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Rendition Resistance

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RENDITION RESISTANCE*

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With the number of immigrant deportations setting new records, attention has focused largely on states like Arizona and Alabama, which seem to be competing to pass the harshest anti-immigrant state law provisions. Yet laws like those at issue in Arizona v. United States, *seeking to augment or supplement federal immigration enforcement efforts, represent only one side of the state and local response to the issue. Recent years have also witnessed a spate of jurisdictions opting out of immigration enforcement by passing measures restricting local law enforcement from honoring federal immigration detainers.*

This Article assesses this wave of rendition resistance in the context of the history of interstate rendition in the United States of fugitive slaves and "fugitives from justice" (criminal fugitives). This history is relevant because, like immigration rendition, slave rendition and criminal rendition concern a paradigmatic transaction—the claim, by a person or government, of a right to have a second government deliver up the body of a person into the custody of the claimant. The history explored here is one of the legal mechanisms for delivering bodies back across borders.

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Our rendition history reveals a robust tradition of rendition resistance stemming from a concern for civil rights. This history supplies a body of precedent supporting those localities that have chosen to resist immigration detainers. Across two centuries of our history, it was widely accepted that the federal government could not compel local officials to comply with rendition demands. During this period, a historical practice of state and local authorities resisting demands for rendition in the name of civil rights persisted. Immigration rendition resistance follows this tradition.

Comparing immigrant rendition to fugitive slave rendition and criminal rendition lays bare the nearly complete absence of procedural protections afforded persons in immigration rendition proceedings. Additionally, appreciating the connections between immigrant rendition and slave and criminal rendition allows us to look beyond legal formalism and perceive the underlying values being served by immigration rendition. Against this historical context, immigration rendition becomes visible as a legal system akin to slave and criminal rendition, established to counter the free migration of laborers of color by delivering them back across borders. The exercise of local authority against rendition efforts, as it has been used in the slave and criminal contexts, can be seen as an expression of disapproval of those underlying values.

INTRODUCTION

The United States deported record numbers of immigrants—more than 800,000—in fiscal years 2011 and 2012 combined.[1] A little more than half of those deported were so-called "criminal aliens"[2]—noncitizens who had been convicted of some criminal offense.[3] These numbers also set record highs for a single year.[4] Yet in this same period of record deportations, some local governments started a wave of resistance by refusing to enforce federal immigration detainers aimed at bringing immigrants caught up in state criminal justice systems into the federal immigration enforcement net.

The discussion of the states' role in immigration enforcement has largely focused on the question of whether states like Arizona, Alabama, and Georgia may "opt in" to immigration enforcement by passing local measures to supplement the federal government's enforcement mechanisms.[5] The Supreme Court's decision in *Arizona v. United States*[6] may have put a damper on local efforts to augment or supplement the federal immigration enforcement regime.[7] But the

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1. Elise Foley, *Deportation Hits Another Record Under Obama Administration*, HUFFINGTON POST (Dec. 21, 2012) (citing *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. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 21, 2012) http://www.ice.gov/news/releases/1212/121221washingtondc2.htm [hereinafter *ICE FY 2012 Report*]), http://www.huffingtonpost.com/2012/12/21/immigration-deportation_n_2348090.html (noting 409,849 deportations in FY 2012 and 396,906 in FY 2011).

2. *ICE FY 2012 Report*, *supra* note 1 (noting 225,390 "criminal alien" deportations); *FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Oct. 18, 2011), http://www.ice.gov/news/releases/1110/111018washingtondc.htm [hereinafter *ICE FY 2011 Report*] (noting 216,698 "criminal alien" deportations).

3. The number includes those convicted of minor traffic offenses. *ICE FY 2011 Report*, *supra* note 2.

4. *Removal Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/removal-statistics/ (last visited Aug. 30, 2013) (click on "Criminal Aliens" drop-down tab).

5. *See generally* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011) (arguing state legislation like Arizona's S.B. 1070 and copycat measures are preempted).

6. 132 S. Ct. 2492 (2012).

7. *Id.* at 2507. I have discussed some specific implications the *Arizona* decision carries for immigration detainer practices in two prior articles. *See generally* Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629 (2013) [hereinafter Lasch, *Detainers After* Arizona] (arguing that federal use of immigration detainers raises substantial constitutional questions, and that the logic of the *Arizona* decision—holding Arizona's statutory scheme to be preempted because of conflicts with the comprehensive immigration enforcement regime established by Congress—can be applied with equal force to the executive branch's detainer regulation,

recent wave of resistance to immigration detainers raises an equally important question: May state and local governments "opt out" of immigration enforcement? This Article answers that question by examining local resistance to immigration rendition in its legal and historical context.

Part I of this Article describes the surge of local resistance to immigration enforcement that began in 2010. It discusses in detail the immigration enforcement program, named "Secure Communities," that drove the number of deportations to record highs and the federal government's use of immigration detainers in support of that program. It then reviews the events leading to the decision of one local government—Santa Clara County, California—to "opt out" of immigration enforcement. Santa Clara's story is emblematic of the resistance found in Chicago, the District of Columbia, New York, San Francisco, and other jurisdictions that chose to opt out.

Part II explores the history of interstate rendition[8] in the United States. It traces the history of the rendition of fugitives from justice and fugitive slaves pursuant to the Extradition and Fugitive Slave Clauses of the Constitution and implementing legislation and follows the rise of uniform state legislation governing extradition and the development of an interstate compact governing the use of detainers for rendition of prisoners.

This history is relevant precedent to be considered in assessing the legality of actions taken with respect to immigration detainers. For this history concerns one paradigmatic transaction—the claim, by a person or government, of a right to have a second government

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which similarly conflicts with Congress's statutory scheme); Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J. L. & POL'Y 281 (2013) [hereinafter Lasch, *Preempting Immigration Detainer Enforcement*] (arguing that even if some residual state authority to enforce federal immigration laws exists after *Arizona*, it is nonetheless preempted, at least with respect to state officials prolonging detention pursuant to immigration detainers). *But see* Kevin R. Johnson, *The Debate Over Immigration Reform Is Not Over Until It's Over*, SCOTUSBLOG (June 25, 2012, 8:14 PM), http://www.scotusblog.com/2012/06/online-symposium-the-debate-over-immigration-reform-is-not-over-until-its-over/ ("States are likely to test the boundaries of *Arizona v. United States* with new, if not improved, immigration enforcement legislation.").

8. In his seminal treatise on extradition and rendition, John Bassett Moore distinguished between "extradition," the delivering up of fugitives between independent nations, and "rendition," the delivering up of fugitives domestically, within the United States. 2 JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION § 516 (Boston, The Boston Book Company 1891). "Extradition" between nations is governed by international law, while "rendition" is governed by domestic law. *Id.* Because domestic law applies to the three forms of delivering up discussed here, I adhere to the term "rendition."

deliver up the body of a person into the custody of the claimant. This is our country's history of legal mechanisms for delivering bodies *back* across borders.

Part III of this Article addresses how the law of immigration detainers and the decision of local governments to dishonor them should be understood in light of precedent—the history of rendition reviewed in Part II. Understood in this context, the decision of Santa Clara County and other localities to opt out of immigration detainer enforcement is not only legally justifiable, but it is also consistent with a historical tradition spanning nearly two centuries of state and local authorities resisting federal demands for rendition in the name of civil rights.

Part IV considers the broader implications of evaluating current immigration practices against the historical backdrop reviewed in Part II. After analogizing current immigration rendition to the rendition of fugitive slaves or fugitives from justice, the Article concludes that a common historical thread emerges: Rendition has been used as a weapon to counter the free migration of laborers of color, by delivering them back across borders, and the exercise of local discretion has, with equal consistency, been used to meet it.

I. SANTA CLARA COUNTY AND THE RISE OF LOCAL RESISTANCE TO IMMIGRATION RENDITION

A. Secure Communities

In March 2008, the federal government launched an immigration enforcement program called "Secure Communities."[9] The stated purpose of the program was to focus on the deportation of immigrants who committed serious crimes.[10] The program targeted

9. *ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide: Initiative Aims to Identify and Remove Criminal Aliens from All U.S. Jails and Prisons*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Mar. 28, 2013), http://www.ice.gov/news/releases/0803/080328washington.htm [hereinafter ICE, *Sweeping New Plan*].

10. *Id.* The list of "Level-1 crimes" included murder, kidnapping, and sexual assault, as well as some arguably significantly less serious crimes, such as "threats," "resisting an officer," and drug crimes with a sentence of greater than one year. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES STANDARD OPERATING PROCEDURES 9, *available at* http://epic.org/privacy/secure_communities/securecommunitiesops93009.pdf. That drug crimes were included in the list of "Level-1 crimes" is not surprising given the nexus policymakers have argued exists between immigration enforcement and the "war on drugs." *See* Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (Or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 588–600

prisoners who were awaiting trial or serving sentences for local, state, or federal crimes.[11]

The "cornerstone" of the Secure Communities program is "interoperability"—the linking of federal crime, immigration, and fingerprint databases.[12] Routinely, local law enforcement officials submit booking fingerprints to the FBI for criminal background checks.[13] The FBI transmits these fingerprints to the Department of Homeland Security ("DHS"),[14] which then determines which prisoners to target for immigration enforcement.[15]

Immigration detainers are the central enforcement tool for the Secure Communities program[16] because they are the principal mechanism for federal immigration officials to obtain custody over suspected immigration violators in the custody of state or local law enforcement officials. When federal officials learn that a suspected immigration violator is in a state prison or local jail, they issue a detainer, also known as a "Form I-247."[17] The form is a piece of paper purporting to command[18] state or local officials to maintain in their

(2010) (exploring the rhetoric and the reality of links between the "war on drugs" and immigration enforcement).

11. ICE, *Sweeping New Plan*, *supra* note 9. Because this Article focuses on state and local resistance to the federal government's enforcement program, I consider only the use of immigration detainers to obtain custody over state and local prisoners and do not address any of the legal issues pertaining to the use of detainers to obtain custody over federal prisoners. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1302–08 (2010) (discussing the intersection of civil immigration detainers and criminal prosecutions of immigrants); LENA GRABER & AMY SCHNITZER, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, THE BAIL REFORM ACT AND RELEASE FROM CRIMINAL AND IMMIGRATION CUSTODY FOR FEDERAL CRIMINAL DEFENDANTS (June 2013), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Federal_Bail_Advisory.pdf.

12. *See, e.g.*, *Buncombe, Henderson, and Gaston Sheriffs' Offices in North Carolina Receive Full Interoperability Technology to Help Identify Criminal Aliens: Departments of Homeland Security and Justice Providing More Identity Information to Local Officers About Non-U.S. Citizen Criminal Arrests*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Nov. 18, 2008), http://www.ice.gov/news/releases/0811/081118charlotte.htm.

13. David J. Venturella, *Secure Communities: Identifying and Removing Criminal Aliens*, POLICE CHIEF, Sept. 2010, at 43, 43–44, *available at* http://www.nxtbook.com/nxtbooks/naylor/CPIM0910/index.php#/40.

14. *Id.*

15. *Id.*

16. *ICE Detainers: Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/detainer-faqs.htm (last visited Aug. 31, 2013) ("Detainers are critical for ICE to be able to identify and ultimately remove criminal aliens who are currently in federal, state or local custody.").

17. *See* U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Dec. 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

18. A thorough discussion of the immigration detainer form, including an analysis of whether the immigration detainer is a request or a command, is presented in Part III.

custody a person who otherwise would be released to freedom[19] and to deliver that person to federal immigration officials.

Secure Communities increased ten-fold the use of immigration detainers as an enforcement tool.[20] The United States now issues approximately 250,000 immigration detainers each year.[21] With this increased use of detainers, the number of deportations has spiked.[22]

B. Santa Clara County and Resistance to Secure Communities

But Secure Communities was not without its detractors. Since its inception in March 2008, opponents have denounced Secure Communities, charging that it encourages racial profiling, diverts local resources from crime control, and makes communities less safe by discouraging immigrants from reporting crimes or cooperating with police.[23]

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19. *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 17 ("IT IS REQUESTED THAT YOU: Maintain custody of the subject . . . beyond the time when the subject would have otherwise been released from your custody to allow [the Department of Homeland Security] to take custody of the subject.").

20. Immigration and Customs Enforcement ("ICE") placed 14,803 immigration detainers in fiscal year 2006 and 20,339 in fiscal year 2007. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2008, at 36, *available at* http://www.dhs.gov/xlibrary/assets/budget_bib-fy2008.pdf; U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2009, at 35, *available at* http://www.dhs.gov/xlibrary/assets/budget_bib-fy2009.pdf. In fiscal years 2009 and 2010, ICE issued 234,939 and 239,523 detainers respectively, or approximately 20,000 per month. U.S. DEP'T OF HOMELAND SEC., FY 2011: BUDGET IN BRIEF 63 [hereinafter FY 2011 BUDGET], *available at* http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf; U.S. DEP'T OF HOMELAND SEC., FY 2012: BUDGET IN BRIEF 79 [hereinafter FY 2012 BUDGET], *available at* http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf.

21. 347,691 detainers were issued during the sixteen-month period from October 1, 2011 through January 31, 2013. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, FEW ICE DETAINERS TARGET SERIOUS CRIMINALS (Sept. 17, 2013), *available at* http://trac.syr.edu/immigration/reports/330; *see also* Complaint for Injunctive and Declaratory Relief and Petition for Writ of Habeas Corpus at ¶ 28, Moreno v. Napolitano, No. 1:11-cv-05452 (N.D. Ill. Aug. 11, 2011) (alleging 270,988 detainers were issued in fiscal year 2009).

22. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: IDENT/IAFIS INTEROPERABILITY MONTHLY STATISTICS THROUGH SEPTEMBER 30, 2011 at 1–2 (2011), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf. In fiscal year 2011, "interoperability" was deployed in 937 new jurisdictions, resulting in an increase of over 100,000 "matches" and nearly 30,000 additional deportations. *Id.* As of August 22, 2012, ICE had activated Secure Communities in ninety-seven percent of jurisdictions nationwide. U.S. IMMIGRATION CUSTOMS & ENFORCEMENT, ACTIVE JURISDICTIONS 1 (2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf.

23. Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 152–54 (2011); NAT'L IMMIGRATION FORUM, *Secure Communities*, *available at* http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf (last visited Aug. 31, 2013); NAT'L IMMIGRATION LAW CTR., MORE

Echoing these criticisms, in June 2010, the Board of Supervisors of Santa Clara County passed a resolution urging the disentanglement of local law enforcement from federal immigration enforcement.[24] The resolution indicated a clear concern for the civil rights of immigrants in Santa Clara County.[25] Its opening paragraph described the county as "home to a diverse and vibrant community of people representing many races, ethnicities, and nationalities, including immigrants from all over the world."[26] The resolution also expressed the belief of the Board of Supervisors that "laws like Arizona's SB 1070 ... subject individuals to racial profiling" and affirmed the county's commitment to protect all of its residents from "discrimination, abuse, violence, and exploitation."[27] The Board of Supervisors identified the Tenth Amendment as a legal basis for separating local law enforcement from the federal immigration enforcement effort.[28]

Following the resolution, United States Representative Zoe Lofgren wrote to DHS Secretary Janet Napolitano and United States Attorney General Eric Holder, asking for clarification on how localities could "opt out" of the Secure Communities program.[29] Counsel for Santa Clara County sought similar clarification, invoking Tenth Amendment concerns by asking whether the county was

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QUESTIONS THAN ANSWERS ABOUT SECURE COMMUNITIES 3–4 (March 2009), *available at* http://v2011.nilc.org/immlawpolicy/LocalLaw/secure-communities-2009-03-23.pdf.

24. Res. 2010-316, 2010 Bd. of Supervisors of the Cnty. of Santa Clara (Cal. 2010), *available at* http://media.sjbeez.org/files/2011/10/Board-Resolution-2010-316(6-22-2010).pdf.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*; *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."). The Tenth Amendment prohibits federal commandeering of local officials, *see* Printz v. United States, 521 U.S. 898, 935 (1997), as well as "unfunded mandates," *see* Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1411 (1993). Zelinsky observes:

> A mandate is a requirement imposed on a subordinate level of government to provide a public service that otherwise would not be furnished or to provide a public service in a more costly fashion. A mandate is unfunded if the higher tier of government fails to reimburse fully the lower level for the costs imposed on it.

Id. at 1366.

29. Letter from U.S. Rep. Zoe Lofgren, Chairwoman, Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law, Comm. on the Judiciary, to Janet Napolitano, Sec'y, Dep't of Homeland Sec., and Eric H. Holder, Attorney Gen. (July 27, 2010), *available at* http://media.sjbeez.org/files/2011/10/1-ZL-Secure-Communities-Opt-Out-Letter-%287-27-10%29.pdf.

"*required* or merely *requested*" to honor detainers, and whether the county would receive reimbursement for any expenses incurred.[30] Federal authorities initially indicated the county could opt out by giving notice to DHS and the relevant state identification bureau,[31] and in September 2010 the Board of Supervisors voted to withdraw Santa Clara County from Secure Communities.[32] Santa Clara gave the requisite written notices, but the Director of Secure Communities told Santa Clara County in a November 2010 meeting the county would not be permitted to withdraw.[33]

The issues that had been percolating in Santa Clara made national news in April 2011 after advocates released reams of documents obtained through Freedom of Information Act requests concerning the Secure Communities program.[34] The released documents confirmed that Santa Clara's experience was not unique.[35] In addition to vividly demonstrating DHS's failure to adhere to the enforcement priorities it claimed, the documents revealed significant confusion about whether local participation in Secure Communities was mandatory or optional.[36] The released documents "reveal[ed]

30. Letter from Miguel Márquez, Cnty. Counsel, to David Venturella, Exec. Dir. of Secure Cmtys., at 2 (Aug. 16, 2010), *available at* http://media.sjbeez.org/files/2011/10/1-County-Counsel-8-16-10.pdf (emphasis in original).

31. Letter from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to U.S. Rep. Zoe Lofgren, Chairwoman, Subcommittee on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law, Comm. on the Judiciary (Sept. 7, 2010), *available at* http://media.sjbeez.org/files/2011/10/2-USDOJ-and-DHS-ResponsestoZL.09.08.2010.pdf; Letter from Ronald Weich, Assistant Attorney Gen., to Rep. Zoe Lofgren, Chairwoman, Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law, Comm. on the Judiciary (Sept. 8, 2010), *available at* http://media.sjbeez.org/files/2011/10/2-USDOJ-and-DHS-ResponsestoZL.09.08.2010.pdf; Letter from David J. Venturella, Assistant Dir. of Secure Cmtys., to Miguel Márquez, Cnty. Counsel (undated), *available at* http://media.sjbeez.org/files/2011/10/4-ICE-response-to-SCC.pdf.

32. Memorandum from Miguel Marquez, Cnty. Counsel, to George Shirakawa, Chairperson, and Donald F. Gage, Vice Chair, Pub. Safety & Justice Comm., at 2 (Dec. 2, 2010), *available at* http://media.sjbeez.org/files/2011/10/9-PSJC-memo-12-2-10.PDF.

33. *See id.* at 5 ("The Director of Secure Communities claimed that a local opt-out had never been a possibility, refusing to acknowledge that this was a clear departure from his earlier written communications with the County.").

34. *See* Lee Romney & Paloma Esquivel, *Noncriminals Swept up in Federal Deportation Program*, L.A. TIMES, Apr. 25, 2011, http://articles.latimes.com/2011/apr/25/local/la-me-secure-communities-20110425.

35. NAT'L DAY LABORER ORG. NETWORK ET AL., BRIEFING GUIDE TO "SECURE COMMUNITIES"—ICE'S CONTROVERSIAL IMMIGRATION ENFORCEMENT PROGRAM: NEW STATISTICS AND INFORMATION REVEAL DISTURBING TRENDS AND LEAVE CRUCIAL QUESTIONS UNANSWERED 1–4, *available at* http://ccrjustice.org/files/Secure%20Communities%20Fact%20Sheet%20Briefing%20guide%208-2-2010%20Production.pdf

36. *Id.* at 3.

that ICE officials had long known that the program was not voluntary."[37] Outraged, Representative Lofgren called for an investigation of DHS, charging the agency with "essentially lying to local government and to members of Congress."[38] Representative Lofgren detailed the trail of inconsistent statements and suggested DHS had adopted an internal definition of the term "opt out" in order to give the department "plausible deniability" while all the while knowing the Secure Communities program was not optional.[39]

The backlash was swift and strong. The Congressional Hispanic Caucus urged the President to "freeze" Secure Communities effective immediately, noting the evidence revealed a "striking dissonance" between its stated purpose and actual effect and suggesting the program may "endanger the public, particularly among communities of color."[40] Illinois and New York notified DHS of their immediate withdrawal from Secure Communities,[41] and Massachusetts Governor Deval Patrick announced his state would withdraw.[42]

With the news that the federal government had unwittingly co-opted state and local governments into a system of mandatory immigration enforcement, legal scholars quickly noted the Tenth Amendment implications. Professor Bill Ong Hing observed: "The central teaching of the Tenth Amendment cases is that 'even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to

37. Haraz Ghanbari, *Congresswoman Calls for Investigation of Enforcement Program that Screens for Illegal Immigrants in Jails*, L.A. NOW (Apr. 22, 2011, 5:09 PM), http://latimesblogs.latimes.com/lanow/2011/04/congresswoman-calls-for-investigation-of-enforcement-program-that-screens-for-illegal-immigrants-in-.html.

38. *Id.*

39. Letter from U.S. Rep. Zoe Lofgren, to Charles K. Edwards, Acting Inspector Gen., and Timothy Moynihan, Assistant Dir., Office of Prof'l Responsibility, U.S. Immigration and Customs Enforcement (Apr. 28, 2011), *available at* http://www.huffingtonpost.com/2011/04/28/lofgren-calls-for-dhs-investigation_n_855138.html. The documents also suggested that DHS may have "shifted away from agreements with local police to signing top-down state level agreements without local input," which "seems to have limited the right of localities to choose not to participate in the program." NAT'L DAY LABORER ORG. NETWORK ET AL., *supra* note 35, at 3 & nn.15–16.

40. Letter from U.S. Rep. Charles A. Gonzalez, Chairman, Cong. Hispanic Caucus, to President Barack Obama (May 5, 2011), *available at* http://ndlon.org/pdf/2011-05chcletter.pdf.

41. Letter from Mylan Denerstein, Counsel to the Governor of N.Y., to John Sandweg, Counselor to the Sec'y, U.S. Dep't of Homeland Sec. (June 1, 2011), *available at* http://www.governor.ny.gov/assets/Secure%20Communities.pdf; Letter from Pat Quinn, Governor of Ill., to Marc Rapp, Acting Assistant Dir., Secure Cmtys. (May 4, 2011), *available at* http://epic.org/privacy/secure_communities/sc_ill.pdf.

42. *See* Editorial, *Resistance Grows*, N.Y. TIMES, June 7, 2011, http://www.nytimes.com/2011/06/08/opinion/08wed1.html.

compel the States to require or prohibit those acts.' "[43] And from Boalt Hall, Aarti Kohli noted Secure Communities caused costs to state and local governments, thus indirectly referencing a Tenth Amendment "unfunded mandate" concern.[44]

Stymied in its efforts to opt out of Secure Communities, Santa Clara decided to cut its ties to federal immigration enforcement by taking away the federal government's key tool for obtaining its targets—the immigration detainer. On October 18, 2011, the Board of Supervisors declared independence from federal immigration enforcement by announcing the county would no longer routinely honor federal immigration detainers.[45] Santa Clara resolved not to honor any immigration detainer unless the federal government agreed to pay the costs of detention, and then only if the prisoner were convicted of a serious crime.[46] The county declared absolute its refusal to honor immigration detainers for juvenile prisoners.[47]

Santa Clara is but one example in a wave of jurisdictions opting out in the wake of the documents released in April 2011.[48] In Alameda County (California),[49] Champaign County (Illinois),[50] Cook

43. Media Advisory, Chief Justice Earl Warren Inst. on Law and Soc. Policy, Univ. of Cal.-Berkeley, Sch. of Law, Legal Scholars Weigh in on Immigration Enforcement Controversy in California and the ICE's "Secure Communities" Program 2 (May 10, 2011) (quoting New York v. United States, 505 U.S. 144, 166 (1992)), *available at* http://www.law.berkeley.edu/img/Final_Media_Advisory_SComm.pdf. Prof. Hiroshi Motomura observed that Secure Communities "may overstep the constitutional authority of the federal government to tell local governments how to run [their] police departments." *Id.*

44. *Id.* at 3 ("Because of ICE [detainers], local jurisdictions use their own limited resources to feed, detain, and manage low-level offenders who would ordinarily not remain in custody. All of this occurs before the person is even taken into custody by ICE. *Secure Communities has resulted in a dramatic rise in ICE [detainers] issued to local jails, thereby overburdening local law enforcement with the detention of those arrested on minor offenses who would not normally be held for extended periods.*").

45. SANTA CLARA CNTY. BD. OF SUPERVISORS, SUMMARY OF PROCEEDINGS / MINUTES OF OCTOBER 18, 2011, item 11(a)(2), *available at* http://sccgov.iqm2.com /Citizens/Calendar.aspx?From=1/1/2011&To=12/31/2011. The resolution that was passed is available at http://sccgov.iqm2.com/Citizens/Detail_LegiFile.aspx?ID=9495.

46. *Id.*

47. *Id.*

48. BD. OF SUPERVISORS OF THE CNTY. OF SANTA CLARA, CAL., BD. OF SUPERVISORS' POLICY MANUAL § 3.54, Civil Immigration Detainer Requests (2013), *available at* http://www.sccgov.org/sites/bos/legislation/bos-policy-manual/documents /bospolicychap3.pdf.

49. *See* Letter from Richard Valle, Supervisor, District 2, to Bd. Supervisors, Alameda Cnty. (Apr. 17, 2010), *available at* http://www.acgov.org/board /bos_calendar/documents/DocsAgendaReg_04_23_13/BOARDS%20COMMISSION/Set %20Matter%20Calendar/BOS_Approve_a_resolution_regarding_ICE_Civil_Detainer_R equests.pdf (including resolution text). Local commentators have described the resolution as symbolic and non-binding on the sheriff. *See* Steven Tavares, *Alameda County*

County (Illinois),[51] Milwaukee County (Wisconsin),[52] Multnomah County (Oregon),[53] the towns and cities of Amherst,[54] Berkeley,[55] Chicago,[56] Los Angeles,[57] Newark,[58] New Orleans,[59] New York,[60] and San Francisco,[61] and the District of Columbia,[62] measures have been

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Supervisors Discourage Sheriff From Detaining Undocumented Residents, EBCITIZEN.COM (Apr. 23, 2013), http://www.ebcitizen.com/2013/04/alameda-county-supervisors-discourage.html. In adjacent Contra Costa County, the sheriff is reported to be finalizing a policy that would limit detainer compliance. Malaika Fraley, *Contra Costa County Softening Policies on Immigrant Deportations*, CONTRA COSTA TIMES, May 24, 2013, http://www.contracostatimes.com/contra-costa-times/ci_23313741/contra-costa-county-softening-policies-immigrant-deportations.

50. *See* Letter from Dan Walsh, Champaign Cnty. Sheriff, to U.S. Immigration and Customs Enforcement (March 8, 2012), *available at* http://d3n8a8pro7vhmx.cloudfront.net/progressivemajorityaction/pages/92/attachments/original/1369418919/Champaign__IL_Policy_Letter.pdf?1369418919.

51. COOK COUNTY, ILL., ORDINANCE § 46-37(a) (Supp. 2012), *available at* http://cookcountygov.com/ll_lib_pub_cook/cook_ordinance.aspx?WindowArgs=1501 ("The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.").

