

## THE PERVERSE LOGIC OF IMMIGRATION DETENTION: UNRAVELING THE RATIONALITY OF IMPRISONING IMMIGRANTS BASED ON MARKERS OF RACE AND CLASS OTHERNESS

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Karl Marx and Friedrich Engels close the first part of the Communist Manifesto by writing, “What the bourgeoisie, therefore, produces, above all, is its own grave-diggers. Its fall and the victory of the proletariat are equally inevitable.”<sup>1</sup> More than a century and a half after Marx and Engels first published that hope, the modern proletariat remains far from manifesting itself as the “revolutionary class” that the pair envisioned.<sup>2</sup>

The distance between Marx and Engels’ prediction and what has transpired in the United States is due in large part due to our nation’s lifelong commitment to adding the wedge of race into every aspect of our lives. White workers are positioned against non-white workers, the multi-axis category in which most immigrants are initially placed even if they later “become” white, in a battle for pieces of the figurative, and sometimes literal, pie. Rather than the deracinated class unity that Marx, Engels, and countless Marxists since them imagined, the United States has been and remains a society committed to distributing privilege through the markers of race and class. Privilege and its corollary, subordination, attach to the axes of race and class. These axes cannot be divorced from one

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<sup>1</sup> KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 79 (Joseph Katz ed., Samuel Moore trans., Washington Square Press 1964) (1848).

<sup>2</sup> *Id.* at 75.

another; they are joint hallmarks of the distribution of legal privilege.<sup>3</sup>

Today, as in years past, race and class occupy central space in the nation's immigration imagination. Visions of impoverished masses streaming across the southern border, brown bodies hiding under cover of darkness, terrorize many by raising the specter of a silent invasion. In response, political actors nationwide have rallied around an anti-immigrant fervor while the federal government has adopted a mass incarceration scheme as part of its immigration law enforcement strategy.<sup>4</sup>

In an effort to explain the massive growth of immigration imprisonment, this Essay explores the use of race and class as tools for policing immigration law. The Essay does this by contemplating the effect of an immigration law scheme that, at its most fundamental, requires sorting desirable immigrants from undesirable immigrants, and that, in recent years, has accomplished this sorting through increased reliance on criminal records. Placing these two features of contemporary immigration law within the context of two decades-old forms of indisputably racialized policing—mass incarceration of black and brown people for criminal law violations and the Supreme Court's sanctioning of racial profiling in immigration law policing—the Essay concludes that it was inevitable for penal imprisonment trends to taint immigration law enforcement with raced and classed mass incarceration.

## I. THE EVOLVING SHADOW WORLD OF PRISON

In a moving dissent regarding a constitutional claim brought by a prison inmate, Justice William Brennan thought it necessary to first discuss the status of prisoners as they relate to the rest of us: "Prisoners are persons whom most of us would rather not think

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<sup>3</sup> Here, the Essay borrows from critical race, critical race feminism, and LatCrit theory's development of intersectionality—the notion that all people have multiple identities and that subordination frequently occurs at the intersection of multiple identities. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 863 (2006).

<sup>4</sup> See, e.g., Michael Chertoff, *Tools Against Terror: All of the Above*, 32 HARV. J.L. & PUB. POL'Y 219, 227 (2009) (describing the perceived danger posed by cross-border migration and justifying detention).

about,” he wrote.<sup>5</sup> “Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness.”<sup>6</sup>

Brennan’s observation has been manifested millions of times over on young brown and black people whose lives have been so heavily criminalized by every “crime control” campaign in recent memory.<sup>7</sup> Yet no matter how many bodies have been thrown in jail, the thirst for prisoners has not been quenched.<sup>8</sup> Generations of young brown and black people have taught us that a jail that is built will be filled. This pattern has repeated itself for decades with such persistence that imprisonment is now a stage of life for a large swath of the country’s young people of color.

Public consciousness and political will today are steeped with acceptance of mass incarceration of brown and black people comparable only to the now discredited forms of mass incarceration from generations past—slavery and Japanese internment. Decades of imprisoning immense numbers of people-cum-criminals have immunized us to the trauma and cost of locking up so many people. Surveilling and holding brown and black bodies has become an acceptable method for dealing with the “problem” of brown and black “criminality.”<sup>9</sup> Prisons are the answer for preventing the undesirables from poisoning the communal well.

In the years since Brennan described penal institutions in 1987, institutions that at the time were reserved primarily for

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<sup>5</sup> *O’lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting).

