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# Intersectionality at the Intersection of Profiteering and Immigration Detention

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Mariela Olivares\*

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## I. INTRODUCTION

The scene: a meeting between a lawyer and her client. The following are the lawyer's observations, as told to and reported by a journalist:

The front room was empty except for two small desks arranged near the center. A door in the back opened to reveal dozens of young women and children huddled together. Many were gaunt and malnourished, with dark circles under their eyes. "The kids were really sick," [the lawyer reported]. "A lot of the moms were holding them in their arms, even the older kids—holding them

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like babies, and they're screaming and crying, and some of them are lying there listlessly."<sup>1</sup>

Out of context, the lawyer's observations paint a portrait of a scene from a refugee camp or from the depths of a developing country. Perhaps she is describing families escaping war and bloodshed in a besieged part of the world.

But this scene took place much closer to home—in a government-run immigrant family detention center, located in the isolated, dusty town of Artesia, New Mexico, in 2014. The lawyer was meeting with women and their children who have fled from various Central American countries to the United States, seeking safety from the ravages of violence and poverty in their home countries. When they are captured by or turn themselves in to the U.S. Customs and Border Patrol (CBP), these women and children are locked away. Euphemistically called “family residential centers” by the U.S. government, it is most accurate to report the truth: the U.S. government is imprisoning women and children.

With its storied narrative of welcoming shores and cries of “bring me your huddled masses,”<sup>2</sup> one may wonder how American immigration law and policy arrived at the practice of imprisoning mothers and children. And, importantly, a critical observer may query under which foundation does this behemoth prison industrial complex, full of detained immigrants, lie. This Article explores these questions and argues that the social and political subordination of immigrants—who embody the marginalized identities of criminals, non-citizens, and persons of color—feed the profit-seeking carceral machine. The symbiotic relationship between the lucrative prison business and the societal and political pressures for stricter immigration law and policy, driven by these multiple marginalized identities, result in the imprisonment of more immigrants. The current practice of locking up mothers and children illustrates the breadth of this complex. Importantly, and as this Article argues, the success of the corporate prison model relies and flourishes on the continued oppression of immigrants. Though the discussion in this Article of the continued imprisonment of immigrants who are mothers and children helps illuminate the practice, it serves to provide just one stark example of the long-standing and well-established policy of immigrant detention.

Part II of the Article sets a foundation regarding the history and constitutional underpinnings of immigrant detention in order to understand the legal and political genesis of the current scheme. By pro-

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1. Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html>, archived at <http://perma.unl.edu/7E5F-UELM>.

2. EMMA LAZARUS, *THE NEW COLOSSUS* (1883).

viding a snapshot of the current state of immigrant detention, this discussion presents the arrival of a record number of immigrant mothers and children to the United States in 2014 as a case study to elaborate on the role that detention plays in the immigration enforcement system.

Part III builds on this foundation and explores the immigration prison-industrial complex. Section III.A begins by providing a brief history of the societal, legal, and political foundations of the current enormous carceral state—including the political movements of the war on drugs and against supposedly lax criminal justice policies. In this discussion, attention is paid to the growing influence of the prison industry in the political and legislative process to secure its continued success. Section III.B then expands this exploration to the immigrant-detention context, noting how the same trends—the war on drugs, crime, and, to an extent, terrorism—have resulted in massive increases in the number of immigrants detained. Again, prison corporations and entities have gained enormous profits due to these efforts, including, more recently, remarkable financial gains due to the detention of mothers and children.

Part IV then illuminates the necessary ingredient for this endeavor to be so successful. As a non-citizen with few to no rights and privileges in the United States, the immigrant prisoner is easy for the larger society to ignore. Immigrants are perceived as criminals and thus suffer the effects of this marginalizing identity. The effect is especially insidious in this context because the Immigration and Nationality Act (INA) provides that immigrants may be imprisoned despite any finding of flight risk, danger to the larger community, criminal history or, indeed, adjudicated finding of wrongdoing. Incarcerated for suspected infractions of the INA—which are civil offenses, not criminal—detained immigrants often have no legal counsel and limited due process protections. Further, as a person of color—or perceived to be of color—the immigrant suffers the additional long-term, chronic effects of racial political subordination.<sup>3</sup> Again using the example of imprisoned mothers and children, Part IV highlights the oppressive power of subordination. Because immigrants are deemed unworthy of protection due to this powerful intersection of subordinated identities, corporatized monetary interests continue to exploit their continued detention for increased profits while calls for humanitarian protections are largely ignored. It is only because the affected population is a marginalized and historically oppressed group that such efforts can continue—and succeed—unabated.

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3. Although immigrants of all races and ethnic backgrounds are subject to detention, as established in Part IV, the overwhelming majority of detained immigrants are Latina/o. *See infra* Part IV.

Part V therefore argues that comprehensive immigration reform must account for this reality and embrace measures that disrupt these toxic connections. Because imprisoning people has become lucrative due to the power of oppressing the marginalized, legislative and advocacy measures must work to disrupt the intersections between profitability and oppression. This Part advocates for changes to the INA to restrict immigrant detention for the most critical cases. Further, law and policy must reject the goal of corporate profit in the detention process, such that for-profit entities are either banned from the prison business or leave it due to decreased profits in the face of increased scrutiny. As a model of disruptive change, Part V then looks to an example of when calls for humane treatment of the oppressed negatively affected corporations that previously benefitted from such oppression. In particular, this Part explores how political and social movements successfully influenced pharmaceutical companies to end the sale of drugs used for lethal injections to U.S. states that were using the drugs for that purpose. Next, Part V argues that the profit goals of detention must be erased completely, such that for-profit “alternatives to detention” do not merely replace the current default to detention scheme. To conclude, Part V sets forth a call toward following these paths and ending the widespread reliance on immigration detention.

## II. THE ROAD TO AND REALITIES OF IMMIGRANT DETENTION

As an important preliminary matter, it bears clarifying what this Article means when it uses the term “immigrant.” According to the INA, a person in immigrant status is a foreign-born person who comes to the United States with a permanent intent to remain.<sup>4</sup> The term as used for statutory purposes is more limited than the way in which I use it here; the statutory definition does not generally, for example, include nonimmigrants who are foreign-born people that arrive with the intent to stay temporarily.<sup>5</sup> Yet, both categories of people per the INA labels—immigrants and nonimmigrants—can lawfully be detained under the INA detention provisions, described more fully below.<sup>6</sup> The more appropriate term under the INA to fully describe the category of people who could be detained, then, is “alien.”<sup>7</sup> Like many others, however, I do not use the term “alien” due to its pejorative and

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4. See Immigration and Nationality Act (INA) § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2012) (defining “immigrant” as an alien who is not a nonimmigrant).

5. See *id.* (outlining the various nonimmigrant visa categories, which prescribe temporary lawfulness on the holder).

6. See *infra* section II.A.

7. See INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (“The term ‘alien’ means any person not a citizen or national of the United States.”).

de-humanizing connotations other than when it is essential to the legal, cultural, or social context.<sup>8</sup> Thus, this Article uses “immigrant” to describe the affected community.

An immigrant could be detained at many times and junctures in the United States. Indeed, at any time from when the immigrant physically enters—or attempts to enter—the United States to the time when the immigrant naturalizes and becomes a U.S. citizen (if naturalization is even a possibility), he or she can be subjected to detention by the U.S. government under the INA.<sup>9</sup> This Part begins by providing a brief historical entry into the legal basis for this broad power to detain and then presents a snapshot of current trends, data, and the practical realities of immigrant detention. As an insightful example, the discussion uses the recent increase in the Department of Homeland Security’s (DHS) detention of mothers and children to highlight the breadth of the practice.

### A. The Origins of Immigrant Detention

The practice of detaining immigrants for alleged civil infractions derives from the INA. The well-established plenary power doctrine affords broad and near unassailable powers to Congress to establish immigration law and policy through governing statutes without judicial oversight.<sup>10</sup> Wielding this power to exclude and deport immi-

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8. For a discussion of the pejorative connotation of the term and the far-reaching implications of its usage, see, for example, Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 268 (1997) (“My hope is to illustrate how the term alien masks the privilege of citizenship and helps to justify the legal status quo. Similar to the social construction of race, which legitimizes racial subordination, the construction of the alien has justified the fact that our legal system offers noncitizens limited rights.”); Richard W. Painter, *People Who Are Not Legal and Who Are Not Alive in the Eyes of the Law*, 59 VILL. L. REV. 667, 668 (2014) (noting the ostracizing effect of the language surrounding alienage); D. Carolina Nuñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1551 (2013) (describing the metaphorical connotations brought forth by the term “alien”).

9. Shockingly, even U.S. citizenship cannot protect a person from being detained by ICE. See Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606 (2011) (describing in detail and through case studies the rates at which ICE detains and deports U.S. citizens, even though it has no jurisdiction over these citizens).

10. There is abundant literature about the extraordinary breadth of congressional reach in immigration law and the ways in which this power affects other aspects of law and policy. See, e.g., Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 260–78; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Frank H. Wu, *The Future of the American Mosaic: Issues in American Immigration Reform*, 7 STAN. L. & POL’Y REV. 35 (1996); Margaret H. Taylor, *Detained Aliens Challenging Condi-*

grants since the earliest days of the federal immigration power,<sup>11</sup> it was a seemingly short leap for Congress to expand the INA to detain immigrants. In fact, Congress has solidified immigration officers' power to detain immigrants pending their removal since the end of the nineteenth century,<sup>12</sup> bolstered by the U.S. Supreme Court's approval of the practice in the Cold War Era cases of *United States ex rel. Knauff v. Shaughnessy*<sup>13</sup> and *Shaughnessy v. United States ex rel. Mezei*.<sup>14</sup> In both cases, national security concerns about Communist influences and espionage created an environment in which allegedly suspicious immigrants could be held in government detention while awaiting their deportation fate.<sup>15</sup> Unconcerned with due process considerations, both Ms. Knauff and Mr. Mezei were detained at Ellis Island for several years without a hearing; the U.S. Supreme Court famously declared in *Knauff*: "Whatever the procedure authorized by

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*tions of Confinement and the Porous Borders of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995).

11. See *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (upholding the congressional power to exclude Chinese immigrants under the aptly named Chinese Exclusion Act); *Fong Yue Ting v. United States*, 149 U.S. 698, 707, 713 (1893) (upholding the congressional power to deport noncitizens, including long-term lawful permanent residents, as part of the Page Act, which further targeted immigrants of Asian ancestry).
12. Act of March 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085. César Cuauhtémoc García Hernández has written about the history of detention through United States Supreme Court precedent and congressional mandate. See César Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 How. L.J. 869, 876 (2014) (asserting that immigration law pushes immigrants out from the literal and metaphorical protections of the U.S. border, thereby stripping them of due process protections and imprisoning them).
13. 338 U.S. 537 (1950).
14. 345 U.S. 206 (1953).
15. Ellen Knauff was born in Germany, became a refugee in England during World War II, and ended up working for the U.S. War Department in Germany. See *Knauff*, 338 U.S. at 539. While in Germany, she met and married a U.S. citizen. *Id.* When she sought to enter the U.S. and join her husband, immigration officials detained her at Ellis Island and ordered her to be excluded and removed from the United States based on secret evidence, the disclosure of which, the government argued, would be contrary to national security concerns. *Id.* at 540. As was later uncovered, the evidence implicating Ms. Knauff was shaky at best. See Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 960–64 (1995) (detailing the evidence against Ms. Knauff and her testimony and evidence in defense). Similarly, Mr. Mezei faced government allegations that he was an active member of the Communist party and a communist sympathizer. See *id.* at 972–75. Unlike Ms. Knauff's case, though, Mr. Mezei also faced other exclusion grounds based on his alleged claims of false citizenship and a conviction of petty larceny, which is considered a crime of moral turpitude. *Id.* at 976. Specifically, he was convicted of receiving seven bags of stolen flour. *Id.*

Congress is, it is due process as far as an alien denied entry is concerned.”<sup>16</sup>

Three years later, the Supreme Court upheld this fealty to the plenary power doctrine in *Mezei*.<sup>17</sup> Mr. Mezei, a Lawful Permanent Resident and long-term resident of the United States, was denied entry back into the country after returning from Hungary.<sup>18</sup> Because he was unable to secure entry into several other countries despite his best efforts and because the U.S. would not allow his entry based on confidential evidence similar to that which plagued Ms. Knauff,<sup>19</sup> he languished on Ellis Island for approximately three years.<sup>20</sup> Unmoved by his plight and his inability to counter evidence that was not initially disclosed to him, the Court upheld his detention, citing *Knauff*<sup>21</sup> and the panoply of plenary power precedent that sustains the broad congressional powers to dictate immigration law and policy.<sup>22</sup>

Both *Knauff* and *Mezei* concerned the detention of immigrants seeking admission to the United States. Importantly, the power to detain immigrants extends to those facing deportation and to those seeking asylum protections. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>23</sup> expanded INA provisions that allow and mandate immigrant detention at different times.<sup>24</sup> As codified, Immigration and Customs Enforcement (ICE) may apprehend and detain immigrants pending their removal deci-

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16. *Knauff*, 338 U.S. at 544. To be sure, the plenary power as recognized in *Knauff* and *Mezei* retains its heft, and the decisions were recently invoked by the Obama Administration in upholding the doctrine of consular non-reviewability in *Kerry v. Din*, 135 S. Ct. 2128 (2015) (relying upon *Knauff* and *Mezei* in holding that immigrants do not have a constitutional right to live in the United States with their spouses).