52. Res. File No. 12-135, 2012 Milwaukee Cnty. Bd. of Supervisors (Wis. 2012), *available at* http://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=1124069&GUID=3D583485-4F01-4B43-B892-D6FFE5D327BF.

53. Res. 2013-032, 2013 Bd. of Cnty. Comm'rs for Multnomah Cnty. (Or. 2013), *available at* http://web.multco.us/sites/default/files/2013-032.pdf.

54. Yoojin Cho, *Amherst to Opt out of Secure Communities—Resolution to Opt out of Immigration Law Passed*, 22WWLP.COM (May 22, 2012), *available at* http://www.wwlp.com/news/local/hampshire/amherst-1st-town-to-opt-out-of-secure-communities-law.

55. Annotated Agenda, Berkeley City Council Meeting (Oct. 30, 2012), *available at* http://www.ci.berkeley.ca.us/Clerk/City_Council/2012/10Oct/Documents/10-30_Regular_Meeting_Annotated_Agenda.aspx; *see also* Letter from Christine Daniel, City Manager of Berkeley, Cal., to Mayor and Members of the City Council on Consideration of Revisions to Policy Regarding Immigration Detainers in the Berkeley Jail (Oct. 30, 2012), *available at* http://www.ci.berkeley.ca.us/Clerk/City_Council/2012/10Oct/Documents/2012-10-30_Item_19_Consideration_of_Revisions.aspx.

56. CHI., ILL., CODE §§ 2-173-005, 2-173-042 (2013).

57. Editorial, *Baca's Sensible Shift On Immigration—Illegal Immigrants Won't Be Detained for Minor Offenses*, L.A. TIMES (Dec. 6, 2012), http://articles.latimes.com/2012/dec/06/opinion/la-ed-adv-detainers-20121206.

58. James Queally, *Newark Police First in N.J. to Refuse to Detain Undocumented Immigrants Accused of Minor Crimes*, NJ.COM (Aug. 15, 2013), http://www.nj.com/essex/index.ssf/2013/08/newark_police_first_in_nj_to_refuse_to_detain_illegal_immigrants_accused_of_minor_crimes.html.

59. *See* Campbell Robertson, *New Orleans and U.S. in Standoff on Detentions*, N.Y. TIMES, Aug. 13, 2013, at A10 (detailing New Orleans' policy limiting detainer compliance that "came about for a variety of reasons, including a lawsuit filed in federal court in 2011 by two men who had spent months in Orleans Parish Prison on expired detention requests").

60. N.Y.C., N.Y., ADMIN. CODE § 9-131 (Supp. 2013).

61. Brent Begin, *San Francisco County Jail Won't Hold Inmates for ICE*, S.F. EXAMINER (May 6, 2011), http://www.sfexaminer.com/sanfrancisco/san-francisco-county-

passed or policies enacted seeking to end routine compliance with detainers. State-level resistance has occurred in California[63] and Connecticut,[64] and has been proposed in Florida,[65] Massachusetts,[66] and Washington.[67]

The central motivating features of the Santa Clara withdrawal from Secure Communities—and the withdrawal of other localities as well—have been the following: First, concern with the civil rights implications of the Secure Communities enforcement program, and particularly concerns of racial profiling;[68] second, disillusionment with

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jail-wont-hold-inmates-for-ice/Content?oid=2174504 (describing policy adopted by San Francisco Sheriff Michael Hennessey).

62. Immigration Detainer Compliance Amendment Act of 2012, D.C. Act 19-442, 59 D.C. Reg. 10153, 10153–55 (Aug. 24, 2012).

63. The California "TRUST (Transparency and Responsibility Using State Tools) Act," aimed at limiting the state's compliance with federal immigration detainers, was signed into law by the Governor of California on October 5, 2013. *See* Assemb. B. 4, 2013–2014 Reg. Sess. (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB4 (bill history) and http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20130624_amended_sen_v97.pdf (text of bill).

64. Perhaps responding to litigation, *see* Petition for Writ of Habeas Corpus, Brizuela v. Feliciano, No. 3:12-cv-00226-JBA (D. Conn. Feb. 13, 2012), the Connecticut Department of Correction limited its compliance with detainers to instances in which the Department determines the prisoner's release would pose an "unacceptable risk to public safety." CONN. DEP'T OF CORR., ADMIN. DIRECTIVE 9.3: INMATE ADMISSIONS, TRANSFERS AND DISCHARGES ¶ 9–10 (2012), *available at* http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0903.pdf. In June 2013, the Connecticut General Assembly passed and the Governor signed into law a bill that will expand the limitations on detainer compliance beyond the Department of Correction to other state and local law enforcement agencies. Act of June 25, 2013, 2013 Conn. Acts 13-155, *available at* http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00155-R00HB-06659-PA.pdf (concerning civil immigration detainers).

65. S.B. 730, 2012–2013, Reg. Sess. (Fla. 2013). The bill, which would have limited detainer compliance to cases involving specified "serious offense[s]," *id.* at 4, died in committee in May 2013. *See S 730*, OPEN STATES, http://openstates.org/fl/bills/2013/S730/ (last visited Sept. 2, 2013).

66. H.B. 1613, 188th Gen. Ct., Reg. Sess. (Mass. 2013). The bill was titled "An Act relative to restore community trust in Massachusetts law enforcement," and would severely restrict state participation in immigration enforcement. *Id.* For example, the act would preclude Massachusetts judges from denying bail based solely on an immigration detainer, prevent law enforcement from sharing booking lists or release dates for state prisoners, and prevent law enforcement from making state prisoners available for ICE interviews without providing the inmate the opportunity to have counsel present. *Id.* § 40(b). The act would prevent the honoring of immigration detainers except for adults sentenced to a prison term of five years or longer, and even then only when ICE has (1) a prior order of removal or has filed a notice to appear with the immigration court and (2) entered into an agreement for reimbursement of any costs of prolonged state incarceration. *Id.*

67. H.B. 1874, 63rd Leg. Reg. Sess. (Wash. 2013), *available at* http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/House%20Bills/1874.pdf.

68. *See supra* notes 23–27 and accompanying text.

the failure of the federal government to honor its stated enforcement priorities;[69] and third, legal reliance on the Tenth Amendment, and the argument that the federal government—particularly in the absence of compensation—cannot compel enforcement of federal law by state and local officials.[70]

The concerns motivating Santa Clara's resistance to immigration rendition are not new. Indeed, each of these features has been implicated at some point in the struggles and controversies over interstate rendition that have persisted across the span of United States history. Understanding that history is essential to understanding the legitimacy of local resistance to immigration detainers.

II. THE HISTORY OF RENDITION AND RESISTANCE IN THE UNITED STATES

A. From Colonial Times to Emancipation

Two rendition systems were in operation during the first half of American history—a criminal rendition system for delivering up "fugitives from justice" and a slave rendition system for delivering up escaped slaves.[71] Rendition controversies abounded in the antebellum period, with rendition disputes—whether in cases involving fugitives from justice or fugitives from slavery—arising largely in the context of the broader sectional dispute over slavery.[72] These controversies were persistent in part because of the lack of any enforcement mechanism to bring states into compliance with the formal legal rules governing rendition.[73] The federal government, throughout this period, was

69. *See supra* notes 34–40 and accompanying text.

70. *See supra* notes 43–44 and accompanying text. In December 2012, for example, California's Attorney General Kamala D. Harris issued guidance encouraging California law enforcement agencies to adopt their own policies on detainer compliance. Attorney General Harris opined: "If ... detainers were mandatory, forced compliance would constitute the type of commandeering of state resources forbidden by the Tenth Amendment." KAMALA D. HARRIS, INFO. BULLETIN 2012-DLE-01: RESPONSIBILITIES OF LOCAL LAW ENFORCEMENT AGENCIES UNDER SECURE COMMUNITIES 2 (2012) (citing Printz v. United States, 521 U.S. 898, 925 (1997); New York v. United States, 505 U.S. 144, 161 (1992)), *available at* http://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf; *see also Resistance Grows*, *supra* note 42 ("The idea that the federal government can commandeer states' resources for its enforcement schemes seems ripe for legal challenge.").

71. *See* discussion *infra* Part II.A.1.

72. *See* discussion *infra* Part II.A.2–5.

73. *See* discussion *infra* Part II.A.2–5.

believed to lack any power to compel the compliance of state officials with federal rendition law.[74]

This situation—with states able to effectively opt out of the rendition process—pertained in both the realms of criminal rendition and slave rendition.[75] State discretion to opt out of criminal rendition would persist into the twentieth century.[76] With respect to slave rendition, the Fugitive Slave Act of 1850 represented an attempt to solve the problem of persistent state rendition controversy by placing enforcement of rendition exclusively in the control of federal officials.[77]

1. The Constitutional Provisions for Interstate Rendition

The history of interstate rendition in the United States has been driven by two clauses in the Constitution requiring fugitives to "be delivered up"—the Extradition Clause[78] and the Fugitive Slave Clause.[79] The coupling of these clauses in the Constitution (the Fugitive Slave Clause immediately following the Extradition Clause) reflected a linking of fugitive slaves and fugitives from justice that was more than a century old. Indeed, the first formal compact among colonies—the New England Confederation of 1643 between Massachusetts, Connecticut, New Haven, and New Plymouth—provided in a single article for the return of both fugitive slaves and fugitives from justice.[80] The Articles of Confederation of the United Colonies in 1672 did the same.[81] As a general matter, neither fugitive

74. *See* discussion *infra* Part II.A.2–5.

75. *See* discussion *infra* Part II.A.2–5.

76. *See* discussion *infra* Part II.B.1.

77. *See* discussion *infra* Part II.A.4.

78. U.S. CONST. art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

79. U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

80. Frank Kopelman, *Extradition and Rendition: History—Law—Recommendations*, 14 B.U. L. REV. 591, 625–26 (1934).

81. ARTICLES OF CONFEADERATION BETWEEN THE PLANTATIONS UNDER THE GOUERMENT OF THE MASSACHUSETTS THE PLANTATIONS VNDER THE GOUERNMENT OF NEW PLYMOUTH; AND THE PLANTATIONS VNDER THE GOUERMENT OF CONECTICOTT of 1672, art. VII, *reprinted in* THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH: TOGETHER WITH THE CHARTER OF THE COUNCIL AT PLYMOUTH, AND AN APPENDIX, CONTAINING THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND AND OTHER

slaves nor fugitives from justice found quarter in escaping from one English colony to another during the pre-revolutionary period.[82]

The eighteenth century and the American Revolution put an end to the unanimity of the colonies on the question of slavery. The concept of slavery, as a metaphor, dominated eighteenth century political discourse, culminating in Americans viewing themselves on the eve of the Revolution as "the most abject sort of slaves" to the British.[83] The premise behind the metaphor was that slavery was abhorrent to the natural rights of man.[84] Inevitably, in an age in which the colonists increasingly employed the slavery metaphor in their efforts to throw off the yoke of English oppression, antislavery sentiment waxed concurrently with this logic: "The identification between the cause of the colonies and the cause of the Negroes bound in chattel slavery—an identification built into the very language of politics—became inescapable."[85] While those in the southern states were reluctant to embrace the identification of the two causes, such rhetoric was commonplace in the northern and middle colonies by 1774.[86] This contributed to the rising anti-slavery feeling.[87] The

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VALUABLE DOCUMENTS 314, 317 (William Brigham ed., Boston, Dutton & Wentworth 1836).

82. ALMON WHEELER LAUBER, INDIAN SLAVERY IN COLONIAL TIMES WITHIN THE PRESENT LIMITS OF THE UNITED STATES 217–25 (1913) (detailing measures taken for the return of fugitive slaves in the colonies); MARION GLEASON MCDOUGALL, FUGITIVE SLAVES (1619–1865), at 89–103 (Boston, Ginn & Co. 1891) (detailing colonial legislation for fugitive slave rendition); I.T. Hoague, *Extradition Between States: Executive Discretion*, 13 AM. L. REV. 181, 188–89 (1879) (describing "intimate" relationship of the colonies with regard to criminal justice); Kopelman, *supra* note 80, at 624–25 (noting that fugitives from justice "usually" could not obtain asylum); Michael Edmund O'Neill, *Article III and the Process Due a Connecticut Yankee Before King Arthur's Court*, 76 MARQ. L. REV. 1, 62 (1992) (describing how fugitives from justice could be transported to England from the colonies for trial in an English court). *But see* C.W.A. David, *The Fugitive Slave Law of 1793 and its Antecedents*, 9 J. NEGRO HIST. 18, 18 (1924) ("In New England a provision obtained for the temporary protection of runaway servants who had fled on account of tyranny of their masters.").

83. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 232–33 (1967).

84. Slavery "meant the inability to maintain one's just property in material things and abstract rights, rights and things which a proper constitution guaranteed a free people." *Id.* at 233. It was an "absolute political evil," a "symptom and consequence of disease in the body politic." *Id.* at 232–33.

85. *Id.* at 235. *See generally id.* at 232–46 (acknowledging conflicts between slavery and principles of freedom based in the American Revolution as noted by Revolutionary figures); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 19–22 (1975) (identifying numerous Revolutionary era figures who wrote in opposition to slavery because of its conflict with the principles of freedom and liberty); David, *supra* note 82, at 20 (noting the resistance to the slave trade in the Continental Congress leading up to the Revolutionary War).

86. BAILYN, *supra* note 83, at 236–39.

sectional divide thus engendered would spur rendition controversies implicating slavery until the Civil War ended them.

The conviction that slavery was inimical to natural law had long been discussed, but it also flowed easily from Lord Mansfield's decision in *Somerset's Case*[88] in 1772, condemning slavery as "so odious, that nothing can be suffered to support it, but positive law."[89] *Somerset's Case* "became a cloud over the legitimacy of slavery in America."[90] It resonated with revolutionary ideology and fueled the antislavery movement in America. Slaves in Massachusetts successfully sued for their freedom on the ground that no positive law in Massachusetts supported their enslavement.[91] Abolitionists declared the entire ground of the American colonies to be free soil, since slavery had been held in *Somerset's Case* to be inconsistent with the English Constitution, and the colonies were forbidden from establishing laws inconsistent with England's.[92] Rising antislavery sentiment fueled significant accomplishments before and during the Revolution, including the abolition of slavery (either immediate or gradual) in several of the northern states.[93] The sectional divide over slavery deepened.

With respect to rendition, the states after the Revolution were no longer bound together as colonies of the Crown[94] but were instead

87. David, *supra* note 82, at 20; James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023, 2027–30 (1996).

88. Somerset v. Stewart, (1772) 98 Eng. Rep. 499, 509–10 (K.B.).

89. COVER, *supra* note 85, at 17 (quoting *Somerset's Case*, 98 Eng. Rep. at 510). Scholars have debated the true content and meaning of *Somerset's Case*. *See* Jerome Nadelhaft, *The Somerset Case and Slavery: Myth, Reality, and Repercussions*, 51 J. NEGRO HIST. 193, 200–01 (1966) (casting doubt on that portion of the reported decision that Cover quotes here); William M. Wiecek, *Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 141–46 (1974) (summarizing variants of the *Somerset* decision). What is important here, however, is *Somerset's* reception in America, and it is clear that Lord Mansfield's condemnation of slavery as "odious" reached the American audience. *See* Wiecek, *supra*.

90. *Wiecek*, *supra* note 89, at 88. The author notes this "result ... would have surprised and annoyed [Lord] Mansfield." *Id.*

91. *Id.* at 115.

92. *Id.* at 116–17.

93. David, *supra* note 82, at 20; Oakes, *supra* note 87, at 2027–30.

94. Before the Revolution, the colonies regularly delivered up fugitives from justice from one colony to another, in part because they were "under a common sovereign" and the "common good of the whole sovereign" was implicated. Kopelman, *supra* note 80, at 624–25; *see* Commonwealth v. Deacon, 10 Sergeant & Rawle 125, 129, 1823 WL 2218 (Pa. 1823) ("The common good of the whole, forbids an asylum, in one part, for crimes committed in another. So, prior to the American revolution, a criminal who fled from one colony, found no protection in another."). Justice Tilghman's opinion in *Deacon* was cited by leading commentators. *See, e.g.*, ROLLIN CARLOS HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE

independent nations with no duty to deliver up fugitives to each other.[95] Since *Somerset's Case* "supported the conclusion that a slave became free upon setting foot in a free jurisdiction,"[96] the rendition of fugitive slaves between free and slaveholding states now became an open question.[97]

The Articles of Confederation, drafted in 1776 and 1777, and ratified in 1781, contained a provision for the return of fugitives from justice[98]—but none for fugitive slaves.[99] Rendition of fugitive slaves was governed only by comity: "The state to which a slave fled was free to emancipate her or to return her, as it saw fit."[100] Fugitive slaves

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CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 592 (Albany, W.C. Little & Co. 1858); 2 MOORE, *supra* note 8, at 980; JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 522 (Boston, Hilliard, Gray, & Co. 1834).

95. *See* O'Neill, *supra* note 82, at 63. *Cf.* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446 (1987) ("[F]ederation by mutual treaty was exactly what the Revolutionaries had in mind when they created the Articles. The document was not styled as a 'constitution' (as were the new charters within each state) but as a 'confederacy,' a 'firm *league* of friendship' entered into by '*different* states,' each of which would 'retain[] its *sovereignty*, freedom, and independence, and every Power, Jurisdiction and right, which is not by this *confederation* expressly delegated to the United States, in Congress assembled.' ")

96. COVER, *supra* note 85, at 87.

97. *See* David, *supra* note 82, at 20 (noting that the Revolution "divided [the country] into slave and non-slave-holding sections, a condition which made the return of fugitives a sectional question").

98. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1. At least Connecticut and Virginia passed legislation purporting to implement this provision. ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 110 (Timothy Green, ed., New London 1784); MOORE, *supra* note 8, at 824 (citing 10 HENNING'S STAT. AT LARGE 130). Additionally, a custom predating the Articles of Confederation, by which surrender of a fugitive was made upon receipt of a writ signed by the chief justice of the demanding state and endorsed by the chief justice of the asylum state, appears to have prevailed in some jurisdictions during the period of the Articles of Confederation. Hoague, *supra* note 82, at 189–91.

99. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

100. Robert J. Kaczorowski, *Fidelity Through History and to It: An Impossible Dream?*, 65 FORDHAM L. REV. 1663, 1674 n.56 (1997) (citing, inter alia, THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861, at 15–16 (1974), and WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760–1848, at 78–79 (1977)). Kaczorowski further explains:

> As Northern states abolished slavery while Southern states retained it, two conflicting legal systems emerged in the United States. This troubled slaveholders. The legal effect of any state's law did not go beyond its territorial jurisdiction. A state that did not recognize slavery was under no obligation to give effect to the master's right in his slave, should either or both come within the state's

reaching Massachusetts, for example, were likely to be declared free on the basis of *Somerset's Case*.[101]

But this decoupling, in the Articles of Confederation,[102] of the issues of fugitive slave rendition and the rendition of fugitives from justice, would prove short-lived. Less than a decade later, in the Northwest Ordinance of 1787, the rendition of fugitives from justice and fugitive slaves would be rejoined.[103] While the Northwest

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> jurisdiction. Nor were nonslaveholding states under any legal obligation to return runaway slaves to their owners in another state.

Id.

101. THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861, at 15 (1974). One author suggests the omission from the Articles of Confederation of a provision for fugitive slave rendition was inconsequential. *See* MCDOUGALL, *supra* note 82, at § 14 at 13 ("Since all the thirteen colonies recognized slavery, the Revolution made no difference in any previous intercolonial practice as to the delivery of slaves; in framing the Articles of Confederation no clause on the subject was thought necessary."). This conclusion underestimates, in my opinion, the confluence of three factors, already discussed, that would quite logically have led representatives of the southern states to demand something more than comity—the significant confluence of revolutionary and antislavery ideology, particularly in the northern and middle colonies, which presaged sectional conflict over slavery; *Somerset's Case* and its perceived holding that slavery exists by positive law only; and the prevailing notion of the states as independent nations entering into a confederation. *See supra* notes 88–95 and accompanying text. Additionally, similar logic would suggest a provision for fugitives from justice—which *was* included in the Articles of Confederation—would have been "thought unnecessary" as well.

102. Interestingly, a proposal for colonial confederacy, William Penn's 1697 "Plan for a Union of the Colonies in America," also decoupled the two rendition issues, referencing fugitive debtors and fugitives from justice but omitting mention of fugitive slaves. MR. PENN'S PLAN FOR A UNION OF THE COLONIES IN AMERICA, *reprinted in* HOWARD W. PRESTON, DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1863, at 147 (3d ed., New York, G. P. Putnam's Sons 1893). Penn's plan listed points of concern in calling for a congress that would

> hear and adjust all matters of Complaint or difference between Province and Province. As, 1st, where persons quit their own Province and goe to another, that they may avoid their just debts, tho they be able to pay them, 2nd, where offenders fly Justice, or Justice cannot well be had upon such offenders in the Provinces that entertaine them . . . .

Id. The omission of any mention of fugitive slaves as a "matter[] of Complaint" is possibly grammatical rather than ideological, as Penn's list was illustrative, not exhaustive. Penn himself owned slaves. *See* Edward Raymond Turner, *The Abolition of Slavery in Pennsylvania*, 36 PENN. MAG. HIST. & BIOGRAPHY 129, 132 (1912). Antislavery sentiment in Pennsylvania would not rise until the second half of the eighteenth century. *See generally id.* (describing the early abolitionist movement in Pennsylvania).

103. AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO of 1787, *reprinted in* PRESTON, *supra* note 102, at 241, 241–50. Article IV of the Northwest Ordinance incorporated the Articles of Confederation, and consequently the provision for rendition of fugitives from justice. *Id.* at 248. Article VI provided that in the case of "any person escaping into the [Northwest

Ordinance purported to ban slavery from the Northwest Territories,[104] the Ordinance contained a compromise: The slavery ban was coupled with a provision for rendition of any fugitive slave who might escape from the states to the territories.[105] Thus, "the first and last antislavery achievement of the central government in the period"[106] was also the first legislation of the national government respecting fugitive slave rendition[107] and "an important victory for slavery."[108]

The Northwest Ordinance was passed in July 1787;[109] in August, South Carolina's delegation to the Constitutional Convention attained a similar gain for slavery with little opposition or debate[110]—the inclusion of the Fugitive Slave Clause in the Constitution.[111] The

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territories], from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid." *Id.* at 250.

104. *Id. But see* Paul Finkelman, *Slavery and the Northwest Ordinance: A Study in Ambiguity*, 6 J. EARLY REPUBLIC 343, 344–46 (1986) (concluding the Ordinance's actual impact on slavery in the territories was negligible).

105. *See* AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO of 1787, art. IV, *supra* note 103, at 248.

106. ULRICH B. PHILLIPS, AMERICAN NEGRO SLAVERY 128 (1918).

107. C.W.A. David describes the ordinance as "set[ting] the precedent that Congress alone had the right to regulate the extension of slavery." David, *supra* note 82, at 21. The Ordinance ought not be considered as precedent for federal regulation of fugitive slave rendition, however, as it only demonstrated the national government's dominance over the territories—not the States.

108. Finkelman, *supra* note 104, at 345. Finkelman argues that the presence of the fugitive slave provision in the Northwest Ordinance might have contributed to a southern perception of the Ordinance as "proslavery, or at least as protective of slavery." *Id.* at 345 n.4.; *see also* David, *supra* note 82, at 21 (describing the fugitive slave provision of the Ordinance as having been "passed to appease the southern members of Congress").

109. 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1779, at 334 (Roscoe R. Hill ed.,1936).

110. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 145–52 (1913); Earl M. Maltz, *The Idea of the Proslavery Constitution*, 17 J. EARLY REPUBLIC 37, 58 (1997) ("[C]riticism of the fugitive slave clause was virtually nonexistent."). Maltz has suggested this was because the Fugitive Slave Clause was a compromise—while the Clause required the return of *fugitive* slaves, it was silent on the issue of whether northern states could free slaves *voluntarily* brought onto free soil by their masters. *Id.* at 56–59.

111. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 26–27 (1981). There are suggestions that the fugitive slave provisions in the Northwest Ordinance and the Constitution were part of a single compromise on slavery. James Madison reportedly described a "compromise by which the northern or anti-slavery portion of the country agreed to incorporate, into the Ordinance and Constitution, the provision to restore fugitive slaves." EDWARD COLES, HISTORY OF THE ORDINANCE OF 1787, at 28–29 (1856), *quoted in* Staughton Lynd, *The Compromise of 1787*, 81 POL. SCI. Q. 225, 228 (1966).

text of the Fugitive Slave Clause, which was nearly identical to that of the fugitive slave provision in the Northwest Ordinance,[112] immediately followed the Extradition Clause,[113] which was drawn nearly verbatim from an analogous clause in the Articles of Confederation.[114] The inclusion of a provision for the rendition of fugitive slaves was seen as both a significant departure from current practice and as a significant gain for the southern slaveholding states.[115] James Madison, arguing at the Virginia ratifying convention, summarized the advantages under the proposed Constitution to a slaveholding state: "This is a better security than now exists. . . . [A]t present, if any slave elopes in any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the States are uncharitable to one another in this respect . . . ."[116]

The Constitution appeared to replace the relationship of comity between the states that had prevailed under the Articles of

112. *Compare* U.S. CONST. art. IV, § 2, cl. 3 ("No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."), *with* AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO of 1787, art. VI, *supra* note 103, at 250 ("[A]ny person escaping in the [Northwest territories], from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.").

113. U.S. CONST. art. IV, § 2, cl. 2 ("A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

114. ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 2 ("If any Person guilty of, or charged with treason, felony or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.").

115. *See, e.g.*, FINKELMAN, *supra* note 111, at 27–28 ("The delegates returning to North Carolina . . . told their governor that '[t]he Southern States have also a much better Security for the Return of Slaves who might endeavor to Escape than they had under the original Confederation. Charles Cotesworth Pickney was the most optimistic, telling the South Carolina House of Representatives, 'We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before.' " (quoting 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254–55 (Max Farrand ed., Yale University Press rev. ed. 1937) (1911))).

116. FINKELMAN, *supra* note 111, at 27 (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 453 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1896)). "During the critical decade of the 1780's," Robert Cover writes, "it was almost axiomatic that the operation of normal 'international' reciprocity would not lead to the recognition by one state of the slave property of another." COVER, *supra* note 85, at 88.

Confederation with a relationship of compulsion. Whether that change would prove true in practice, however, depended on the ability of the federal government to enforce the Fugitive Slave Clause.

2. Congressional Action: The Extradition and Fugitive Slave Acts of 1793

The Extradition Clause and Fugitive Slave Clause of the Constitution provided explicit endorsement of interstate rendition; Congress first asserted its power to legislate in this field in 1793.[117] The events leading to the legislation comprising the Extradition and Fugitive Slave Acts of 1793 suggested a rendition system governed only by comity between the states would be made difficult by the states' widening division on the subject of slavery.

On March 9, 1791, a group of Virginians under the command of Francis McGuire killed four Delaware Indians at Big Beaver Creek in Pennsylvania.[118] The killings were in retaliation for alleged acts committed in late February by a band of Delaware Indians against Virginians.[119] A group of aggrieved Indian chiefs composed a letter to President Washington, and in turn Washington's Secretary of War suggested Governor Mifflin of Pennsylvania seek extradition from Virginia of McGuire and his men, to be tried for the murders in Pennsylvania.[120] This was done, and Governor Randolph of Virginia immediately offered a reward to anyone who would turn the fugitives over to Pennsylvania.[121]

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117. Act of Feb. 12, 1793, ch. VII, 1 Stat. 302 (1793). Fugitives from justice and fugitive slaves were the subject of a single act of Congress. Following common usage, I will refer to the first two sections, §§ 1–2, 1 Stat. at 302, dealing with fugitives from justice, as the "Extradition Act of 1793," and the remaining sections, §§ 3–4, 1 Stat. at 302–05, dealing with fugitive slaves, as the "Fugitive Slave Act of 1793."

