertently—created a body of third parties dependent on that policy choice. While governmental authorities remain critical of the immigration-imprisonment phenomenon, “the state does not act on its own as if it were a monolithic and homogenous institution but through a bloc of actors that operate at the nexus between the state and civil society.”<sup>372</sup> In particular, a host of private prison corporations, local- and foreign-government entities, financial investors, service providers, and prison employees have coalesced to make immigration imprisonment possible. This is not a surprising development. As Weaver observed in his analysis of government institutions, “[o]nce in place, policy regimes tend to spawn supportive coalitions.”<sup>373</sup> The existence of these third parties in turn makes divergence from the prevailing imprisonment focus much more difficult. “Changes,” Weaver adds, “are likely to impose costs on politicians, program clientele, and implementers who have adapted their expectations and strategies to the current policy regime.”<sup>374</sup> Indeed, the entities that have grown around the immigration-imprisonment regime have become deeply invested in its maintenance and have implicitly encouraged government officials to take expansive views of their imprisonment authority.<sup>375</sup>

Perhaps there is no group that more vividly evokes a commitment to imprisonment than the private prison companies that own or operate a large percentage of the immigration-detention estate. Private prison companies oversee almost 17.8 percent of all federal prisoners (a significant and growing percentage of whom are imprisoned for committing immigration crimes) and,

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370. See *supra* notes 118–33 and accompanying text.

371. See *supra* notes 135–44 and accompanying text.

372. GONZALES, *supra* note 283, at 100.

373. Weaver, *supra* note 316, at 223.

374. *Id.*; see also Krasner, *supra* note 312, at 84 (“Once a choice is made, other institutions reorient themselves or new services are created.”).

375. See Gellhord & Verkuil, *supra* note 360, at 992.

in any given year, between 40 and 50 percent of civil immigration detainees.<sup>376</sup> As profit-making enterprises, private prison companies seek the greatest return on their investments. To be profitable, therefore, they must keep costs down while maximizing revenues. An obvious way of maintaining robust revenue is to “ensure that prisons are not only built but also filled.”<sup>377</sup> News reports claim that private prison companies tried to do this by engaging in “a quiet, behind-the-scenes effort to help draft and pass Arizona Senate Bill 1070,” the infamous state law that the Supreme Court eventually held was largely unconstitutional, and that would have resulted in a vast expansion of Arizona’s criminalization of immigration activity.<sup>378</sup> In addition, the Corrections Corporation of America (CCA), GEO Group, and other private prison companies have vigorously lobbied lawmakers. Collectively, from 2005 to early 2013, private prison companies spent approximately \$45 million lobbying state and federal politicians, including key lawmakers who have advanced proposals that would have expanded civil and criminal immigration imprisonment.<sup>379</sup>

Though the largest prison corporations publicly disclaim any interest in expanding the prison population, their financial records indicate a keen awareness that more punitive laws improve their financial condition while a more relaxed approach toward immigration law enforcement could undermine their financial health. CCA, the nation’s largest private prison operator, for example, told its shareholders in 2004 that “[f]urther [revenue] growth is expected to come from increased focus and resources by the Department of Homeland Security dedicated to illegal immigration,” among other sources.<sup>380</sup>

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376. See E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, NCJ 239808, PRISONERS IN 2011, at 32 app. tbl.15 (2012) (providing federal inmate data for 2011); CODY MASON, THE SENTENCING PROJECT, DOLLARS AND DETAINEES: THE GROWTH OF FOR-PROFIT DETENTION 5 (2012) (providing ICE data for 2002–2012).

377. Ken Silverstein, *America’s Private Gulag*, in THE CELLING OF AMERICA: AN INSIDE LOOK AT THE U.S. PRISON INDUSTRY 156, 158 (Daniel Burton-Rose et al. eds., 1998); see also Christine Bacon, *The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies* 17 (Refugee Studies Ctr., RSC Working Paper No. 27, 2005) (“There is concern among some scholars that private correctional corporations may attempt to increase the number of those incarcerated.”).

378. Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010, 11:01 AM), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>; see also *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (upholding Ariz. S.B. 1070 section 2(B), which requires a police officer to check the immigration status of all people stopped, detained, or arrested if the officer has reasonable suspicion to believe that the individual is unlawfully present in the United States).

379. See Sasha Chavkin, *Immigration Reform and Private Prison Cash: Key Lawmakers in the Immigration Debate Are Among the Top Recipients of Campaign Contributions From the Prison Industry*, COLUM. JOURNALISM REV. (Feb. 20, 2013), [http://www.cjr.org/united\\_states\\_project/key\\_senators\\_on\\_immigration\\_get\\_campaign\\_cash\\_from\\_prison\\_companies.php](http://www.cjr.org/united_states_project/key_senators_on_immigration_get_campaign_cash_from_prison_companies.php) (citing the Associated Press).

380. Geiza Vargas-Vargas, Comment, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 41 (2005) (citing Corrs. Corp. of Am., Annual Report (Form 10-K) 16 (Mar. 12, 2004) (second alteration in original)).

In 2013, the second-largest prison company, GEO Group, announced that “[i]mmigration reform laws which are currently a focus for legislators and politicians at the federal, state and local level also could materially adversely impact us.”<sup>381</sup>

Though private corporations are heavily involved in immigration imprisonment today, local governments also reap financial rewards from this practice. Many elected officials, especially in rural locations, view prisons as economic engines.<sup>382</sup> Prisons in which migrants are detained are no different. Indeed, immigration prisons are particularly attractive to local political leaders because the federal government pays almost all of the costs of detention. This arrangement allows county and city governments to readily develop immigration prison revenue streams. The mayor of Oakdale, Louisiana, the largest town in a parish (the Louisiana equivalent of counties) of roughly 7,200 people, vigorously lobbied INS officials during the mid-1980s to open an immigration prison there.<sup>383</sup> The prison, Mayor George Mowad explained, “would lead to the ‘economic rebirth’ of Oakdale.”<sup>384</sup> As the mayor saw it, “[i]mmigration prisons . . . are ‘a recession-proof industry,’ because if the U.S. economy suffered, the world economy would follow, which would lead to more undocumented aliens coming to the United States, and thus more employment for Oakdale.”<sup>385</sup> Similarly, a county commissioner in Pennsylvania’s Perry County explained, “We tried like the dickens to get some of those Chinese,” referring to Chinese migrants who had recently been apprehended aboard a grounded ship.<sup>386</sup> “We thought at one point that we were going to get 30 of them, but it didn’t pan out. We told the Immigration Service we were willing to help them out of a spot. Maybe then they’d help us out of a spot. . . . The big reason we’re doing all this is because we want to keep everybody [at the prison] working.”<sup>387</sup> In a similar vein, the chairman of the Board of Commissioners of Irwin County in South Georgia lamented the prospect of a privately owned immigration prison closing: “If it closes, then everybody loses their jobs . . . and the inmates go back to wherever they came from, but we hope that it never gets to that.”<sup>388</sup> It did come to that at the Willacy County Correctional Center, a south Texas facility run by the private prison operator Management Training Corporation (MTC). After years of

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381. The GEO Grp., Inc., Registration Statement (Form S-4) 31 (Nov. 7, 2013).

382. See Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. & SOC. SCI. 41, 54 (2011).

383. See KAHN, *supra* note 109, at 151–52.

384. *Id.*

385. *Id.*

386. Matt Miller, *Prison Board Shopping for Inmates to Prevent Lay-offs*, PATRIOT-NEWS (Harrisburg, Pa.), June 22, 1993, at A4 (brackets in original).