17. *Mezei*, 345 U.S. at 216.

18. *See id.* at 208.

19. *See id.*

20. *See* Weisselberg, *supra* note 15, at 971–80 (detailing the history of Mr. Mezei from his initial venture to Eastern Europe back to the United States, where he was detained on Ellis Island until the conclusion of a protracted hearing process in which he faced the government’s evidence used against him to exclude his admission).

21. *Mezei*, 345 U.S. at 211.

22. *Id.* at 210.

23. Pub. L. No. 104-208, 110 Stat. 3009, Div. C (codified in scattered sections of 8 U.S.C.).

24. *See* Stephen H. Legomsky, *The Detention of Aliens, Theories, Rules and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 533–34 (1999) (discussing the ways in which IIRIRA and the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 altered the landscape of immigrant detention); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1362 (2014) (acknowledging the importance of the 1996 legislation while asserting that the history of expansive immigrant detention measures begins with American efforts to criminalize illicit drug activity in the 1980s). IIRIRA was passed in a generally hostile political and social environment:



sion by an immigration judge;<sup>25</sup> and “shall take into custody” criminal aliens<sup>26</sup> and suspected terrorist aliens.<sup>27</sup> The INA further provides an expedited removal process whereby immigration officers can detain arriving immigrants whom they suspect to have fraudulent or insufficient arrival documentation (e.g., a visa) without conducting a hearing.<sup>28</sup> This expedited removal mechanism and the concomitant detention proviso apply even to those arriving immigrants who seek asylum due to fear of persecution in their home countries.<sup>29</sup>

Indeed this provision is the backbone of ICE’s current practice of detaining mothers and children fleeing violence in their home countries. As DHS Secretary Jeh Johnson testified before the Senate Committee on Appropriations regarding adult immigrants who brought their children with them: “Again, our message to this group is simple: we will send you back. We are building additional space to detain

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IIRIRA came at a time of heightened anxiety and suspicion of immigrants and other marginalized communities, including the poor. IIRIRA was one of various new federal efforts aimed at decreasing undocumented immigrants’ access to public benefits, which, in turn, sought to decrease the number of undocumented immigrants in the United States while also clearing the path to deporting other immigrants already in the country.

Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 246 (2014).

25. See INA § 236(a), 8 U.S.C. § 1226(a) (2012).
26. See *id.* § 236(c), 8 U.S.C. § 1226(a). The Board of Immigration Appeals has interpreted the term “custody” as it is used in INA § 236 to “refer[] to actual physical restraint or confinement within a given space” and thus it is synonymous with detention. *Matter of Aguilar-Aquino*, 24 I&N Dec. 747, 752 (B.I.A. 2009); see also García Hernández, *supra* note 24, at 1409 (discussing the ways in which the BIA could change its interpretation).
27. See INA § 236A(a), 8 U.S.C. § 1226(a).
28. See *id.* § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2008); Legomsky, *supra* note 24, at 534.
29. See *id.* §§ 235(b)(1)(A)(ii), (b)(1)(B)(ii)-(iii), 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(ii)-(iii); Legomsky, *supra* note 24, at 534 & nn.14–15 (noting further that the INA provision allows for detention of asylum applicants unless they can prove a “credible fear” of persecution but stating that the INA still provides that the government can continue to detain asylum seekers until such a standard has been met (citing INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (“Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”))); see also Nora Caplan-Bricker, *Deported Without Seeing a Judge: One of the Worst Parts of the Immigration System*, NEW REPUBLIC (Apr. 14, 2014), <http://www.newrepublic.com/article/117355/expedited-removal-deportations-immigrants-dont-get-due-process>, archived at <http://perma.unl.edu/3N89-F44H> (discussing ICE’s widespread reliance on the expedited removal procedure for immigrants, including for those who may be eligible for asylum). For a more thorough discussion of the history of the INA detention provisions and the case law surrounding immigrant detention, see Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 141–44 (2013).

these groups and hold them until their expedited removal orders are effectuated.”<sup>30</sup> Secretary Johnson goes on to state that, even though the immigrant women and children may have the right to seek asylum or other relief, “within the confines of our laws, our values, and our resources,” the “vast majority” of them will be removed to their home countries.<sup>31</sup> The official government message is thus clear: continued detention of women and children fleeing violence and abuse in their home countries is acceptable because they will be eventually removed and because the practice serves as a deterrent to future migration.<sup>32</sup>

The detention of women and children immigrants pending their removal hearings—which DHS apparently considers a mere perfunctory step prior to certain removal<sup>33</sup>—serves as an important example for analyzing the intersection between legislation and subordinated identity, which is more thoroughly explored in Part IV. Unlike other provisions of the INA that mandate detention of certain immigrants who have entanglements with criminal consequences<sup>34</sup> or prescribe deten-

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30. *Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations*, DEP’T HOMELAND SEC. (JULY 10, 2014), [HTTP://WWW.DHS.GOV/NEWS/2014/07/10/STATEMENT-SECRETARY-HOMELAND-SECURITY-JEH-JOHNSON-SENATE-COMMITTEE-APPROPRIATIONS](http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations) [hereinafter *Statement by Secretary Johnson*], archived at <http://perma.unl.edu/YHN6-CETQ>.

31. *Id.* Advocates have noted, however, that immigration courts have approved grants of asylum for detained women and children. See, e.g., Statement of the Am. Immigrant Lawyers Ass’n submitted to the U.S. Comm’n on Civil Rights Briefing on “State of Civil Rights at Immigration Detention Facilities” (Jan. 30, 2015), archived at <http://perma.unl.edu/YY7N-P6A5> (explaining a pro bono project begun by the American Immigrant Lawyers Association (AILA) where attorneys represent detained women and children and have reported that most of their clients should be eligible for asylum; indeed, project attorneys report that they have won the majority of the cases they have presented before an immigration judge).

32. See *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015) (holding that reliance on a deterrence argument is not adequate grounds to continue to detain mothers and children and to set high bonds for their release); see also Associated Press, *Lawyers: Detained Immigrant Families in Texas Offered Bonds*, FOX NEWS (Mar. 1, 2015), <http://latino.foxnews.com/latino/news/2015/03/01/detained-immigrant-families-in-texas-being-offered-bonds-lawyers-say/>, archived at <http://perma.unl.edu/5K54-MGTD> (noting a change in ICE practice after the *R.I.L.-R* decision of setting bonds for some of the families in detention at the Karnes City detention facility, even though many bond amounts were as high as \$7,500, an impossible amount for the immigrants).

33. See *Statement by Secretary Johnson*, *supra* note 30 (“[U]nless the child has been granted asylum or some other protection in this country—and the vast majority will not—he or she will be sent back and we seek additional resources to do that quickly.”).

34. See INA § 236(c), 8 U.S.C. § 1226(a) (2012). As discussed in Part IV, the general acceptance of detaining the “criminal” alien serves to sanitize the otherwise problematic detention of all immigrants, especially those who are awaiting a removal hearing. See *infra* Part IV. This perception of criminality that flows over *all* immigrants regardless of their actual criminal history perpetuates their further subordination by public and private actors. Further, and as others have ex-

tion in certain cases after the immigrant has already received an immigration court order of removal,<sup>35</sup> the detention of mothers and children—just like thousands of other immigrants in other detention facilities—occurs prior to any final removal adjudication and absent any finding of criminal wrongdoing. Moreover, unlike traditional criminal courts in which loss of liberty is a possible consequence of an adjudication of guilt, in immigration proceedings the immigrant who is detained at the border—like the women and children migrants—receives minimal, if any, due process protections and is not guaranteed legal representation.

The lack of procedural safeguards for immigrant detention is well established. The Supreme Court has upheld the power of the U.S. government to detain immigrants pending their removal from the United States after an adjudicative proceeding regarding their removability.<sup>36</sup> Yet, the Court has also approved of governmental detention of immigrants *prior* to the removability proceeding and ultimate decision,<sup>37</sup> and the INA continues to provide for detention when the immigrant seeks asylum.<sup>38</sup> Thus, at the point of detention—which can

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plored, a defendant's criminal conviction is, in many instances, a result of a flawed criminal justice system. *See, e.g.,* Reetu Mody, *The Criminal Justice System Is Not Broken, It's Doing Exactly What It's Meant to Do*, KENNEDY SCH. REV.: HARV. KENNEDY SCH. PUB. POL'Y J. (Dec. 5, 2014), <http://harvardkennedyschoolreview.com/the-criminal-justice-system-is-not-broken-its-doing-exactly-what-its-meant-to-do/>, archived at <http://perma.unl.edu/PEG4-2DLS> (arguing the criminal justice system has perpetuated oppression, as evidenced by the fact Blacks and Latinos make up 58% of all prisoners but only 25% of the American population); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing the many ways in which the criminal justice system skews towards imprisoning people of color); William Quigley, *Racism: The Crime in Criminal Justice*, 13 *LOY. J. PUB. INT. L.* 417 (2012) (discussing the role race plays in the criminal justice system, arguing that the biggest crime in the US criminal justice system is that it is a race-based institution where Black people are directly targeted and punished in a much more aggressive way than white people). This important topic regarding the general chronic problems in the criminal justice system, however, is outside the scope of this Article.

35. INA § 241, 8 U.S.C. § 1231(a)(2) (2012).

36. *See Zadvydas v. Davis*, 533 U.S. 678 (2001) (upholding the detention of an immigrant pending his removal, though limiting the detention to a certain time frame).

37. *See Clark v. Martinez*, 543 U.S. 371 (2005) (upholding detention of inadmissible immigrants, though also with temporal limitations, per *Zadvydas*); *Demore v. Kim*, 538 U.S. 510 (2003) (upholding the mandatory detention of immigrants pending their removal determinations despite no finding of flight risk).

38. INA § 236(a), 8 U.S.C. § 1226(a) (2012); *see also* Bill Frelick, *U.S. Detention of Asylum Seekers: What's the Problem? What's the Solution?*, 10 *BIB* 159 (Apr. 1, 2005) (discussing the discrepancies in ICE policy toward asylum seekers and stating that the guidance to release aliens who meet their credible fear interview is not evenly applied nor readily enforceable).

constitutionally last for months<sup>39</sup>—the immigrant has not had any type of formal proceeding that highlights her or his claim for immigration relief, including asylum. And if, during this expedited removal process, the immigration officer does not believe that an asylum applicant has a good claim of credible fear, the person can remain detained unless the applicant is granted a review of the determination by an immigration judge.<sup>40</sup> Although such detention does not fall under the statutorily prescribed mandatory detention of a criminal alien<sup>41</sup> in which bond and release is not allowed, the common practice of ICE or an immigration judge is to set an outrageously high bond, even for asylum applicants, creating an insurmountable barrier for the immigrant's release.<sup>42</sup>

## B. A Snapshot of Detention

Having explored the history and the procedural limitations of immigrant detention, this Article now turns to more concrete realities and, in particular, the incredible increase of detained immigrants in recent decades. In January 2014, Congress passed and President Obama approved a fiscal year 2014 operating budget for DHS that allocated \$2,038,239,000 to “Custody Operations,” which amounts to imprisoning 34,000 immigrants each night.<sup>43</sup> Just ten years prior in 2004, DHS operating budgets allocated funds for 18,000 detention beds.<sup>44</sup> In 1995, DHS detained approximately 85,730 immigrants total throughout the entire year.<sup>45</sup> In 2013, by contrast, DHS detained

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39. *See Zadvydas*, 533 U.S. at 731 (holding that detention may not exceed a period reasonably necessary to secure removal, and instructing adjudicative bodies to measure reasonableness primarily in terms of the statute's purpose of assuring the alien's presence at the moment of removal); *see also* Milton J. Valencia, *US Court Rulings Limit Detention of Immigrants*, BOS. GLOBE (July 5, 2014), <http://www.bostonglobe.com/2014/07/04/immigrant/D9aOm3BDHnKRXp998gvPyI/story.html>, archived at <http://perma.unl.edu/8ZVH-USBG> (noting how two federal judges in Massachusetts limit detention of immigrants to six months).