118. William R. Leslie, *A Study in the Origins of Interstate Rendition: The Big Beaver Creek Murders*, 57 AM. HIST. REV. 63, 64 (1951).

119. *Id.*

120. *Id.* at 64–65.

121. *Id.* at 64–66. The requisition was made in April 1791. *Id.* at 64–65. The Governor of Pennsylvania, "having received information upon oath that four freindly [sic] Indians were murdered on the Ninth of March last by a body of armed men, under the Command of Samuel Brady and Francis McGuire," wrote the Governor of Virginia "and required that the above named two persons should be delivered up ...." Executive Minutes of Governor Thomas Mifflin 1790–1792 (Apr. 23, 1791), *in* 1 PENNSYLVANIA ARCHIVES, 9TH SER. 3, 89 (Gertrude MacKinney, ed., 1931). The history of Indian nations' sovereignty and the relationships between Indian nations, the states, and the federal government is not explored in this Article, though I suspect much could be learned through an examination of the history of rendition among those governments. For such an examination, see generally Kerstin G. LeMaire & Mark D. Tallan, *Issues Involving*

Ten days later, after favorably observing the swift and certain response of Governor Randolph to the requisition of the Big Beaver Creek murderers, the Pennsylvania Society for Promoting the Abolition of Slavery asked Governor Mifflin to issue a requisition for a second group of Virginians.[122] These men had been indicted for kidnapping after they abducted an African American named John, claiming him to be a fugitive slave.[123] Among those named in the indictments was Francis McGuire—one of the Big Beaver Creek murderers.[124]

In June 1791, Governor Mifflin of Pennsylvania again wrote Governor Randolph of Virginia, demanding the surrender of the kidnappers.[125] In marked contrast to Governor Randolph's swift acquiescence to the requisition of the Big Beaver Creek murderers, the second requisition aroused the deep divide between Pennsylvania and Virginia over slavery and generated fierce resistance.[126] Governor Randolph refused the extradition request, citing various technical reasons explaining why the requisition was not in compliance with the requirements of the Extradition Clause of the Constitution, arguing that the Extradition Clause had been supplied with no enforcement mechanism and implicitly asserting that rendition was purely a matter of executive prerogative.[127] The divide deepened, and Governor Randolph ultimately recalled his reward for the Big Beaver Creek murderers in addition to refusing the extradition of the indicted kidnappers.[128] "Co-operation, at first vigorous, then stumbling, had finally stopped completely."[129] Congressional action was ultimately seen as the only remedy for the impasse.[130]

Extradition and fugitive slave rendition were addressed together in the legislation of 1793. The Extradition Act of 1793 imposed a duty

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Extradition and Their Impact on Tribal Sovereignty, 76 U. DET. MERCY L. REV. 803 (1999).

122. Leslie, *supra* note 118, at 66–67.

123. *Id.*

124. *Id.* at 67.

125. Executive Minutes of Governor Thomas Mifflin 1790–1729, *supra* note 121, at 124 ("A Letter was written ... demanding that Balwin Parsons[,] Francis McGuire[,] and Absalom Wells who have been indicted in the County of Washington in this State for having illegally and forcibly carried off from the said County a certain free Negroe named John with an intention to sell him as a slave in another State, may be delivered up to this State ....").

126. *See* Leslie, *supra* note 118, at 68–70.

127. *Id.*

128. *Id.*

129. *Id.* at 71.

130. *Id.* at 71–73.

on state governors to surrender a fugitive from justice upon demand of another state governor; the Fugitive Slave Act of 1793 similarly imposed a duty on state agencies, permitting the person recapturing a fugitive slave to take him or her before a state judge or magistrate and declaring it the duty of the judge or magistrate to issue a certificate after summary procedures to establish ownership and fugitivity.[131]

What is perhaps most noteworthy about the 1793 Acts is that it was the division over slavery that fueled the need for national legislation. So long as the issue of rendition was unconnected to slavery—the extradition of Virginians for the murder of the Delaware in Pennsylvania—comity between the states appeared more than sufficient to accomplish that end.[132] But when slavery touched the issue, the states' differences rose to the fore. Rendition of fugitives from justice, ordinarily a noncontroversial issue, would generate legal battles across the antebellum period when tied to the slavery issue, as in Francis McGuire's case.[133]

But far from resolving the differences between the states, the 1793 Acts instead raised key questions about the relationship between the state and federal governments. Most importantly, did Congress have the authority to compel state action? The 1793 Acts clearly imposed duties on state officials.[134] But could any federal authority provide a remedy if state officials failed to discharge these duties?[135]

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131. Act of Feb. 12, 1793, ch. VII, 1 Stat. 302, 302–05 (1793).

132. *See* Leslie, *supra* note 118, at 66 ("Up to this point there was not even a ripple of discord between Pennsylvania and Virginia."). While Leslie discusses Governor Randolph's subsequent disillusionment with the account received from Governor Mifflin, upon which Randolph had relied in quickly issuing the reward for surrendering the fugitives, *id.*, it was the dispute over slavery that ultimately sharpened the divide and led to the 1793 Acts. *Id.* at 72–73.

133. *See infra* Part II.A.5.

134. The Extradition Act of 1793 prescribed the duties of a state governor. § 1, 1 Stat. at 302 ("[I]t shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given ... and to cause the fugitive to be delivered ...."). Similarly, the Fugitive Slave Act of 1793 prescribed the duties of state magistrates. § 3, 1 Stat. at 302–05 (authorizing the owner of a fugitive slave (or his agent) to seek a certificate from a magistrate judge and declaring "it shall be the duty of such ... magistrate [receiving satisfactory proof] to give a certificate ... which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled").

135. Another question that has arisen with regularity concerning the legality of rendition is: What limitations, if any, does the Fourth Amendment impose on rendition? *See, e.g.*, Michigan v. Doran, 439 U.S. 282, 285 n.3 (1978) (assuming without deciding that the Fourth Amendment applies to extradition proceedings); *id.* at 293 n.3 (Blackmun, J., concurring) (observing the Court's assumption that the Fourth Amendment applies to

In 1818, a bill was proposed which would have strengthened the Fugitive Slave Act, in part by making it a federal crime for state officials to refuse assistance in enforcing the Fugitive Slave Act.[136] Representative Whitman from Massachusetts objected to the bill because "he did not believe Congress had the right to compel the State officers to perform this duty—they could only authorize it."[137] Senator Morril of New Hampshire likewise offered impassioned argument against the bill because he did not believe Congress had the right to compel state officers to perform this duty.[138]

Another question left open by the 1793 Acts was whether the states, notwithstanding federal legislation on rendition, had authority to pass legislation touching on the rendition process. The states took the view that they exercised at least concurrent legislative power. Both before and after the 1793 legislation, states passed anti-kidnapping and "personal liberty" laws designed to offer some minimum procedural protections, such as the right to present evidence and the right to testify, to alleged fugitive slaves.[139] In 1820, Pennsylvania enacted legislation increasing the penalty for kidnapping and prohibiting state officials from enforcing the Fugitive Slave Act.[140] This prompted some efforts in Congress to strengthen the Fugitive Slave Act, but no legislation was passed.[141]

3. 1842: *Prigg v. Pennsylvania*

Federal and state legislation continued for some time in an uneasy coexistence. This ended with *Prigg v. Pennsylvania*,[142] which

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Extradition Clause cases). While I believe the same methodology I employ here would be useful in discussing the question, I leave it for another day, as I believe it deserves separate treatment.

136. 31 ANNALS OF CONG. 839 (1818); MCDOUGALL, *supra* note 82, § 20, at 22.

137. 31 ANNALS OF CONG. 839. Whitman's argument was unavailing—the bill passed the House. *Id.* at 840.

138. *Id.* at 254; *see also id.* at 245 ("[Y]ou call upon a State officer, under the State government, to perform a judicial act authorized by a law of the United States. Upon the services of this officer you have no claim; to demand them you have no power."). The bill ultimately failed. MCDOUGALL, *supra* note 82, § 20, at 22–23 (noting the bill failed for non-concurrence between the House and Senate versions).

139. Scott J. Basinger, *Regulating Slavery: Deck-Stacking and Credible Commitment in the Fugitive Slave Act of 1850*, 19 J.L. ECON. & ORG. 307, 316–18 (2003); *see also* Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 809–10 (2011) (discussing personal liberty laws).

140. *See* An Act to Prevent Kidnapping, ch. 73, *in* Acts of the General Assembly of the Commonwealth of Pennsylvania 104, 104–05 (Harrisburg, 1820); *see* Basinger, *supra* note 139, at 316.

141. MCDOUGALL, *supra* note 82, § 21, at 23–24.

142. 41 U.S. (16 Pet.) 539 (1842).

arose from conflict between Pennsylvania's personal liberty law of 1826[143] and the Fugitive Slave Act of 1793.[144]

In 1837, Edward Prigg, Nathan Bemis, Jacob Forward, and Stephen Lewis, four slave-catchers from Maryland, made a demand to Pennsylvania officials[145] and thereupon secured the arrest of Margaret Morgan (whom they claimed to be a fugitive slave), her husband Jerry Morgan (indisputably a free person), and their children.[146] Unable to persuade Pennsylvania officials to issue a certificate of removal, the slave-catchers abducted Margaret Morgan and her children and took them to Maryland.[147] After indictments were obtained against the slave-catchers for the kidnapping, the Pennsylvania Governor demanded of the Maryland Governor that Prigg be delivered up to Pennsylvania for trial.[148] This demand was initially refused.[149] Only after the two states brokered a compromise, intended to bring the matter quickly to the Supreme Court to resolve the constitutionality of the Fugitive Slave Act of 1793 and Pennsylvania's personal liberty law, did Maryland surrender Prigg for trial.[150] Prigg was tried and convicted, and after an expedited appeal resulted in affirmance by the Pennsylvania Supreme Court, the case reached the United States Supreme Court.[151]

Although the case arose from the criminal rendition of Prigg, the legal issues before the Court centered on the preemptive effect of the Fugitive Slave Act of 1793: Was it constitutional, and if so, could Pennsylvania enact litigation that would impose additional burdens

143. Act of Mar. 25, 1826, ch. L, 1826 Pa. Laws 150.

144. Act of Feb. 12, 1793, ch. VII, § 3, 1 Stat. 302, 302–05 (1793).

145. The demand was in compliance with provisions of Pennsylvania's law that imposed pre-seizure procedural protections against slave rendition. *See* Basinger, *supra* note 139, at 317–18.

146. Paul Finkelman, *When International Law Was a Domestic Problem*, 44 VAL. U. L. REV. 779, 793 (2010) ("A local constable then accompanied the four Marylanders to the Morgan home, arrested the family, and brought them back to Justice of the Peace Henderson."); Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and* Prigg v. Pennsylvania, 78 CORNELL L. REV. 1086, 1122–23 (1993).

147. Paul Finkelman, Prigg v. Pennsylvania *and Northern State Courts: An Anti-Slavery Use of a Pro-Slavery Opinion*, 25 CIV. WAR HIST. 5, 7–8 (1979); *See* Holden-Smith, *supra* note 146, at 1122–23; Ronald S. Sullivan Jr., *Classical Racialism, Justice Story, and Margaret Morgan's Journey from Freedom to Slavery: The Story of* Prigg v. Pennsylvania, *in* RACE LAW STORIES 59, 61–63 (Rachel F. Moran & Devon W. Carbado eds., 2008).

148. Paul Finkelman, *Sorting out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 612 (1993).

149. *Id.*

150. *Id.*

151. *Id.*

on the slave rendition process?[152] The Court, in an opinion by Justice Story,[153] held that Congress was authorized to legislate in this area and that Congress's power in that regard was exclusive.[154] Prigg's conviction for violating Pennsylvania's personal liberty laws was reversed.[155]

Since the Court was broadly considering the constitutionality of the Fugitive Slave Act, the Justices had occasion to opine on the matter of whether the federal government could compel state officials to implement federal law. Nearly all of the Justices believed the federal government held no such power of compulsion.[156]

Even Justice Story—whose opinion exalted Congress as the sole body capable of and empowered with implementing through legislation both the Extradition Clause and the Fugitive Slave Clause[157]—acknowledged it was doubtful that an act of Congress could *compel* state action.[158] After concluding that the Fugitive Slave Clause required implementing legislation and that Congress would be the body to enact such legislation, Justice Story noted that "it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution."[159] Thus, while

152. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 609–10 (1842).

153. Whether and to what extent Justice Story was opposed to slavery is hotly contested. *Compare* GRANT GILMORE, THE AGES OF AMERICAN LAW 38 (1977) (describing Justice Story as "among the notable judicial figures of the period who are known to have been convinced antislavery men"), *and* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1749 & n.195 (1998) (describing Justice Story's "outrage against slavery"), *with* Alfred L. Brophy, *Thomas Ruffin: Of Moral Philosophy and Monuments*, 87 N.C. L. REV. 799, 844 (2009) (finding "little reason to think Story was antislavery") *and* Holden-Smith, *supra* note 146, at 1091 (arguing that "Story's antislavery reputation is seriously overblown" and that "Story cared far more about the protection of property rights and the expansion of federal power than he did about the injustices being done to black people by the fugitive slave law").

154. *Prigg*, 41 U.S. (16 Pet.) at 622; *see* Finkelman, *supra* note 148, at 608–09 (summarizing the opinions of the Justices).

155. *Prigg*, 41 U.S. (16 Pet.) at 673–74.

156. Finkelman, *supra* note 148, at 646–47 (summarizing Justice Story's view that the federal government could not compel state officials to act). Finkelman also notes the existence of some disagreement on the part of Justices Taney and Daniel regarding compelling state officials to act. *Id.* at 656–57.

157. *Prigg*, 41 U.S. (16 Pet.) at 625. Paul Finkelman asserts Justice Story's "primary goal in *Prigg* was to enhance the power in the national government." Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 249.

158. *Prigg*, 41 U.S. (16 Pet.) at 615–16.

159. *Id.* at 616.

Justice Story declared Congress's Fugitive Slave Act of 1793 "to be clearly constitutional in all its leading provisions," he equivocated with respect to "that part which confers authority upon state magistrates."[160] He noted that "a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act" under the Fugitive Slave Act.[161] However, Justice Story held no doubt that state magistrates might *choose* to comply with the law if not otherwise precluded by state law.[162]

Thus, the prevailing view in *Prigg* was that even if Congress could legislate on the subject, it could not compel the performance of a duty by state officials.[163]

Justice McLean took a different view. While taking "as a conceded point . . . that Congress had no power to impose duties on state officers,"[164] he would have held that "although, as a general principle, Congress cannot impose duties on state officers," the text of the Extradition and Fugitive Slave Clauses specifically imposed such duties.[165] He recognized, though, that these duties were as a practical matter unenforceable: "This power may be resisted by a state, and there is no means of coercing it."[166] This remark foreshadowed the outcome in *Kentucky v. Dennison*.[167]

160. *Id.* at 622.

161. *Id.*

162. *Id.* ("[S]tate magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.").

163. *See id.* at 630 (Taney, C.J., concurring) ("The state officers mentioned in the law are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by a law of the state; and the state legislature has the power, if it thinks proper, to prohibit them. The act of 1793, therefore, must depend altogether for its execution upon the officers of the United States named in it."). Professor Finkelman credits Justice Story's opinion in *Prigg* with originating the concept of unfunded mandates. Paul Finkelman, *The Roots of* Printz: *Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 BROOK. L. REV. 1399, 1407–10 (2004).

164. *Prigg*, 41 U.S. (16 Pet.) at 664 (McClean, J., concurring).

165. *Id.* at 665.

166. *Id.* at 666.

167. 65 U.S. (24 How.) 66, 109–10 (1860) (per curiam) (holding that "there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel" a state governor to return a fugitive to the jurisdiction in which he was charged), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219 (1987).

4. From *Prigg* to the Fugitive Slave Act of 1850

While proclaiming Congress's exclusive legislative power, *Prigg* nonetheless encouraged further concurrent state legislation in two ways. First, Justice Story emphasized the states had not surrendered their inherent police powers, which would justify legislation in the field but for Congress's exclusive power.[168] States might pass legislation not antagonistic to the federal enactment.[169]

Second, and more critically, Justice Story's conclusion that state officers could not be compelled to carry out Congress's rendition plan encouraged the northern states to continue their resistance.[170] Their response to *Prigg* was to reenact a more robust form of the personal liberty laws that had been at the heart of the *Prigg* controversy.[171] The new personal liberty laws prohibited northern judges and law enforcement officers from giving force to the Fugitive Slave Act.[172] In Massachusetts, for example, citizens petitioned for a law that would prohibit state officers from participating in fugitive recapture and would also prohibit the use of state facilities for detaining fugitives.[173] Rendition controversies continued unabated, and since many states had only one or two federal judges who could enforce the Fugitive Slave Act, *Prigg* rendered the Act largely unenforceable.[174]

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168. *Prigg*, 41. U.S. (16 Pet.) at 625.

169. *See id.* at 622.

170. *See generally* Finkelman, *supra* note 147 (explaining the northern states' response to the *Prigg* decision).

171. *Id.*

172. Basinger, *supra* note 139, at 320–21; Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1799–1800 (1996); Finkelman, *supra* note 147, at 21–22; Rierson, *supra* note 139, at 812–13.

173. Rierson, *supra* note 139, at 812 n.207. Such laws are reminiscent of today's "sanctuary" legislation in the immigration realm. *See generally* Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 600–05 (2008) (discussing the tensions caused by and motivations of local sanctuary laws). An Oregon statute, for example, provides:

> No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.

OR. REV. STAT. § 181.850(1) (2007). A separate provision of the same law permits local officials to arrest a suspected immigration violator only where a federal magistrate has issued an arrest warrant for a *criminal* immigration violation. *Id.* § 181.850(3).

174. Leslie Friedman Goldstein, *A "Triumph of Freedom" After All?* Prigg v. Pennsylvania *Re-examined*, 29 LAW & HIST. REV. 763, 764 (2011).

As part of a broader compromise over slavery—"the famous 'Compromise of 1850' "[175]—a strengthened fugitive slave act was passed.[176] The Fugitive Slave Act of 1850 combined the self-help provisions of the Act of 1793 with sharply curtailed procedures, prohibiting the testimony of the alleged fugitive and eliminating both the possibility of trial by jury and the availability of habeas corpus.[177] The Act doubled the civil penalty for violating its provisions and for the first time criminalized non-compliance with slave rendition with a potential sentence of up to six months' imprisonment.[178]

But the centerpiece of the Fugitive Slave Act of 1850 was a provision authorizing federal judges to appoint commissioners to hear fugitive slave cases, creating a potentially vast federal enforcement machine and making the Act of 1850 "an even more remarkable exercise of national authority" than its predecessor.[179] The 1850 Act was passed against a background in which it was acknowledged that Congress could not compel state officials to participate in fugitive recapture.[180] Rather than continue reliance on the voluntary participation of state courts and officials, the Fugitive Slave Act of 1850 put control squarely in the hands of federal officials.[181] Enforcement was accomplished not only by the federal commissioners whose jobs were created by the Act, but also in some cases by federal troops.[182]

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175. Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1038 (1997).

176. *See generally id.* at 1035–38 (describing the Fugitive Slave Act of 1850 and its connection to the Compromise of 1850).

177. *Id.* at 1036, 1038.

178. *Id.* at 1037.

179. *See id.* at 1035–36.

180. *See supra* notes 157–62 and accompanying text (describing Justice Story's conclusion in *Prigg* that the federal government could not compel state officers to enforce the Fugitive Slave Act of 1793).

181. While northern resistance to slave rendition continued, *see* Kaczorowski, *supra* note 175, at 1039–40, there is some evidence that the Act of 1850 was enforced with some regularity, *see* Gerald G. Eggert, *The Impact of the Fugitive Slave Law on Harrisburg: A Case Study*, 109 PA. MAG. HIST. & BIOGRAPHY 537, 537–38 (1985). *See generally* STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860 (1968) (asserting that the Fugitive Slave Law was enforced more often than most southerners in the 1850s believed).

182. *See* Rierson, *supra* note 139, at 819 ("[T]he federal government threw its military weight behind enforcement of the Fugitive Slave Act of 1850 in a series of well-publicized incidents that shocked the conscience of many who were previously neutral on the subject."); *id.* at 819–22 (describing such incidents).

5. 1860: Rendition of Fugitives From Justice in *Dennison v. Kentucky*

With regard to the Extradition Act of 1793 and the rendition of fugitives from justice, a situation obtained that was in many ways similar to that regarding fugitive slaves. We have seen that despite a clear command in the Constitution, an initial lack of legislation produced a fairly quick breakdown in the comity of the states.[183] This led to passage of the Extradition Act of 1793, which set forth rules for implementing the provision of the Constitution.[184] Yet, just as the 1793 legislation was not seen as a bar to independent state action on the fugitive slave issue, neither did the states passively obey the commands of the Extradition Act.

Rendition controversies regarding fugitives from justice were more rare than slave rendition controversies, but contests did arise, exacerbated by the sectional divide on slavery.[185] Southern states refused extradition to the north of slave-catchers accused of kidnapping free African Americans, while northern states refused extradition to the south of those accused of aiding and abetting fugitive slaves.[186] An example of the former was Virginia's refusal to extradite Francis McGuire to Pennsylvania—which spurred passage of the Extradition Act of 1793.[187] An example of the latter[188] was

183. *See supra* Part II.A.2.

184. *See supra* Part II.A.2.

185. FINKELMAN, *supra* note 111, at 7 ("[R]efusals of northern and southern governors to surrender fugitives from justice indicate slavery's potential for disrupting comity and interstate relations.").

186. Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1508 & n.158 (2007) (citing, inter alia, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861, at 183–94 (2005) and FINKELMAN, *supra* note 111, at 6–8 (1981)). The pattern in rendition controversies, for state authority to be selectively employed in the service of one side or the other in the slavery debate, mirrored the larger tendency in the antebellum period, for states' rights arguments to be so employed: "When states' rights suited the needs of slaveholders, they argued states' rights. When states' rights interfered with the slaveholder agenda, appeals to states' rights were abandoned." Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause"*, 36 AKRON L. REV. 617, 619 (2003) (citing Paul Finkelman, *States' Rights North and South in Antebellum America*, *in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 125 (Kermit L. Hall & James W. Ely, Jr., eds., 1989)).

187. *See supra* notes 118–33 and accompanying text. Another example is the case of *Ohio v. Forbes and Armitage*. *See* FINKELMAN, *supra* note 111, at 7 & n.9. Forbes and Armitage were indicted in Ohio for kidnapping Jerry Phinney, an African American. State of Ohio v. Forbes, 3 W. L.J. 370, 370 (Ky. Cir. Ct. 1846). The Kentucky court found that Forbes and Armitage were "within the protecting clause" of a Kentucky act providing that persons indicted for removing fugitive slaves from other jurisdictions would not be subject to extradition if acting pursuant to authority of the slaveowner. *Id.* at 377–78, 380.

188. For other examples, see FINKELMAN, *supra* note 111, at 6–7.

Ohio's refusal to honor the demand of the Governor of Kentucky for the rendition of Willis Lago, a "free man of color" who had been indicted in Woodford County, Kentucky, for having "seduce[d] and entice[d] Charlotte, a slave, the property of C. W. Nuckols, to leave her owner and possessor."[189] Two successive Ohio governors rebuffed Governor Magoffin's demand, and the case made its way to the United States Supreme Court in 1860 as *Kentucky v. Dennison.*[190]

Ohio's arguments as to the propriety of its Governor's refusal of extradition were based, in part, on that portion of *Prigg* declaring the federal government's inability to compel state action:

> The [Governor] against whom the writ is prayed is not subject, in any form or degree, to the jurisdiction of this court. . . . The proceeding . . . is aimed at the supreme Executive of the State of Ohio, to "coerce" the exercise of one of its imagined functions. But no power has been confided to any Department of the Federal Government to impose a duty upon any functionaries of a State, or to constrain the discharge of their official concerns.[191]

The Supreme Court, argued Ohio, lacked any power to issue the requested relief—a writ of mandamus compelling Ohio's Governor to take action.[192] And just as the Court in *Prigg* had trumpeted the legislative power of Congress yet admitted its weakness to compel enforcement of its laws by state officials, so did Chief Justice Taney's opinion in *Dennison.*[193]

Writing for the Court, Justice Taney held that even though Congress imposed in the Extradition Act of 1793 a "duty" on state governors to act and framed its legislation in such terms, that duty was unenforceable.[194] The Court went on to reject, in the most ringing of terms, the idea that Congress could direct the actions of state officials: "[W]e think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it . . . ."[195]

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189. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 67 (1860), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219 (1987).

190. Paul Finkelman, Kentucky v. Dennison, *in* THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS 149 (Kermit L. Hall ed., 1999).

191. *Dennison*, 65 U.S. (24 How.) at 92–93.

192. *Id.* at 92 (arguing that the "official personage" of Ohio's Governor was not subject "in any form or degree" to the Court's jurisdiction).

193. *Id.* at 107.

194. *Id.* (holding that "the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created").

195. *Id.*

As in *Prigg*, the prevailing view was that Congress might *authorize* a state officer to act, but it could never *compel* action.

6. Conclusion

The antebellum history of rendition demonstrates three salient features. First, slave rendition and criminal rendition are linked, and controversies over rendition were tied to the sectional divide over slavery throughout the period.[196] Northern resistance to slavery manifested itself in efforts to undermine slave rendition and in northern governors' refusals to comply with criminal rendition requests that implicated slavery, like the requisition for Willis Lago in the *Dennison* case for charges of aiding and abetting a fugitive slave.[197]

Second, it was an accepted fact that the federal government could not compel state officials' compliance with either slave or criminal rendition.[198] This was evident in the congressional remarks concerning proposed legislation in 1818;[199] and it was abundantly clear in the *Prigg* and *Dennison* decisions of the Court.[200]

Third, the attempted solution to the problem of rendition controversies was to remove the states' control of the rendition process and place it exclusively in the control of the federal government. The Fugitive Slave Act of 1850, with its vast federal enforcement mechanisms, would be the only effort at a federally dominated rendition scheme.[201] And with the Civil War's arrival, it would prove to be short-lived.

B. Post-Civil War Rendition Resistance: From Fugitive Slaves to Fugitives from Justice

Although slave rendition was no longer an issue after the Civil War, rendition controversies continued in the realm of criminal rendition. There, the federal control over slave rendition accomplished by the Fugitive Slave Act of 1850 had no parallel.

Instead, state discretion in criminal rendition continued unchecked.[202] While slavery was gone, the south quickly transformed itself to maintain a command economy with African Americans

196. *See supra* Part II.A.5.
197. *See supra* Part II.A.5.
198. *See supra* Parts II.A.3, II.A.5.
199. *See supra* notes 136–38 and accompanying text.
200. *See supra* Parts II.A.3, II.A.5.
201. *See supra* Part II.A.4.
202. *See infra* Part II.B.2.

supplying an essentially captive labor system.[203] Rendition controversies continued, therefore, to arise based on sectional friction and differing visions of the civil rights of African Americans.