<sup>6</sup> *Id.*

<sup>7</sup> See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1970-71 (2008) (listing imprisonment rates for blacks, Latinos, and whites).

<sup>8</sup> See Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 9-13 (2008) (detailing the disproportionate imprisonment rate of black people, pointing out that “[t]he nearly seven-to-one [black-white] difference in imprisonment rates continued nearly unchanged for a quarter century”).

<sup>9</sup> See MARC MAUER, *RACE TO INCARCERATE* 9-10 (1999) (arguing that “a massive prison system” that developed in the last decades of the twentieth century “virtually guarantee[s] a national commitment to a high rate of incarceration”); *id.* at 81 (describing prison as one of several options available for addressing criminal behavior); *id.* at 134, 135 (explaining that drug crimes are sanctioned more leniently when the perceived violators are white and more severely when the perceived violators are black); see also KELLY LYTLÉ HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* 120 (2010) (explaining that “[t]he consequences were high for persons of Mexican origin in the U.S.-Mexico borderlands as the Border Patrol’s net of surveillance expanded in the region”).

criminal law violators, another prison shadow world has developed. Immigration prisons, once a footnote in the prison narrative, have become a central component of the nation's current imprisonment frenzy. This shadow world is enormous. The number of individuals detained in conjunction with civil immigration proceedings has more than tripled in seven years, going from 122,783 prisoners in 2003 to 383,524 in 2009.<sup>10</sup> Most immigration prisoners are not simply awaiting a seat on a bus or airplane that will take them to their country of origin. On the contrary, most are in immigration prison awaiting an Immigration Judge's decision on their removability—the technical phrase for determining whether someone can stay or must leave the country.<sup>11</sup>

To house almost 400,000 people, the Department of Homeland Security (DHS) relies on a nationwide network of approximately 300 jails.<sup>12</sup> Imprisoning hundreds of thousands of people spread throughout hundreds of facilities naturally comes with a substantial price tag. The Immigration and Customs Enforcement (ICE) agency's detention and removal operations, the unit of DHS responsible for immigration detention, cost \$2.55 billion in Fiscal Year (FY) 2010, including \$1.77 billion for custody expenses alone.<sup>13</sup> The agency requested a \$2.6 billion detention and removal budget for FY 2011, including \$20 million more than in previous years to

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<sup>10</sup> See HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 2 (2009) (providing data for Fiscal Year 2003), available at <http://www.hrw.org/sites/default/files/reports/us1209web.pdf>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., CHANGING COMPOSITION OF ICE DETAINEES, FY 2005—FY 2010 (1ST QUARTER), <http://trac.syr.edu/immigration/reports/224/include/1.html> (providing data for the 2009 fiscal year).

<sup>11</sup> See DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 1 (Sept. 2009), <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>. A Migration Policy Institute study of detention data provided by DHS found that “[o]f the 32,000 immigrants in ICE custody [as of January 25, 2009], 18,690 had pending removal cases (in other words, they had not received final orders of removal).” *Id.* at 16.

<sup>12</sup> See DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), [http://www.midwesthumanrights.org/sites/midwesthumanrights.org/files/091005\\_ice\\_detention\\_report-final.pdf](http://www.midwesthumanrights.org/sites/midwesthumanrights.org/files/091005_ice_detention_report-final.pdf).

<sup>13</sup> See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: ICE FISCAL YEAR 2010 ENACTED BUDGET 2 (2010), <http://www.ice.gov/doclib/news/library/factsheets/doc/2010budgetfactsheet.doc>.

increase the number of available detention beds.<sup>14</sup> Despite the growing price tag, policymakers seem unperturbed by the cost of detaining people awaiting a decision on their ability to stay in the country.

Nothing suggests that this trend will abate in the near future. Currently the Obama Administration's chief complaint about the number of detainees seems to be that it is doing all it can with limited resources, suggesting that more money would result in more prisoners.<sup>15</sup> Already DHS oversees the single largest prison population in the country, eclipsing the next largest custodial agency, the Federal Bureau of Prisons, by almost 200,000.<sup>16</sup> While policymakers and pundits contemplate the virtues of immigration law reform, comprehensive or piecemeal, and demands for boosting border security go on unabated, the doors of immigration prisons, it seems, will remain open.