387. *Id.*

388. Jeremy Redmon, *ICE Detention Center Struggling Financially*, ATLANTA J.-CONST. (Apr. 23, 2012, 3:36 PM), <http://www.ajc.com/news/news/local/ice-detention-center-struggling-financially/nQTFZ>.

operating as a civil immigration detention center for ICE (called the Willacy County Processing Center), Willacy housed convicted immigration crime offenders for BOP when inmates rebelled in February 2015. Roughly two weeks after the rebellion, MTC announced that it was firing all but about twenty-five members of its approximately four-hundred-person staff.<sup>389</sup>

Often, local governments pair up with private prison companies to jointly facilitate the development of an immigration prison. Border analyst Tom Barry explains that these “public-private prison[s]” are “publicly owned by local governments, privately operated by corporations, publicly financed by tax-exempt bonds, and located in [economically] depressed communities.”<sup>390</sup> The public-private consortium then turns its attention to securing an agreement with one of the various federal government agencies involved in immigration imprisonment—ICE, BOP, or USMS. The federal government receives prison beds while the local governments and private operators receive revenue.<sup>391</sup> Importantly, because public-private prison partnerships leave ownership in the local government’s hands, the public entities remain liable for financial shortfalls that arise when the revenue stream falls below the level necessary to operate or maintain the facility—that is, when there are not enough inmates to meet prison expenses.<sup>392</sup> Local officials, therefore, have every reason to pressure the federal government to maintain a steady supply of immigration prisoners.<sup>393</sup>

Neither private businesses nor local governments, however, can carry the cost of building and operating prisons alone.<sup>394</sup> On the contrary, they rely heavily on financial investors to make the risk that goes along with such

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389. Aaron Nelsen, *Prison Company: Inmates in Willacy County May Have Planned Riot*, SAN ANTONIO EXPRESS-NEWS (Mar. 2, 2015, 6:40 PM), <http://www.mysanantonio.com/news/local/article/Prison-in-Willacy-County-to-lay-off-all-employees-6110137.php>; Fernando del Valle, *Willacy County Braces for Prison Layoffs*, VALLEY MORNING STAR (Harlingen, Tex.) (Mar. 6, 2015, 10:45 PM), [http://www.valleymorningstar.com/premium/article\\_ce6c250c-c484-11e4-b01d-57658f494172.html](http://www.valleymorningstar.com/premium/article_ce6c250c-c484-11e4-b01d-57658f494172.html); *Willacy County Prison Plans to Lay Off 200 Workers Monday*, VALLEYCENTRAL.COM (Mar. 9, 2015, 12:08 PM), <http://www.valleycentral.com/news/story.aspx?id=1174897>.

390. TOM BARRY, *BORDER WARS* 4–5 (2011).

391. *Id.* at 15.

392. *See id.* at 45–46.

393. *See* Allen Essex, *New Prisoners Begin Arriving at “Tent City,”* THE MONITOR (McAllen, Tex.) (Oct. 10, 2011, 12:00 AM), [http://www.themonitor.com/news/local/new-prisoners-begin-arriving-at-tent-city/article\\_c958cc6d-e46e-56ab-926d-b8a747f6db32.html](http://www.themonitor.com/news/local/new-prisoners-begin-arriving-at-tent-city/article_c958cc6d-e46e-56ab-926d-b8a747f6db32.html)

(noting that Willacy County, Texas, would receive \$1.3 million per year if a county-owned, privately run prison contracted to BOP to house criminal immigration prisoners housed 1,380 per day, but \$2.3 million if it housed 1,381 or more prisoners); Charles Murphy, *Glades County Sheriff to Close Jail Facility; Says Federal Government Cut Back on Arrests of Illegal Immigrants and Large Jail Facility is Losing Money; 100 Jobs Lost*, GLADES CNTY. DEMOCRAT (Glades Cnty., Fla.) (Apr. 9, 2014, 1:34 PM), <http://florida.newszap.com/gladescounty/131120-113/glades-county-sheriff-to-close-jail-facilitysays-federal-government-cut-back-on-arrests-of-illegal-i> (reporting that the sheriff of Glades County, Florida, blamed ICE for the county’s inability to afford to keep the county jail open).