As occurred in the antebellum period, the irregularity of the rendition system (owing largely to differing regional attitudes toward civil rights) led to calls for reform.[204] In contrast to the antebellum effort to reform the rendition system by consolidating power in the federal government, the postbellum period ultimately saw the regularization of rendition attained through the passage of uniform state legislation (the Uniform Criminal Extradition Act) and an interstate compact (the Interstate Agreement on Detainers).[205]

1. The Continued Exercise of States' Rights in Criminal Rendition Matters, in Support of Civil Rights

State governors and state courts could and did play an essential role in vindicating civil rights throughout the century following the Civil War. The "failure" of national extradition law during this period can be seen as a triumphant assertion of local power to differentiate between fugitives from justice and fugitives *to* justice.[206]

Emancipation dealt a formal death blow to the Fugitive Slave Clause and the Fugitive Slave Act,[207] but it did not put an end to disputes over the migration of African American laborers from the south. Emancipation did ensure that such disputes would be framed by the laws governing fugitives from justice—the Extradition Clause and Extradition Act of 1793—rather than those governing fugitive slaves. African Americans might no longer have been fugitives from slavery, but they continued to migrate from the south as fugitives from convict leasing, lynching, Jim Crow justice, chain gangs, and deplorable prison conditions.[208]

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203. *See infra* Part II.B.1.

204. *See infra* Part II.B.2.

205. *See infra* Parts II.B.3, II.B.4.

206. John J. Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, 1074 (1983) ("One of the fascinating historical aspects of extradition law was its function as a guardian of civil rights. For many years, the extradition process protected persons from discriminatory application of the trial process, threatened civil rights violations—including the ultimate violation of lynching—and poor prison conditions.").

207. The end to the Fugitive Slave Act's practical authority came earlier. *See* Ashutosh Bhagwat, Cooper v. Aaron *and the Faces of Federalism*, 52 ST. LOUIS U. L.J. 1087, 1112 (2012) (noting that the Fugitive Slave Act was only enforced "until 1861, when secession, then civil war, then emancipation mooted the issue").

208. *See infra* notes 215–42 and accompanying text. The first chapter of Michelle Alexander's indictment of mass incarceration provides a useful general account of slavery's "preservation through transformation" throughout American history. MICHELLE

Following the Civil War, the slave labor system immediately transformed itself into a forced labor system, initially driven in large part by convict leasing.[209] The so-called "Black Codes"—legislative "plans for getting things back as near to slavery as possible"[210]—essentially criminalized the idea of any African American existence inconsistent with the perpetuation of a plantation economy supported by a subjugated labor force. The Codes required African Americans to maintain proof of employment, subjected them to harsh physical punishment for breaking labor contracts, subjected their families to work under their labor contracts, and subjected their children to "apprenticeship" without any requirement of parental consent.[211]

Perhaps most importantly, vagrancy laws proliferated throughout the former Confederate states. The criminal justice system, which before Emancipation had no concern for slaves (who were disciplined by their masters), now focused its eye on the freedman.[212] Even vagrancy laws that made no reference to race were aimed at one target—"the vagrant contemplated was the plantation negro."[213] Once

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ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20–57 (2010).

209. *See generally* ALEXANDER, *supra* note 208, at 26–35 (discussing the transition from slavery to a racial caste system supported by convict leasing and Jim Crow laws); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 198–205 (1988) (explaining the various legal means that were used to limit the freedom of African Americans); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 31–53 (1996) (detailing convict leasing in Mississippi); William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 33 (1976) (describing a "system of involuntary servitude that emerged after the Civil War [and] was a fluid, flexible affair which alternated between free and forced labor in time to the rhythm of the southern labor market").

210. FONER, *supra* note 209, at 199 (citation omitted).

211. *Id.* at 199–201. For a summary in graphic form of laws aimed at controlling labor in the postbellum south, see WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861–1915, at 240–41 (1991).

212. *See* Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 901 (2012) ("Most African-Americans, as slaves, faced 'plantation justice' instead of the state criminal justice system."); Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587, 614–17 (2011) (concluding that "[i]nstead of subjecting slaves to the penitentiary, slaves were largely subjected to the discipline of their owners and as such were largely outside the reach of the criminal justice system").

213. FONER, *supra* note 209, at 201 (citation omitted); *see also* Cohen, *supra* note 209, at 33 ("Broadly drawn vagrancy statutes enabled police to round up idle blacks in times of labor scarcity and also gave employers a coercive tool that might be used to keep workers on the job."). Cohen points out that vagrancy laws and convict leasing existed in the north, but he notes a difference in "the spirit in which these measures were enforced. Most of the laws discussed here made no mention of race, but southerners knew that they were intended to maintain white control of the labor system, and local enforcement authorities

an African American was charged with a crime, he could essentially be enslaved:

> If employers could no longer subject blacks to corporal punishment, courts could mandate whipping as a punishment for vagrancy or petty theft. If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms . . . [and] bind them out to white employers who would pay their fines.[214]

Escape rates from the convict lease system were "astronomical,"[215] and it is reasonable to believe escapees were among those attempting to migrate from the south.[216] While impediments to African American migration certainly were in place,[217] the corrupt justice system and convict leasing were "push" factors supporting northward and westward movement.[218]

The 1879 mass exodus of African Americans ("exodusters") from southern states to Kansas and Indiana,[219] which prompted a Congressional investigation into its causes, was perhaps emblematic of this migration movement. One witness testified to the prevailing sentiment behind the migration: "We felt we had almost as well be slaves under these men."[220] In support of their "fear that they would

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implemented them with this in mind." *Id.* at 34; *see also id.* at 49–52 (describing enforcement of the vagrancy laws).

214. FONER, *supra* note 209, at 205.

215. MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928, at 75 (1996); *id.* at 37 ("[M]any convict camps were virtual sieves. Perhaps the only statistic in excess of mortality rate would be escape rate."); OSHINSKY, *supra* note 209, at 50–51, 67–68 (describing annual escape rate "often reach[ing] 25 percent" in the Arkansas convict leasing system and "at least 10 percent" in the Mississippi system); GEORGE WASHINGTON CABLE, *The Convict Lease System in the Southern States* (1883), *reprinted in* THE SILENT SOUTH 115, 132–33 (1996) (reporting 257 escapes from an average convict population of less than 600 in two years in Tennessee).

216. One author reports that "[r]ecords show that literally thousands of escaped convicts must have inhabited the late-nineteenth-century Southern landscape." MANCINI, *supra* note 215, at 68. This of course assumes escaped convicts remained in the south.

217. *See* Cohen, *supra* note 209, at 38–42 (discussing "emigrant-agent laws" passed in "those states which felt themselves most threatened by Negro out-migration").

218. Cohen documents migration in the late nineteenth century as largely from southeast to southwest. COHEN, *supra* note 211, at 248–73.

219. *See generally* NELL IRVIN PAINTER, EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION 185–201 (1976) (detailing the mass movement of previously enslaved Americans to Kansas).

220. SELECT COMM., 46TH CONG., S. REP. ON MIGRATION OF NEGROES (1879–80), *reprinted in* 4 J. NEGRO HIST. 58, 69 (1919); *see also* Nell Irvin Painter, *Millenarian Aspects of the Exodus to Kansas of 1879*, 9 J. SOC. HIST. 331, 331 (1976) ("The movement was as much a fleeing from reenslavement as a flocking to freedom.").

be eventually reduced to a system of peonage even worse than slavery itself,"[221] witnesses cited the criminal and convict leasing laws:

> Under these laws they allege that a colored man may be fined $500 for some trifling misdemeanor, and be compelled to work five or six years to pay the fine; and that it is not uncommon for colored men thus hired out to be worked in a chain gang upon the plantations under overseers, with whip in hand, precisely as in the days of slavery.[222]

The convict lease system would effectively hold many African Americans in slavery into the early twentieth century.[223] But prison farms and chain gangs, ultimately no less punitive than leasing, persisted even longer.[224] Inhumane treatment of prisoners in the south continued to be cause for flight, as evidenced by extradition battles fought by escapees from southern chain gangs seeking refuge in the north as recently as 1970.[225] Abominable prison conditions remained a cause for denying southern extradition requests into the 1970s.[226]

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221. S. REP. ON MIGRATION OF NEGROES, *reprinted in* 4 J. NEGRO HIST. at 87.

222. *Id.* Witnesses related that in Texas "a colored man had been arrested for carrying a 'six-shooter' and fined $65, including costs, and . . . had been at work nearly three years to pay it." *Id.* So-called "county convicts" could be leased "at any price the county judge may determine"—one African American woman was leased for one-fourth of a cent per day. *Id.*

223. As late as 1912, the convict lease system was assailed as equivalent to slavery. E. Stagg Whitin, *Prison Labor*, 2 PROC. ACAD. POL. SCI. N.Y.C. 633, 633 (1912) ("[B]ehind the dark bastilles we call our prisons, penitentiaries, reformatories, workhouses and refuges there still hides the enemy of our social progress, the economically vicious slave system."). The same author described the following exchange, occurring in May 1911:

> "Will you buy me, Sah?" asked a boy convict in an Alabama convict camp, when approached by the writer. "Won't you buy me out, Sah?" he reiterated to the rejoinder, "I'm not buying niggers." "It'll only cost you $20, Sah, an' I'll work fer you as long as you say. I'se fined $1.00, Sah, and got $75 costs. I'se worked off all but $20. Do buy me out, Sah, please do."

E. STAGG WHITIN, PENAL SERVITUDE 1 (1912). For a collection of authorities on the end of convict leasing, see Stephen Garton, *Managing Mercy: African Americans, Parole and Paternalism in the Georgia Prison System 1919–1945*, 36 J. SOC. HIST. 675, 678 n.20 (2003). *See generally* Jane Zimmerman, *The Convict Lease System in Arkansas and the Fight for Abolition*, 8 ARK. HIST. Q. 171 (1949) (describing the gradual demise of convict leasing in Arkansas over four decades).

224. *See generally* OSHINSKY *supra* note 209 (describing the history of prison farms); Consuelo Alden Vasquez, Note, *Prometheus Rebound by the Devolving Standards of Decency: The Resurrection of the Chain Gang*, 11 ST. JOHN'S J. LEGAL COMMENT. 221, 227–35 (1995) (recounting a brief history of chain gangs).

225. Vasquez, *supra* note 224, at 232 ("The barbaric and inhumane conditions endured by chain gang convicts caused prisoners to seek refuge in other states."); Garton, *supra* note 223, at 696 n.50 ("[E]scape was a regular occurrence and quite a number succeeded, many never to be recaptured."); *see also* Vasquez, *supra* note 224, at 232 n.60 (citing cases,

Migrating African Americans cited as a cause of their exodus not only the south's laws, but also its lawlessness. Unfair courts and unrestrained violence against African Americans prevailed.[227] The rise of the Ku Klux Klan after the Civil War was a leading indicator of widespread violence, with its whippings, rapes, and murders of the recently freed population.[228] One estimate for the years 1868–71 puts the number of Klan lynchings at over 400.[229] The violence was so

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ranging in year from 1949 to 1970, arising from extradition proceedings to reinstate fugitives from the chain gang). Georgia's chain gang system, "like its predecessor the convict lease system, [was] condemned as a harsh, barbaric and brutal form of oppression, with little thought given to rehabilitation." Garton, *supra* note 223, at 675. One magazine urged that "no [fugitive] ought to be delivered to Georgia as long as it persists in its inhuman and barbarous chain-gang system." *Editorial Paragraph*, 136 THE NATION 1, 2 (Jan. 4, 1933). In 1949, a panel of the Third Circuit held a fugitive from Georgia's chain gang was entitled to a writ of habeas corpus, finding "the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity." Johnson v. Dye, 175 F.2d 250, 256 (3d Cir. 1949), *rev'd sub nom.*, Dye v. Johnson, 338 U.S. 864 (1949). The court declined to describe with particularity the "revolting barbarities which Johnson and his witnesses state were habitually perpetrated as standard chain gang practice." *Id.* at 256 n.12.

226. *See, e.g.*, Koch v. O'Brien, 131 A.2d 63, 64 (N.H. 1957) (noting a fugitive fought extradition on the grounds of his mistreatment at the South Carolina State Penitentiary, where the petitioner alleged he had been held in solitary confinement for four and one-half years "on reduced rations under filthy conditions"); Stewart v. State, 475 P.2d 600, 601 (Or. Ct. App. 1970) (documenting that fugitive fought extradition on grounds he would be subjected to "cruel and inhuman treatment" in the Mississippi State Penitentiary). In 1967, an Oregon court granted habeas relief to a fugitive sought for extradition to Arkansas. Recent Case, 84 HARV. L. REV. 456, 456 (1970) (describing the unreported Oregon case). The court described the Arkansas penitentiaries as a "system of barbarity, cruelty, torture, bestiality, corruption, terror, and animal viciousness that reeks of Dachau and Auschwitz," and as "institutions of terror, horror, and despicable evil." *Id.*; *see also A Way for Lester*, TIME, July 12, 1971, at 53 (reporting on same fugitive case); *Let Me Stay up North*, JET, Apr. 2, 1971, at 43 (reporting on same fugitive case); *Michigan Governor Rejects Extradition of Arkansas Negro*, N.Y. TIMES, Apr. 29, 1971, at 27 (reporting case in which a fugitive "feared for his safety if returned" to Arkansas). In 1952 the Supreme Court held a fugitive seeking habeas corpus relief from extradition would first be required to exhaust all remedies in the *demanding* state. Sweeney v. Woodall, 344 U.S. 86, 89–90 (1952). The case was brought by an African American man who sought to block his extradition from Ohio to Alabama, where he alleged he had been beaten with a "nine-pound strap with five metal prongs" to the point of unconsciousness, had been "stripped to his waist and forced to work in the broiling sun all day long without a rest period," and had been "forced to serve as a 'gal-boy' or female for the homosexuals among the prisoners." *Id.* at 92 (Douglas, J., dissenting).

227. *See* Christopher Waldrep, *Substituting Law for the Lash: Emancipation and Legal Formalism in a Mississippi County Court*, 82 J. AM. HIST. 1425, 1450–51 (1996) (describing the postbellum attempt to "use law to resume a domination previously sustained outside the law"—slavery—as a "failed experiment" that ultimately resulted in Mississippians turning to extralegal violence against freedmen).

228. *See* PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 39–49 (2002).

229. *Id.* at 49.

severe as to spur passage of the Ku Klux Klan Act of 1871, making it a federal crime to "go in disguise upon the public highway . . . [to] depriv[e] any person or any class of persons of the equal protection of the laws."[230] The Ku Klux Klan Act was the high water mark of federal intervention in the postbellum south and indicated how dire the situation was.[231] Yet what little gains were accomplished by the indictments and convictions under the Klan Act—which were "not significant in terms of numbers"[232]—turned out to be fleeting. The Klan provided violent support to the democratic efforts to "redeem" the south,[233] culminating in the withdrawal of federal troops from civil rights enforcement[234] and the end of Reconstruction.

Henry Adams, an organizer of the 1879 "exoduster" migration, testified before a Senate committee to the names of 683 African American men who had been "whipped, maimed or murdered within the . . . eight years" leading up to the exodus.[235] Louisiana in 1879 was described as exhibiting "[c]rime and lawlessness existing to an extent that laughs at all restraint . . . . The fiat to go forth is irresistible. . . . It is flight from present sufferings and from wrongs to come."[236]

The use of criminal law in the south as a mechanism for implementing "neoslavery" continued well into the 1940s.[237] Debt peonage was common throughout the deep south, with vagrancy charges leading to unpaid fines which in turn led to forced labor.[238] Workers who attempted to escape this system were rounded up as vagrants, given additional fines, and returned to work.[239]

The most horrific violence from which African Americans sought escape during this period was, of course, mob violence and lynching.[240] African Americans accused of assaulting white women, in

230. Civil Rights Act of 1871, ch. 22, 17 Stat. 13, 13.

231. *See* DRAY, *supra* note 228, at 47; FONER, *supra* note 209, at 454–59.

232. DRAY, *supra* note 228, at 47; *see also* FONER, *supra* note 209, at 458 ("Judged by the percentage of Klansmen actually indicted and convicted, the fruits of 'enforcement' seem small indeed, a few hundred men among thousands guilty of heinous crimes.").

233. ALEXANDER, *supra* note 208, at 30–31.

234. *See* FONER, *supra* note 209, at 581–82 (describing the "Bargain of 1877" and the triumph of "Redemption").

235. SELECT COMM., 46TH CONG., S. REP. ON MIGRATION OF NEGROES (1879–80), *reprinted in* 4 J. NEGRO HIST. 58, 85 (1919).

236. *Id.* at 86.

237. *See* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS 152 (2010).

238. *Id.* (citing Jerrell H. Shofner, *The Legacy of Racial Slavery: Free Enterprise and Forced Labor in Florida in the 1940s*, 47 J. S. HIST. 411, 414–16 (1981)).

239. Jerrell H. Shofner, *The Legacy of Racial Slavery: Free Enterprise and Forced Labor in Florida in the 1940s*, 47 J. S. HIST. 411, 415–16 (1981).

240. George Swanson Starling was one African American who was forced to migrate north in order to escape death threats as opposed to debt peonage. WILKERSON, *supra*

particular, faced a choice between flight and mob "justice"—trials were relatively infrequent given the tolerance of mob rule.[241] Fear of lynching was frequently cited, in cases spanning the postbellum century, as a reason why a northern governor or court should not grant extradition of a fugitive back to the south.[242] The NAACP,

note 237, at 127–39, 150–57. Starling, a Floridian fruit picker in the 1940s, had attempted to organize workers for a better wage and was forced to escape Florida to avoid being lynched. *Id.* "Leaving was his only option." *Id.* at 157.

241. *See* OSHINSKY, *supra* note 209, at 104–06.

242. *See, e.g.*, Commonwealth *ex rel.* Mattox v. Superintendent of Cnty. Prison, 31 A.2d 576, 577 (Pa. Super. 1943) (discussed in A.R.H., *Recent Cases*, 17 TEMP. L. Q. 469, 469–72 (1943) and Raymond Pace Alexander, *The Thomas Mattox Extradition Case*, 2 NAT'L B.J. 1, 5 (1944) (describing how habeas was sought to prevent extradition of a 16-year-old African American boy to Georgia, where "he would be in very grave danger of being lynched")); VANN R. NEWKIRK, LYNCHING IN NORTH CAROLINA, A HISTORY, 1865–1941, at 67–69 (2009) (chronicling attempt to prevent extradition of Munroe Rogers from Massachusetts to North Carolina on grounds that he would be lynched there); Lyda Gordon Shivers, Note, *Interstate Rendition—Was it Meant to be Obligatory?*, 2 MISS. L.J. 240, 240 (1929) (discussing a 1928 case in which Ohio's Governor refused to grant extradition to Mississippi because of the "bad lynching record of the state"); *see also Extradition—Refusing Requisition of Fugitive Because of Fear that He Will be Lynched*, 55 CENT. L.J. 341, 341–42 (1902) (discussing the Rogers case); Florence Murray, *The Negro and Civil Liberties During World War II*, 24 SOC. FORCES 211, 213–14 (1945) (documenting cases where northern governors and courts refused to return African Americans to the south on the grounds "that the Negroes would not receive fair trials in the southern courts, or that they had already served enough time for the crimes they were alleged to have committed"); Russell J. Cowans, *Fight to Save Sheriff's Slayer from South*, CHI. DEFENDER, Nov 21, 1931, at 13 (describing a case in which the lawyer for the fugitive introduced a map marking lynchings in the Alabama county to which extradition was sought); *Georgia Sheriff Foiled in Attempt to "Kidnap"*, CHI. DEFENDER, Nov. 3, 1923, at 22 (reporting a case in which a New Jersey governor refused extradition to Georgia); *Lawyers in Legal Fight to Save Man from Georgia Mob*, CHI. DEFENDER, Feb. 5, 1921, at 1 (detailing a case of a black man accused of killing a white sheriff in Georgia, who allegedly "had broken into his home and endeavored to place a rope about his neck"); *Lynching Threat Stops Extradition*, THE N.Y. AMSTERDAM NEWS, Mar. 14, 1928, at 17 (reporting that "extradition of Will Brown . . . from Columbus, O., to Missouri, where it was feared he would be lynched on charge of a murder committed 14 years ago, has been defeated"); *Lynching Threats Prevent Extradition to Missouri*, PHILA. TRIBUNE, Mar. 15, 1928, at 3 (describing same case in which Ohio refused Missouri's extradition requests for a black man who Missouri officials could not clearly identify or connect to the murder with which he was charged); *Negro Prisoner's Plea: He Successfully Fights an Extradition Case with Arkansas Authorities*, CLEV. PLAIN DEALER, Jan. 3, 1895, at 8 (documenting a case where a Tennessee prisoner obtained habeas corpus when he alleged that authorities in Arkansas sought his extradition for charges on which he had been acquitted, and claimed "the officers of this county sought to bring him back here for the purpose of having him mobbed"); *Not a Good Reputation*, CHI. DEFENDER, Jul 22, 1922, at 12 (detailing a case in which the Ohio Governor refused extradition of an African American man to Georgia because of danger of lynching); *Officials' Lives Hostage in Extradition Case: Iowa Gov. Demands Fair Trial*, PITTSBURGH COURIER, Feb. 6, 1932, at 3 (describing a case in which the Iowa Governor agreed to the extradition of an African American to Missouri only after county sheriff guaranteed to protect the accused's life with his own); *Refuse Extradition on Hill to Arkansas*, CHI. DEFENDER, Mar. 20, 1920, at 1 (reporting the

founded in 1909, pursued efforts on behalf of numerous fugitives to block extradition from northern states to southern lynch mobs.[243] In George Crawford's case in 1933, for example, the NAACP feared a lynching either before or after trial in the event the African American was extradited to Virginia for the murders of two white women.[244] One reporter saw in a Massachusetts federal judge's refusal to extradite Crawford "New England [going] about its old business of refusing to extradite fugitive 'slaves' to Virginia."[245]

A case arising in the late nineteenth century exemplified the anti-lynching rationale for refusing extradition and indicated the persistence of the sectional conflict at the heart of the *Dennison* case.[246] The Reverend A.S. Hampton, an African American, was arrested in Ohio for extradition to Kentucky on charges of shooting with intent to kill.[247] The Governor of Ohio approved the requisition, but Hampton had received letters warning him his life was not safe.[248] "A colored man and a colored boy had been lynched there [in Kentucky], one for murder and the other for criminal assault, and he would be strung up by a mob if taken back."[249] Upon receiving this information, a Cincinnati judge refused to honor the requisition without the personal guarantees of the Kentucky Governor and local authorities that Hampton would be protected from lynching.[250] The Ohio judge, Judge Buchwalter, said the last man he surrendered to Kentucky "had been lynched in twenty-four hours."[251]

Kansas Governor's refusal to extradite African American unionizer to Arkansas because of "the failure of the Arkansas officials to guarantee a fair trial to Hill").

243. James Weldon Johnson & Herbert J. Seligmann, *Legal Aspects of the Negro Problem*, 140 ANNALS AM. ACAD. POL. & SOC. SCI. 90, 96 (1928). *See generally* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950 (1980) (chronicling the NAACP's efforts to prevent the extradition of black fugitives to the south).

244. *Boston Fights for George Crawford*, AFRO-AMERICAN, Feb. 4, 1933, at 21.

245. *Echoes of the Fugitive Slave*, AFRO-AMERICAN, May 6, 1933, at 6.

246. *Afraid of Southern Justice: A Cincinnati Judge Refuses to Surrender a Colored Prisoner*, DAILY INTER OCEAN, Jan. 1, 1895, at 5.

247. *Id.*; *Brown Is Indignant: He Criticizes Judge Buchwalter for the Demands of the Safety of Hampton*, ROCKY MOUNTAIN NEWS, Jan. 2, 1895, at 5.

248. *Afraid of Southern Justice*, *supra* note 246.

249. *Id.*

250. *Exacts a Pledge Not to Lynch: Judge Will Surrender No Prisoners Without Governor's Promise of Protection*, CHI. DAILY TRIB., Jan. 1, 1895, at 1.

251. *Id.*; *see also This Week in Review*, CONGREGATIONALIST, Jan. 10, 1895, at 48 ("[A] judge of an Ohio court has virtually said to the State of Kentucky, 'Not until you give your pledge as a commonwealth that lynchings shall cease within your bounds will I honor your writs of extradition . . . .' ").

> "I have sent two colored men back lately," said Judge Buchwalter. "One to Georgia and one to Kentucky, although the offense of the latter was only shooting at somebody. He was taken by a mob out of the Burlington jail and hanged to a tree. I determined then I would never send another prisoner South, unless I had assurance he would be protected from a mob and be given a fair trial."[252]

The Governor of Kentucky, John Young Brown, retorted that his "self-respect and his regard for the dignity of the state of Kentucky forbid that he should ever give any such humiliating guarantee."[253] On January 4, 1895, before a courtroom so densely packed "that one attorney became ill and had to retire," Kentucky's agent presented a corrected copy of the requisition and indictment but "no letter from Gov. Brown promising protection as required by the court."[254] The next day, Judge Buchwald discharged Hampton from custody, citing the previously mentioned instance of a fugitive surrendered by the court to a Kentucky lynching as one of nineteen such lynchings "within a comparatively short time."[255]

An interesting postscript to the Hampton case occurred three years later. While Kentucky's Governor, a Democrat, had in 1895 proclaimed concerns of lynch law unfounded while seeking Hampton's extradition,[256] the reins of government soon passed to Republican hands. In 1898, Kentucky's Republican Governor William O'Bradley refused to issue requisition papers for an African American indicted for rape who had fled Kentucky to Illinois.[257] Governor O'Bradley based his refusal "on the wholesale slaughter of negroes by mobs in [Graves County, Kentucky] and on the failure to punish their murderers."[258]

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252. *Afraid of Southern Justice*, *supra* note 246.

253. *John Brown's Kick: The Governor of Kentucky Gives Judge Buchwalter Fits—Constitutional Question at Issue*, CLEV. PLAIN DEALER, Jan. 3, 1895, at 5. Governor Brown also questioned Judge Buchwalter's failure "to rebuke the violence of the mob that on Sunday night attempted to rescue Hampton from the officers when they arrested him." *Pledge Against Lynching: Governor Brown, of Kentucky, Refuses to Give One to an Ohio Judge*, BALT. SUN, Jan. 3, 1895, at 7.

254. *No Assurances from Kentucky: Judge Buchwalter Holds the Hampton Extradition Case Under Advisement*, CLEV. PLAIN DEALER, Jan. 5, 1895, at 3.

255. *He Discharges Prisoner Hampton*, CHI. DAILY TRIB., Jan. 6, 1895, at 12; *see also Ohio and Kentucky Clash Over a Negro Criminal*, 10 THE LITERARY DIG. 336–37 (1895) (chronicling several newspapers' reactions to Judge Buchwalter's decision).

256. *Pledge Against Lynching*, *supra* note 253 ("Hampton is in no danger of mob violence and never was in any danger of it.").

257. *Record of Political Events [from May 11 to November 10, 1898]*, 13 POL. SCI. Q. 735, 760 (1898).

258. *Id.*

2. Calls for "Reform" of the Criminal Rendition System

State action to block extradition in the name of civil rights was hardly met with uniform approval.[259] Indeed, a competing narrative of the postbellum period depicted the lawlessness of extradition proceedings and the tendency for any expectation of regularity to be frustrated.[260] A diversity of state legislation, coupled with the effective reduction (by the *Dennison* decision) of the relationship between the states to one of comity, created conditions of uncertainty that called for nearly continuous litigation of the issues surrounding interstate rendition.[261] Repeatedly, particularly notorious extradition disputes spurred calls for "reform" of the extradition process.[262]

Mahon v. Justice,[263] arising out of the infamous and bloody feud between the Hatfields of West Virginia and the McCoys of Kentucky in the late 1880s,[264] inspired such calls. After the West Virginia Governor refused to extradite several people indicted for murder in Kentucky, a band of men crossed over into West Virginia and abducted them.[265] After the Supreme Court held West Virginia could not reclaim them by means of habeas corpus,[266] a *New York Times* editorial claimed *Mahon* "illustrate[d] the need of a more effective law for the regulation of inter-State extradition."[267] The writer noted with dismay that despite the Constitution's command that fugitives from justice "shall be delivered up," "Congress has left the matter in

259. *See, e.g.*, *Extradition—Refusing Requisition of Fugitive Because of Fear That He Will Be Lynched*, *supra* note 242, at 341 (1902) ("We cannot too strongly express our disapproval .... What right has the Governor of Massachusetts to 'arraign' the administration of justice in North Carolina, or what right has the Governor of Indiana to say that one charged with crime in Kentucky cannot obtain a fair trial in the latter state?"); *see also* Note, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 YALE L.J. 97, 110–11 & n.74 (1956) (citing criticism arising in cases in which extradition was blocked).