## II. THE LOGIC OF IMMIGRATION IMPRISONMENT

Although the existence of almost 400,000 jailed individuals on suspicion of violating civil immigration laws should be astounding, the undeniable logic of immigration imprisonment is that it is entirely rational given immigration law's underlying premise of distinguishing between desirable and undesirable people. Jailing is a necessary element of our desire to sort the good from the bad. There can be no sorting without order and no order without control. In turn, government officials charged with watching and

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<sup>14</sup> See The Fiscal Year 2011 Budget for U.S. Immigration and Customs Enforcement: Hearing Before the H. Comm. on Appropriations Subcomm. on Homeland Sec., 111th Cong. (2010) (statement of John Morton, Assistant Sec'y, Dep't of Homeland Sec.), available at [http://www.dhs.gov/news/testimony/testimony\\_1271443011074.shtm](http://www.dhs.gov/news/testimony/testimony_1271443011074.shtm) [hereinafter Hearings].

<sup>15</sup> See Memorandum from John Morton, Assistant Sec'y, Dep't of Homeland Sec., to All ICE Employees 1 (n.d.), American Immigration Lawyers Association, ICE Civil Enforcement Priorities Memorandum, AILA InfoNet Doc. No. 10062989 (June 29, 2010) (explaining that "ICE must prioritize the use of enforcement personnel, detention space, and removal resources" because it "only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States") (on file with the *Columbia Journal of Race and Law*).

<sup>16</sup> According to the Pew Center on the States, on January 1, 2010, the Bureau of Prisons counted 208,118 people under its control, Texas had 171,249, and California had 169,413. See THE PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 7 (Apr. 2010), [http://www.pewcenteronthestates.org/uploaded/Files/Prison\\_Count\\_2010.pdf?n=880](http://www.pewcenteronthestates.org/uploaded/Files/Prison_Count_2010.pdf?n=880).

sorting 22 million people, the number of people in the United States who are not citizens<sup>17</sup> and could be subject to removal for violating immigration laws, cannot control the sorting process without tightly holding the bodies of the potentially unfit. Prisons, then, are immigration law's necessary purgatory, the physical in-between space that must exist to facilitate the welcoming embrace of the "good immigrant" and DHS's concerted efforts to remove unwanted immigrants.

To regulate this system of deserving and undeserving, DHS must police the masses not only of the undeserving, but also of the potentially undeserving. That group of potentially undeserving is almost coextensive with the immigrant population. The method perfected in the context of criminal law enforcement for sifting through the masses to identify the undeserving is to target people marked by symbols of race and class-based otherness, threatening to imprison those not in prison and, as Justice Brennan suggested, rendering invisible those in prison.<sup>18</sup> Potential undesirables must be watched and threatened with imprisonment at the moment that they cross the line into undesirability.

To determine whether immigrants have crossed that line, the Immigration and Nationality Act (INA) relies on arrest and detention.<sup>19</sup> Even if DHS relaxed its strict interpretation of its detention authority—perhaps to allow people with a bona fide argument that they have not crossed the line into undesirability<sup>20</sup> to remain out of jail—they nonetheless must be watched by government agents: their address tracked, their physical presence demanded in Immigration Court.<sup>21</sup> At all times the threat for

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<sup>17</sup> U.S. CENSUS BUREAU, THE 2011 STATISTICAL ABSTRACT: THE NATIONAL DATA BOOK tbl.42, [http://www.census.gov/compendia/statab/cats/population/native\\_and\\_foreign-born\\_populations.html](http://www.census.gov/compendia/statab/cats/population/native_and_foreign-born_populations.html) (indicating that in 2008 there were 11,777,000 males and 10,437,000 females who were not born as U.S. citizens and have not been naturalized).

<sup>18</sup> See PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 43-45 (2009) (linking the criminalization of opium, cocaine, and marijuana to its use by Chinese men, blacks, and Mexicans, respectively); MAUER, *supra* note 9, at 126 (contending that the image of the criminal is that of "a baggy pants-wearing black kid with a handgun").

<sup>19</sup> See Immigration and Nationality Act (INA) § 236(a), Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1226(a) (2006)).

<sup>20</sup> See Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility—A Case Study*, 78 FORDHAM L. REV. 541, 565 (2009).

<sup>21</sup> See INA § 240(b)(5) (identifying the consequences of failing to

noncompliance must be imprisonment: stray from the announced course and the mighty hand of the law will snatch you up and throw you into immigration's purgatory perhaps for a year or more.<sup>22</sup>

This threat of imprisonment holds true no matter where we draw the line between which people Congress, through the INA, deems wanted and which it deems unwanted—the non-criminals from the “criminal aliens,” the person convicted of murder from the person convicted of jumping a subway turnstile, or any other boundary. So long as our immigration law scheme is premised on the distinction between desirable and undesirable people, all efforts to sort people into these categories necessarily destine those marked with the symbols of potential undesirability to suffer under the watchfulness of the coercive apparatuses of our immigration policing institutions.