394. *See* Silverstein, *supra* note 377, at 162.

complicated projects worthwhile. Financial institutions such as banks provide the capital necessary to build, refurbish, or expand prisons.<sup>395</sup> Indeed, major banks in the United States have taken important, though indirect, roles in immigration imprisonment by supporting the private prison companies and local governments that actually build or operate these facilities. Wells Fargo, for example, invests in the GEO Group and also manages CCA's financial restructuring.

## VI.

### DENATURALIZING IMMIGRATION IMPRISONMENT

Despite its central presence in modern immigration law enforcement, incarceration is undeniably an extraordinary power. It is a "severe sanction," as the Supreme Court has put it on multiple occasions.<sup>396</sup> Short of the state's authority to take a person's life, it is the most awesome power that the state wields.<sup>397</sup> Acknowledging that incarceration necessarily entails a severe deprivation of liberty that sharply departs from the western legal tradition's otherwise strong claim to respect a person's liberty,<sup>398</sup> the Supreme Court has repeatedly recognized that people have a "constitutionally protected interest in avoiding physical restraint."<sup>399</sup>

To better reflect the extraordinary character of imprisonment, its proper place in enforcing immigration law should be at the sidelines.<sup>400</sup> It should, at most, represent the margins of governmental authority. In the context of civil immigration law, confinement should be prohibited unless the government can provide clear, articulable facts indicating that a particular migrant represents a danger to the public or a risk of flight that cannot be substantially ameliorated by alternative means, as is already the case for pretrial detention of criminal defendants. The same standard ought to apply to pretrial detention in the criminal immigration context.

Upon conviction for an immigration crime, incarceration ought to be permitted only to the extent that it accomplishes some goal that the civil immigration law enforcement system cannot.<sup>401</sup> Since neither criminal nor civil

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395. See Martin Lemberg-Pedersen, *Private Security Companies and the European Borderscapes*, in *THE MIGRATION INDUSTRY AND THE COMMERCIALIZATION OF INTERNATIONAL MIGRATION* 152, 167 (Thomas Gammeltoft-Hansen & Ninna Nyberg Sørensen eds., 2013).

396. *Nichols v. United States*, 511 U.S. 738, 762 (1994) (Blackmun, J., dissenting); see also *Scott v. Illinois*, 440 U.S. 367, 372 (1979).

397. See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991).

398. See *United States v. Salerno*, 481 U.S. 739, 750 (1987).

399. *Demore v. Kim*, 538 U.S. 510, 553 (2003) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

400. See Noferi, *supra* note 304 (promoting less civil immigration detention).

401. See Victor C. Romero, *Decriminalizing Border Crossings*, 38 *FORDHAM URB. L.J.* 273, 279–80 (2010) (positing that using criminal powers "when civil penalties will do offends constitutional safeguards of individual liberty by tempting law enforcement to overreach").



immigration law enforcement has much of a deterrent effect, and since imprisonment incapacitates a detained individual whether through civil or penal detention, incarceration after conviction of an immigration crime should be restricted to situations in which confinement promotes criminal law's retributive justification. Whether retributivist aims are served must be considered in light of the reality that many unauthorized migrants come to the United States not of their own volition (as is the case of migrants brought as children)<sup>402</sup> or for morally commendable reasons (e.g., to escape violence).<sup>403</sup> Given that imprisonment for immigration crimes is largely ineffective as a deterrent and that many migrants break the law for morally justifiable reasons, it would be appropriate to significantly reduce the sentences meted out for these crimes. It would even be fitting to decriminalize unauthorized border crossings unless "the federal government can prove that, with requisite criminal intent, [a migrant] engaged in an act aside from crossing the border that would constitute a crime."<sup>404</sup> Imprisonment should, in effect, be an extraordinary power resorted to only in the most exceptional of circumstances.