260. *See infra* notes 263–87 and accompanying text (describing several chaotic controversies in which governors refused to extradite men wanted for crimes in other states).

261. *See infra* notes 263–87 and accompanying text (noting that two of the aforementioned controversies resulted in cases being heard before the Supreme Court).

262. *See infra* notes 263–87 and accompanying text (giving examples of newspaper writers and politicians calling for congressional intervention into extradition controversies).

263. 127 U.S. 700 (1888).

264. *Hatfield-M'Coy Vendetta: Official Report of the Governor of West Virginia in Regard to a Remarkable Family Feud*, PHILA. INQUIRER, Feb. 1, 1888, at 1 ("The Hatfields were in the Confederate army, and the McCoys in the Union army.").

265. *Mahon*, 127 U.S. at 700–01.

266. *Id.* at 715.

267. Editorial, N.Y. TIMES, May 15, 1888, at 4.

such shape that it still depends on the discretion of the Governor of the State in which the criminal is found."[268]

Similar calls for national legislation followed an extradition battle arising from political turmoil in Kentucky at the turn of the century. The 1900 gubernatorial election followed a "campaign of unexampled bitterness" between the Democratic candidate for governor, William Goebel, and the Republican candidate, William Taylor.[269] After Taylor was declared the winner,[270] Goebel initiated a challenge to the election results.[271] While the challenge was pending, Goebel was assassinated by a shot fired from the executive mansion.[272] Before his death, Goebel was declared governor.[273] Taylor was indicted and fled to Indiana, and Goebel's successor initiated extradition proceedings.[274] When the Republican Governor of Indiana, Winfield Durbin, refused to accede to the requisition, critics called for congressional legislation "as the most effective solution of these unhappy and serious clashes of authority between the governors of sister commonwealths over the extradition of fugitives from justice."[275]

Congress took up the matter. In December 1901, James Robinson, a Congressman from Indiana and a Democrat, proposed legislation that would have added a federal enforcement tool to the Extradition Act.[276] Robinson's bill would have permitted a state governor, upon having an extradition attempt rebuffed by another

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268. *Id.*

269. Wiliam Cullen Dennis, *Jury Trial and the Federal Constitution*, 6 COLUM. L. REV. 423, 438 n.2 (1906). Both candidates attempted to court the crucial African American vote, but Goebel ultimately embraced segregated train cars, while Taylor "reluctantly admitted that he opposed segregated cars." HAMBLETON TAPP & JAMES C. KLOTTER, KENTUCKY: DECADES OF DISCORD, 1865–1900, at 433–35 (1977); *see also* JAMES C. KLOTTER, WILLIAM GOEBEL: THE POLITICS OF WRATH 74–75 (1977) (discussing Goebel's attempt to court the African American vote); GEORGE C. WRIGHT, 2 A HISTORY OF BLACKS IN KENTUCKY: IN PURSUIT OF EQUALITY, 1890–1980, at 92–94 (1992) (same).

270. GEORGE C. WRIGHT, LIFE BEHIND A VEIL: BLACKS IN LOUISVILLE, KENTUCKY, 1865–1930, at 186 (1985) ("Black leaders rejected Goebel's position and remained with their party. Their vote proved crucial.").

271. Dennis, *supra* note 269, at 438 n.2.

272. *Id.*; Michael C. Heintz, *A Refuge for American Criminals*, 18 J. AM. INST. CRIM. L. & CRIMINOLOGY 331, 332 (1927).

273. Dennis, *supra* note 269, at 438 n.2.

274. *See* KLOTTER, *supra* note 269, at 112–14; TAPP & KLOTTER, *supra* note 269, at 453; Dennis, *supra* note 269, at 438 n.2; Heintz, *supra* note 272, at 332.

275. 53 CENT. L.J. 421, 422 (1901). Taylor remained in Indiana until he was pardoned in 1909. *Governor Pardons Taylor and Finley; Willson of Kentucky Dismisses Cases Against Six Men Accused of Goebel Murder; Youtsey Alone Punished; Taylor and Finley, Long Exiles in Indiana, Hope to Return to Kentucky to Live*, N.Y. TIMES, April 24, 1909, at 1.

276. 54 CENT. L.J. 1, 1 (1902).

governor, to enlist federal marshals to arrest the fugitive.[277] This legislation would have effectively paralleled the Fugitive Slave Act of 1850 by putting enforcement of the rendition process in the hands of federal officials. The bill failed, to the chagrin of those who felt reform was needed.[278]

Less than a decade later, the failure of extradition law again aroused calls for congressional action. The Supreme Court in 1906 considered the legality of the rendition from Colorado to Idaho of "Big Bill" Haywood, President of the United Mine Workers Association, and his compatriots, on charges of conspiracy to murder the ex-Governor of Idaho.[279] Despite colorable claims by Haywood and his comrades that they had been abducted at night and extradited before they could avail themselves of the Colorado courts,[280] the Court was steadfast, as it had been in *Mahon*, in denying a remedy.[281] Once again the only question the Court would consider was whether the present detention of the petitioners—as opposed to how that detention came about—was lawful.[282]

Justice McKenna, dissenting on the ground that the allegations of misconduct on the part of the states themselves set this case apart from *Mahon*, viewed the decision as bringing the Court "perilously near" the destruction of both the right to personal liberty and the means to enforce it.[283] The Haywood case, once again affirming the absolute discretion of state governors given the *Dennison* decision, vividly demonstrated to one commentator "the present state of the law [as] an inducement to kidnaping and lawlessness" and prompted a call for congressional legislation.[284]

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277. *Id.*

278. *Extradition—Refusing Requisition of Fugitive Because of the Fear That He Will Be Lynched*, *supra* note 242, at 341–42 (1902) (lamenting "its enactment would have avoided many of the unhappy and serious clashes of authority between the governors").

279. Pettibone v. Nichols, 203 U.S. 192, 194, 200 (1906). Haywood was represented by Clarence Darrow, who argued the case before the Supreme Court. *Id.* at 196. The University of Minnesota law library has an excellent web page devoted to the case, with primary materials in abundance. *The Clarence Darrow Digital Collection: The Bill Haywood Trial*, U. MINN. L. LIBR., http://darrow.law.umn.edu/trials.php?tid=3 (last visited Nov. 16, 2013).

280. *Pettibone*, 203 U.S. at 219–20 (McKenna, J., dissenting) (describing the claims of Haywood and his colleagues).

281. *See id.* at 215–16 (majority opinion).

282. *Id.* at 216 (1906) ("[T]he vital fact remains that Pettibone is held by Idaho in actual custody for trial under an indictment charging him with crime against its laws . . . .").

283. *Id.* at 218–19 (McKenna, J., dissenting).

284. Note, *Inter-State Rendition*, 5 MICH. L. REV. 269, 269–70 (1907).

From the Civil War to the early twentieth century, then, two themes played out. On the one hand, the inability of the federal government to enforce the dictates of the Extradition Clause and the Extradition Act gave rise to a leitmotif of state officials refusing extradition in the name of civil rights. Alongside this theme, a counterpoint was rising to a crescendo, calling for reform in the name of uniformity.[285] The dissonance between these themes was a reprise of an antebellum conflict explored by Robert Cover—the clash of morality and the demands of formal law.[286] Just as antislavery judges surrendered their private morality to the service of legal formalism, calls for subservience to "the general"[287] ultimately prevailed in the early twentieth century.

Reform did not come in the form of federal dominance, however, but rather in the form of state legislation.

3. Uniform State Legislation: The Uniform Criminal Extradition Act

Given the precedents of *Prigg*, establishing the exclusivity of federal legislation implementing the Fugitive Slave Clause, and *Dennison*, establishing Congress's power (presumptively exclusive per *Prigg*) to implement the Extradition Clause, one might have expected state legislation governing criminal rendition to subside. To the contrary, the leading nineteenth-century treatise on interstate rendition, listing seven reasons why it should be so, concluded: "State legislation is not necessarily excluded from the inter-State extradition of fugitive criminals. There is an opportunity for it."[288] And in 1916, in

285. *See, e.g.*, *Extradition—The Law and the Procedure*, 92 CENT. L.J. 297, 297 (1921) ("It is the conduct of political Governors that gives concern," and referencing "the danger, if not the threat, of the influence of politics, racial prejudices or sectional animosities, destroying the uniformity of operation of extradition laws . . . .").

286. *See generally* COVER, *supra* note 85, at 197–256 (discussing the conflict between "the moral values served by antislavery" and "the interests and values served by fidelity to the formal system").

287. *See* Roscoe Pound, *Cooperation in Enforcement of Law*, 17 A.B.A. J. 9, 13 (1931) (lamenting the prevalence in state-to-state relations of the "old attitude of non-co-operation and indifference to the general," and citing interstate rendition as a "conspicuous example").

288. SAMUEL T. SPEAR, THE LAW OF EXTRADITION, INTERNATIONAL AND INTER-STATE 311 (Albany, Weed, Parsons & Co. 3d ed. 1885); *see also* 1 THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 192 (Boston, Little, Brown & Co. 1880) ("The extradition of fugitives as between the States has commonly been made under state legislation, and the States in passing laws on the subject appear to have assumed that the duty imposed by the Constitution was a state duty . . . ."). Spear shared the widely held belief that the states' inherent police power authorized the passage of legislation concerning rendition:

the face of persistent views that state legislatures could enact laws concerning criminal rendition (at least to fill the gaps left by Congress[289]), the Court formally ended what had for years been a fiction, that Congress possessed exclusive legislative authority in the field.[290]

> Mr. Bishop, in his Criminal Law, vol. 1, p. 133, says that "statutes have been enacted, in most or all of the States, authorizing the arrest of persons on the charge of being fugitives from the justice of other States, on warrant issued by a magistrate, in advance of the executive demand." This, as he says, has been done in aid of the "legislation of Congress and for purposes of domestic police." Mr. Hurd, in his work on Habeas Corpus, p. 636, suggests that "such legislation by the States, when in no sense opposed to the law of Congress, may be rested upon the general police power of the States . . . ."

Samuel Spear, *Inter-State Extradition and State Authority*, 18 ALB. L.J. 166, 167 (1878). Spear examined New York's "act to authorize the arrest and detention of fugitives from justice from other States and Territories of the United States" and concluded that it was "abundantly justified" not only because it was in aid of and not in conflict with Congress's Extradition Act, but also by virtue of the "domestic police [power] and general comity among the States." *Id.*

Long after *Prigg* and *Dennison*, state courts characterized the Extradition Clause as being "in the nature of a treaty stipulation between the States of the Union," Hibler v. Texas, 43 Tex. 197, 203 (1875), or "purely a matter of compact or agreement between the States, . . . confer[ring] no powers upon Congress over its subject matter," *In re* Romaine, 23 Cal. 585, 591 (1863). The constitutionality of federal legislation was challenged and ruled upon as though *Prigg* and *Dennison* had not been decided. *Id.* ("If this was a new question, free from the political excitements which have grown out of the discussion of the subject of slavery, and the enforcement of the succeeding clause relating to fugitives from service, few would have disputed that this clause confers no power upon Congress over the subject, and that all Congressional legislation founded thereon is void.").

289. *See, e.g.*, JAMES ALEXANDER SCOTT, THE LAW OF INTERSTATE RENDITION, ERRONEOUSLY REFERRED TO AS INTERSTATE EXTRADITION § 36, at 44–45 (1917) ("The States themselves have regarded interstate rendition as a concurrent field of legislation, and therefore, they have not hesitated to enact laws covering the phases omitted by Congress, as well as other laws auxiliary to the Constitution and laws of the United States on this subject."); Charles P. McCarthy, *A Constitutional Question Suggested by the Trial of William D. Haywood*, 19 GREEN BAG 636, 636–44 (1907) (urging the adoption of State laws to circumvent the holding of *Hyatt v. New York*, 188 U.S. 691 (1903), eliminating constructive presence and constructive flight as a basis for extradition).

290. While acknowledging that *Dennison* and subsequent decisions of the Court had recognized "the exclusive character" of federal legislation, the Court in *Innes v. Tobin*, 240 U.S. 127 (1915), held that "those cases when rightly considered go no further than to establish the exclusion by the statute of all state action from the matters for which the statute expressly or by necessary implication provided," *id.* at 134. In a somewhat unsatisfying opinion, citing no authority for its reasoning, the Court held that

> the reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power [the statute] must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them—state authority until it was deemed essential by further legislation to govern them exclusively by national authority.

The belief in state power to legislate concerning criminal rendition would ultimately lead to a legislative "solution" to the perceived "failure" of rendition law occasioned by the persistence of rendition controversies after the Civil War. The unpredictability of extradition proceedings, given the unbridled discretion of state governors, diversity in state legislation,[291] and gaps in the Extradition Act led to calls for uniform state legislation.[292] In 1926, the National Conference of Commissioners on Uniform State Laws approved and recommended the Uniform Act for the Extradition of Persons Charged with Crime.[293]

Twenty-six states adopted the Act by 1939, and twelve more did so by 1951.[294] By 1983 all states but two had adopted it, and the Uniform Criminal Extradition Act ("UCEA"), as it had come to be known, was described as "occup[ying] a core position in the law of

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Id. at 134–35. The very next sentence, however, revealed the Court's true reasoning was from necessity: "[S]uch conclusion is essential to give effect to the act of Congress, since to hold to the contrary would render inefficacious the regulations provided concerning the subjects with which it dealt." *Id.* at 135. One commentator described the Court's reasoning as based "upon a failure, more by inadvertence than by intention in Congress, to make a statute as broad as it should have been made." *Extradition—Requisition for Fugitive in State to Which He Had Been Removed by Extradition*, 82 CENT. L.J. 261, 261 (1916). The remedy was not to permit the state to legislate but to leave the matter to Congress: "It would seem, at all events, that the constitution intended, that the subject was to be cared for by federal legislation and if it was not exhaustive, it ought to have been." *Id.*

291. The Conference of Commissioners on Uniform State Laws noted "quite diversified legislation . . . in the various States." *See Supplemental Report of the Standing Committee on Uniform State Laws*, 49 ANN. REP. A.B.A. 530, 568 (1926).

292. *See, e.g.*, Judge A.H. Reid, *Interstate Extradition for Extra-Territorial Crimes*, 43 ANN. REP. A.B.A. 432, 432–40 (1920) (calling upon States to pass uniform legislation).

293. *Supplemental Report of the Standing Committee on Uniform State Laws*, *supra* note 291, at 530; *id.* at 562–68 (text of proposed Uniform Act for the Extradition of Persons Charged with Crime); *see also Proceedings of the Twenty-Sixth Annual Meeting of the National Conference of Commissioners on Uniform State Laws*, 39 ANN. REP. A.B.A. 852, 856 (1916) (Uniform Act for the Extradition of Persons of Unsound Mind). The drafters of the Uniform Act believed the States had concurrent legislative power with Congress:

> [I]t has come to be recognized that the several states may provide machinery for applying the law of extradition in respect to matters not covered by the Act of Congress. Thus the states can legislate upon the method of applying for the writ of habeas corpus, upon the method of arrest and detention of the fugitive before extradition is demanded, upon the mode of preliminary trial, upon the manner of applying for a requisition, upon the extent of asylum allowed a prisoner when brought back to the state from which he has fled, and upon his exemption from civil process; not to mention other points less important which have always been regulated by local law.

Supplemental Report of the Standing Committee on Uniform State Laws, *supra* note 291, at 568.

294. 11 U.L.A. CRIM. LAW & PROC. 51 (master ed. 1974).

interstate transfer of not only fugitives but also other persons indispensable to state criminal justice."[295]

4. An Interstate Compact: The Interstate Agreement on Detainers

State legislation also promised a solution to problems plaguing a subset of extradition cases—those in which the fugitive from justice was serving a sentence in another state. In such a case, states would use a "detainer"—"a request, usually in the form of a warrant or hold order, to detain a fugitive from justice wanted by the demanding state."[296]

A 1945 article by the Director of the Federal Bureau of Prisons documented the corrosive effect of detainers on prisoners' rehabilitative efforts, as well as noting the class of detainers lodged "[w]ith [n]o [f]oundation," and called for the formation of an interstate compact.[297] The negative effects of detainers on prisoner

295. Murphy, *supra* note 206, at 1090–91.

296. Note, *The Detainer: A Problem in Interstate Criminal Administration*, 48 COLUM. L. REV. 1190, 1190–91 (1948) (footnotes omitted).

297. James V. Bennett, *The Correctional Administrator Views Detainers*, 9 FED. PROBATION 8, 9–10 (1945); *see also* Note, *supra* note 296, at 1191–94 (documenting problems with detainers). Because the Interstate Agreement on Detainers ("IAD"), unlike the UCEA, is an interstate compact, it required congressional consent. *See* Cuyler v. Adams, 449 U.S. 433, 438–42 (1981). Congress passed the Interstate Crime Control Consent Act in June 1934, and in December 1934, the President convened a "National Crime Conference," at which "one of the main topics discussed was the feasibility of obtaining more efficient control of crime through such interstate and federal cooperation to simplify arrest and extradition." Richard Hartshorne, *Inter-Governmental Cooperation–The Way Out*, 2 N.J. L. REV. 5, 16–17 (1936). In 1935 the Interstate Commission on Crime was founded; among its immediate concerns were "loopholes" and the " 'no-man's land' of crime control," such as that presented by interstate rendition. *See* Frank Bane, *Foreword*, *in* COUNCIL OF STATE GOV'TS, THE HANDBOOK ON INTERSTATE CRIME CONTROL (rev. ed. Sept. 1949). The Interstate Commission on Crime's work was taken over by the Council of State Governments, *id.*, which ultimately drafted and recommended the Interstate Agreement on Detainers, COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957 at 3–4, 74–76, 78–85 (1956). Thus, the IAD was never seen as purely state legislation. However, the need for congressional consent was not by virtue of its subject matter—rendition—as the UCEA demonstrates, but rather by virtue of its being an agreement among states. It seems noncontroversial to suggest that both the UCEA and IAD, to the extent they govern the process by which a state *obtains* custody over fugitives, are simple extensions of the process for prosecuting crime and therefore fall within the core of the states' police powers. Those parts of the UCEA and IAD which govern the process by which a state *relinquishes* custody over fugitives, by contrast, would seem to be in need of an argument similar to that made in *Commonwealth v. Tracy*, 46 Mass. (1 Met.) 536 (1843), that fugitives are "a class of persons dangerous to the security and peace of . . . [the] community." *Id.* at 549. At any rate, there does not appear to have been any argument raised against this process being within the states' police powers. Congress's authority to enter into the field of intergovernmental rendition has been held to be located in both the Extradition and Commerce Clauses. *Adams*, 449 U.S. at 442 n.10.

rehabilitation[298] drew the attention of the Council of State Governments which assembled a "Joint Committee on Detainers" that included three members from the National Conference of Commissioners on Uniform State Laws.[299] By 1956, model legislation had been drafted, and state legislatures recommended for adoption what would become known as the Interstate Agreement on Detainers ("IAD").[300]

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298. *See* Larry W. Yackle, *Taking Stock of Detainer Statutes*, 8 LOY. L.A. L. REV. 88, 91–93 (1975) (same); Note, *Detainers and the Correctional Process*, 1966 WASH. U. L.Q. 417, 418–23 (documenting detainer problems). These negative effects were later summarized by the Supreme Court:

> [T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i.e., honor farms or forestry camp work); (4) ineligible for trustee [sic] status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle [him] to additional good time credits against [his] sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

Carchman v. Nash, 473 U.S. 716, 730 n.8 (1985) (alterations in original) (quoting Cooper v. Lockhart, 489 F.2d 308, 314 n.10 (8th Cir. 1973)). Similar burdens are placed on a prisoner with an immigration detainer:

> Prisoners subject to immigration detainers are treated as higher security risks, and are prohibited from serving their sentences in minimum security facilities or community treatment centers. Non-citizens typically also find themselves ineligible for halfway houses, early release programs, out-patient drug rehabilitation programs, work release, literacy programs, or probation.

Brief of Nat'l Ass'n of Criminal Defense Lawyers, et al., as Amici Curiae in Support of Petitioner, at 7–8, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651) (citations omitted).

299. The Joint Committee's report included a catalog of difficulties caused by detainers, COUNCIL OF STATE GOV'TS, THE HANDBOOK ON INTERSTATE CRIME CONTROL, *supra* note 297, at 85–86. It also included a list of "guiding principles" for reform, including that "[n]o prisoner should be penalized because of a detainer pending against him unless a thorough investigation of the detainer has been made and it has been found valid." *Id.* at 87–88.

300. COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957, *supra* note 297, at 78–85. Article I of the proposed IAD gave recognition to the problems with detainers that had occasioned the need for legislation, reciting that unresolved detainers "produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." *Id.* at 81. By 1966, nine states had enacted the IAD; by 1970 that number had increased to twenty-five. *See* S. REP. NO. 91-1356 at 1 (1970); Note, *supra*

As with the UCEA, the need for the IAD grew directly out of the *Dennison* and *Prigg* opinions and the lack of any enforcement mechanism external to the states for the Extradition Clause.[301] Under *Dennison* and *Prigg*, the states' relationships with one another regarding fugitives from justice ultimately depended on comity.[302] The purpose of the IAD was to regularize the treatment of detainers by converting criminal rendition from a scheme governed by comity to one governed by compulsion.[303]

5. Conclusion

The postbellum period continued to be marked by the "problem" of disuniformity in rendition occasioned by states' differing civil rights norms. The *Prigg* and *Dennison* decisions, which alleged the exclusive power of Congress to legislate regarding rendition but acknowledged the impotence of the federal government to compel compliance with such legislation, underscored the need for a solution.[304] But whereas the vision for an antebellum solution had been in a consolidation of federal power in the Fugitive Slave Act of 1850,[305] in the postbellum period state legislatures filled the void, going some distance toward solving the disuniformity problem, by promulgating the UCEA and the IAD.[306]

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note 298, at 430 n.61; *see also* United States v. Mauro, 436 U.S. 340, 349–51 (1978) (recounting history of the development of the IAD).

301. *See* Bennett, *supra* note 297, at 8–9 (lamenting the lack of interjurisdictional coordination and the "lack of definite boundaries to comity [and] understanding"); COUNCIL OF STATE GOV'TS, THE HANDBOOK ON INTERSTATE CRIME CONTROL, *supra* note 297, at 88 (urging all jurisdictions to "observe the principles of interstate comity in the settlement of detainers"); COUNCIL OF STATE GOV'TS, THE HANDBOOK ON INTERSTATE CRIME CONTROL 91 (rev. ed. 1966) (noting that before the IAD, "the only way a prosecuting official . . . could secure [a prisoner subject to a detainer] for trial was by resort to a cumbersome special contract between the Governors of the two states involved").

302. *See supra* Parts II.A.3, II.A.5.

303. *See* Bennett, *supra* note 297, at 10.

304. *See supra* Parts II.A.3, II.A.5.

305. *See supra* Part II.A.4.

306. *See supra* Part II.B.3–4. Both the UCEA and IAD stem from the Extradition Clause and require that extradition, or the placing of a detainer, be based on criminal charges. By their terms, these statutory schemes are inapplicable to immigration detainers. *See, e.g.*, United States v. Gonzalez-Mendoza, 985 F.2d 1014, 1016 (9th Cir. 1993) (holding the IAD applies only to detainer related to pending criminal charges in another jurisdiction, and not to immigration detainer).

C. *Postscript:* Puerto Rico v. Branstad *(1987)*

The final chapter in this history is Justice Thurgood Marshall's 1987 opinion in *Puerto Rico v. Branstad*,[307] overruling *Dennison* and holding that the duties imposed by the Extradition Clause can be enforced in federal court.[308] That Justice Marshall should write the opinion overruling *Dennison* was fitting—Justice Marshall had litigated many of the cases through which the Court had expanded federal power in the name of civil rights enforcement.[309] Chief Justice Taney's decision in *Dennison* was the opposite—Taney "rediscovered the viability of states' rights . . . in order to protect the slave states from federal interference on the eve of the Civil War."[310]

The facts of *Branstad* were simple. Ronald Calder, a white man and a native of Iowa, was charged with murder while living in Puerto Rico for his work as an air traffic controller.[311] Calder was alleged to have struck and killed two people with his automobile in a parking lot in Aguadilla and thereafter fled to Iowa, where he resisted extradition efforts on the belief that "a white American man . . . could not receive a fair trial in the Commonwealth of Puerto Rico."[312] When the Iowa Governor refused to extradite Calder to Puerto Rico, territorial authorities sought a writ of mandamus to compel the Iowa Governor to perform his duty under the Extradition Clause and Extradition Act.[313]

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307. 483 U.S. 219 (1987).

308. *Id.* at 230.

309. *See generally* Anthony G. Amsterdam, *Thurgood Marshall's Image of the Blue-Eyed Child in* Brown, 68 N.Y.U. L. REV. 226 (1993) (describing Marshall's oral arguments and litigation strategy in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)).

310. Paul Finkelman, *The Taney Court, 1836–1864: The Jurisprudence of Slavery and the Crisis of the Union*, *in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 95 (Christopher Tomlins ed., 2005); *id.* at 95–96 ("Sympathetic to the Southern cause, Taney avoided writing an opinion that would have given the federal government the legal authority to force state governors to act."). Taney, of course, wrote the infamous decision in *Dred Scott*, in which he defended the power of the federal government. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). Finkelman concludes the apparent inconsistency between Taney's states' rights and federalist opinions demonstrates

> Taney's larger jurisprudential goal of protecting slavery and the South whenever he could. . . . He could flit back and forth from states' rights to federal supremacy. When it benefitted slavery . . . Taney was happy to allow the states to determine the status of people within their jurisdiction. When it did not, as in *Dred Scott*, Taney denied states that capacity.

Finkleman, *supra*, at 96.

311. *Branstad*, 483 U.S. at 221–22.

312. *Id.*

313. *Id.* at 222–23.

Dennison of course stood in the way of such relief.[314] But Justice Marshall dismissed Taney's *Dennison* opinion, somewhat charitably, as dictated by circumstance, with the "practical power of the Federal Government" in 1861 "at its lowest ebb since the adoption of the Constitution."[315] Then, citing the Civil Rights Movement precedents of *Brown v. Board of Education*[316] and *Cooper v. Aaron*[317]—both of which he had argued before the Court—Justice Marshall dealt *Dennison* its death blow, declaring "[t]he fundamental premise of the holding in *Dennison*–'that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns–is not representative of the law today.' "[318]

With regard to the Tenth Amendment, *Branstad*'s holding that the federal government can compel the states to perform their duties under the Extradition Clause is a break in a long historical chain.[319] *Branstad* did not indicate, however, that the ability of the federal government to exercise compulsion over state officials would be widespread.[320] Indeed the holding of *Branstad* was narrowly confined to the Extradition Clause, where "the duty is directly imposed upon the States by the Constitution itself."[321]

Thus, *Branstad* left open the very question under inquiry here—whether the Tenth Amendment prohibits the federal government from compelling state compliance for the purpose of delivering up suspected immigration violators.[322]

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314. *See id.* at 223 (stating the district court dismissed the complaint because of *Dennison*'s holding).