40. INA § 235(b)(B)(iii)(III)–(IV), 8 U.S.C. § 1225(b)(B)(iii)(III)–(IV) (2008); 8 C.F.R. § 235.3(b)(4)(ii) (2011) (“Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained.”).

41. *See* INA § 236(c)(1), 8 U.S.C. § 1226(c)(1).

42. *See id.* § 236(a)(2), 8 U.S.C. § 1226(a)(2) (prescribing release conditions, including setting a “bond of at least \$1,500”); Associated Press, *supra* note 32.

43. *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. 2 (requiring ICE to allocate funds to maintain a level of not less than 34,000 detention bed through FY2014).

44. *See* DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., OIG-06-33, DETENTION AND REMOVAL OF ILLEGAL ALIENS 5 tbl.1 (2006) [hereinafter DETENTION AND REMOVAL], archived at <http://perma.unl.edu/6L6K-HN6A> (providing bed space numbers between 2002 and 2004).

45. *See* DORIS MEISSNER, DONALD M. KERWIN, MUZZAFAR CHISHTI & CLAIRE BERGERON, MIGRATION POL'Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED

a total of 440,557 immigrants.<sup>46</sup> The reasons given for the huge swell in numbers of immigrants detained have varied, but, as detailed more thoroughly below, many point to the legislative reforms beginning in the 1980s and continuing through present day as a bellwether for increased detention.<sup>47</sup> As more immigrants fell under the expanded statutory umbrella of discretionary or mandatory detention, the need for increased detention facilities became critical.

In 2006, for example, at the peak in the numbers of immigrants detained, a DHS Report decried insufficient funding for bed space and for ICE personnel allocations as having led to large numbers of criminal aliens from countries “whose governments support state sponsored terrorism (SST) or who promote, produce, or protect terrorist organizations and their members (SIC)” being released rather than being detained.<sup>48</sup> The 2006 Report astutely predicted that to detain and remove all of these purported dangerous aliens—the SST, SIC and aliens adjudicated guilty of crimes—ICE would need a congressional allocation of approximately \$1.1 billion to provide an additional 34,653 detention beds.<sup>49</sup> By 2014, Congress responded to the call with a \$2 billion budget for 34,000 bed spaces.

Moving forward with filling these 34,000 beds, ICE confronted a new challenge when, in 2014, thousands of women and children immigrants fleeing from violence in Central America entered the United States without inspection. By way of comparison, in fiscal year 2013, CBP apprehended 21,553 unaccompanied children and 7,265 “family units”—meaning, women and their child(ren)—along the South Texas border with Mexico.<sup>50</sup> In contrast, in 2014, CBP apprehended 49,959 unaccompanied children and 52,326 family units.<sup>51</sup> The DHS response to this influx of new immigrants was to call for an increase of family detention units.<sup>52</sup> DHS reported:

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STATES: THE RISE OF A FORMIDABLE MACHINE 11 (2013), *archived at* <http://perma.unl.edu/4MQP-TZ2S>.

46. See JOHN F. SIMANSKI, DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATS., IMMIGRATION ENFORCEMENT ACTIONS 6 tbl.5 (2013), *archived at* <http://perma.unl.edu/X4EJ-5ERZ>.

47. See *infra* section III.B.

48. See DETENTION AND REMOVAL, *supra* note 44, at 2 (“Of the 605,210 [aliens other than those from Mexico] apprehended between FY 2001 and the first six months of FY 2005, 309,733 were released of which 45,008 (15%) purportedly originated from SST and SIC countries.”).

49. See *id.*

50. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 3 (2014), *archived at* <http://perma.unl.edu/JQ6Z-4PC8>.

51. See *id.* at 2.

52. See *id.* (noting that unaccompanied children are not placed in detention but rather turned over to local agencies of Health and Human Services for care and guardianship; family units—i.e., mothers with their children—are placed in separate detention facilities, euphemistically called “family residential centers”).

[The greater number of immigrants] requires ICE to maintain an increased level of family detention space, which historically has been limited to fewer than 100 beds nationwide. ICE cannot detain family units, including children, in adult detention facilities. As a result, in the summer [2014] ICE sought substantial resources and authority to build additional detention capacity to detain and remove family units, and since then ICE has opened or expanded the use of three facilities for this purpose.<sup>53</sup>

Quick to respond to the demand, ICE—contracting with private prison corporations Corrections Corporation of America (CCA) and GEO Group, Inc. in two instances and the Berks County, Pennsylvania county government in another—constructed or repurposed 3,700 bed spaces for family detention units by the first quarter of 2015.<sup>54</sup> Euphemistically deemed “family residential centers” by DHS, these detention units more closely resemble guarded prison facilities than family-friendly bucolic retreats. Lawyers and advocates representing the detained mothers and children in these centers—located in Artesia, New Mexico; Karnes, Texas; Dilley, Texas; and Berks County, Pennsylvania—have brought to light the prison-like conditions that the mothers and children face. For example, the Artesia Residential Family Center—which DHS closed in December 2014, transferring the detainees to the newly opened Karnes center—had every appearance of a prison setting: “There is a barbed-wire fence and a perimeter road that enclose the entire . . . facility. There is a secondary razor-wire fence interlaced with plastic slats the color of sand that surrounds the detention center itself. The plastic slats made the detention center invisible.”<sup>55</sup>

Conditions within the facilities are equally dismal. Lawyers for the detainees have filed lawsuits and complaints against DHS and the prison corporations, alleging inadequate medical treatment for the women and children who have suffered the physical, mental, and emotional effects of continued detention.<sup>56</sup> Complaints against ICE’s

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53. See *id.*; *ICE’s New Family Detention in Dilley, Texas to Open in December*, ICE (Nov. 7, 2014), <http://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>, archived at <http://perma.unl.edu/5HG6-FFMP>.

54. See NAT’L IMMIGRANT JUSTICE CTR., *THE DETENTION OF IMMIGRANT FAMILIES* (2015), archived at [perma.unl.edu/TEE7-HRQM](http://perma.unl.edu/TEE7-HRQM).

55. See Stephen Manning, *Ending Artesia*, INNOVATION LAW LAB, <http://innovationlawlab.org/the-artesia-report/>, archived at <http://perma.unl.edu/AYNK-PNSU> (describing in great detail the history of the Artesia family detention center, conditions for its detainees, and the efforts by lawyers and advocates to protest the conditions); David McCabe, *Administration to Close Immigration Detention Center at Month’s End*, THE HILL (Nov. 18, 2014), <http://thehill.com/news/administration/224626-administration-to-close-immigrant-detention-center>, archived at <http://perma.unl.edu/46JC-5LAM>.

56. See Ed Pilkington, *Many Migrant Families Held by US Could Soon Be Free from Detention Nightmare*, THE GUARDIAN (May 11, 2015), <http://www.theguardian.com/us-news/2015/may/11/undocumented-migrants-detention-held-texas-pennsylvania>, archived at <http://perma.unl.edu/L4DB-587V> (describing investigative reports regarding the family detention facility in Berks County, Pennsylvania,

treatment of detainees in Karnes assert that women and children have not been given adequate food; guards have harassed mothers for not being able to quiet crying children; children do not have appropriate access to educational and developmentally appropriate outlets; mothers are forced to carry their infants constantly, rather than let the children crawl or toddle; and guards sexually harass and sexually abuse the women.<sup>57</sup> Preliminary reports from the Dilley facility paint an improved picture for detention conditions,<sup>58</sup> though some activists have raised similar concerns for the women and children, including lack of access between lawyers and their detained clients<sup>59</sup> and the prolonged, unnecessary detention of their clients.<sup>60</sup> Importantly, and as discussed in Part III, this increase in the number of women and children immigrants—and the increased detention facilities required to house them—provide huge profits for the prison interests that build and operate the units under government contract.

### III. THE COMMODIFICATION OF IMMIGRANTS

Having established the legal, political, and societal origins of immigrant detention and provided a snapshot of the current practice of im-

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including “allegations of poor medical treatment that saw sick children, including a three-year old who was throwing up blood, being advised to ‘drink more water’”); Lisa De Bode, *Rights Groups Challenge DHS Policy Detaining Migrant Women and Children*, ALJAZEERA AM. (Feb. 3, 2015), <http://america.aljazeera.com/articles/2015/2/3/against-no-release-policy-of-central-american-asylum-seekers.html>, archived at <http://perma.unl.edu/34T3-V6GU>.

57. See MALDEF letter to USCIS et al. (Sept. 25, 2014), archived at <http://perma.unl.edu/23WD-W5H8> (describing the poor treatment of women and children detained at Karnes); MALDEF letter to Jeh Johnson et al. (Sept. 30, 2014), archived at <http://perma.unl.edu/W623-QF69> (describing sexual harassment and abuse claims, among others, at the Karnes detention facility); see also Stephen Dinan, *Immigrant Rights Groups Sue Border Patrol Over Detention Facility Conditions*, WASH. TIMES (June 10, 2015), <http://www.washingtontimes.com/news/2015/jun/10/border-patrol-sued-over-immigrant-detention-conditions/>, archived at <http://perma.unl.edu/TP8P-GQ7X> (describing how immigrant rights groups are seeking relief in federal court regarding poor detention conditions).
58. See Julia Preston, *Hope and Despair as Families Languish in Texas Immigration Centers*, N.Y. TIMES (June 14, 2015), [http://www.nytimes.com/2015/06/15/us/texas-detention-center-takes-toll-on-immigrants-languishing-there.html?emc=eta1&\\_r=1](http://www.nytimes.com/2015/06/15/us/texas-detention-center-takes-toll-on-immigrants-languishing-there.html?emc=eta1&_r=1), archived at <http://perma.unl.edu/HT7C-RLZB> (discussing the amenities of the new Dilley facility, including medical and educational facilities, and disputing reports that many children are not eating).
59. See Elise Foley, *Immigration Attorneys Allege ICE Is Making It Tougher to Help Women in Detention*, HUFFINGTON POST (May 7, 2015), [http://www.huffingtonpost.com/2015/05/07/immigration-dilley\\_n\\_7225334.html](http://www.huffingtonpost.com/2015/05/07/immigration-dilley_n_7225334.html), archived at <http://perma.unl.edu/VH79-55QB> (noting the ICE procedures at Dilley, which prohibit lawyers from using basic legal office supplies, like cell phones, printers and scanners).
60. See Preston, *supra* note 58 (noting that some mothers and children have been detained for six months or more).

prisoning immigrants in Part II, Part III delves into the next critical road at the intersection of the lucrative practice of immigrant detention. It bears repeating that Congress controls just about every aspect of immigration law, as evidenced by the statutes that provide for discretionary and mandatory detention of immigrants, largely with no judicial oversight.<sup>61</sup> Thus, this plenary power in drafting and implementing the provisions affecting immigrants affords Congress monumental and extraordinary command over immigration policies regarding detention. Further, as section III.A explores, the business of imprisoning immigrants is extremely profitable. Private prison corporations and publicly funded prison entities quickly identified the profit-making possibilities in light of these stricter criminal justice reforms, resulting in opportunities to imprison more people. As section III.B asserts, prison corporations profited from new laws that expanded the type of immigrant conduct that would result in discretionary or mandatory detention, leading to the detention of more immigrants. Most recently, the prison industry has generated incredible revenue by detaining women and children migrants. This analysis lays the groundwork for the discussion of the forces that permit this commodification of people, which follows in Part IV.

### A. The Prison Business

Scholars and activists have boldly and expertly told the story of the genesis of the current system of mass incarceration. Michelle Alexander provides a framework for understanding how the current U.S. carceral state—imprisoning over 2.3 million persons in local jails and state and federal prisons at the end of 2013<sup>62</sup>—owes its birth to the politicization of anti-drug policy and both explicit and implicit targeted efforts to criminalize and imprison people of color.<sup>63</sup> andré

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61. See INA §§ 235(b)(B)(ii)–(iii), 236, 8 U.S.C. §§ 1225(b)(B)(ii)–(iii), 1226 (2012); see also *supra* Part II (discussing the INA provisions regarding detention of immigrants and regarding congressional plenary power over immigration law and policy). Recent orders from the Executive that have extended deferred action prosecutorial discretion to certain classes of immigrants are examples of immigration policy and implementation that does not stem from congressional action. See, e.g., Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015) (outlining the history upholding the legality of executive action granting prosecutorial discretion in immigration law, including the 2014 Deferred Action for Parents of American and Lawful Permanent Residents (DAPA) program).

62. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATS., BULLETIN: PRISONERS IN 2013, at 1 (2014), archived at <http://perma.unl.edu/9336-8KYL>.

63. ALEXANDER, *supra* note 34, at 40–46 (discussing the origins of politically criminalizing black communities' civil disobedience and protest during the Civil Rights Movement, which morphed into a focus on targeting criminal activity). Alexander explores in great depth how this “tough on crime” narrative bore political fruit beginning in the 1980s and continued through President Bill Clinton’s ad-



douglas pond cummings outlines just how profitable mass incarceration of minority communities since the so-called “War on Drugs” has been for the prison-industrial complex, with prison companies making billions of dollars every year.<sup>64</sup> Kevin R. Johnson highlights the growth of the incarcerated population, noting that the anti-drug political agenda to imprison more people affects a disproportionate percentage of people of color, though they do not represent a higher percentage of perpetrators.<sup>65</sup> Sociologists Lawrence D. Bobo and Victor Thompson assert that the current system of mass incarceration is a product of socioeconomic changes that exacerbated urban poverty and a heightened reliance on incarceration as an answer to societal ills, which were both fueled by intensified racist attitudes toward Black communities.<sup>66</sup> And as discussed below, the recent scholarly and advocacy-focused conversation regarding the contours and problems of and relationships between corporate profitability and immigrant detention has been rich and robust.<sup>67</sup>

The history of mass incarceration—meaning the veritable explosion in the number of people imprisoned since the 1970s<sup>68</sup>—began when public and political attitudes shifted to support legislative

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ministration in the 1990s with pointed efforts to increase legislative criminal penalties for non-violent drug offenses. *See id.* at 47–57.

64. andré douglas pond cummings, “*All Eyes on Me*”: *America’s War on Drugs and the Prison-Industrial Complex*, 15 *J. GENDER RACE & JUST.* 417, 436–37 (2012) (noting that, at bottom, the corporate system requires management to advocate for maximized profits for its shareholders and that, in the private prison corporate setting “management . . . must hope for, even work for, an increase in the number of human beings being incarcerated in the United States. Indeed this work has been handsomely rewarded in recent years; reports issued in 2011 indicate that the two largest private prison companies, CCA and GEO Group . . . together profited more than \$2.9 billion in 2010.”).
65. 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, 590–91 (2010) (stating that “[e]ven though the available statistical data suggests that whites, Latina/os, Blacks, and Asian Americans have roughly similar rates of illicit drug use, the ‘war on drugs’ . . . has had devastating impacts on minority communities” in part because law enforcement targets and racially profiles young African-American and Latino men.).
66. Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice and Punishment*, in *DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY* 322 (Hazel R. Markus & Paula Moy eds., 2010).
67. *See infra* section III.B.
68. One definition of “mass imprisonment,” often synonymous with “mass incarceration,” was coined by David Garland: “A rate of imprisonment . . . that is markedly above the historical and comparative norm for societies of this type . . . [imprisonment] ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population.” David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1, 5–6 (David Garland ed., 2001).

changes that categorized more conduct as criminal;<sup>69</sup> increased the carceral penalties of such conduct;<sup>70</sup> lengthened sentences for various crimes, including making imprisonment mandatory in some circumstances (e.g., “three strikes and you’re out” laws);<sup>71</sup> and diverted fewer people accused of crime away from sentences to programs that did not involve jail time.<sup>72</sup> Many have written about how this era of policies and legislation implicitly targeted communities of color, especially after civil rights reform outlawed explicitly racist programs.<sup>73</sup> In partic-

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69. See, e.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 59 (2012) (noting how the increase in prosecution and sentencing offenses for sex-related offenses has affected white people, who are most often prosecuted and imprisoned for such offenses: “Prosecutions for sexually explicit material offenses have risen by more than 400% since 1996. In addition to the dramatic rise in the number of cases filed, the sentences imposed for all child-pornography related offenses have become increasingly severe, rising from an average of 2.4 years in 1996 to almost 10 years in 2008.”).
70. See, e.g., ALEXANDER, *supra* note 34, at 109–11 (describing the effects of the federal law mandating enhanced sentencing for crack offenses in the case of Edward Clary, a Black man who “was convicted in federal court and sentenced under federal laws that punish crack offenses one hundred times more severely than offenses involving powdered cocaine. A conviction for the sale of five hundred grams of powder cocaine triggers a five-year mandatory sentence, while only five grams of crack triggers the same sentence . . . . Because Clary had been caught with more than fifty grams of crack (less than two ounces), the sentencing judge believed he had no choice but to sentence him—an eighteen-year-old, first-time offender—to a minimum of ten years in federal prison.”).
71. See, e.g., *id.* at 89–90 (criticizing mandatory sentencing law regimes: “Mandatory sentencing laws are frequently justified as necessary to keep ‘violent criminals’ off the streets, yet these penalties are imposed most often against drug offenders and those who are guilty of nonviolent crimes. In fact, under three-strikes regimes, such as the one in California, a ‘repeat offender’ could be someone who had a single prior case decades ago.”); Bobo & Thompson, *supra* note 66, at 326 (“Mandatory minimum sentencing guidelines, three-strikes laws, various special enhancements (i.e., selling drugs near a school), and truth in sentencing provisions ensure that people convicted of crimes are not only more likely to end up in prison but are there for much longer periods of time.”).
72. See, e.g., Forman, *supra* note 69, at 48 (noting that the state response to violent crime is “less diversion and longer sentences”); see also BUREAU OF JUSTICE STATS., U.S. DEP’T OF JUSTICE, NATIONAL PRETRIAL REPORTING PROGRAM (2012), archived at <http://perma.unl.edu/N5X7-ZZBQ> (showing that the median bail amounts for prisoners who remained detained in large urban counties rose between 1990 and 2004 from \$7,500 to \$25,000). But see BUREAU OF JUSTICE STAT., U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, archived at <http://perma.unl.edu/M7JY-NFFT> (showing that use of “community supervision” programs such as parole and probation decreased the total number of individuals in the American correctional system between 1985 and 2013 from 64% to 57%). This trend towards rebooting diversionary programs in more recent years has also had the effect of emphasizing immigrant detention and alternative monitoring means as new sources of profit for the prison companies. See *infra* section III.B and Part V.
73. Many have researched and documented this phenomenon. For viewpoints from some of the scholars who have recently written about it, see, for example, ALEXANDER, *supra* note 34; Forman, *supra* note 69, at 60 (noting also the lack of atten-

ular, the shift toward increasing the sentencing mandates for certain drug-related crimes in the “War on Drugs” meant that arrests, prosecution, and prison sentences for crimes that previously had been considered minor now carried serious carceral penalties.<sup>74</sup> Similarly, politicians were wary of being perceived as “soft on crime,” and communities also sought tougher laws that focused on putting away violent criminals.<sup>75</sup> Thus, penalties for violent crime were strengthened and fewer diversionary programs were employed. This had a disproportionately negative effect on young Black men, who were incarcerated at higher rates than other populations.<sup>76</sup> This result was in part fueled by racially motivated law enforcement and legal strategies that condoned racial and ethnic profiling at various stages in the criminal justice system (e.g., at arrest, prosecutorial discretion at charging and litigation, and at sentencing).<sup>77</sup>

The result of these successful movements to expand the role that incarceration plays in the criminal justice system was a huge increase in the number of people imprisoned.<sup>78</sup> Indeed, for much of the twentieth century, the number of people in jails and prisons stayed relatively

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tion played by many advocates to the plight of Latina/os in the prison system: “The Hispanic prison population climbed steadily during the 1990s, to the point where one in six Hispanic males born today can expect to go to prison in their lifetime.”); Bobo & Thompson, *supra* note 66; cummings, *supra* note 64.

74. See, e.g., ALEXANDER, *supra* note 34 at 52–94 (discussing the surge of drug crime laws, sentencing enhancements and other carceral and civil penalties associated with the War on Drugs); Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1106–07 (2013) (noting the interconnected history of the drug laws and the high rates of incarceration while also noting the recent trends towards decriminalization in certain state laws and enforcement, like California and other places where use of marijuana has been legalized).

75. See ALEXANDER, *supra* note 34, at 54–55 (describing the political environment and rhetoric of the 1990s at the height of the movement: “Politicians of every stripe competed with each other to win the votes of poor and working-class whites, whose economic status was precarious, at best, and who felt threatened by reforms . . . former allies of African Americans—as much as conservatives—adopted a political strategy that required them to prove how ‘tough’ they could be on ‘them,’ the dark-skinned pariahs.”); Forman, *supra* note 69, at 36–46 (discussing the calls from Black communities for tougher drug laws at about this same time and asserting that, although incarcerations rates for drug crimes are high, the majority of those incarcerated are there for violent crime prosecutions, thereby arguing that a fuller picture of the mass incarceration phenomenon must account for realities beyond drug crime).

76. See, e.g., ALEXANDER, *supra* note 34, at 96 (“In at least fifteen states, blacks are admitted to prison on drug charges at a rate from twenty to fifty-seven times greater than that of white men . . . in the mid-1980s, prison admissions for African Americans skyrocketed, nearly quadrupling in three years, and then increasing steadily until it reached in 2000 a level more than twenty-six times the level in 1983. The number of 2000 drug admissions for Latinos was twenty-two times the number of 1983 admissions.”).

77. See, e.g., *id.* at 60–64.

78. See, e.g., Bobo & Thompson, *supra* note 66, at 324.

stable—about 300,000 a year.<sup>79</sup> Sociologists Bobo and Thomson report that in 1980, which was near the end of a roughly fifty-year trend of relatively consistent numbers of people incarcerated, there were fewer than 300,000 people in prison.<sup>80</sup> But in the mid-1980s, the numbers began to jump dramatically in response to these targeted law reforms. Thus, by 2000, over 1 million people were imprisoned.<sup>81</sup> By 2007, there were more than 2.3 million people incarcerated.<sup>82</sup>

Government agencies and law enforcement departments, at that point, faced a dilemma: where could they house this surge of prisoners?<sup>83</sup> The stable of prisons and jails were inadequate, and financial resources to construct more prisons could not come fast enough.<sup>84</sup> The public construction and maintenance of prisons—by counties, states, and the federal government—indeed flourished and continues to house a large portion of imprisoned people and detained immigrants, as has been historically true.<sup>85</sup> But sensing a lucrative and timely opportunity, private companies stepped in to fill the void left by the insufficient publicly funded prisons.<sup>86</sup> With promises to efficiently and effectively build prison facilities quickly and at a significantly lower cost for the government (local, state, or federal), these corpora-

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79. *See id.* at 324–35 figs. 12.1, 12.2.

80. *Id.* at 324–25.

81. *Id.*

82. *Id.*

83. *See, e.g.,* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 455 (2005) (tracing the “reemergence of private contractors in American corrections . . . to the dramatic growth in incarceration nationwide over the past three decades”); Cummings, *supra* note 64, at 421–22, 436.

84. *See, e.g.,* Dolovich, *supra* note 83, at 455–56 (stating that, although initial responses to increases in incarceration rates were to ship prisoners to existing facilities, government officials soon ran out of space and faced criticisms and lawsuits due to mismanagement and overcrowding).

85. To be sure, prisons have a long history of state operation and control. *See id.* at 453–56 (discussing the emergence of privately run prison systems as the public operations could not meet the increased demand); Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of “Custody,”* 48 MICH. J. L. REFORM 101, 120 (2015) (“After World War I, prisons eventually became public, non-profit institutions until the late 20th century’s push for privatization and the prison population boom. Laws passed in the 1920s and 1930s explicitly barred prisons from engaging in profit-seeking activities.”). The most recent report from the Bureau of Justice Statistics shows that “private prisons held 7% of the total state prison population and 19% of the federal prison population on December 31, 2013.” CARSON, *supra* note 62, at 13. Thus, the vast majority of prisoners in the general criminal justice prison system are held in publicly run local, state, or federal prisons. There is a higher reliance on private prison operations in the immigration detention context, with roughly 50% of detained held in publicly run detention in 2011.