The markers of potential undesirability are no different than those we have used for decades to build the mass shadow world of penal imprisonment—race and class. There is no constitutional violation, wrote Justice Lewis Powell, when a federal agent tasked with enforcing immigration laws more closely scrutinizes someone “largely on the basis of apparent Mexican ancestry.”<sup>23</sup> In a companion decision one year earlier, Justice Powell explained, “[T]rained officers can recognize that characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.”<sup>24</sup> This presumption of illegality, Powell makes clear, attaches according to the usual outward markers of exclusion—race and class. This stigma unmistakably attaches based on a look and not with regard to citizenship status. People who look Mexican, Powell's words clearly suggest, are legitimate targets of suspicion in the nation's efforts to sort the wanted from the unwanted.<sup>25</sup>

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appear for a hearing in Immigration Court); *id.* § 265(a) (explaining the address registration requirement imposed on all non-citizens); *see also* Form AR-11, Alien's Change of Address Card (providing a uniform form that all non-citizens subject to INA § 265(a) must use to inform the Department of Homeland Security of their residence).

<sup>22</sup> *See* SCHIRO, *supra* note 12, at 6 (explaining that “about 2,100 aliens, are detained for a year or more”).

<sup>23</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976).

<sup>24</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975).

<sup>25</sup> *Amici curiae* in the litigation against Arizona Senate Bill 1070 provide contemporary examples of race-based suspicion. *See* Brief for Friendly House as Amici Curiae Supporting Respondent at 3-6, *United States of America v. State of Arizona*, No. Civ. 10-1413 (9th Cir. 2010) (No. 10-

### III. THE FINAL INGREDIENT

Enter the convergence of criminal law and immigration law. An immigration law regime that requires sorting, widespread public desensitization to and accommodation of mass penal imprisonment, and the constitutional sanctioning of raced and classed policing of people suspected of immigration law violations did not alone produce mass incarceration of people suspected of immigration law violations. These three trends meandered through the years with minimal overlap until immigration law entered its newest phase—the feverish use of immigration law as an extension of criminal law.

The steadfast convergence of criminal law and immigration law has characterized immigration law since the late 1980s, but did not reach a frenzy until 1996. In that year, in response to the 1995 bombing of the federal office building in Oklahoma City, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA)<sup>26</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>27</sup> Together these statutes vastly increased the number of criminal offenses that could result in removal, drastically expanded the severity of removable offenses to include relatively minor crimes, provided the legal authorization for local governments to police immigration law through cooperative agreements with the federal government, and eliminated relief that had been part of immigration law for decades.<sup>28</sup>

Since then, removal as a result of involvement with the criminal law system has expanded exponentially. Once a relatively rare event, removal of individuals convicted of a crime now occurs

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<sup>26</sup> Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

<sup>27</sup> Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 8 U.S.C. § 1226(e) (2006)).

<sup>28</sup> *See, e.g.*, AEDPA § 440(e) (adding several criminal offenses to the definition of “aggravated felony” including some gambling offenses and document fraud offenses); AEDPA § 440(d) (eliminating a decades-old form of relief available under INA § 212(c), 8 U.S.C. § 1226(a) (2006), for individuals convicted of an aggravated felony or a number of other offenses); IIRIRA § 321 (further adding to the list of offenses constituting an “aggravated felony,” including certain theft and tax evasion offenses); IIRIRA § 304 (repealing INA § 212(c)); IIRIRA § 133, 110 Stat. 3009–546, 3009-563 to 64 (enacting 287(g) authorization).



daily many times over.<sup>29</sup> More importantly, the presence of “criminal aliens” serves as the justification for virtually all immigration policing efforts today. It is of little consequence that many efforts billed as targeting “criminal aliens” catch more people who do not fall into this category than those who do.<sup>30</sup> The threat of the “criminal alien” is sufficient to justify targeting many more who might be “criminal aliens.”