315. *Id.* at 224–25.

316. 349 U.S. 294 (1955).

317. 358 U.S. 1 (1958).

318. *Branstad*, 483 U.S. at 227–28 (quoting FERC v. Mississippi, 456 U.S. 742, 761 (1982)).

319. *Id.* at 227 ("If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that 'the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' basic constitutional principles now point as clearly the other way.") (quoting Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1860), *overruled by Branstad*, 483 U.S. 219) (citation omitted).

320. *See Branstad*, 483 U.S. at 228.

321. *Id.*

322. *Id.* (stating that the Court had "no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment," because "the duty [of extradition] is directly imposed upon the States by the Constitution itself").

III. HISTORY AS PRECEDENT FOR LOCAL RESISTANCE TO IMMIGRATION RENDITION

The history of local resistance to slave and criminal rendition in the United States provides compelling precedent for the resistance of Santa Clara County and other jurisdictions to immigration rendition. The greater span of history has validated local resistance to rendition when it has been spurred by civil rights concerns and justified by reference to the reserved powers of local governments. *Branstad* ultimately broke this pattern, but for reasons that will be discussed below, *Branstad* does not render localities powerless to resist federal immigration rendition.

The history thus far reviewed is persuasive, not binding precedent. While the Fugitive Slave and Extradition Clauses directly governed slave and criminal rendition,[323] they do not govern immigration rendition, and there is no similar clause in the Constitution pertaining to immigration rendition. The Extradition Act,[324] Fugitive Slave Acts,[325] UCEA,[326] and IAD[327] by their terms do not apply to immigration rendition.[328] Before proceeding to a discussion of how this non-binding but persuasive historical precedent applies to the legal questions surrounding immigration detainers, it is necessary to first examine the law directly governing immigration detainers.

A. The Statutes and Regulation Governing Immigration Detainers

There are references to immigration detainers dating back at least to 1950, and a form detainer was in existence as early as 1983.[329] Yet, the only statutory reference to immigration detainers—section 287(d) of the Immigration and Nationality Act ("INA")—was not enacted until 1986.[330] Shortly thereafter, the first federal regulation

323. U.S. CONST. art. IV, § 2, cl. 2–3.

324. *See supra* Part II.A.2.

325. *See supra* Parts II.A.2, II.A.4.

326. *See supra* Part II.B.3.

327. *See supra* Part II.B.4.

328. *See, e.g.*, United States v. Gonzalez-Mendoza, 985 F.2d 1014, 1016 (9th Cir. 1993) (holding IAD does not apply to immigration detainer).

329. Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 182–85, 182 n.104, 183 n.105 (2008).

330. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751(d), 100 Stat. 3207, 3207–47 to 3207–48 (1986) (codified as amended at INA § 278(d), 8 U.S.C. § 1357(d) (2012)).

detailing how immigration detainers could be issued and enforced was enacted.[331]

The immigration detainer regulation was immediately challenged as *ultra vires*.[332] The regulation is broad in scope, authorizing "[a]ny authorized immigration officer" to issue "at any time" an immigration detainer to "any other Federal, State, or local law enforcement agency."[333] Opponents of the regulation pointed to the fact that the statutory authority—section 287(d) of the INA—was much narrower, applying only in cases where a suspected immigration violator is arrested for a controlled substance offense.[334] This challenge was rejected by the Immigration and Naturalization Service ("INS"), which claimed that the statute did not limit the situations in which an immigration detainer could be issued[335] and that the regulation

331. 8 C.F.R. § 287.7 (1988); *see also* 8 C.F.R. § 1236.1 (2004) (referencing § 287.7 as the governing regulation on detainers); 8 C.F.R. § 236.1 (2013) (same); 8 C.F.R. § 1236.1 (2013) (same). The history of 8 C.F.R. § 287.7 and its relationship to its purported authority is discussed extensively in my first article on detainers. Lasch, *supra* note 329, at 182–85. Reference to "deportation" or "immigration" detainers can be found in federal regulations predating 1986. *See, e.g.*, Treatment and Instruction of Inmates, 47 Fed. Reg. 22,006, 22,007 (May 20, 1982) (to be codified at 28 C.F.R. pt. 544) ("deportation detainer"); Supervision and Recommitment of Prisoners, 43 Fed. Reg. 22,747, 22,747 (May 26, 1978) (to be codified at 28 C.F.R. pt.2) ("immigration detainer"); Parole, Release, Supervision and Recommitment of Prisoners, Youth Offenders, and Juvenile Delinquents, 39 Fed. Reg. 45,223, 45,231 (Dec. 31, 1974) (to be codified at 28 C.F.R. pt. 2) ("immigration detainer"); Parole, Release, Supervision and Recommitment of Prisoners, Youth Offenders, and Juvenile Delinquents, 38 Fed. Reg. 26,652, 26,653 (Sept. 24, 1973) (to be codified at 28 C.F.R. pt. 2) ("immigration detainer"); Parole, Release, Supervision, and Recommitment of Prisoners, Youth Offenders, and Juvenile Delinquents, 27 Fed. Reg. 8,487, 8,488 (Aug. 24, 1962) (to be codified at 28 C.F.R. pt. 2) ("immigration detainer"). But these regulations addressed the effect of immigration detainers on federal prisoners' eligibility for programs or parole, and did not specify when a detainer could issue or how it could be enforced. *See, e.g.*, 39 Fed. Reg. at 45,231–32.

332. *See* Lasch, *supra* note 329, at 184–85 (describing federal immigration officials' response to public comment challenging the detainer regulation as "overly broad because the authority to issue detainers is limited by section 287(d) of the Act to persons arrested for controlled substances offenses") (quoting Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42,406, 42,411 (Aug. 17, 1994) (to be codified at 8 C.F.R. pt. 242)).

333. 8 C.F.R. § 287.7(a) (2011).

334. 8 U.S.C. § 1357(d) (2012) (codifying INA § 287(d)).

335. One federal district court has agreed with this interpretation. Comm. for Immigrant Rights v. Cnty. of Sonoma, 644 F. Supp. 2d 1177 (N.D. Cal. 2009). In *Committee for Immigrant Rights*, the plaintiffs argued, inter alia, that the detainer statute, INA § 287(d), was a limit on the detainer authority of federal immigration officials, permitting detainers to be issued only in cases involving controlled substance arrests. *Id.* at 1187. Because the federal detainer regulation does not limit the situations in which detainers can be issued, the plaintiffs argued the regulation is *ultra vires* of the statute. *Id.* at 1196; *see also* Lasch, *supra* note 329, at 186–93 (arguing the regulation is *ultra vires* because it does not require the detainer process to be initiated by the arresting law

merely codified the longstanding "general authority of the Service to detain any individual subject to exclusion or deportation proceedings."[336]

Even accepting the notion that federal immigration authorities have unbridled authority to detain suspected immigration violators,[337] and a concomitantly broad "general detainer authority,"[338] a key question remains: What *is* an immigration detainer—is it nothing more than a request for notification prior to a prisoner's release, or is it a command that state or local officials continue the detention of a suspected immigration violator who would otherwise be released?

The question is important because a federal command to state officials to enforce immigration rendition provisions implicates the history reviewed in Part II. That history of slave and criminal rendition reveals a consistent rejection of the idea that the federal government could compel state officials to participate in rendition of prisoners until the *Branstad* decision in 1987.

B. Is an Immigration Detainer a Request or a Command?

There has been considerable uncertainty as to whether an immigration detainer is a request or a command.[339] From 1983 until

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enforcement agency, and that the regulation is *ultra vires* for lack of limits as to situations in which detainers can be issued).

The district court, however, concluded that the federal immigration detainer regulation was not *ultra vires* of its enabling legislation. *Comm. for Immigrant Rights*, 644 F. Supp. 2d at 1198. The court first concluded that the detainer statute was not meant to limit the situations in which the federal government might issue a detainer—rather, the detainer statute was meant to impose additional requirements on the federal government in controlled substance cases. *Id.*; *see* 8 U.S.C. § 1357(d) (requiring federal immigration officials to "promptly determine whether or not to issue such a detainer" upon request in such cases). Legislative history not cited by the court or the parties supports the court's conclusion. 132 CONG. REC. 22981 (1986) (indicating the provision for detainers in INA § 287(d) was added in response to "local law enforcement complaints concerning the INS's inability to issue a judgment on a suspect's citizenship status fast enough to allow the authorities to continue to detain him," and was intended to mandate a faster response from federal immigration authorities to requests initiated by local law enforcement).

336. Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42,406, 42,411 (Aug. 17, 1994) (to be codified at 8 C.F.R. pt. 242); *see* Lasch, *supra* note 329, at 184–85.

337. *But see* Arizona v. United States, 132 S.Ct. 2492, 2505–06 (2012) (recognizing the authority of federal immigration officials to arrest suspected immigration violators is not unlimited); *see also* Lasch, *Preempting Immigration Detainer Enforcement*, *supra* note 7, at 295–97 (discussing *Arizona*'s recognition of limited federal arrest authority).

338. Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. at 42,411; *see* Lasch, *supra* note 329, at 185 (noting the federal government's contention that it has "general detainer authority" regarding immigration detainers).

339. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 11–14 (2012) (detailing authorities supporting the position

June 2011, the immigration detainer form ("Form I-247") used by the federal government contained language suggesting the detainer was nothing more than a request for notice:

> Please accept this notice as a detainer. *This is for notification purposes only and does not limit your discretion in any decision* affecting the offender's classification, work, and quarters assignments, or other treatment which he or she would otherwise receive.[340]

Additionally, the 1983 version of the detainer form did not instruct local officials to maintain custody of the prisoner beyond his or her release date. Instead, the form included a checkbox with the following language: "IT IS REQUESTED THAT YOU . . . Notify this office of the time of release at least 30 days prior to release or as much in advance as possible."[341]

Following the enactment of INA section 287(d) and the first regulation on immigration detainers, the government added a checkbox to the Form I-247, accompanied by the following statement:

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that the detainer is a request and authorities supporting the position that the detainer is a command). Federal district courts have noted the mandatory language of 8 C.F.R. § 287.7(d). Moreno v. Napolitano, No. 11 C 5452, 2012 WL 5995820, at *5 (N.D. Ill. Nov. 30, 2012) (noting the absence of record evidence that the plaintiffs' "risk of future confinement is 'conjectural' or 'hypothetical,' or that the mandatory language of 8 C.F.R. § 287.7 is not followed in practice"); Rios-Quiroz v. Williamson Cnty., Tenn., No. 3-11-1168, 2012 WL 3945354, at *4 (M.D. Tenn. Sept. 10, 2012) (holding that use of "shall" in 8 CFR § 287.7(d) renders the regulation mandatory upon state officials). The Third Circuit appears poised to decide the question of whether immigration detainers can be mandatory on state officials, in *Galarza v. County of Lehigh*. *See* Galarza v. Cnty. of Lehigh, No. 12-3991 (3d Cir. Oct. 10, 2013). Oral arguments were heard on October 10, 2013; at the time of publication, a decision had not been rendered. *See id.* The plaintiff in *Galarza*, a United States citizen, brought an action for damages against the County of Lehigh, which honored an immigration detainer lodged against him by federal officials, detaining Mr. Galarza beyond when he would otherwise have been released. Galarza v. Szalczyk, No. 10-cv-06815, 2012 WL 1080020, at *1–2 (E.D. Pa. Mar. 30, 2012). The district court held the county could not be held liable because the county's policy of honoring all immigration detainers was "consistent with" the federal regulation stating that a local law enforcement agency "shall" prolong detention pursuant to a detainer. *Id.* at *18–19 (citing 8 CFR § 287.7(d)). I am counsel of record on an amicus brief which argues (consistent with my arguments here) that despite the mandatory language of the federal regulation, as a matter of law the federal government cannot require state and local officials to prolong the detention of prisoners based on immigration detainers. Brief of Law Professors as Amici Curiae in Support of Appellant & in Support of Reversal, Galarza v. Cnty. of Lehigh, No. 12-3991 (filed March 26, 2013), at 20–26 [hereinafter *Galarza* Amici Brief].

340. U.S. IMMIGRATION & NATURALIZATION SERV., FORM I-247 (Mar. 1983) (emphasis added) (this version does not include the word "please"); U.S. IMMIGRATION & NATURALIZATION SERV., FORM I-247 (Apr. 1997); U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Aug. 2010).

341. U.S. IMMIGRATION & NATURALIZATION SERV., FORM I-247 (Mar. 1983).

> Federal regulations (8 CFR 287.7) *require* that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien.[342]

The form now contained language indicating that the detainer was "for notification purposes only" but also that federal regulations "require" continued detention, confusing the issue of whether the detainer is a request or a command.[343]

The government's official position on this point has been as ambiguous as its detainer form. The County of Santa Clara noted the ambiguity that existed by virtue of mixed messages in the Form I-247, the federal regulations, and DHS's published Secure Communities "standard operating procedures."[344] Santa Clara asked the director of Secure Communities directly: "Is it [DHS]'s position that localities are legally required to hold individuals pursuant to Form I-247 or are detainers merely requests with which a county could legally decline to comply?"[345] In September 2010, the director responded:

> ICE views an immigration detainer as a *request* that a law enforcement agency maintain custody of an alien who may otherwise be released for up to 48 hours (excluding Saturdays, Sundays, and holidays). This provides ICE time to assume custody of the alien.[346]

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342. U.S. IMMIGRATION & NATURALIZATION SERV., FORM I-247 (Apr. 1997) (emphasis added).

343. *Id.*

344. The County noted that the Secure Communities "standard operating procedures" described a detainer as a "request" but stated local law enforcement "*will* abide by the conditions" stated in the detainer; 8 C.F.R. § 287.7 similarly describes a detainer as a "request" but states local law enforcement "*shall* maintain custody" of prisoners who would otherwise be released; and the Form I-247 itself uses a combination of "request" and "require" terminology. Memorandum from Miguel Marquez, Cnty. Counsel, Cnty. of Santa Clara, to George Shirakawa, Chairperson of the Bd. of Supervisors' Pub. Safety & Justice Comm. & Donald F. Gage, Vice Chair of the Bd. of Supervisors' Pub. Safety and Justice Comm., at 13 (Sept. 1, 2010), *available at* http://altopolimigra.com/wp-content/uploads/2012/05/2010-09-01_SC-County-Counsel-Memo.pdf.

345. Letter from Miguel Márquez, Cnty. Counsel, Cnty. of Santa Clara, to David Venturella, Exec. Dir., Office of Secure Cmtys., U.S. Dep't of Homeland Sec. (Aug. 16, 2010), *available at* http://ccrjustice.org/files/SCC%20County%20Counsel%20letter%20to%20Venturella.pdf.

346. Letter from David Venturella, Exec. Dir., Office of Secure Cmtys., U.S. Dep't of Homeland Sec., to Miguel Márquez, Cnty. Counsel, Cnty. of Santa Clara (Sept. 27, 2010) (emphasis added), *available at* http://www.deportationnation.org/library/. The Council of the City of New Orleans relied on this characterization of the detainer as a "request" in enacting its recent policy limiting compliance with detainers. *See* Council of the City of

An August 2010 revision of the detainer form retreated from language indicating the regulation *requires* local law enforcement to detain a person for DHS[347] to language describing the detainer as a *request* based on the regulation.[348] This alteration suggested ICE's position had solidified on this point. And in early 2011, DHS officials reportedly stated privately that an immigration detainer is "merely a request" and that "there is no federal law or mandate or court case that requires local jurisdictions to honor [immigration] detainers."[349] Yet in June 2011 the government changed course yet again, issuing yet another revision of the Form I-247 detainer, which eliminated the "for notification purposes only" language and quoted the detainer regulation as providing that "a law enforcement agency 'shall maintain custody of an alien' once a detainer has been issued by DHS."[350] The most recent revision of the detainer form once again describes itself as a "request" for prolonged custody and references the detainer regulation but does not quote its mandatory language.[351]

Whether the federal government is claiming the authority to command obedience from state officials remains unclear, given these inconsistent pronouncements.[352] The August 2010 detainer form had

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New Orleans, Res. R-13-164 (May 16, 2013), *available at* http://nowcrj.org/wp-content/uploads/2013/08/City-Council-Resolution-R-13-164.pdf.

347. *See* U.S. IMMIGRATION & NATURALIZATION SERV., FORM I-247 (Apr. 1997).

348. U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Aug. 2010).

349. Jason Winshell, *San Francisco Poised to Revive 'Sanctuary City' After Feds Deport More than 100 Non-Criminals*, S.F. PUBLIC PRESS (Apr. 15, 2011), http://sfpublicpress.org/news/2011-04/san-francisco-poised-to-revive-sanctuary-city-after-feds-deport-more-than-100-non-crimi.

350. U.S. DEP'T OF HOMELAND SEC., FORM I-247 (June 2011) (including in bold language just below the document's caption, the command: "MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS").

351. U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Dec. 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

352. The federal government has recently taken the position, in litigation, that a detainer is a "legally authorized request" that does not "impose[] a requirement upon a [local enforcement agency] to detain the individual on ICE's behalf." Defendants' Answer to Amended Complaint, at 11, Moreno v. Napolitano, No. 11-cv-05452 (N.D. Ill. May 13, 2013); *see also* Defendants' Memorandum in Support of Motion for Partial Judgment on the Pleadings, at 9, Moreno v. Napolitano, No. 11-cv-05452 (N.D. Ill. Aug. 2, 2013) (arguing immigration detainers do not violate the Tenth Amendment by commandeering state and local officials because "detainers issued pursuant to 8 C.F.R. § 287.7 are voluntary requests"). Relying in part on this litigation position, forty-nine members of Congress recently requested that DHS clarify its position publicly. Describing "concern over conflicting information the Department of Homeland Security (DHS) has disseminated regarding the Secure Communities program," the members of Congress, after expressing their belief that "[i]t is clear ... that the I-247 is a request and not a requirement," asked DHS to "direct [them] to an easily accessible online resource that clarifies that I-247 detainers are requests, imposing no requirements on [local law

seemed to signal a retreat from any such claim.[353] The June 2011[354] and later forms,[355] making reference to the federal immigration detainer regulation (which does purport to compel state officials to detain prisoners at the federal government's insistence[356]) and the suggestion by negative implication that state officials are "authorized to hold the subject"[357] for a limited time pursuant to the detainer, signaled a return to the claim of federal compulsion.

C. *The Legality of Immigration Detainers in Light of the Precedent*

The legal question this raises is whether compulsion of state officials by the federal government violates the Tenth Amendment's reservation of powers to the states.[358] Modern jurisprudence suggests an affirmative answer. The Court has spoken with abundant clarity in

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enforcement agencies]," or to post such information "in an easily accessible location online." Letter from Mike Thompson, U.S. Rep., Zoe Lofgren, U.S. Rep., et al., to Rand Beers, Acting Sec'y of Homeland Sec. (Oct. 17, 2013) (on file with the North Carolina Law Review).

353. U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Aug. 2010) (using the term "request").

354. U.S. DEP'T OF HOMELAND SEC., FORM I-247 (June 2011).

355. U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Oct. 2011) (on file with the North Carolina Law Review); U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Dec. 2011); U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Dec. 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

356. 8 C.F.R. § 287.7(d) (stating local law enforcement receiving a detainer "*shall* maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department" (emphasis added)); *see also* Ramirez-Mendoza v. Maury County, 2013 WL 298124, at *8 (M.D. Tenn. Jan. 25, 2013) (holding that 8 CFR § 287.7(d) "imposed a federal mandate" on state officials); Rios-Quiroz v. Williamson Cnty., Tenn., No. 3-11-1168, 2012 WL 3945354, at *4 (M.D. Tenn. Sept. 10, 2012) (holding that the use of "shall" in 8 C.F.R. § 287.7(d) renders the regulation mandatory upon state officials); Galarza v. Szalczyk, No. 10-cv-06815, 2012 WL 1080020, at *19 (E.D. Pa. Mar. 30, 2012) (holding that "although an immigration detainer 'serves to advise another law enforcement agency that the Department seeks custody' and 'is a request' to the federal, state, or local law enforcement agency presently holding the individual named in the detainer that it 'advise the Department, prior to release' of that individual, once the immigration detainer is issued, the local, state, or federal agency then holding the individual 'shall' maintain custody" (citation omitted) (quoting 8 C.F.R. §§ 287.7(a), 287.7(d))); *cf.* Buquer v. City of Indianapolis, 797 F.Supp. 2d 905, 911 (S.D. Ind. 2011) (describing an immigration detainer as "not a criminal warrant, but rather a voluntary request" directed to state or local officials).

357. U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Dec. 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf ("*[Y]ou are not authorized to hold the subject beyond these 48 hours.*").

358. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Printz v. United States,[359] striking down in no uncertain terms a federal statute requiring local law enforcement officers to submit prospective handgun purchaser background check requests to the federal government: "Today we hold that Congress cannot ... conscript[] the States' officers directly.... [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."[360]

If, for example, Congress had written INA section 287(d) to *require* (rather than to permit) local law enforcement officials to report controlled substance arrestees suspected of being immigration violators and to *require* (rather than to permit) those local officials to request immigration officials to "promptly determine whether or not to issue such a detainer,"[361] the facts would be virtually indistinguishable from *Printz*.[362] But while Congress seems to have carefully crafted the detainer *statute* to avoid Tenth Amendment problems,[363] the same cannot be said of the immigration detainer *regulation*, which purports to compel state officials to enforce its provisions.[364]

The history explored in Part II reveals that the question of whether the federal government can compel state officials to implement federal law is not at all a new question—in fact it has been a recurring one with respect to rendition.[365] Rendition history provides deep support for the conclusion hastily drawn from modern precedent—that the federal government has no authority to compel state officials to detain prisoners for rendition.

The absence of federal authority to compel state compliance with rendition was an unchallenged legal fact from the Articles of

359. 521 U.S. 898 (1997).

360. *Id.* at 935.

361. 8 U.S.C. § 1357(d) (2012).

362. *Compare id.*, *with Printz*, 521 U.S. at 935.

363. Congress left control in the hands of local law enforcement officials to decide for themselves when to bring a controlled substance arrestee to the attention of federal immigration officials, ensuring INA § 287(d) avoided any Tenth Amendment unfunded mandate problems. *See* Lasch, *supra* note 329, at 186–90 (discussing statutory language allocating authority for initiating detainer process to law enforcement officials making the criminal arrest).

364. 8 C.F.R. § 287.7(d) (2013).

365. One legal historian traces the *Printz* decision back to *Prigg*. Professor Finkelman, seizing upon Justice Scalia's mention of the Fugitive Slave Act in *Printz*, *see* 521 U.S. 898, 906 (1997), and noting the Justice's failure to mention that the portion of the Act which required state judges to adjudicate claims was held unconstitutional by Justice Story in *Prigg*, *see supra* notes 153–63 and accompanying text, has devoted an article to the matter. *See* Finkelman, *supra* note 163, at 1400–01. In that article he treads some of the ground that I also cover here.

Confederation straight through to *Puerto Rico v. Branstad*.[366] In fact, there was every objective indication that the proposition was settled law. In 1818, legislation that would have compelled state officials to cooperate with fugitive slave rendition on pain of federal criminal charges failed.[367] And the Court's rejection of a federal compulsion power in *Prigg* was near unanimous[368] and abiding, as it was reaffirmed in *Dennison* years later.[369] Even Justice McLean, the lone voice in favor of a federal compulsion power over rendition, rested his argument narrowly upon the explicit duties governing state officials in the text of the Fugitive Slave Clause of the Constitution.[370]

Against the backdrop of this history, the current immigration detainer regulation suffers from the same defect shared by the Fugitive Slave and Extradition Acts of 1793—each attempted to impose by federal law a duty on state officials. The inability of the federal government to compel performance of that duty leaves it unenforceable; rendition controversies ensue. To the extent a solution is needed, it will have to take a form akin to the Fugitive Slave Act of 1850[371]—federal, rather than state, officials will have to be charged with enforcing the quarter million immigration detainers issued each year. Alternatively, regularized cooperation with immigration detainers could take the form of state legislation for the processing of federal immigration detainers, akin to the state statutory enactments of the UCEA or IAD.

But the long history of the anti-commandeering doctrine in rendition proceedings ended with *Branstad*,[372] leaving open the possibility that Justice Marshall's *Branstad* opinion has opened the door for federal compulsion of state officials in immigration rendition matters. As applied to the federal regulation governing immigration detainers, this argument is unpersuasive for four reasons.

First, the timing of the *Branstad* opinion makes using it to support federal compulsion of state officials pursuant to the regulation on immigration detainers problematic. The statute first mentioning detainers, INA section 287(d), was passed in 1986,[373] a year before *Branstad* was decided, and the interim regulation that

366. *See supra* Part II.
367. *See supra* notes 136–38 and accompanying text.
368. *See supra* Part II.A.3.
369. *See supra* Part II.A.5.
370. *See* Prigg v. Pennsylvania, 41 U.S. 539, 666 (1842) (McLean, J., dissenting).
371. *See supra* Part II.A.4.
372. *See supra* Part II.C.
373. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751(d), 100 Stat. 3207–47 (codified as amended at 8 U.S.C. § 1357 (2012)).

first imposed a duty on state and local officials to continue holding prisoners subject to immigration detainers was announced in May 1987[374]—a month before *Branstad* was decided.

Not only did the statute and regulation predate the *Branstad* decision, but the government's grounding of the detainer regulation on its historic "general detainer authority,"[375] eschewing INA section 287(d) as a positive source of statutory authority for issuing detainers, invoked the long history of immigration detainers that predated *Branstad*.[376] Federal authority over immigration detainers throughout that period was always understood in light of the anti-commandeering doctrine embodied in *Prigg* and *Dennison*. Consistent with this understanding, the detainer form in use during that historical period merely "requested" state and local officials to notify federal immigration officials of a prisoner's scheduled release date.[377] The interim regulation—passed before *Branstad* was decided—marked a substantial expansion of the federal government's claimed power over immigration rendition.[378] *Branstad* is at best a *post hoc* justification for the regulation.

Second, *Branstad*'s holding is not capable of enlargement to cover immigration rendition. While Justice Marshall in his *Branstad* opinion did speak in sweeping terms about the changed relationship between the states and federal government[379] and the incompatibility

374. Parole Judicial Recommendations Against Deportation Proceedings To Determine Deportability of Aliens in the United States, 52 Fed. Reg. 16,370, 16,370–71 (May 5, 1987) (to be codified at 8 C.F.R. pt. 287).

375. *See* Lasch, *supra* note 329, at 185 & n.116; *see* Fed. Defendants' Notice of Motion to Dismiss & Memorandum of Law in Support Thereof at 12–17, Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma, No. 4:08-cv-04220, 2009 WL 3502742 (N.D. Cal. Jan. 28, 2009) [hereinafter Fed. Defendants' Notice, *Immigrant Rights*].

376. *See, e.g.*, Fed. Defendants' Notice, *Immigrant Rights*, *supra* note 375, at 12–17 (arguing that ICE has broad legal authority to detain and issue detainers for illegal aliens and reviewing the different sources of law that support this proposition).

377. U.S. IMMIGRATION & NATURALIZATION SERV., FORM I-247 (Mar. 1983).

378. The word "detainer" as used in INA § 287(d) is best understood in light of this history. History would not have envisioned federal officials commanding state officials to detain suspected immigration violators on behalf of the federal government. "Detainer" as used in INA § 287(d) should be construed as a detainer in the form of a *request* and not a command. 8 U.S.C. § 1357 (2012) (codifying INA § 287); *see* U.S. IMMIGRATION & NATURALIZATION SERV., FORM I-247 (Mar. 1983). That part of the detainers regulation which commands state officials to continue holding prisoners beyond their release date, 8 C.F.R. § 287.7(d) (2013), can draw support neither from INA § 287(d), nor from any supposed historical "general detainer authority." *See* Lasch, *supra* note 329, at 185 & n.116.

379. Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987) ("The fundamental premise of the holding in *Dennison*—'that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law

of *Dennison*'s reasoning with that changed relationship,[380] *Branstad*'s holding is nonetheless as narrowly expressed as was Justice McLean's exception to the Court's unanimity on this point in *Prigg*.[381] Both Justice Marshall and Justice McLean found that federal compulsion of state officers was permitted—not as a general matter, but only because the text of the Constitution specifically imposed duties on state officers.[382] This explicit textual command eliminated any need to consider Tenth Amendment principles.[383] But there is no Fugitive Slave Clause or Extradition Clause explicitly imposing duties on state officers to comply with immigration rendition,[384] and thus the Tenth Amendment anti-commandeering concerns persist.[385]

Third, the post-*Branstad* decisions of *New York v. United States*[386] and *Printz* reaffirmed the anti-commandeering doctrine seen throughout the nineteenth century and taken as a given in *Prigg* and *Dennison*. In *New York*, the Court limited *Branstad* to the proposition "only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to

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today.' ") (quoting FERC v. Mississippi, 456 U.S. 742, 761 (1982)); *id.* at 230 ("*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development. Yet this decision has stood while the world of which it was a part has passed away. We conclude that it may stand no longer.").

380. *Id.* at 230.

381. Prigg v. Pennsylvania, 41 U.S. 539, 666 (1842) (McLean, J., dissenting) ("I go no farther than to say, that where the Constitution imposes a positive duty on a state or its officers to surrender fugitives, that Congress may prescribe the mode of proof, and the duty of the state officers.").

382. *See Branstad*, 483 U.S. at 228 ("Because the duty is directly imposed upon the States by the Constitution itself, there can be no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment."); *Prigg*, 41 U.S. at 666 (McLean, J. dissenting).

383. *See Branstad*, 483 U.S. at 228; *Prigg*, 41 U.S. at 666 (McLean, J., dissenting).

384. Indeed the Extradition Clause does not require states to render up fugitives to *the federal government*—and hence it was believed necessary for the federal government to join the IAD in order to obtain fugitives from the states for prosecution in the District of Columbia. S. REP. NO. 91-1356, at 4 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4864, 4868 ("[U]nless the legislation is made applicable to the District, its prosecuting authorities would not be able to have a prisoner in a party State made available for disposition of local detainers. For these reasons the government of the District of Columbia recommended amendments ... to make the legislation directly applicable to the District.").

385. *See* Michael D. Hatcher, Printz *Policy: Federalism Undermines* Miranda, 88 GEO. L.J. 177, 201–02 (1999) (arguing that while *Branstad* and similar cases "show that the federal courts do have the power to order state executive officials to perform affirmative duties when the State commits a constitutional violation[,] [i]t does not follow from these cases that federal courts have the same power to issue[] orders requiring state officials to perform affirmative duties absent a constitutional violation" (footnotes omitted)).

386. 505 U.S. 144 (1992).

comply with federal law, propositions that by no means imply any authority on the part of Congress to mandate state regulation."[387] And when the federal government argued in *Printz* that the Extradition Act of 1793 was an instance of Congress imposing duties on state executive officials, the *Printz* majority pointed out that this was direct implementation of the Extradition Clause.[388] Thus, *Branstad* has not been held to support a broad power of compulsion in the federal government.

Finally, and perhaps most importantly, *Branstad*'s reversal of *Dennison* should be understood not as a simple expression of federal dominance, but rather as a more nuanced expression of federal dominance in a particular context—a United States *after* the Civil Rights Movement and the Warren Court's criminal procedure revolution.[389] The decision must be read in light of those historical developments.

Branstad must be understood as a post-Civil Rights Movement decision. The significance of Justice Marshall's citations in *Branstad* to *Brown v. Board of Education of Topeka*[390] and *Cooper v. Aaron*[391] is twofold. First, the decisions mark the clear difference in historical context that Justice Marshall uses to support overruling *Dennison*, as

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387. *Id.* at 179.

388. Printz v. United States, 521 U.S. 898, 909 (1997). The majority proceeded to discuss early anti-commandeering measures that directly support the argument that federal immigration officials cannot require state jails to house federal prisoners:

> On September 23, 1789—the day before its proposal of the Bill of Rights—the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Congress "recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States," and offered to pay 50 cents per month for each prisoner. Moreover, when Georgia refused to comply with the request, Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made.

Id. at 909–10 (citations omitted).

389. *See generally* Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869 (1994) (connecting the Civil Rights Movement, the Warren Court's "due process revolution" (characterized by a constitutionalization of state criminal proceedings made possible by incorporating the protections of the Bill of Rights via the Fourteenth Amendment's Due Process Clause) and an increase in the federal courts' power and jurisdiction).

390. 344 U.S. 1 (1952).

391. 358 U.S. 1 (1958).

these two decisions affirming the rights of African Americans are juxtaposed against Justice Taney's decision intended "to protect the slave states from federal interference on the eve of the Civil War."[392] Second, *Brown* and *Aaron* relied upon the injunctive power of the Supreme Court and thus illustrated the necessity of federal compulsion to vindicate civil rights.

Branstad should also be understood in light of the Warren Court's due process revolution. It would have been anomalous, after years of combatting local racism by incorporating the Constitution's criminal procedure guarantees against the states, for the Court to have shown sympathy to the claim that a white man would not receive a fair trial in Puerto Rico. The guarantee of constitutionally fair trials in all jurisdictions had, in theory, eliminated the need for executive discretion in rendition controversies implicating civil rights.[393]

Understanding the context of the *Branstad* decision illustrates its inapplicability to the immigration rendition problem. Federal compulsion as used in *Branstad* is grounded in the same principles that allowed the use of federal compulsion to effectuate civil rights decisions like *Brown* and *Aaron* and the use of federal compulsion to effectuate minimum Due Process guarantees in criminal cases. The federal compulsion sanctioned in *Branstad* is nothing more than the compulsion necessary to coerce compliance with federal constitutional guarantees.

Reading *Branstad* as authorizing federal compulsion beyond that necessary to attain compliance with the Constitution would eliminate a fertile source of political dialogue between the states and the federal government. *Branstad* teaches that the Tenth Amendment and the anti-commandeering doctrine can be dispensed with in matters involving constitutional commands. But where the Constitution does not compel a result, the Tenth Amendment anti-commandeering principle allows for dialogue between the federal government and the states as they allocate resources to express their perhaps differing priorities.[394] In this light, northern states can be seen

392. *See* Finkelman, *supra* note 310, at 95. Justice Marshall's opinion in *Branstad* at most only alludes to the pro-slavery character of Justice Taney's Dennison opinion, describing it as written in the context of a fracturing country when federal power was at its "lowest ebb." Puerto Rico v. Branstad, 438 U.S. 219, 224–25 (1987).

393. Murphy, *supra* note 206, at 1076.

394. Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1250–61 (2004) (discussing local resistance to participating in the federal government's anti-terrorism measures as an example of how the Tenth Amendment can provide a mechanism for local expression of individual rights norms greater than those guaranteed by federal law). This idea is akin to the idea that state

to have expressed their opposition to slavery by not putting state resources in the service of fugitive slave rendition. And Santa Clara County has expressed its opposition to the federal government's immigration rendition practices by withdrawing its resources from the endeavor.

In the light of all of the history reviewed in Part II, then, Santa Clara's decision is a justifiable exercise of Tenth Amendment retained powers. Additionally, Santa Clara's decision belongs to a historical tradition of states, in the absence of federal enforcement, exercising discretion over rendition decisions in order to enforce civil rights norms.

IV. ANALOGIZING IMMIGRATION RENDITION TO SLAVE RENDITION AND CRIMINAL RENDITION DEEPENS OUR UNDERSTANDING OF CURRENT IMMIGRATION ENFORCEMENT PRACTICES

While history can serve as precedent, the review of history can also illuminate underlying truths. If it is startling to encounter, in the paragraphs of an article on immigration detainers in the twenty-first century, references to fugitive slave-catchers and forcible abductions, it is because discussing immigration rendition and slave rendition together awakens a realization. The juxtaposition serves as a solemn reminder of what violence it is to claim the body of a person, and how contrary it is to everyday assumptions that this violence might be accomplished with nothing more than a piece of paper.

A. The Common Experience Across Three Rendition Systems

The lived experience of both the individuals and the communities that have been targets of immigrant, slave, and criminal rendition suggests the deep commonality shared by these three rendition systems. Senator William Lewis Dayton from New Jersey, in speaking against what would become the Fugitive Slave Act of 1850, described the following:

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constitutions can provide more protection than the United States Constitution—an idea repeatedly endorsed by Justice Marshall. *E.g.*, Fare v. Michael C., 442 U.S. 707, 731 & n.4 (1979) (Marshall, J., dissenting); Oregon v. Hass, 420 U.S. 714, 728 (1975) (Marshall, J., dissenting); *cf.* Robert M. Cover & Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1036 (1977) (discussing federal habeas corpus review of state court criminal judgments as a mechanism for constitutional dialogue between state and federal courts).

> A black male or female lives in a free community, and has, perhaps, for years; they are recognized as free by our laws, and have children born there, (as was the case of the female carried off by Prigg from Pennsylvania.) Upon some calm day a stranger unknown to the community, presents himself there, and, without process or evidence, simply says, that man, or that woman is my slave! The black denies it: and yet he lays violent hands upon that slave, and carries him or her off by force. That community cannot follow to see how matters will terminate; yet they know nothing of the man who presents himself, nor of his right. They only know that the black has been there, perhaps for years, and supposed to be free. Can it be matter of surprise that, under such circumstances, there should be mobs, and riots, and outrages? The case is calculated to create excitement, and the feelings of all free communities revolt against it.[395]

That these words might well describe the immigrant rendition experience today[396] is illuminated by considering a similar report concerning the effects of present-day immigration detainers "disappearing" members of the community:

> Parents get taken to Pima County Jail, there we have them on a website, we know they are on an [immigration] hold, and then it

395. APPX. TO CONG. GLOBE, 31ST CONG., 1ST SESS., 438–39 (1850). Senator Dayton's remarks were in favor of importing some measure of procedural due process to slave recapture. *Id.*

396. I do not wish to be overly facile in drawing the connection between present-day immigration rendition and antebellum fugitive slave rendition. Similarities between the two issues, however, raise the question of the degree to which current practices represent historic practices that have undergone "status regime . . . 'modernization.' " *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–79 (1996) (describing how "civil rights reform does not simply abolish a status regime" but instead "modernizes the rules and rhetoric" used to justify and enforce the former status hierarchy—"status regime modernization" means "status relationships will be translated from an older, socially contested idiom into a newer, more socially acceptable idiom"); *see also* ALEXANDER, *supra* 208, at 14–15 (proposing to trace a line of history from slavery to Jim Crow and then to mass incarceration "to illustrate the ways in which systems of racialized social control have managed to morph, evolve, and adapt to changes in the political, social and legal context over time"); Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 185 (2007) (describing America's undocumented immigrant population as "harken[ing] back to the days of slavery and Jim Crow in the United States, with a racial caste of workers subject to exploitation and abuse in the secondary labor market"); Johnson, *supra* note 10, at 604 (same). Status regime modernization is a larger question left for another day; my modest goal is to use history to illuminate current practices. *See* Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 952 (2012) (noting that "similarities between current immigration policies and the Fugitive Slave Acts provide insight into current enforcement policies").

> seems like from one minute to the next they disappear. What I mean by disappear is that they are no longer at the Pima County Jail and we don't know where they went .... As you know, INS facilities are not public, are not published, there's not a web page that we can go to, to see if parents are there ....[397]

A Jamaican immigrant in detention for a drug offense recently drew the slavery parallel explicitly:

> Being held in prison while awaiting your deportation hearing, you are constantly reminded that you're not considered a person. You have the feeling of being stripped of anything that makes you feel human, taken away from your home, your family, with a devastating effect on your children. It is the worst punishment that any country or system can bestow upon someone.

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397. SW. INST. FOR RESEARCH ON WOMEN & THE BACON IMMIGRATION LAW AND POLICY PROGRAM, UNIV. OF ARIZ., DISAPPEARING PARENTS: A REPORT ON IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 11 (2011) (footnotes omitted); *id.* at 13–17 (describing "climate of fear" created in the community); *see also* HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 1, 3, 5 (Dec. 2009) (documenting observations of federal immigration detainee transfer policy); INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS para. 394–401, at 137–40 (2010) (documenting observations of federal immigration detainee transfer policy); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 556–57 (2009) (noting "DHS regularly transfers detainees to faraway remote detention facilities often making multiple transfers for a single detainee"). *See generally* IMMIGRANT FAMILY ADVOCATES, A PLEA FOR COMPASSION AND COMMON SENSE: THE SENSELESS AND *OPTIONAL* DETENTION OF UNDOCUMENTED IMMIGRANTS BY LOCAL LAW ENFORCEMENT IN DESCHUTES COUNTY, OREGON 2 (2010) (describing process by which members of the community are removed by immigration detainers typically placed after minor traffic violations and similar offenses); *id.* at 2 (reporting "terrible impacts" on the community when "[a] parent, often the family breadwinner, is 'disappeared' without notification to family, friends or faith community"). ICE reported to Human Rights Watch in early 2010 that it was reviewing its detainee transfer policy and "intend[ed] to minimize the number of detainee transfers to the greatest extent possible." Letter from Phyllis Coven, Acting Dir., Office of Detention Policy and Planning, U.S. Immigration and Customs Enforcement, to Allison Parker, Deputy Dir., U.S. Program, Human Rights Watch (Feb. 22, 2010), *available at* http://www.hrw.org/node/89408. *But see* HUMAN RIGHTS WATCH, A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES 10–12 (2011) (reporting that while ICE did make available an online detainee locator service, "no significant policy changes have been made" regarding detainee transfer).

> Being shackled constantly for hours on end, dragged up and down those hallways, you get the feeling of every person who was in captivity and led into slavery.[398]

The lived experience of individuals detained because of immigration rendition also bears an obvious and overwhelming similarity to the lived experience of those who are detained because of criminal rendition. Under both systems, a person who is locked up stays locked up, when she would otherwise be released, and held for rendition to some other government that claims the right to detain her. Indeed, the experience of an immigrant detainee can be indistinguishable from that of a criminal prisoner[399]—she is held in the same local jail or prison as other criminal defendants awaiting trial or serving sentences,[400] in the same general population,[401] and under the same conditions.[402] The voice of one Iranian detainee tells of the common experience:

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398. Mark Reid, Op-Ed., *Armed Forces Veteran Caught Up in Deportation Nightmare*, HARTFORD COURANT, Aug. 12, 2013, http://www.courant.come/news/opinion/editorials/hc-op-america-deports-its-own-soldiers-instead-of--20130809,0,2569798.story.

399. HUMAN RIGHTS WATCH, LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES, Ch. I: Summary and Recommendations (1998) [hereinafter HRW Summary], *available at* http://www.hrw.org/reports98/us-immig/Ins989-02.htm#TopOfPage ("[S]ince the INS has decided to contract with local jails and has refused to insist on separate, special treatment of immigration detainees who are held in these jails, an INS detainee's experience in a local jail is no different from that of a local inmate.").

400. *Id.* at Ch. IV: Findings ("Commingling INS Detainees with Local Jail Populations"), *available at* http://www.hrw.org/reports98/us-immig/Ins989-05.htm#P742_138332.

401. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE/DRO DETENTION STANDARD: CLASSIFICATION SYSTEM (2008), *available at* http://www.ice.gov/doclib/dro/detention-standards/pdf/classification_system.pdf (permitting immigration detainees to be housed with the "general population" of local jails and prisons).

402. There have been widespread reports of abuses inflicted on immigration detainees, including overcrowding, lack of access to legal resources or counsel, denial of medical and mental health care, and physical abuse of detainees. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-875, ALIEN DETENTION STANDARDS: TELEPHONE ACCESS PROBLEMS WERE PERVASIVE AT DETENTION FACILITIES; OTHER DEFICIENCIES DID NOT SHOW A PATTERN OF NONCOMPLIANCE 5 (2007) (detailing systemic telephone access problems and varying compliance with other detention standards); HRW Summary, *supra* note 399, at Ch. I: Summary and Recommendations (finding immigration detainees "are sometimes subjected to physical mistreatment and grossly inadequate conditions of confinement"); SEATTLE UNIV. SCH. OF LAW INT'L HUMAN RIGHTS CLINIC & ONEAMERICA, VOICES FROM DETENTION: A REPORT ON HUMAN RIGHTS VIOLATIONS AT THE NORTHWEST DETENTION CENTER IN TACOMA, WASHINGTON 62 (2008), *available at* http://www.weareoneamerica.org/sites/default/files/OneAmerica_Detention_Report.pdf (chronicling "mistreatment in areas of legal access, family visitation, medical care, food, officer treatment and living conditions" at one contract service facility).

> [I] have not committed any crime. I have never been in any type of prison system but when I came here they locked me up like I'm some kind of criminal . . . they locked me up along with inmates, people that have committed crimes . . . that's why I fear for my life . . . .[403]

Juxtaposing current immigration detainer practices with slave rendition and criminal rendition forces us to see what these systems hold in common. Such accounts of the immigration rendition experience, considered in the light of history, admonish us to treat immigration detainers, and the legal issues surrounding them, with gravity.[404] Given the number of people affected by immigration rendition,[405] the question of the proper state and local role in enforcing or resisting immigration detainers is of major importance.

B. Lessons for Immigrant Rendition from Criminal and Slave Rendition: Procedural Reforms

Considering immigrant rendition together with criminal and slave rendition is helpful not only because of the similarities among these systems, but because their differences can indicate what procedural reforms are needed in the immigration rendition regime.[406] A brief discussion of the pre- and post-seizure procedural

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403. *Letters from Detainees*, HUMAN RIGHTS WATCH (June 11, 1998), http://www.hrw.org/legacy/reports/reports98/us-immig/Ins989-01.htm (excerpting letter from P.H., an Iranian detainee, to Human Rights Watch).

404. An empirical study of the *criminal* detainer system in the early 1970s found that the problems caused by detainers were exacerbated because of "the discrepancy between the casualness with which the detainers are filed and the seriousness with which they are received." Edward Dauber, *Reforming the Detainer System: A Case Study*, 7 CRIM. L. BULL. 669, 670–71 (1971). The author's recommendations for reducing the "casualness with which the detainers are filed" included limiting the authorities responsible for filing detainers and implementing guidelines for when detainers ought to be filed. *Id.* at 706–09. Similar suggestions have been made with respect to immigration detainers. AM. CIVIL LIBERTIES UNION ET AL., COMMENTS ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DRAFT DETAINER POLICY 13–19 (2010), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-Detainer CommentsFinal-10-1-2010.pdf (criticizing draft detainer policy for failing to provide sufficient guidance and failing to hew to ICE's stated enforcement priorities). The "seriousness with which [immigration detainers] are received" includes, apparently, a nearly universal compliance by state officials with immigration detainers, as I documented in an earlier article. *See* Lasch, *supra* note 329, at 173–74 (2008).

405. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 21 (analyzing data from 347,691 detainers issued over the course of 16 months); Foley, *supra* note 1.

406. Scholars have argued for increased procedural protections in immigration proceedings. *See, e.g.*, Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 778 (2000) (arguing that "courts should apply specific constitutional protections to [deportation] cases, analogous to those granted to criminal

protections (or lack thereof) will demonstrate the fecundity of this soil.

The Fugitive Slave Acts of 1793 and 1850 were devoid of any pre-seizure protections. Section 3 of the Act of 1793 permitted self-help for the slave owner, who was "hereby empowered to seize or arrest such fugitive from labor."[407] This power was later approved as constitutional in *Prigg*,[408] and section 6 of the Act of 1850 similarly authorized self-help.[409]

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defendants"); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 345–47 (2008) (arguing that immigrants in "expulsion" proceedings, as contrasted with "exclusion" proceedings, should receive the entire panoply of criminal procedural protections). Scholars have questioned the "civil" label given to immigration proceedings, *see, e.g.*, Kanstroom, *supra*, at 787 (rejecting a "formal civil/criminal line" for determining appropriate procedural protections in deportation proceedings, in favor of a "more flexible and functional idea of punishment"); have documented the blurring of the civil-criminal divide with the rise of "crimmigration" (the increasing intertwining of criminal law in immigration), *see* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–79 (2006); and have disparaged the absence of the right to counsel and the reduced presence in immigration proceedings of the exclusionary rule, *see, e.g.*, Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 617–18 (2011) (contending that the right to counsel should extend to individuals facing deportation); *see also* Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1155–57 (arguing that constitutional violations by immigration officers and the fundamental changes in immigration law warrant a reconsideration of the position that the exclusionary rule does not apply to immigration proceedings). But no one is yet writing about the disparity in protection afforded in the criminal and immigration rendition systems. *Cf.* Molly F. Franck, *Unlawful Arrests and Over-Detention of America's Immigrants: What the Federal Government Can Do to Eliminate State and Local Abuse of Immigration Detainers*, 9 HASTINGS RACE & POVERTY L.J. 55, 57–58 (2012) (arguing that greater federal oversight is needed to curb detainer abuses committed by state and local law enforcement, but not addressing the lack of procedural protection in immigration rendition).

407. Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, 302 (1793) (repealed 1864); *see also* Basinger, *supra* note 139, at 314 (explaining that the Fugitive Slave Act of 1793 permitted slave owners, or their agents, to seize escaped slaves).

408. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 613 (1842). *Prigg* dealt a formal blow to those states which had attempted, through "personal liberty" or anti-kidnapping laws, to impose by state law some pre-seizure procedural protections. Pennsylvania, for example, required slave-catchers to obtain an arrest warrant for fugitive slaves, which would be executed by state law enforcement officials. *See* Basinger, *supra* note 139, at 316–18.

409. Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463–64 (1850) (repealed 1864); *see also* Kaczorowski, *supra* note 175, at 1035–36 (highlighting that, in addition to permitting self-help, the Act of 1850 called for citizens to assist slave owners in recapturing escaped slaves).

As for post-seizure procedural protections, both the Act of 1793 and the Act of 1850 included scant protection for the alleged fugitive slave. The Act of 1793 required, after the seizure of an alleged fugitive, that "proof" be presented to a federal or state judicial authority, by either oral testimony or affidavit.[410] Upon satisfactory proof, a certificate would issue sufficient for removal of the fugitive from the state.[411] The Act of 1850 closed the gaps in the Act of 1793, which had afforded state courts opportunity to embellish the post-procedural process due an alleged fugitive.[412] The Act of 1850 put post-seizure procedure exclusively in the hands of federal officials.[413] Section 6 of the Act of 1850 expressly prohibited the alleged fugitive from testifying in her own behalf.[414] Most importantly, the Act expressly declared the summary federal process for issuing a certificate of removal conclusive and prohibited interference with the rendition process by state habeas corpus or otherwise.[415] "[P]rima facie evidence would be sufficient to enslave an accused fugitive, who would have no access to habeas corpus."[416]

In stark contrast to fugitive slave rendition, criminal rendition has become quite regularized in terms of procedure—the IAD and UCEA contain important pre- and post-seizure procedural protections for accused fugitives. First, the Fourth Amendment's guarantee against unreasonable seizures[417] is protected throughout the rendition process. The IAD and UCEA require rendition demands to be based on an underlying criminal complaint, information, or indictment.[418] Second, in criminal rendition

410. § 3, 1 Stat. at 302–04.

411. *Id.*

412. *See supra* Part II.A.4.

413. §§ 1, 5, 6, 9 Stat. at 462–64; *see* Kaczorowski, *supra* note 175, at 1035–36 ("The Fugitive Slave Act of 1850 represented an even more remarkable exercise of national authority to enforce constitutional rights than its 1793 counterpart.").

414. § 6, 9 Stat. at 463.

415. *Id.*; *see also* COVER, *supra* note 85, at 175–77 (detailing early efforts to challenge the Act in Massachusetts); Basinger, *supra* note 139, at 323–24 (discussing the Act's creation of Fugitive Slave Commissioners and the expanded power of certificates of removal); Kaczorowski, *supra* note 175, at 1036–37 (describing the effect of certificates of removal on state process under the Act).

416. Basinger, *supra* note 139, at 324.

417. U.S. CONST. amend. IV.

418. Interstate Agreement on Detainers Act, 18 U.S.C. app. § 2 (2012); UNIFORM CRIMINAL EXTRADITION ACT § 3 (1936); *see also* United States v. Mauro, 436 U.S. 340, 352 n.19 (1978) (noting IAD may only be invoked by a jurisdiction in which the prisoner is the subject of a pending "untried indictment, information, or complaint") (quoting 18 U.S.C. app. § 2 art. IV (1976)); UNIFORM EXTRADITION AND RENDITION ACT prefatory note at 6–7 (1980) (discussing the requirement of proposed uniform legislation of a finding of probable cause as a prerequisite to rendition).

proceedings, the prisoner has the right to be notified of a detainer,[419] can challenge the detainer through habeas corpus,[420] and can demand speedy processing of the detainer.[421]

None of these procedural protections apply to immigration detainers. There is no requirement that a detainer be issued upon probable cause[422]—indeed, most immigration detainers have been issued on no greater basis than that "investigation has been initiated."[423]

And there are no procedural protections available once an immigration detainer issues. Although the federal government modified its detainer form in 2011 to include a checkbox that indicates the local law enforcement authorities should notify the immigrant prisoner of the detainer,[424] nothing in the statute or regulation requires notice.[425] More importantly, even if the prisoner does receive notice of the detainer, no mechanism for challenging a detainer exists. Habeas corpus has generally been denied to those challenging immigration detainers on the ground that the detainer does not put the prisoner "in custody" for purposes of habeas jurisdiction.[426]

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419. 18 U.S.C. app. § 2 (2012); UNIFORM CRIMINAL EXTRADITION ACT § 10.

420. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 500 (1973) (allowing prisoner subject to criminal detainer to bring habeas corpus action to challenge its validity); UNIFORM CRIMINAL EXTRADITION ACT § 10 (explicitly guaranteeing right to challenge extradition through habeas corpus).

421. *See* Alabama v. Bozeman, 533 U.S. 146, 151 (2001) ("[T]he [IAD] basically (1) gives a prisoner the right to demand a trial within 180 days; and (2) gives a State the right to obtain a prisoner for purposes of trial, in which case the State (a) must try the prisoner within 120 days of his arrival, and (b) must not return the prisoner to his 'original place of imprisonment' prior to that trial.").

422. *See* 8 C.F.R. § 287.7 (2013).

423. *See* U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Dec. 2011) (with a checkbox indicating DHS has "[i]nitiated an investigation to determine whether this person is subject to removal from the United States"); *see also* Lasch, *supra* note 329, at 173–82 (detailing common immigration detainer practices, including the seeming lack of procedural protections afforded detained individuals). The most recently issued detainer guidance and accompanying form suggest that detainers will be issued only where there is "reason to believe" (a standard equating to probable cause) the targeted prisoner is an immigration violator. *See* Lasch, *Preempting Immigration Detainer Enforcement*, *supra* note 7, at 295–97. While this guidance may make up for the regulation's lack of any evidentiary standard, it may also be transitory.

424. U.S. DEP'T OF HOMELAND SEC., FORM I-247 (June 2011).

425. INA § 278(d), 8 U.S.C. § 1357(d) (2012); 8 CFR § 287.7. The detainer form now also includes on its back a single-paragraph "notice to the detainee," with a phone number the immigrant prisoner can call with complaints. *See* DEP'T OF HOMELAND SEC., FORM I-247 (Dec. 2012).