86. *See* Dolovich, *supra* note 83, at 455–56; CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 2 (Jan. 2012), archived at <http://perma.unl.edu/QF5S-JPEC>.

tions entered the prison business.<sup>87</sup> CCA was founded in 1983, and although its founders had no correctional management experience, the company's leaders hired people with experience in the prison system.<sup>88</sup> The GEO Group—then known as the Wackenhut Corrections Corporation—also entered the market at that time.<sup>89</sup> As Susan Dolovich writes: “Both CCA and Wackenhut were turning a profit by the late 1980s, and by the mid-1990s, they together controlled 75 percent of the American private prison market.”<sup>90</sup>

Indeed, the prison business has handsomely rewarded these companies, their leaders, and shareholders. In the first quarter of fiscal year 2015, GEO Group's earned revenue was \$427.4 million dollars<sup>91</sup>—or roughly \$142.4 million dollars per month. Similarly, in that same time frame, CCA's earned revenue was \$426 million<sup>92</sup>—or roughly \$142 million dollars per month. This money comes, in short, from government contracts.<sup>93</sup> In the immigration context, for example, DHS contracts with the companies to construct, open, operate, and maintain immigrant detention facilities.<sup>94</sup> A recent report estimates that, based on the 2014 congressional allocation of money to DHS for immigrant detention practices, this amounts to \$5.6 million

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87. See Dolovich, *supra* note 83, at 458–59; Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 598 (2012) (discussing how CCA began its carceral career by swiftly opening its first immigrant detention facility pursuant to a contract with the Immigration and Naturalization Service (INS)).

88. See Dolovich, *supra* note 83, at 459.

89. See *id.*

90. *Id.*

91. See *The GEO Group Reports First Quarter 2015 Results*, GEO GROUP, INC. (Apr. 30, 2015), <http://www.snl.com/irweblinkx/file.aspx?IID=4144107&FID=29242485&printable=1>, archived at <http://perma.unl.edu/2DQU-X72Q>.

92. See *CCA Reports First Quarter 2015 Results*, CCA (May 6, 2015), [http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-newsArticle\\_pf&ID=2044970](http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-newsArticle_pf&ID=2044970), archived at <http://perma.unl.edu/6KGS-J6ZB>.

93. See, e.g., *id.* at 2 (noting the government contract with DHS to build family detention centers); Dolovich, *supra* note 83, at 455–62; Torrey, *supra* note 85, at 120–21; Cummings, *supra* note 64, at 434–36 (discussing the various frameworks that the government uses to enter into contracts with prison corporations and the ways in which the companies ensure profits).

94. See Dolovich, *supra* note 83, at 457, 474 (discussing the incentives of the private prison corporation in its government contracting with the state or federal entities); IN THE PUBLIC INTEREST, CRIMINAL: HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS FOR PRIVATE PRISON CORPORATIONS (2013), archived at <http://perma.unl.edu/4RHB-FSTM> (discussing in depth about how private prisons require contracts with government agencies that guarantee certain prison occupancy rates, thus ensuring payment even if the prison beds remain empty). Such quota contracts are linked to the congressional mandate of 34,000 beds for detained immigrants and point to the incentive of criminalizing more activity to fill the quota-required beds and contracts.

dollars of taxpayer money a day,<sup>95</sup> which corresponds to \$164 a day per imprisoned immigrant.<sup>96</sup>

It is not a leap of logic, then, to understand that the cheaper the companies operate their detention facilities, the more money that they make.<sup>97</sup> Therefore, despite their promises of efficiency and humane treatment of inmates and detainees,<sup>98</sup> critics have long contended that the companies instead provide inadequate and sometimes dangerous conditions in their facilities. Certain privately run facilities have been accused practically since their inception of providing unsecure facilities;<sup>99</sup> not affording inmates and detainees sufficiently safe living quarters, which leads to rampant violence, including physical assaults and murder;<sup>100</sup> and denying inmates medical care, proper food, and humane living conditions.<sup>101</sup> Moreover, the promises of

95. See NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 2 (Aug. 22, 2013) [hereinafter MATH OF IMMIGRATION DETENTION], archived at <http://perma.unl.edu/6ZMP-LREP>.

96. See *id.*

97. See, e.g., Dolovich, *supra* note 83, at 460 (noting the profit-margin quandary: "If the state is to reduce the cost of its prisons through contracting out to the private sector, the contract price must be less than the total cost the state would otherwise incur in operating the facility. And if private providers are likewise to make money on the venture, they must spend less to run the prisons than the contract price provides. For such arrangements to be remunerative for both parties, therefore, private prisons must be run at a considerably lower cost than the state would otherwise incur.")

98. See, e.g., CORRECTIONS CORP. OF AM., CCA HUMAN RIGHTS POLICY STATEMENT 3 (2014), archived at <http://perma.unl.edu/5YWD-DB3N> ("Our facilities and operations are designed to ensure an appropriate standard of living [and to] maintain safe, humane conditions.")

99. See, e.g., Torrey, *supra* note 85, at 121 & n.127 (describing the first CCA-run detention facility pursuant to a contract with the then INS in Houston where some of the immigrant detainees escaped the facility by pushing air conditioning units out of the windows; CCA had just leased an old motel building and deemed it a detention facility).

100. See, e.g., Dolovich, *supra* note 83, at 461 (describing the Youngstown, Ohio CCA-run facility that in 1997—despite penal protocol and in order to save money—housed maximum-security, high-risk inmates with prisoners from a medium-security facility, leading to forty-four assaults and two murders within the prison in eighteen months).

101. See, e.g., Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 481–86 (2013) (detailing the history of a detained immigrant who died from penile cancer due to gross medical neglect while in detention); Torrey, *supra* note 85, at 122–23; Dolovich, *supra* note 83, at 460–62. The critiques against the private prison corporations extend to their treatment of their own employees, who are often overworked and underpaid so as to increase profits. See GRASSROOTS LEADERSHIP & THE PUBLIC SAFETY & JUSTICE CAMPAIGN, THE DIRTY THIRTY: NOTHING TO CELEBRATE ABOUT 30 YEARS OF CORRECTIONS CORPORATION OF AMERICA 4 (June 2013) [hereinafter THE DIRTY THIRTY], archived at <http://perma.unl.edu/R7GS-RSN2> (quoting Joshua Miller of the public-sector union, AFSCME: "Private corrections is structurally flawed. The profit motive drastically changes the mission of corrections

cost-savings also appear to be overstated, with some estimating that the private prison-contracting scheme actually does not result in significant savings to the government.<sup>102</sup>

Nevertheless, the private prison business flourishes: CCA and the GEO Group reported combined revenues of \$3 billion in 2011.<sup>103</sup> To be sure, public entities also reap huge financial profits through their governmental contracts to maintain prison and detention facilities.<sup>104</sup> To keep the profit margins high, then, the entities rely on a steady stream of inmates and detainees. And to ensure that steady stream, state and federal legislation must continue to prioritize arrest, prosecution, and lengthy incarceration.

What happens, then, when this stream begins to dry up? Indeed, 2007 was at about the zenith for incarceration rates, with almost 1.6 million people in federal or state prisons.<sup>105</sup> As the Bureau of Justice Statistics (BJS) reported, “During 2007, the prison population increased more rapidly than the U.S. resident population.<sup>106</sup> The im-

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from public safety and rehabilitation to making a quick buck. Chronic employee turnover and understaffing, a high rate of violence, and extreme cost-cutting make the private prison model a recipe for disaster.”)

102. See AM. CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 19 (Nov. 2, 2011), *archived at* <http://perma.unl.edu/BD3F-SCJV> (noting that, while some evidence supports a view that private prison corporations provide cost savings, “numerous other studies and reports have indicated that private prisons do not save money, cannot be demonstrated to save money in meaningful amounts, or may even cost more than governmentally operated prisons”).
103. See Paul Szoldra, *Private Prisons Will Get Totally Slammed by Immigration Reform*, BUS. INSIDER (Feb. 2, 2013), <http://www.businessinsider.com/a-3-billion-industry-is-going-to-be-slammed-by-immigration-reform-2013-1>, *archived at* <http://perma.unl.edu/A29K-7AXU>. The corrections business as a whole is incredibly lucrative, with estimates placing it at a \$70-billion-a-year enterprise. See John W. Whitehead, *Jailing Americans for Profit: The Rise of the Prison Industrial Complex*, HUFFINGTON POST (June 10, 2012), [http://www.huffingtonpost.com/john-w-whitehead/prison-privatization\\_b\\_1414467.html](http://www.huffingtonpost.com/john-w-whitehead/prison-privatization_b_1414467.html), *archived at* <http://perma.unl.edu/ZL8Y-53XX>.
104. See, e.g., Anthony Orozco, Ford Turner & Nicole C. Brambila, *Lawyers Seek Closure of Berks County Residential Center*, READING EAGLE (Mar. 26, 2015), <http://readingeagle.com/news/article/lawyers-seek-closure-of-berks-county-residential-center>, *archived at* <http://perma.unl.edu/6W39-DCFU> (discussing the Berks County Residential Center, the only publicly run family detention center currently operating, and quoting a Berks County Commissioner speaking about the center: “This was an opportunity for Berks County to make profitable use of a vacant building that was in relatively good shape . . . . It is amazing how well-treated these people are given that they are here illegally.”).
105. CARSON, *supra* note 62, at 2 (showing that, although the peak of the prison incarcerations was in 2009, most of the momentum came from a steep rise in the prison population in 2007).
106. HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATS. BULL., *PRISONERS IN 2007* (2008), *archived at* <http://perma.unl.edu/479F-MWCZ>.

prisonment rate—the number of sentenced prisoners per 100,000 residents—increased from 501 prisoners per 100,000 U.S. residents in 2006 to 506 prisoners per 100,000 U.S. residents in 2007.<sup>107</sup> But, as the BJS has more recently reported, relative rates of incarceration have since fallen. In 2012, the U.S. prisoner population declined for the third year in a row: “In 2012, the number of admissions [i.e., people entering prison] (609,800) was the lowest since 1999, representing a 9.2% decline (down 61,800 offenders) from 2011.”<sup>108</sup> Albeit still an incredibly high number of imprisoned people, the companies that profit off of ever-higher rates of incarceration had to expand their focus on whom to target as inmates.<sup>109</sup>

As it turns out, finding the stream of new people to incarcerate was easy—immigrants apprehended by ICE. Indeed, CCA began its carceral career by opening a facility for immigrants with the Immigration and Naturalization Service (INS),<sup>110</sup> the agency that preceded the current immigration agency scheme under the DHS. Recognizing immigration detention as an under-tapped font of possible revenue, prison corporations turned their attention to capturing more of the immigrant detention business, resulting in even more profit.

## B. The Prison Industry Discovers the Price of Immigrants

On May 6, 2015, CCA released its first quarter 2015 investor relations report.<sup>111</sup> The profitability of imprisoning immigrants is clear:

In the first quarter of 2015, ICE continued housing female adults with children arriving illegally on the Southwest border at the South Texas Family Residential Center, a facility we lease in Dilley, Texas. As of the end of the first quarter of 2015, the facility had capacity to house up to 480 individuals while ongoing construction will provide housing in 480-bed increments for up to 2,400 individuals to be completed in the second quarter of 2015. The new

107. *Id.*

108. E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATS., PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012 (2013), archived at <http://perma.unl.edu/FF6L-S4FT>.

109. See, e.g., Geiza Vargas-Vargas, *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?*, 48 CAL. W. L. REV. 351, 357–58 (2012) (arguing that the “source of profit for prisons . . . is the war on drugs” but that the source has reached its optimal growth potential and thus, “Prison companies cannot justify building new prisons on the basis of drug convictions. However, prison companies can justify the building of new prisons based on a whole new kind of prisoner: the illegal alien, and more specifically, the ‘Mexican.’”); see also Leslie Berestein, *Detention Dollars: Tougher Immigration Laws Turn the Ailing Private Prison Sector into a Revenue Maker*, SAN DIEGO UNION TRIB. (May 4, 2008), [http://www.utsandiego.com/uniontrib/20080504/news\\_lz1b4dollars.html](http://www.utsandiego.com/uniontrib/20080504/news_lz1b4dollars.html), archived at <http://perma.unl.edu/4KCG-W2UF> (discussing how the private prison corporations begin losing revenue in the early years of 2000 and sought new streams of profit by contracting with DHS).

110. See, e.g., Torrey, *supra* note 85, at 124.

111. CCA Reports First Quarter 2015 Financial Results, *supra* note 92.



facility and services are being provided under amended Intergovernmental Service Agreement (IGSA) . . . . During the first quarter of 2015, [CCA] recognized \$36.0 million in revenue associated with the amended IGSA.<sup>112</sup>

In short, CCA realized \$8 million dollars in revenue each month for the first quarter of 2015 just by imprisoning immigrant mothers and children.