Immigration policing tactics that are intended to siphon out the “criminals” inevitably must use the markers of race and class that criminal law uses to identify its targeted population. Because contemporary immigration law has become interwoven with criminal law, the potentially undeserving are the potential “criminal aliens” lying in our midst. These people, criminal law enforcement institutions have so readily announced, are race and class outsiders— people of color and poor people.<sup>31</sup>

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<sup>29</sup> See Juliet Stumpf, *Fitting Punishment*, 66 WASH & LEE L. REV. 1683, 1715-18 (2009); see also Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 149 (1999) (noting that a criminal conviction could not serve as the basis for deportation until 1917, thereby implying that no individuals were deported as a result of a criminal conviction prior to that year); HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NON-VIOLENT OFFENSES 19 (2009) (describing DHS data indicating that between April 1, 1997 and August 2007, “deportations occurred every day” for crime-based reasons).

<sup>30</sup> According to DHS, in Fiscal Year 2009, ICE detained approximately 383,524 people and removed 128,345 (approximately one-third) for a crime-related ground of removal. See U.S. DEPT OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS ANNUAL REPORT: 2009, 3-4 tbl.4 (2010), [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf). In addition, the Government Accountability Office reported that “some participating agencies are using their 287(g) authority to process for removal aliens who have committed minor crimes, such as carrying an open container of alcohol.” U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF IMMIGRATION LAW 4 (2009).

<sup>31</sup> Here again the concept of intersectionality, *supra* note 3, provides a crucial theoretical framework for understanding the targeting of people because they are poor and people of color. Kevin R. Johnson makes this connection explicitly in the immigration context when he argues, “poor and working immigrants of color are marginalized on multiple grounds. They are generally subordinated in American social life based on characteristics of race, class, and immigration status.” See Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 5 (2009).

Evidence showing that immigrants are actually less prone to criminal behavior than native born individuals<sup>32</sup> is no match for popular perceptions fueled by decades of targeting the communities that immigrants quickly become a part of and by news stories of death and destruction across the developing world. The fact that the vast majority of today's immigrants come from Latin America, with the single largest number from Mexico,<sup>33</sup> allows for quick association of today's immigrants with heavily criminalized Latina/o communities. Add to this the daily media reports of violence and chaos raging across Latin America, Haiti, Jamaica, and any number of African nations—from the Latin American and African civil wars of the 1980s and 1990s to the Jamaican and Mexican drug cartel wars of the 2000s<sup>34</sup>—and a perception blooms that immigrants bring criminal tendencies, if not a formal relationship with criminal networks, with them. In the public imagination, then, immigrants from these regions become part of the same impoverished brown and black communities that provide the bodies that have filled our penal institutions for decades. One new immigrant, this narrative suggests, is one new criminal.

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<sup>32</sup> See, e.g., Ramiro Martinez, Jr., *Coming to America: The Impact of the New Immigration on Crime*, in IMMIGRATION AND CRIME: RACE, ETHNICITY, AND VIOLENCE 1, 10-12 (Ramiro Martinez, Jr. & Abel Valenzuela, Jr. eds., 2006).

<sup>33</sup> See MIGRATION POLICY INST., TEN SOURCE COUNTRIES WITH THE LARGEST POPULATIONS IN THE UNITED STATES AS PERCENTAGES OF THE TOTAL FOREIGN-BORN POPULATION: 2008, available at <http://www.migrationinformation.org/datahub/charts/10.2008.shtml> (listing individuals originally from the following countries as comprising the largest percentage of the United States' foreign-born population in 2008: Mexico (30%), Philippines (4%), India (4%), China (4%), Vietnam (3%), El Salvador (3%), Korea (3%), Cuba (3%), Canada (2%), and the Dominican Republic (2%)).

<sup>34</sup> See, e.g., Randal C. Archibold & Damien Cave, *Drug Wars Push Deeper into Central America*, N.Y. TIMES, Mar. 24, 2011, at A1 (describing the impact of Mexico's push to control drug traffickers on regional security); Stephen Foley, *Haitians Go To Polls Amid Violence and Ballot Station Chaos*, INDEPENDENT (U.K.), Mar. 21, 2011, at 30 (describing instability in Haiti); Benjamin Weiser & Kareem Fahim, *After Bloody Manhunt in Jamaica, a Subdued Court Appearance in New York*, N.Y. TIMES, June 26, 2010, at A17 (reporting on the arrest and prosecution of a reputed Jamaican drug dealer); Marlise Simons, *War Crimes Trial to Hear from Ex-Liberia President*, N.Y. TIMES, July 13, 2009, at A9 (describing the prosecution of former Liberian president Charles Taylor for crimes allegedly committed between 1996 and 2002); Peter Huck, *Evil Trade of the Three Franciscos*, N.Z. HERALD, Apr. 4, 2009, at B5 (linking the Mara Salvatrucha gang to clandestine immigrant crossings into the U.S.).