Denaturalizing immigration imprisonment may appear a tall task, impossible or at least unrealistic in the current political environment. But it is not a "foregone conclusion." Imprisonment need not be a central part of the immigration law enforcement regime.<sup>405</sup> Just as the prison was naturalized, it can be denaturalized.<sup>406</sup> Recent developments in criminal incarceration offer promising models and proof that it is possible to rewind the clock on imprisonment policy. In late 2013, then-Attorney General Eric Holder announced Justice Department plans to reduce the size of the federal prison population, in part by doing what would have been unthinkable for most of the last thirty years: "fundamentally rethinking the notion of mandatory minimum sentences for drug-related crimes."<sup>407</sup> Similarly, several states, including some known for their staunchly conservative legislatures and large prison systems, have reduced their prison populations.<sup>408</sup> Notably, for three years running—from 2010 to 2012—the total federal and state prison population in the United

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402. See 147 CONG. REC. 15361 (2001) (statement of Sen. Hatch) (introducing proposed legislation known as the DREAM Act that "would allow children who have been brought to the United States through no volition of their own the opportunity to fulfill their dreams, to secure a college degree and legal status").

403. See PORTES & RUMBAULT, *supra* note 44, at 23–25 (explaining that refugees and asylees come to the United States to avoid persecution).

404. Romero, *supra* note 402, at 275.

405. See Feeley, *supra* note 248, at 333.

406. See Doty & Wheatley, *supra* note 306, at 430 ("This system is neither automatically self-perpetuating nor incapable of change.").

407. Eric Holder, U.S. Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

408. See, e.g., Shane Bauer, *How Conservatives Learned to Love Prison Reform*, MOTHER JONES (Feb. 25, 2014, 7:00 AM), <http://www.motherjones.com/politics/2014/02/conservatives-prison-reform-right-on-crime>.

States declined. There were almost forty-three thousand fewer people imprisoned in federal or state prisons across the country at the end of 2012 than at the end of 2009, the year that the number of prisoners peaked.<sup>409</sup>

Denaturalizing immigration imprisonment will not come easily. As Part V illustrated, there are numerous impediments rooted in institutional design, politics, and the cold realities of business affairs to turning away from entrenched incarceration. It is difficult to imagine that any of the entities currently involved in immigration imprisonment will voluntarily remove themselves from this thriving practice. Only external pressure can shift the foundations of modern immigration law enforcement.

#### CONCLUSION

The policy initiatives and laws that currently drive migrants into imprisonment rely on the rhetoric of migrant criminality. Arizona's human smuggling crime, for example, portrays migrants who pay someone to help them enter the United States clandestinely as conspirators in a law-breaking enterprise. As a matter of law, they are treated identically to the people who were paid to bring the migrants into the country. In a similar vein, fast-track pleas, no-bail provisions, and other initiatives that radically alter traditional criminal processes suggest that migrants are simply too dangerous for government to rely on ordinary investigative methods. Likewise, Secure Communities, CAP, immigration detainers, and other initiatives that break down boundaries between criminal and civil immigration law enforcement suggest that the old ways of compartmentalizing enforcement efforts into silos of substantive law are simply insufficient. And if the old ways of enforcing law's obligations are insufficient, then it must be because the new threat is beyond what those traditional branches of law enforcement can police.

In response, governments at every level turned to imprisonment to buttress their immigration law enforcement powers. In time, imprisonment embedded itself so deeply in the nation's collective law enforcement arsenal that it became normal. It spawned a network of decision-making processes and actors that reproduce the drive to imprison. But as with the development of the prison itself, imprisonment as a form of immigration law enforcement is neither necessary nor an enforcement mechanism that has been with us since time immemorial. That immigration imprisonment has become naturalized is the result of a deliberate, identifiable series of political actions to demonize migrants—actions operationalized through policy decisions expanding the harsh consequences of immigration activity.

Neither political actions nor policy decisions are forever. As with the development of prisons in the first place, what is required is a willingness to imagine a different path and the entrepreneurial spirit necessary to

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409. CARSON & GOLINELLI, *supra* note 8, at 1.

operationalize it.<sup>410</sup> Only then can immigration imprisonment return to the aberration it once was and ought to be.

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410. See Feeley, *supra* note 284, at 329.