As discussed above, the general law reform movements that began in the 1980s had the effect of increasing the number of people subject to arrest and incarceration. Similarly, immigration law reform at that time expanded the types of conduct for which an immigrant could face discretionary or mandatory detention and eventual deportation. And just as the motivations for general criminal law reform were the “War on Drugs” and movements focused on arresting more people and giving them more severe prison sentences aimed ostensibly at cleaning the streets and being tough on crime, the legislative provisions targeting immigrants largely intertwined drug use and abuse and general criminality with immigrant status.<sup>113</sup> More recent programs (post-September 11, 2001) were billed as targeting potential terrorist threats from within the immigrant communities, which eventually led back to a more expansive scheme aimed at rooting out alien criminal activity, in general. This series of laws and programs set the stage for the success of the prison industry in the immigrant detention business.

As César Cuauhtémoc García Hernández documents, between 1986 and 1994, Congress passed eight laws and resolutions that stemmed from the “growing desire to fight drugs” and ultimately “set the legislative groundwork for the expansive immigration detention apparatus that exists today . . . .”<sup>114</sup> As one important example, the Anti-Drug Abuse Act (ADAA) of 1988 coined the term “aggravated felony,” which it defined to include murder, drug trafficking and illegal

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112. *Id.*

113. The new legislative and regulatory regime, which increases the ways in which immigrants are entrapped in the criminal justice system, is part of a broader scheme of intertwining criminality with immigration even though there is nothing inherently “criminal” about immigration law and policy, as Jennifer M. Chacón asserts. See Jennifer Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012). Chacón notes that increased state and locality encroachment into the immigration enforcement system, coupled with a heightened federal enforcement, results in a hyper-criminalized environment for immigrants. *Id.*

114. See García Hernández, *supra* note 24, at 1361 (discussing the series of laws that serve as part of the genesis of the scheme of immigration detention: “[T]he Anti-Drug Abuse Act (ADAA) of 1986, the Immigration Reform and Control Act (IRCA) of 1986, the Refugee Assistance Extension Act of 1986, a 1986 joint congressional resolution, the ADAA of 1988, the Crime Control Act of 1990, the Immigration Act of 1990 (IMMACT 90), and the Violent Crime Control and Law Enforcement Act of 1994.”).

trafficking in firearms or explosive devices.<sup>115</sup> An immigrant who is convicted of an aggravated felony faces serious immigration consequences, including mandatory detention and removal from the country, while being ineligible for most types of removal relief.<sup>116</sup>

The ADAA of 1988 was only one step in a quick series of laws that resulted in a sudden increase in detention. The Immigration Act of 1990 extended the definition of “aggravated felony” from the previously delineated three crimes to a more general category that included crimes of violence with a sentence of at least five years.<sup>117</sup> Then, in 1996, and along with the general political and societal anti-immigrant and anti-poverty environment that ushered in other controversial laws of the time, like welfare reform,<sup>118</sup> Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). As one of its goals, AEDPA amplified the use of mandatory detention for immigrants beyond those convicted of aggravated felonies and targeted, among others, “noncitizens convicted of any controlled substances offense, [and] those who used drugs [who] would also be subject to detention without review by an immigration judge.”<sup>119</sup> Moreover, AEDPA added to the growing list of crimes that qualified as an aggravated felony.<sup>120</sup> Similarly, IIRIRA expanded the definition of “aggravated felony” and mandated detention of huge categories of immigrants accused of committing a broad array of crimes,<sup>121</sup> includ-

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115. Anti-Drug Abuse Act (ADAA) of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (1988) (codified as amended at 8 U.S.C. § 1101(a)(43) (2012)); see also Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 600, 642 (2015) (discussing the history of the ADAA of 1988).

116. ADAA of 1988, Pub. L. No. 100-690, § 7343(a)(4), 102 Stat. 4181, 4470 (amending INA § 242(a), which mandates detention of certain immigrants with criminal convictions, including those convicted of aggravated felonies); Torrey, *supra* note 85, at 114; Das, *supra* note 29, at 147; García Hernández, *supra* note 24, at 1370; see generally Andrew David Kennedy, *Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, 60 VAND. L. REV. 1847, 1848 (2007) (discussing the implications of a finding of aggravated felony).

117. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990); see also Torrey, *supra* note 85, at 115 (describing the impact of the Immigration Act of 1990).

118. See Olivares, *supra* note 24, at 246–47 (discussing the various federal efforts during this time that targeted immigrants and other marginalized communities, including the poor).

119. See García Hernández, *supra* note 24, at 1370 (citing AEDPA, Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276–77 (1996) (amending INA § 242(a)(2), 8 U.S.C. § 1252(a)(2))).

120. See AEDPA § 443.

121. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Pub. L. No. 104-208, § 321(a), 110 Stat. 3009, 3009-627 (codified as amended at 8 USC § 1101(a)(43) (1996)) (adding to the definition of “aggravated felony”); García Hernández, *supra* note 24, at 1371.

ing, for example, those convicted of multiple offenses of “crimes involving moral turpitude,”<sup>122</sup> an immigration law term of art that attempts to characterize a body of crimes amounting to “baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general.”<sup>123</sup> Further, and as discussed above, IIRIRA codifies ICE’s power to detain immigrants pending their removal decision by an immigration judge<sup>124</sup> and allows for the detention of arriving aliens whom CBP suspects of having a fraudulent visa without a hearing.<sup>125</sup> This expedited removal process even extends to those arriving aliens seeking asylum protections.<sup>126</sup>

Since these 1996 laws, Congress has continued to grow INS’ (and now DHS’) power to detain immigrants. Significantly, after the September 11, 2001 terrorist attacks, Congress ramped up its funding allocations with the goal of locating, detaining, and deporting suspected terrorists.<sup>127</sup> But from that time to about 2012, congressional focus shifted from ostensibly rooting out terrorism threats back to a more general plan of targeting broad ranges of criminal activity in the immigrant population.<sup>128</sup> As a result, congressional funding schemes centered on the apprehension, detention, and removal of more immigrants through such administrative programs as the 2003 Operation Endgame, which included the Secure Communities initiative.<sup>129</sup> Billed as a strategy to rid communities of criminal aliens, Secure Communities instead created a foundation for local and state law enforcement agencies to partner with federal immigration officials to profile and target immigrants—including those accused of the most minor of

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122. See IIRIRA § 303(a), 8 U.S.C. § 1226(c) (1996) (adding to list of crimes leading to mandatory detention); INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2008) (“Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude . . . is deportable.”); see also Das, *supra* note 29, at 148 (“In 1996, Congress vastly expanded the types of removable offenses that trigger mandatory detention to include offenses that were not per se bars to relief from removal, like drug crimes and multiple ‘crimes involving moral turpitude.’”).

123. *Marciano v. INS*, 450 F.2d 1022, 1025 (8th Cir. 1971) (quoting *Ng Sui Wing v. United States*, 46 F.2d 755, 756 (7th Cir. 1931)).

124. See INA § 236(a), 8 U.S.C. § 1226(a).

125. See *id.* § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2008); Legomsky, *supra* note 24, at 534.

126. See INA §§ 235(b)(1)(A)(ii), (b)(1)(B)(ii)-(iii), 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(ii)-(iii); Legomsky, *supra* note 24, at 534 & nn.14–15 (citing INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV)) (further noting that the INA provision allows for detention of asylum applicants unless they can prove a “credible fear” of persecution and that the government can continue to detain asylum seekers until such a standard has been met).

127. See Sthanki, *supra* note 101, at 453.

128. See *id.*

129. See *id.*

offenses (like traffic violations) for their arrest and eventual removal.<sup>130</sup>

As a result of this decades-long strategy amplifying the ways in which immigrants could be detained, the number of immigrants subject to imprisonment and eventual deportation rose dramatically. Just as the numbers of the general prison population began to swell in the 1990s and reached all-time high numbers in the first decade of the new millennium, the same trends occurred with the number of detained immigrants.<sup>131</sup> Moreover, IIRIRA added INA § 241(g)(2), which required (now) DHS to meet the increased demand for detention bed space by first considering “for purchase or lease any existing prison, jail, detention center, or other comparable facility suitable” for detaining immigrants before constructing new bed space.<sup>132</sup> Further, IIRIRA also allowed the expenditure of INS budget allocations for additional required bed space in INA § 241(g)(1), which approves of the use of “amounts necessary to acquire land and to acquire, build, remodel, repair and operate land and to acquire, build, remodel, repair and operate facilities . . . necessary for detention.”<sup>133</sup> Thus, in addition to the body of laws that greatly expanded the number of immigrants who fall under the detention regime, this statute created a timely and lucrative opportunity for the private prison corporations by requiring the government to access existing prison space, contract for new space, or both.

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130. *See id.* at 453–54; Johnson, *supra* note 65, at 596–600; Olivares, *supra* note 24, at 268. Advocates and law enforcement agencies criticized the Secure Communities initiatives, asserting that law enforcement targeting of immigrants actually led to higher rates of crime against immigrants and less cooperation from their communities in bringing perpetrators to justice, due to immigrants’ fear of eventual apprehension by immigration authorities. *See, e.g.,* Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317, 341 (2012) (noting that although Secure Communities was ostensibly geared towards deporting violent criminals, it actually targeted any undocumented person in its implementation, creating an atmosphere of fear in immigrant communities). As a result, many entities refused to participate in Secure Communities or work with the federal immigration authorities. *Id.* at 326. DHS terminated the Secure Communities program in November 2014 and replaced it with the Priority Enforcement Program (PEP), which “enables DHS to work with state and local law enforcement to take custody of individuals who pose a danger to public safety before those individuals are released into our communities.” *See* Office of Enforcement and Removal Ops., *Priority Enforcement Program (PEP)*, ICE (2015), [http://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep\\_brochure.pdf](http://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf), archived at <http://perma.unl.edu/89SS-GQYR>.

131. *See supra* note 46 and accompanying text.

132. INA § 241(g)(2), 8 U.S.C. § 1231(g)(2) (2006); *see also* García Hernández, *supra* note 24, at 1371 (noting that this provision amounts to a governmental concession that detained immigrants can be rightly and “suitably” held in regular prisons and jails while also facilitating “the growing reliance on private prison corporations to meet the bed space needs of the INS and later, DHS”).

133. INA § 241(g)(1), 8 U.S.C. § 1231(g)(1).

To be sure, one result of this increased emphasis on immigrant criminality and reliance on detention through legislative measures is a huge increase in the numbers of immigrants detained each year *and* the numbers detained in private facilities. By comparison: In 1995, the federal government detained approximately 85,730 immigrants.<sup>134</sup> Just eighteen years later in 2013, DHS detained 440,557 immigrants.<sup>135</sup> Similarly, the role of privatized immigrant detention has increased exponentially since its first foray into detention in 1984. In fact, reports estimate that private prisons detain somewhere between roughly half to two-thirds of the total detained immigrant population, making them a dominate force in the business.<sup>136</sup> GEO Group and CCA more than doubled their total revenues stemming from immigrant detention from 2005 to 2013.<sup>137</sup> And when ICE increased its apprehensions of mothers and children, both CCA and GEO Group quickly jumped into the market by opening the “family residential centers” in Karnes (GEO Group) and Dilley (CCA),<sup>138</sup> thereby helping to realize these enormous profits.

Thus, the political and societal movements to increase the criminalization of immigrant conduct pursuant to the War on Drugs, getting tough on crime, and the War against Terror were incredibly successful catalysts in ramping up the detention machine. Fueled by this lucrative opportunity—which arrived at a time when the general criminal justice scheme for increased incarceration was losing steam—corporate prison interests astutely entered the immigrant detention market to secure their critical participation in this new money-making endeavor. Now the relationship between immigrant detention and profit-centered prisons is solidly built, but their symbiotic connection relies on an important component to maintain its foundation. As Part IV argues, this key element is the continued political subordination of immigrants as perceived criminals, non-citizens, and people of color.

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134. See Meissner et al., *supra* note 45, at 11.

135. See SIMANSKI, *supra* note 46, at 6 & tbl.5.

136. Alex Tribou, *Immigrant Detention Quota a Boon for Private Prisons*, BLOOMBERG BUS. (Feb. 24, 2013), <http://www.bloomberg.com/infographics/2013-09-24/immigrant-detention-quota-a-boon-for-private-prisons.html>, archived at <http://perma.unl.edu/W2M9-WB7S> (reporting that nearly two-thirds of immigrants are detained in “investor owned prisons”)

137. See Sasha Chavkin, *Immigration Reform and Private Prison Cash*, COLUM. JOURNALISM REV. (Feb. 20, 2013), [http://www.cjr.org/united\\_states\\_project/key\\_senators\\_on\\_immigration\\_get\\_campaign\\_cash\\_from\\_prison\\_companies.php](http://www.cjr.org/united_states_project/key_senators_on_immigration_get_campaign_cash_from_prison_companies.php), archived at <http://perma.unl.edu/H4CP-YF3J> (documenting the exponential increases in private prison corporate revenue and tying it to lobbying and campaign efforts).