426. Cases holding that an immigration detainer does not put a prisoner into constructive custody of federal immigration authorities (as a criminal detainer puts a

One reason the immigrant rendition experience on the ground has mirrored slave rendition more closely than criminal rendition has been the near absolute lack of procedural protections for immigrants in the rendition system. The closest historical analogy to today's immigration rendition scheme is the slave rendition system established by the Fugitive Slave Act of 1850—a system which allowed seizure without warrant or process, and which prohibited any procedure for questioning rendition orders issued on scant evidence.[427] Yet even the Fugitive Slave Act of 1850 required *some* evidence—whereas the prisoner who is the target of an immigration detainer may be held based on nothing more than an unsworn statement that investigation has been initiated into the individual's immigration status.[428]

C. *Lessons for Immigrant Rendition from Criminal and Slave Rendition: Unmasking Legal Formalism*

Analogizing immigration rendition to slave rendition and criminal rendition also serves the important function of connecting

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prisoner into the constructive custody of the jurisdiction filing the detainer) are based upon the view that an immigration detainer is nothing more than a request for advance notice of a prisoner's release. *E.g.*, Zolicoffer v. U.S. Dep't of Justice, 315 F.3d 538, 540 (5th Cir. 2003) ("Filing a detainer is an informal procedure in which the INS informs prison officials that a person is subject to deportation and requests that officials give the INS notice of the person's death, impending release, or transfer to another institution." (quoting Giddings v. Chandler, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992))); Orozco v. U.S. Immigration and Naturalization Serv., 911 F.2d 539, 541 & n.2 (11th Cir. 1990) ("The filing of a detainer is an informal process advising prison officials that a prisoner is wanted on other pending charges and requesting notification prior to the prisoner's release." (citing United States v. Shahryar, 719 F.2d 1522, 1524 n.3 (11th Cir. 1983))). Because these cases hinge on a "notice only" view of immigration detainers, it seems doubtful they will continue to have binding force in light of the detainer regulation's explicit command for continued custody after the time the prisoner would otherwise be released. *See, e.g.*, Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 498–99 (1973) (holding prisoner is in constructive custody of an agency when future custody is certain); Vargas v. Swan, 854 F.2d 1028, 1032–33 (7th Cir. 1988) (remanding for a determination whether an INS detainer would be treated as a simple notice of INS interest in a prisoner or as a "hold" on the inmate which would result in extended detention after his sentence until the INS could take him into custody); Moreno v. Napolitano, No. 11 C 5452, 2012 WL 5995820, at *5 (N.D. Ill. Nov. 30, 2012) (holding that plaintiffs held pursuant to immigration detainer suffered injury because under the "mandatory language [of the detainer regulation], Plaintiffs faced an actual and imminent risk of injury because they faced an imminent risk of future confinement pursuant to the I–247 detainers beyond the time that they would otherwise be released"); Rios-Quiroz v. Williamson Cnty., Tenn., No. 3-11-1168, 2012 WL 3945354, at *4 (M.D. Tenn. Sept. 10, 2012) (holding that use of "shall" in 8 CFR § 287.7(d) renders the regulation mandatory upon state officials).

427. *See* Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463 (1850) (repealed 1864).

428. *See* U.S. DEP'T OF HOMELAND SEC., FORM I-247 (Dec. 2011).

existing critiques of immigration enforcement to critiques of slavery and the criminal justice system and generating new critiques and insights. While driven by formal legal categories, slavery and criminality have been revealed as complex societal functions driven by attitudes toward race, labor, and profit.

Recognizing immigration rendition as a legal system resembling slave and criminal rendition raises questions as to whether immigration rendition is similarly driven by race, labor, or profit rather than by criminality, as the federal government claimed it would be when it launched Secure Communities.[429]

As the documents revealed in April 2011 showed,[430] there has been a general failure of Secure Communities to hit its target—the "Level-1" criminal immigrants thought to pose a serious risk to national security and public safety.[431] The documents indicated some seventy-nine percent of immigrants deported through Secure Communities had either no criminal conviction or only a lower level criminal conviction.[432] Twenty-eight percent of those turned over to DHS through the program had no criminal conviction at all.[433] A study of detainers issued over a more recent sixteen-month period found nearly half of those targeted by a detainer had no criminal conviction at all.[434]

In many jurisdictions the government's failure to adhere to its enforcement priorities was much more pronounced. In Maricopa County, Arizona, for example—policed by the notoriously anti-immigrant Sheriff Joe Arpaio[435]—some fifty-four percent of

429. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, STATE IDENTIFICATION BUREAU DEPLOYMENT BRIEFING: NEW YORK STATE (2009), *available at* http://ccrjustice.org/files/17.%20State%20Identification%20Bureau%20Deployment%20Briefing.pdf (illustrating ICE advanced Secure Communities as a program aimed at addressing crime).

430. *See supra* notes 34–39 and accompanying text (discussing documents obtained from DHS that raised questions about the effectiveness and voluntariness of Secure Communities and prompted calls for an investigation into the program).

431. NAT'L DAY LABORER ORG. NETWORK ET AL., *supra* note 35, at 1–2.

432. *Id.*

433. *Id.* at 2.

434. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 21 (finding 47.7% of those subjected to immigration detainers had no criminal conviction whatsoever, and only 23% had "Level-1" convictions).

435. *See* Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513, 1515 (2013) (noting Sheriff Arpaio's "heavy-handed policing" of Latinos); Kevin R. Johnson & Joanna E. Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform*, 91 N.C. L. REV. 1613, 1651 (2013) (noting the "well-publicized civil rights abuses by the Maricopa

immigrants turned over to the federal government through Secure Communities had no criminal conviction.[436]

The numbers demonstrate that criminality is not guiding immigration rendition; reviewing our rendition history helps reveal what other forces might be at work.

1. Rendition as a Mechanism for Enforcing Racial Boundaries

The most important and obvious aspect of the shared experience, tying together those people and communities targeted by immigration rendition, criminal rendition, and of course slave rendition, is race. The entire history of slave rendition, and much of the history of postbellum criminal rendition, was one of returning African Americans to the south. Even now, beyond the days of convict leasing and chain gang labor, the racial disparity endemic to our criminal justice system[437] means criminal rendition disproportionately affects persons of color. Scholars have similarly documented the pervasive racial aspect of American immigration enforcement,[438] which means

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County Sheriff's Office in Arizona, led by the controversial Sheriff Joe Arpaio" and the subsequent Justice Department civil rights action against him).

436. NAT'L DAY LABORER ORG. NETWORK ET AL., *supra* note 35, at 4.

437. *See generally* ALEXANDER, *supra* note 208 (highlighting contemporary issues of race in the criminal justice system); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (detailing racial disparities throughout the United States criminal justice system); MARC MAUER, RACE TO INCARCERATE (1999) (documenting the growth of the United States prison system); ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010) (examining the influence of southern slavery practices on the evolution of the U.S. prison system).

438. *See, e.g.*, KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 13–53 (2004) [hereinafter JOHNSON, "HUDDLED MASSES"] (describing the relationship, throughout United States history, between immigration enforcement and racial subordination); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS., Fall 2009, at 1, 17–18 [hereinafter Johnson, *Intersection*] (highlighting the issues of racial profiling in immigration enforcement and noting the distinction between enforcement at the United States' borders with Mexico and Canada); Johnson, *supra* note 10, at 608–13 (describing the impact of racism on immigration debate in the United States); *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5–6 (1998) (describing the roots of immigration law's plenary power doctrine, which permits racial discrimination, in the nineteenth century race-based laws, and arguing that "[t]he Supreme Court's immigration jurisprudence represents the last vestige of an antique period of American law"); César Cuauhtémoc García Hernández, *Criminal Defense after* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 480–83 (2012) (tracing crimmigration's history to nineteenth century "racist displeasure with Chinese immigrants"); Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447, 449 (2006) (concluding that "Latinos (particularly dark complected, poor, and working class) are at risk before the law").

the targets of immigration rendition are likewise disproportionately people of color.

Putting immigration rendition next to slave and criminal rendition raises the question whether immigration rendition is simply yet another legal procedural mechanism to return people of color back across borders. Given the history, it seems appropriate that racial profiling was one of Santa Clara County's concerns when it sought to withdraw from Secure Communities.[439] And it is perhaps not surprising that the numbers in Maricopa County do appear to have been the product of racial profiling—in December 2011, the Justice Department concluded a three-year investigation into Sheriff Joe Arpaio's practices, finding the Maricopa County Sheriff's Office "engages in racial profiling of Latinos; [and] unlawfully stops, detains, and arrests Latinos."[440]

2. Rendition as a Mechanism for Fulfilling Labor Demands

Considering slave and criminal rendition can remind us of the extent to which immigration rendition is a labor-driven system. Unauthorized immigrants, for the most part, migrate to the United States to find employment—a 2006 report found that ninety-four percent of unauthorized male immigrants and fifty-four percent of unauthorized female immigrants participate in the labor force,[441] comprising a significant percentage of the labor force in certain industries.[442]

There is no question, then, that immigration rendition acts as a mechanism for returning migrating laborers back across borders in

439. *See supra* notes 24–27 and accompanying text.

440. Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice Civil Rights Div., to Bill Montgomery, Maricopa Cnty. Attorney, at 2 (Dec. 15, 2011), http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

441. JEFFREY S. PASSEL, PEW RESEARCH CTR., SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 9–10 (2006), *available at* http://pewhispanic.org/reports/report.php?ReportID=61.

442. *See id.* at ii–iii (reporting that unauthorized migrants account for nearly 5%—over 7.2 million workers—of the U.S. labor force, including making up "24% of all workers employed in farming occupations, 17% in cleaning, 14% in construction and 12% in food preparation industries," and in further breaking down those categories, unauthorized workers make up "36% of all insulation workers, 29% of roofers and drywall installers, [and] 27% of all butchers and other food processing workers"); *see also* Johnson, *supra* note 10, at 585 (arguing that migration to the United States is "not all about drugs, terrorism, leprosy, September 11, welfare, crime, [or] just about every other social problem about which certain segments of the public, policy-makers, and pundits have profound—and, at times, even legitimate—worries," but rather "is primarily about jobs and economic opportunity").

the same way slave rendition and criminal rendition returned people across borders.[443] This common thread suggests the relationship between labor and rendition practices is essential to understanding the driving forces behind immigration rendition.

There was a complicated relationship between abolitionism and labor protectionism before the Civil War. Attitudes toward abolition and the migration of African American workers may have varied according to social class—with northern capitalists, for example, favoring abolition because it would free a cheap labor force and northern laborers opposing it for protectionist reasons.[444] Fear of freed African Americans competing for jobs with whites produced anti-abolitionist sentiment throughout the antebellum period[445] and caused riots in New York City in 1863.[446]

Criminality, like slavery, is a legal formalism toward which attitudes might be adjusted according to labor market needs.[447] Thus, criminality was a sufficiently malleable concept to accommodate the need for plantation labor in the postbellum south, establishing "a fluid, flexible affair which alternated between free and forced labor in time to the rhythm of the southern labor market."[448]

Of course, in considering both slavery and criminality, labor concerns have by no means been divorced from attitudes toward race. Throughout the antebellum period, the presence of African American workers was seen as degrading or contaminating the white labor force,[449] and the "inherent inferiority of blacks" was assumed.[450]

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443. *See supra* Part II.B.1.

444. Edna Bonacich, *Abolition, the Extension of Slavery, and the Position of Free Blacks: A Study of Split Labor Markets in the United States, 1830–1863*, 81 AM. J. SOC. 601, 622 (1975).

445. *Id.* at 622–23; Williston H. Lofton, *Abolition and Labor*, 33 J. NEGRO HIST. 261, 272–74 (1948); *c.f.* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860, at 5–6 (1961) (discussing white laborers' distaste for competition that slave labor created).

446. Albon P. Man, Jr., *Labor Competition and the New York Draft Riots of 1863*, 36 J. NEGRO HIST. 375, 375 (1951).

447. *See supra* notes 209–11 and accompanying text.

448. Cohen, *supra* note 209, at 33.

449. Cheryl I. Harris, *"Too Pure an Air:"* Somerset*'s Legacy from Anti-Slavery to Colorblindness*, 13 TEX. WESLEYAN L. REV. 439, 450 (2007); *see* GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914, at 140 (1987) (recounting the announcement of Representative David Wilmot of Pennsylvania that "he 'would preserve to free white labor a fair country, a rich inheritance, where the sons of toil, of my own race and own color, can live without the disgrace which association with negro slavery brings upon free labor.' "); *id.* (describing how "the free-soil movement . . . combined principled opposition to slavery . . . with a considerable amount of antipathy to the presence of Negroes on any basis whatever"); LITWACK, *supra* note 445, at 269 (describing the

This animosity toward laborers of color, and the belief that "Negroes were unfit to associate with whites," caused even some who favored abolition to support a plan of "Negro containment" in the south.[451]

This complex of socio-economic forces might explain what at first blush seems like a critical difference between modern-day immigration rendition and historical slave and criminal rendition. Fugitive slave and Jim Crow era criminal rendition were tools used by southern states to *bring back* a captive labor force, whereas current immigration rendition is used by the federal government to *send back* a free labor force.[452] The rendition of African American laborers should be understood not only as the return of a captive labor force to the south but also as the expulsion from the north of laborers of color, who would degrade, contaminate, and compete with free white labor.[453]

Republican party's claim, in 1858, to be the "white man's party . . . for free white men, and for making white labor respectable and honorable, which it can never be when negro slave labor is brought into competition with it").

450. Derrick A. Bell, *Justice Accused: Anti-Slavery and the Judicial Process*, 76 COLUM. L. REV. 350, 356 & n.13 (1976) (book review) (citing, inter alia, WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 429 (1968) and LITWACK, *supra* note 445, at viii ("[T]his was a white man's country in which the Negro had no political voice and only a prescribed social and economic role.")). Racism was rampant even among antislavery forces, and "opposition to slavery . . . could be entirely consistent with a hatred of Blacks." Harris, *supra* note 449, at 450.

451. FREDRICKSON, *supra* note 449, at 144.

452. Another explanation, beyond the scope of this Article, may be that immigration rendition today has taken on the form of sending back a free labor force because of "preservation-through-transformation" or "status regime . . . 'modernization.' " *See* Siegel, *supra* note 396, at 2178–79. Under this theory, the socio-economic forces relating to race and labor that previously were satisfied by formal legal mechanisms (slave rendition and criminal rendition) allowing for a recapture of unfree laborers of color are now satisfied by formal legal mechanisms (immigration rendition) allowing for an expulsion of free laborers of color. *See id.*

453. History might support, for example, the idea that that the fugitive slave provisions in the Northwest Ordinance of 1787 and the Constitution served not only southern interests in preserving a certain form of labor and race relations, but northern interests as well, by furthering "Negro containment." FREDRICKSON, *supra* note 449, at 144. Seen in this light, the abolition of slavery and fugitive slave provisions in the Northwest Ordinance can be seen not as compromise but as consistency. *See* PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 58–64 (1987). The Northwest Territories were not envisioned to be some Utopian society of free peoples of all races—rather, it was intended that white New Englanders would settle there and replicate their society in the territories. *Id.* at 58 (stating that the passage of the ordinance "was intended to attract 'robust and industrious' settlers from New England"); Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 938 (1995) (explaining that the land from the Northwest Territory was marketed primarily to New Englanders); *id.* at 956 (noting the expectation that the territories would be dominated by the Saxon race, as evidenced by the provision in the Northwest Ordinance for "just and lawful wars," which would allow white settlers to oust Indians standing in the way of

3. Rendition as a Mechanism for Generating Profit

Formal rendition schemes not only satisfy socio-economic demands concerning race and labor, they generate profit consistent with those demands. At the micro level, slave catchers and bounty hunters reaped occupational benefits from the slave and criminal rendition systems.[454] Federal magistrates were compensated five dollars for hearing cases and received an additional five-dollar fee for ordering the return of a fugitive slave under the Fugitive Slave Act of 1850.[455] Federal officers were entitled to recover a fee and expenses for executing process under the Act.[456]

State and local officials do not get reimbursed for holding suspected immigration violators on immigration detainers. Indeed, the absence of remuneration has fueled some of the local resistance to immigration detainers—or at a minimum, lent strength to claims of an unfunded federal mandate. In Cook County, where one local official decried Secure Communities as a "$15 million unfunded mandate,"[457] the federal government reportedly has offered to pay the costs of detention in an effort to persuade local officials to honor immigration detainers.[458] History's suggestion, that Cook County

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territorial expansion); Peter S. Onuf, *Liberty, Development, and Union: Visions of the West in the 1780s*, 43 WM. & MARY Q. 179, 196 (1986) (noting the view of Mannaseh Cutler, founder of the Ohio Land Company, that "[u]ntil touched by the white man's transforming hand, the western lands would remain 'barren wilds' and 'immense deserts' "). "The master passion of the age was not with extending liberty to blacks but with erecting republics for whites." William W. Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81, 83 (1972). A vision of the Northwest Territories free of African Americans entirely was consistent with this prevailing sentiment, and furthered by both the provision abolishing slavery in the territories and the provision providing for the return of fugitive slaves. *See* AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO of 1787, art. VI, *supra* note 103, at 250.

454. The slave-catcher in the *Jones v. Van Zandt* case, for example, received $450 for the return of eight people. Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 497 (2004); *see* Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 LAW & HIST. REV. 797, 815 (2011) (indicating northerners' view of slave-catchers as "morally corrupt profiteers"). For a description of the role of the bounty hunter in the criminal justice system, see generally Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731 (1996).

455. Fugitive Slave Act of 1850, ch. 60, § 8, 9 Stat. 462, 464 (1850) (repealed 1864).

456. Kaczorowski, *supra* note 175, at 1037–38.

457. Press Release, Alvaro R. Obregon, Media Liaison – Gov't Office Manager, New County Ordinance Ends Cooperation on Ice Detainer Requests (Sept. 7, 2011), *available at* http://icirr.org/sites/default/files/ICEOrdPressReleaseFinal.pdf.

458. Antonio Olivo, *Feds Seek Compromise on Cook County Immigration Ordinance: Immigration and Customs Enforcement Director Offers to Pay for Detainer of Suspected Illegal Immigrants Who've Posted Bail*, CHI. TRIB., Feb. 29, 2012, http://articles

would effectively be serving the role of slave-catchers or bounty hunters in the immigration rendition system, puts the proposal in a stark light.

At the macro level, rendition systems may serve perceived needs regarding the labor supply and operate to feed society's engine for profits. In the antebellum south, of course, rendition fueled the slave economy. Slavery was intended to be profitable,[459] and slave rendition was aimed at recapturing slave labor and producing profits.[460]

Captive labor in the postbellum south also served to generate profits for capitalists, and the criminal justice system has fueled some part of the economy since. Douglas Blackmon describes chillingly the intimate connection between postbellum convict leasing and American industry.[461] When convict leasing was abandoned, it was in favor of state penitentiaries and chain gangs—prisoners were put in service of the state economy.[462] The connection between the criminal

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.chicagotribune.com/2012-02-29/news/ct-met-cook-county-immigration-ordinance-0229-20120229_1_illegal-immigrants-ice-detainers-immigration-enforcement-agency. The response to the federal government's offer revealed the Cook County ordinance was truly an act of resistance: the Cook County Board president reportedly declared, "Equal justice before the law is more important to me than the budgetary considerations." Hal Dardick, *Preckwinkle Ices ICE Proposal: Rejects Call For Working Group to Resolve Issues*, CHI. TRIB., April 10, 2012, http://articles.chicagotribune.com/2012-04-10/news/ct-met-toni-preckwinkle-0411-20120411_1_preckwinkle-detainers-immigration-status.

459. There has been considerable debate over whether slavery was in fact profitable. *Compare* Alfred H. Conrad & John R. Meyer, *The Economics of Slavery in the Ante Bellum South*, 66 J. POL. ECON. 95, 96, 121 (1958) (concluding slavery was profitable), *and* Richard K. Vedder & David C. Stockdale, *The Profitability of Slavery Revisited: A Different Approach*, 49 AGRIC. HIST. 392, 404 (1975) (concluding slavery was profitable), *with* Edward Saraydar, *A Note on the Profitability of Ante Bellum Slavery*, 30 S. ECON. J. 325, 331 (1964) (questioning Conrad and Meyer).

460. As is suggested above, *see supra* note 453, slave rendition may also have served the function of promoting "Negro containment" in the south, and thereby promoted different profit interests in the north. This may explain the role that commercial interests played in brokering the "compromise" behind the Northwest Ordinance of 1787 and its inclusion not only of an anti-slavery provision but also of a fugitive slave provision. *See* Duffey, *supra* note 453, at 959, 962 (asserting the Northwest Ordinance promoted commercialism by "making the land in the Territory more salable," and describing the Ordinance as "a machine for channeling the self-interest of settlers and commercial interests and turning it into an increasing fund of liberty for the nation (and the world) as a whole").

461. *See generally* DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008).

462. Alex Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: "The Negro Convict is a Slave"*, 59 J. S. HIST. 85–89 (1993) (describing how the "good roads movement" in the south worked an extension of the south's economic reliance on captive black labor through the abolition of convict leasing in favor of putting convicts to work on

justice system and industry persists today, not only in the employment of prisoners for paltry wages in prison industries,[463] but also in the employment of guards and construction companies to fuel our massive for-profit "prison-industrial complex."[464]

Immigrant detainees contribute to this growth industry, comprising the fastest-growing segment of America's huge incarcerated population.[465] Supported by the broad power of mandatory no-bond detention in immigration proceedings,[466] this profitable mass incarceration of immigrants of color is largely driven by immigration detainers.[467] Putting immigration rendition side-by-side against slave rendition and criminal rendition helps bring that point into sharper focus.

CONCLUSION

A debate is currently raging over the proper relationship between the federal government and the states regarding immigration enforcement—some states and localities seek to "opt in" to immigration enforcement while others like Santa Clara County have chosen to "opt out." Insofar as it affects immigrant rendition, history demonstrates the debate is not new. Through rendition controversies over two centuries, states and localities moderated the formal legal boundaries across which rendition purports to act. Northern states altered the boundary of slavery through at times systematic resistance

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state roads); *see also* OSHINSKY, *supra* note 209, at 135–56 (describing conditions at Mississippi's state-run prison farm following the end of convict leasing).

463. *See* William P. Quigley, *Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work for Decent Wages, Even for Prisoners*, 44 SANTA CLARA L. REV. 1159, 1160, 1164 (2004).

464. *See* JOEL DYER, THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME 53 (2000); Michael Hallett, *Commerce with Criminals: The New Colonialism in Criminal Justice*, 21 REV. POL'Y RES. 49, 49 (2004); Adam Gopnik, *The Caging of America*, NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik. *See generally* DYER, *supra* (discussing the prison industrial complex, its causes, characteristics, and possible solutions); PERKINSON, *supra* note 437 (recounting evolution of U.S. prison system).

465. Robert Koulish, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462, 477 (2008) (citation omitted) (noting the "close nexus . . . between immigrant detention policies and the new boom market in private detention").

466. *See* 8 U.S.C. § 1226(c) (2012) (mandating no-bond detention for, inter alia, any person in immigration proceedings who has been convicted of any controlled substance offense).

467. *See* Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1486–87 (2011) (noting that many of the facilities in which immigrant detainees are held are private, for-profit prisons or jails).

to fugitive slave rendition. Their voice in the dialogue was heard through the accepted legal principle that the federal government could not compel state officials to act—and then silenced by the Fugitive Slave Act of 1850 and its consolidation of control over slave rendition in the federal government. The states also expressed themselves in matters of criminal rendition, both before and after the Civil War, through the same Tenth Amendment anti-commandeering principles.

Seen against this historical backdrop, resistance to federal immigration detainers is not only legally justifiable, but belongs to a tradition of expressed state resistance to rendition in the name of civil rights. States may "opt out" of immigration detainer enforcement because the federal compulsion that is currently a feature of the immigration detainer regulation violates the Tenth Amendment. The Tenth Amendment, put another way, permits states an active voice whenever state officials are put in service of federal immigration enforcement.

History allows us not only to understand the current resistance but to understand how our immigration rendition system compares to historical practice, in terms of procedural protections. The fact that the closest historical analogue to our rendition system is the Fugitive Slave Act of 1850 is deeply troubling and ought to inspire consideration of both pre-seizure and post-seizure procedural protections for our immigration rendition system.

Perhaps most importantly, history also teaches us that we must transcend legal formalism in considering rendition regimes. The formal legal boundaries across which bodies are delivered are nothing more than the accumulation of social and economic attitudes and define the roles people subject to those boundaries are expected to play in our society and our economy. It is necessary to remove the mask of legal formalism in order to understand what our rendition systems actually accomplish.

The mistake in the past has been to explain away a clearly unjust rendition system as ultimately grounded in some culpable act or violation of formal law. For those looking back attempting to decipher "all of the complexities of the process of complicity,"[468] the question to ask is "how was this permitted to happen?" Anti-slavery judges, on one view, were able to put aside their morality and justify enforcing the Fugitive Slave Acts of 1793 and 1850 by means of an exaggerated "escalation of formal values and ... retreat to

468. Bell, *supra* note 450, at 356 (citing COVER, *supra* note 85, at xi).

formalism."[469] Another explanation is that those supposed anti-slavery judges shared sufficient socio-economic interest with pro-slavery forces to water down their anti-slavery views.[470] The importance of either account lies in exposing what lies beneath the formal legal rules.

In the same way, for some time historians overlooked the significance of convict leasing by relying on legal formalism. "Sympathy for the victims, however brutally they had been abused, was tempered because, after all, they were criminals."[471] Reliance on legal formalism obscured the fact that criminality in the Jim Crow South was nothing more than a cover for a race-driven, labor-driven system.

Seeing our current immigration rendition system as a system driven by a complex of attitudes toward race, labor, and profit—as opposed to a system driven by the culpable acts of those it affects, will help us understand how a similar moral sleight of hand is necessary to justify the system. We might hope to justify a race-driven, labor-protective, profit-driven immigrant rendition system by reference to some underlying illegality: "Those who are being deported have committed crimes in our country." But the data reveal that the federal government's promise to prioritize the deportation of so-called "criminal aliens" has been largely myth, with the overwhelming numbers of immigrants deported being those at the *bottom* of the Secure Communities priority scale, many with no criminal convictions whatsoever.

We might hope also to resort to the underlying illegality of border crossing: "Those who are being deported came here illegally. We have legal ways of entering the country, but they jumped the queue." The question we must ask, then, is whether the border we have constructed from our accumulated socio-economic fear and desire can justify such formalism,[472] any more than could the border

469. COVER, *supra* note 85, at 238; *see id.* at 229–38 (discussing judges' "elevation of formal stakes").

470. Bell, *supra* note 450, at 356–57 ("It need not demean these judges to suggest that little in their writings, judicial or personal, forecloses the possibility that (a) they shared the prevailing view of their time regarding the natural superiority of whites and that (b) the resulting perception of the blacks' lesser humanity helped tip the scales of justice toward results deemed necessary to save the union."); *see also* Holden-Smith, *supra* note 146, at 1091 (finding that "[l]ike many privileged whites of his era, [Justice] Story was so far removed from the plight of the black victims of slavery and racism that he was unable to appreciate the harmfulness and depravity of the practices he sanctioned in *Prigg*").

471. BLACKMON, *supra* note 461, at 5.

472. *See* JOHNSON, "HUDDLED MASSES," *supra* note 438, at 152–63 (discussing the social construction of "alien" and "illegal alien," and the use of this social construction as a

between slavery and freedom in the antebellum period, or the border between freedom and convict leasing, chain gangs, and lynching in the postbellum period.

proxy to perpetuate racial subordination); Johnson, *Intersection*, *supra* note 438, at 2 ("The laws are nothing less than a 'magic mirror' into the nation's collective consciousness about its perceived national identity—an identity that marginalizes poor and working immigrants of color and denies them full membership in American social life.").