Shedding any pretense that race and class are not part of the immigration law enforcement regime, the Supreme Court's sanctioning of the use of unabashedly raced and classed criteria to target policing efforts overtly adds those factors to the immigration policing suspicion calculus supported by popular perception of criminality. Everyone who bears the signs that Justice Powell identified—the look of Mexicanness, a certain unspecified haircut, an easily surmisable style of hat—must submit to the watchful eyes of those charged by the state to patrol the border between wanted and unwanted immigrants. For these potential scofflaws we have the remedy of choice for dealing with race and class outsiders in the criminal context: prison.

#### IV. A PRISON IS A PRISON IS A PRISON

Congress has equipped the executive branch very well for this imprisonment task. The INA mandates that “[t]he Attorney General shall arrange for appropriate places of detention . . . ,”<sup>35</sup> and requires that “the Attorney General shall detain the alien” during the removal period.<sup>36</sup> Congressional authorization to imprison—mere words on paper contained in the United States Code—could any day be transformed into steel and concrete—or sometimes canvas tents sitting in the hot South Texas sun.

Officially, facilities devoted solely to detaining immigrants are titled “detention centers” and “service processing centers.”<sup>37</sup>

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<sup>35</sup> INA § 241(g)(1), 8 U.S.C. § 1231(g)(1) (2000). In 2002, with the creation of the Department of Homeland Security, the authority previously granted to the Attorney General was transferred to the Secretary of Homeland Security without changing the statutory language of § 241(g)(1) and numerous other INA provisions. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 441 (2006)).

<sup>36</sup> 8 U.S.C. § 1231(a)(2).

<sup>37</sup> See U.S. Immigration & Customs Enforcement, *Detention and Removal: Immigration Detention Facilities*, <http://www.ice.gov/pi/dro/facilities.htm> (last visited June 4, 2012) (listing “immigration detention facilities” none of which are described as “jails” or “prisons” except those facilities operated by local governments and that serve primarily as county jails); see also Subhash Kateel & Aarti Shahani, *Families for Freedom: Against Deportation and Delegalization*, in KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY 258, 263 (David C. Brotherton & Philip Kretsedemas eds., 2008) [hereinafter KEEPING OUT THE OTHER] (“Some would take issue with the term prison, because it is legally incorrect; in the eyes of the law, these prisoners are civil detainees. But the inmates are compelled to enter and stay. They sleep in dorms arranged body to body. They ask permission to go to the bathroom. Their hands, feet, and waists are

This nomenclature is perhaps an effort to distinguish these facilities from the jails and prisons where penal sanctions are meted out. Despite the cleverness of the official titles, the wire rimmed perimeter that surrounds these facilities is called barbed-wire, the keepers are called guards, and that ever-present heaviness that fills the waiting rooms where families pray and the holding cells where prisoners sit is best described as despair. “They call immigration detention civil confinement, but prison is prison no matter what label you use, and prison breaks people’s souls, hearts, and even minds,” says former immigration prisoner Malik Ndaula.<sup>38</sup>

## V. CONCLUSION: THE PREMISE LEADS TO THE RESULT

Our nation’s passion for surveilling and jailing nonwhite bodies today has turned with renewed vigor toward immigrants. In a society that embraces mass imprisonment, as does ours, imprisonment is not merely an understandable component of sorting the desirable from the undesirable. Mass imprisonment is an inevitable feature of this sorting, and the most plausible manner to conduct this sorting is by following the markers of race and class that we have grown to see so well and embrace so unhesitatingly. Immigration law policing has now undisputedly joined the criminal policing trends of recent decades during which individuals marked as race and class outsiders have been tossed into prison at what ought to be alarming rates. Despite the Marxist emphasis on class, the imprisonment frenzy apparent in immigration law enforcement today suggests that the melding of race and class outsider identities facilitates imprisonment in this context as it has in the criminal context. To ignore the role of race and class in immigration law policing is to render invisible the people who inevitably will be thrown behind barbed wire fences for little more than having the wrong look.

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shackled when they are moved from place to place. In other words, they are prisoners.”).

<sup>38</sup> Malik Ndaula & Debbie Satyal, *Rafiu’s Story: An American Immigrant Nightmare*, in *KEEPING OUT THE OTHER*, *supra* note 37, at 241, 250.