138. See Whitehead, *supra* note 103 (noting the GEO center in Karnes); CCA *First Quarter 2015 Report*, *supra* note 92 (noting the Dilley center).

#### IV. AT THE CROSSROADS—INTERSECTIONALITY AT THE PROFIT-DETENTION INTERSECTION

Understanding now the intersection between the history and practices of immigration detention and the influence of its corporate profitability, this Part turns to the key ingredient for this practice to succeed for so long with relatively little critique. Indeed, the loudest and most prevalent cries against immigrant detention practices have arguably only been in response to the recent imprisonment of mothers and children.<sup>139</sup> That practice—it seems—may push even our pro-carceral boundaries a bit too far. Largely unknown by many, though, the governmental practice of detaining immigrants has thrived for decades, earning prison corporations billions of dollars.

The answer as to how such a practice succeeds lies in the next critical road at the intersection. The intersectionality of subordinated immigrant identity makes the immigrant an easy target for legislation designed to put more people in prison. In short, the power to subordinate becomes legislative fiat *because* “the immigrant” in the United States occupies the most marginalized of identities—that of perceived criminals, non-citizens, and persons of color. This Part explores each of these identities and asserts that this intersectionality of identity allows monied interests to benefit off the imprisonment of the oppressed and to help perpetuate their continued incarceration.

##### A. The Immigrant Is a Criminal

Immigration and criminality have become inextricably linked together in public and political media and discourse. Legislators from both dominant political parties rely on the narrative of the criminal alien to distance themselves from reform and advocacy that may seem too soft on those who violate the immigration laws. For example, regarding his stance on immigration reform, former Florida Governor

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139. See, e.g., Letter from Congress of the United States, House of Representatives, to Jeh Johnson, Secretary, U.S. Dep't of Homeland Sec. (May 27, 2015), *archived at* <http://perma.unl.edu/6PVY-GA6J> (opposing family detention, as evidenced by the signatures of 136 Democrats); Julia Preston, *U.S. to Reduce Long Stays for Families at Immigration Centers*, N.Y. TIMES (June 24, 2015), <http://www.nytimes.com/2015/06/25/us/us-to-reduce-long-stays-for-families-at-immigration-centers.html>, *archived at* <http://perma.unl.edu/9GHK-C28P> (discussing ICE's new procedures to release women and children from detention after religious leaders, migrant advocates, and 136 members of Congress and thirty-three senators called for the end of family detention); Cindy Carcamo, *U.S. Policy Change May Enable Speedy Release of Detained Immigrant Families*, L.A. TIMES (June 24, 2015, 7:18 PM), <http://www.latimes.com/nation/la-na-immigration-family-detention-20150624-story.html>, *archived at* <http://perma.unl.edu/8HT3-B9ZY> (discussing Secretary Johnson's move to release women and children who establish eligibility for asylum or other relief under the laws after outcry over family detention and reports of poor conditions).

and 2016 Republican presidential candidate Jeb Bush proposes that “once immigrants who entered illegally as adults plead guilty and pay the applicable fines or perform community service, they should become eligible to start the process to earn legal status.”<sup>140</sup> Similarly, to support his executive actions to provide deferred action to certain groups of undocumented immigrants, President Obama has noted that his immigration policies are about targeting “felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.”<sup>141</sup>

Both statements support a view of immigrants as criminal lawbreakers, or at least potential lawbreakers. While President Obama’s emphasis on immigrants’ criminality or latent criminality is powerful enough, others cast a criminal character on simply the act of being an undocumented immigrant. Bush’s perspective that, before securing any type of relief, immigrants must “plead guilty”—though immigration violations are only civil law and do not lead to any assessment of one’s guilt—is typical rhetoric that confuses criminality with immigrant status. And President Obama’s assertion that some immigrants are worthy while others are not solidifies the narrative that it is easy for the immigration system to pick and choose among the best, brightest, hardest working, or least culpable of people, when, in reality, the lives of immigrants (like everyone) often involve ambiguities and complications.<sup>142</sup> Moreover, both types of statements contribute to the popular perception that typecasts immigrants as rule-breakers, who are thus rightly subject to prison detention.

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140. Alex Altman, *Republican Candidates Dodge Immigration Questions*, TIME (May 17, 2015), <http://time.com/3867523/immigration-republican-presidential/>, archived at <http://perma.unl.edu/6TW8-H3SC> (quoting answers from Jeb Bush’s spokesperson from a survey regarding immigration reform given to the 2016 Republican presidential candidates).

141. President Barack Obama, Address to the Nation on Immigration (Nov. 20, 2014), archived at <http://perma.unl.edu/F2YB-8777>. President Obama has otherwise spoken in terms of “good” versus “bad” immigrants. See Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), [http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?\\_r=0](http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0), archived at <http://perma.unl.edu/2RRQ-M7D7> (discussing the high number of deportations in the years of the Obama Administration, and stating that though President Obama claims to be deporting criminals, gang members, and other criminals, that is not actually the case).

142. See, e.g., Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 221–22 (2012) (describing how the narrative of criminality and victimhood benefits certain immigrants (the perceived victims) and inordinately targets others (the perceived criminals) without suitable discretion for complexities); Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARVARD LATINO L. REV. 79, 89–98 (2013) (asserting that advocates for DREAM Act-type legislation historically fell victim to the problems inherent in the narrative dilemma of good versus bad immigrant).

In fact, the reality does not match the perception. Research has routinely shown that immigrants do not commit crime at a higher rate than U.S. citizens,<sup>143</sup> bucking the myth that status as an immigrant somehow correlates to a criminal nature or propensity. Moreover, many immigrants held in detention do not have criminal records or records for non-violent infractions, such as misdemeanors or drug-related crimes. ICE's own statistical data shows that in 2014, only 56% of the immigrants it removed from the United States had criminal convictions.<sup>144</sup> Of those eventually removed who were apprehended at a border entry (like, for example, the mothers and children who were caught while entering at the Mexico-U.S. border) and not in the interior, 89% had no criminal record.<sup>145</sup> Although these numbers reflect those immigrants deported and not necessarily those in detention, they are an important reflection of those held in detention.<sup>146</sup>

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143. See WALTER A. EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBAUT, AM. IMMIGR. COUNCIL, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* 4 (2015), archived at <http://perma.unl.edu/8253-HYP2> (surveying the data and showing: “[E]vidence that immigrants tend *not* to be criminals is overwhelming. . . . Crime rates in the United States have trended downward for many years at the same time that the number of immigrants has grown. Second, immigrants are *less* likely to be incarcerated than the native-born. And, third, immigrants are *less* likely than the native-born to engage in criminal behaviors that tend to land one in prison.”); see also César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 362 (2012) (citing Ramiro Martínez, Jr., *Coming to America: The Impact of the New Immigration on Crime*, in IMMIGRATION AND CRIME: RACE, ETHNICITY, AND VIOLENCE 1, 10–12 (Ramiro Martínez, Jr. & Abel Valenzuela, Jr. eds., 2006)) (noting evidence indicating that immigrants are actually less prone to criminal behavior than U.S. citizens); Johnson, *supra* note 65, at 592 (same) (citing KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 155–58 (2007)).
144. ICE, *ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT FISCAL YEAR 2014*, at 7 (2014), archived at <http://perma.unl.edu/T8SA-FC7N>.
145. *Id.*; see also MATH OF IMMIGRATION DETENTION, *supra* note 95, at 5 (discussing earlier detention data: “From 1996 to 2006, 65 percent of immigrants who were detained and deported were detained after being arrested for non-violent crimes. Between 2009 and 2011, over half of all immigrant detainees had no criminal records. Of those with any criminal history, nearly 20 percent were merely for traffic offenses.”).
146. As Juliet Stumpf asserts, the rise of mass detention is a corollary to the rise in increased deportations:
- Greater numbers of detainees will result in greater numbers of deportations. Like any system with inputs and outputs, a non-citizen in detention puts pressure on the system to move that non-citizen through the outcome of the removal decision. That pressure comes either from legal limitations on detention periods, from practical reasons such as limitations on detention space or simply because detention is upriver from deportation.
- Juliet P. Stumpf, *Crimmigration, Surveillance and “Security Threats”: A Multidisciplinary Dialogue*, 40 QUEEN’S L.J. 55, 96 (2014).



Indeed, a 2009 Associated Press study indicates that 58.4% of immigrants held in detention on one studied day had no criminal record at all.<sup>147</sup> This data was again confirmed in a 2014 study,<sup>148</sup> thus effectively countering the myth that imprisonment equals criminality.

Moreover, the complexities of criminality are not always easily discernible in statistics. In its most recent fiscal year (2014) report, ICE details the types of detainees who had criminal convictions and were deported. The ICE data categorizes them as “Level 1,” “Level 2,” or “Level 3,”<sup>149</sup> which correspond to the priority level of their removal from the U.S.—the higher the “level,” the higher the priority for removal.<sup>150</sup> In this case, the Level 1 offenders are considered the highest priority for removal.<sup>151</sup> A review of the most recent ICE National Detention Standards, which ostensibly govern the operations of its detention facilities, is illustrative in understanding what these level-based categorizations and priorities mean. In fact, of the three levels, only Level 1 includes immigrants that have been convicted of some type of violent crime.<sup>152</sup> In 2014, Level 1 offenders amounted to a mere 6.1% of all immigrants detained and deported.<sup>153</sup> As another example, ICE boasts that, in 2014, it detained and deported 2,802 immigrants who were “suspected or confirmed gang members,”<sup>154</sup> which out of the 315,943 immigrants detained and deported that year,

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147. See Michelle Roberts, *Most Immigrants in Detention Did Not Have Criminal Record*, *Reports AP*, HUFFINGTON POST (Apr. 15, 2009), [http://www.huffingtonpost.com/2009/03/15/most-immigrants-in-detent\\_n\\_175118.html](http://www.huffingtonpost.com/2009/03/15/most-immigrants-in-detent_n_175118.html), archived at <http://perma.unl.edu/QXS2-KUJH>; see also Chacón, *supra* note 113, at 633 (noting the discrepancies regarding detention rates for different types of alleged criminal activity: “Strikingly, although 81% of those charged with drug-trafficking offenses are detained after arrest and 87% of those charged with violent crimes are detained after arrest, a full 95% of those who have committed immigration crimes (which are largely nonviolent and most often misdemeanors) are detained upon arrest.”).

148. See Thompson & Cohen, *supra* note 141 (analyzing data in 2014 showing that two-thirds of immigrants deported from the U.S. since 2008 committed minor traffic violations or had no criminal record at all).

149. See ICE ENFORCEMENT REPORT 2014, *supra* note 50, at 8.

150. See ICE, ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 75 (2011) [hereinafter ICE NATIONAL DETENTION STANDARDS 2011], archived at <http://perma.unl.edu/5TBV-7JK6>; Memorandum from John Morton, Director, ICE, to All Field Office Directors, Special Agents in Charge, and Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, 2 (June 17, 2011), archived at <http://perma.unl.edu/FAG9-4GRH>.

151. See ICE ENFORCEMENT REPORT 2014, *supra* note 50, at 9–11.

152. See ICE NATIONAL DETENTION STANDARDS 2011, *supra* note 150, at 75 (stating that detainees classified in the low or medium custody classifications may have a history of violence); see also García Hernández, *supra* note 24, at 1412–13 (arguing that the classification system should serve as guidance in keeping those immigrants deemed low and medium-risk out of detention).

153. See ICE ENFORCEMENT REPORT 2014, *supra* note 50, at 7–8.

154. *Id.* at 7.

equals 0.9% of the total.<sup>155</sup> This point is made not to argue that removing violent criminals is generally bad policy, but rather that ICE uses the worst of the criminal narrative trope in an attempt to support its claims that it is targeting the highest priority criminals for detention and removal, when the reality is that most detained immigrants actually have no criminal record.

This powerful narrative of “the immigrant is a criminal” lives throughout immigration law and policy. For example, the criminal alien identity in many ways mirrors the exclusionary framework of the INA. The INA deems numerous categories of immigrants inadmissible into the United States for having perceived negative or unworthy characteristics—such as being ostensibly financially unable to care for oneself without assistance<sup>156</sup> or having certain physical or mental disabilities.<sup>157</sup> And indeed the INA outlaws the admission of some immigrants with criminal records<sup>158</sup> and prioritizes the deportation of criminals.<sup>159</sup>

But beyond the explicit statutory framework, the identity of the immigrant as a criminal colors the ways in which law and policy affect even those who have clean criminal records and serves to ease the path for their detention. For example, there is a popular perception that immigrants who are present without authorization in the United States are evading immigration law and have broken the law by entering.<sup>160</sup> Yet, as is the often the case with overarching conclusory depic-

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155. *See id.* at 7–8.

156. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2013).

157. *Id.* § 212(a)(1)(A)(iii), 8 U.S.C. § 1182(a)(1)(A)(iii).

158. *Id.* § 212(a)(2), 8 U.S.C. § 1182(a)(2).

159. *Id.*

160. *See, e.g.,* Vázquez, *supra* note 115, at 635 (discussing the history of Latina/o immigrants’ migration to the United States and noting that in the anti-immigrant era of the Immigration Relief and Control Act (IRCA) of 1986: “Unauthorized immigrants’ presence in the United States was again perceived as a danger to American society, its well-being and safety. Their increasing numbers were correlated to an ‘invasion by aliens.’ This time, however, unauthorized immigrants began to be viewed as ‘criminals’ and socially deviant, based on their act of unauthorized crossing and their perceived propensity towards future criminal activity.”). Moreover, the perception of wrongdoing by mere presence underscores the striations of criminality—and on its other side, virtuousness—that persist in immigration laws. Obama’s executive actions, for example, differentiate between those who have been here for a longer amount of time—and, thus, supposedly have more ties to the country or for whom removal would be a bigger hardship—than those immigrants who recently arrived. *See, e.g.,* Wadhia, *supra* note 61, at 1286–89 (discussing the provisions of President Obama’s 2012 and 2014 executive actions, which gave deferred action status to certain minors and parents of minors who satisfy eligibility requirements, including continued U.S. presence, not having criminal records, and not otherwise falling into any category of immigrants who are priorities for removal); Hylton, *supra* note 1, at 3 (indicating that, though President Obama has been progressive in providing relief to certain immigrants, “the president’s new policies apply only to immigrants who have been

tions, the conflation of an undocumented immigrant—who may have committed a civil violation by entering without proper authorization—with a criminal—who ostensibly was adjudicated guilty of a crime—is incomplete.<sup>161</sup>

Importantly, it is not just perceived criminal status that fueled the increase of immigrant detention. As discussed above, the historical conflux of mass incarceration, generally, and expansion of immigration detention practices, specifically, led in part to the current state of detention. As García Hernández writes, the huge increase in immigration imprisonment and penal incarceration was “no coincidence.”<sup>162</sup> He notes that initial steps toward mandatory immigrant detention targeted Haitians and Cubans, two nationalities who “were linked in the public imagination to crime and illegality.”<sup>163</sup> Moreover, the terrorist events of September 11, 2001, buoyed this perception, heightening the long-held historical conflation of immigrant identity with terror threat.<sup>164</sup> Indeed, of the long list of prohibited characteristics and conduct in the INA, posing a threat to national security is one of the most severe categories. From the earliest days of formalized immigration law that excluded Chinese people based on the power to protect the country from any threat, be it “from the foreign nation acting in its national character or from the vast hordes of people crowding in upon us,”<sup>165</sup> U.S. immigration law and policy have marked those immigrants perceived to be a security threat. Just like the law accused Mr. Mezei and Ms. Knauff of communist activities a generation ago,<sup>166</sup> post-September 11 legislation concentrated on national

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in the United States for more than five years; they do nothing to address the emerging crisis on the border today”).

161. See, e.g., Vázquez, *supra* note 115, at 635; Keyes, *supra* note 142, at 217–18 (commenting on the power of the narrative of criminal immigrant: “[T]his narrative equates immigrants with criminals, and it does not distinguish between those who commit the civil violation of being present in the U.S. without inspection and those who commit crimes once present . . . mainstream politicians and fringe hate groups alike define the act of living day-to-day as an undocumented immigrant as an illegal enterprise.”).

162. García Hernández, *supra* note 24, at 1375.

163. *Id.* at 1375–76.

164. See Johnson, *supra* note 65, at 597–98 (discussing more recent campaigns against immigrants accused of participating in terror activities); Juliet P. Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 385 (2006) (“The national focus on terrorism has also had the effect of connecting criminal and immigration law. After the events of September 11, anti-terrorism efforts employed both immigration control and criminal law to reduce terrorist threats.”); Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833 (1997) (detailing the history of INA prohibitions against perceived national security threats).

165. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

166. See *supra* Part II.

security concerns and, among other things, broadened the INA definition of “terrorist activity,” a finding of which could lead to the exclusion, detention, or removal of immigrants.<sup>167</sup> Thus, through this history and focus, the imprisonment of immigrants essentially fulfills an understood depiction of immigrants as criminals.

This perception has been especially strong in response to the mother and children migrants entering the southern U.S. border. Public and political outcry labels immigrants as criminal lawbreakers who will steal free education,<sup>168</sup> public benefits and healthcare,<sup>169</sup> and infest schools and public spaces with disease.<sup>170</sup> In one now infamous 2014 protest, people gathered to shout at buses of immigrant mothers and children who were being transported to a detention facility with cries of: “Nobody wants you. You’re not welcome. Go home.”<sup>171</sup> Even the initial depictions from the Obama Administration of the immigrants evinced a perspective that the mothers and children were lawbreakers with no viable claims for immigration relief and would face expeditious deportation.<sup>172</sup> Yet, initial interviews and reports indicate that at least some of them have legitimate claims for asylum due to their credible fear of persecution should they return to their home countries, including horrific tales of domestic violence, sex-

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167. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections in numerous titles of U.S.C.); Johnson, *supra* note 65, at 596–98 n.79.

168. See, e.g., Katie Pavlich, *Schools to Be Flooded with Illegal Immigrant Children*, TOWNHALL.COM (Aug. 12, 2014), <http://townhall.com/tipsheet/katiepavlich/2014/08/12/schools-to-be-flooded-with-illegal-immigrant-children-n1877702>, archived at <http://perma.unl.edu/4W67-ZSZ9> (“Good news America, tens-of-thousands of children in the country illegally are on their way to a public school near you for a taxpayer funded education and the Department of Education says they’re entitled it.”).

169. See, e.g., Melanie Batley, *Poll: Most Oppose Legal Rights, Benefits for Illegal Immigrants*, NEWSMAX (Oct. 1, 2014), <http://www.newsmax.com/US/Illegal-immigrants-legal-rights-government-benefits-Americans/2014/10/01/id/597981/>, archived at <http://perma.unl.edu/2M5L-AQ53> (noting that 71% of polled Americans believe that undocumented immigrants should not have access to government benefits).

170. See, e.g., *Illegal Alien Minors Spreading TB, Dengue, Swine Flu*, JUDICIAL WATCH (July 3, 2014), <http://www.judicialwatch.org/blog/2014/07/illegal-alien-minors-spreading-tb-ebola-dengue-swine-flu/>, archived at <http://perma.unl.edu/GEA2-AFYX> (“The hordes of illegal immigrant minors entering the U.S. are bringing serious diseases—including swine flu, dengue fever, possibly Ebola virus and tuberculosis—that present a danger to the American public as well as the Border Patrol agents forced to care for the kids, according to a U.S. Congressman who is also a medical doctor.”).

171. See Esther Yu-Hsi Lee, *Protesters Hound Buses of Immigrant Children: ‘Nobody Wants You,’* THINK PROGRESS (July 2, 2014), <http://thinkprogress.org/immigration/2014/07/02/3455678/protesters-block-families-children-buses/>, archived at <http://perma.unl.edu/C2Y5-5K9C>.

172. See *Statement by Secretary Johnson*, *supra* note 30.

ual abuse and assault, and gang violence and intimidation.<sup>173</sup> Preliminary data on the immigration cases for the mothers and children immigrants in 2014 indicate that, when represented by a lawyer, roughly 26% of the cases that went before an immigration official successfully gained some form of relief.<sup>174</sup> By comparison, another 2014 study showed that approximately 73% of the unaccompanied children immigrants (as opposed to those travelling with their parent) who had legal representation were permitted to stay in the United States.<sup>175</sup> Moreover, a recent report by the House Judiciary Committee shows asylum applications from minors have an approval rate of 65%.<sup>176</sup> Thus, the perception that detained mothers and children are law-breakers without any claim to lawful immigration status does not hold true.

Moreover, in contrast to the general ICE Detention Standards,<sup>177</sup> the most recent version of the ICE “Family Residential” Standards for detention (2007) does not have any categorization system for criminal offenders,<sup>178</sup> thereby acknowledging that ICE does not view detained mothers and children as convicted criminals who are high removal priorities.<sup>179</sup> Yet, many mothers and children—regardless of the

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173. See, e.g., *Family Detention Asylum Case Examples*, AM. IMMIGR. LAW. ASSOC. (May 13, 2015), <http://www.aila.org/infonet/family-detention-asylum-grant-examples>, archived at <http://perma.unl.edu/QXX8-3M5D> (detailing relevant stories of some of the case victories litigated by the American Immigration Lawyers Association (AILA) pro bono project on behalf of clients detained in Artesia in which lawyers have won seventeen of the twenty-two asylum cases).

174. In one early analysis of the data, individuals who were not represented by counsel were ordered deported 98.5% of the time; only 1.5% were granted immigration relief. See *Representation Is Key in Immigration Proceedings Involving Women and Children*, TRAC IMMIGRATION (Feb. 18, 2015), <http://trac.syr.edu/immigration/reports/377/>, archived at <http://perma.unl.edu/3A39-YN3Z>. In contrast, if the immigrants had counsel, they achieved relief in 26.3% of the cases. *Id.* Among these 26.3% of cases, “relief was ordered more than twice as often as the immigration judge ruled the government failed to demonstrate a legal basis to order removal.” *Id.* As the report cautions, however, the data is very preliminary and may not be indicative of larger trends. *Id.* Further, because immigration cases may take years to wend through the immigration system, it is not yet possible to gauge the success rates on a large scale.

175. See *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION (Nov. 25, 2014), <http://trac.syr.edu/immigration/reports/371/>, archived at <http://perma.unl.edu/5P57-7ZVX>.

176. See H.R. JUDICIARY COMMITTEE, 113TH CONG., JUDICIARY OBTAINS DATA SHOWING MAJORITY OF CENTRAL AMERICANS’ ASYLUM CLAIMS IMMEDIATELY APPROVED (2014), archived at <http://perma.unl.edu/7ZNH-AM7P>.

177. See *supra* note 150.

178. See *ICE Family Residential Standards*, ICE (2007), <http://www.ice.gov/detention-standards/family-residential> (last visited Feb. 16, 2016), archived at <http://perma.unl.edu/365U-KEPC> (providing links to the manuals, which include no custody categorizations based on security, threat, or criminality).

179. DHS has argued, instead, that employing family detention is a deterrent mechanism for future migration, citing *In re D-J*, 23 I&N Dec. 572 (A.G. 2003). See, e.g.,

strength of an eventual case for immigration relief and the lack of any criminal record—remain imprisoned for many months in detention centers.<sup>180</sup>

Indeed, the vulnerability of the imprisoned mothers and children presents an important example of the parallel between immigrant detention and the more general scheme of mass incarceration in the United States. At their origins, both practices intend to criminalize certain communities.<sup>181</sup> And both practices have succeeded through various means: campaigns implicitly targeting some combination of Blacks, Latina/os and immigrants for societal ills;<sup>182</sup> hyped rhetoric regarding the “wars” on terror and drugs, which in part serve as mere euphemisms for racial, ethnic, immigration-status, and religious profiling;<sup>183</sup> and the proliferation of legal authority and law enforcement

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*Ending the Use of Immigration Detention to Deter Migration*, DETENTION WATCH NETWORK (Apr. 2015), archived at <http://perma.unl.edu/TJQ7-H3RP>. This rationale was criticized by a D.C. District Court in *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015), in which the Court granted an injunction against the continued detention of families.

180. See, e.g., Hylton, *supra* note 1 (presenting cases of women and children facing long detention); MIGRATION AND REFUGEE SERVS./U.S. CONF. OF CATHOLIC BISHOPS, DEMANDING DIGNITY: THE CALL TO END FAMILY DETENTION (2015) [hereinafter DEMANDING DIGNITY], archived at <http://perma.unl.edu/SY78-DB22> (discussing same). Bowing to bipartisan political pressure and a loud public outcry, in June 2015, the Obama Administration announced that it would no longer seek to hold the mothers and children in detention for long periods of time, opting instead to release them to family members in the U.S. and instead rely on other monitoring methods to ensure their presence at later immigration court proceedings. See Preston, *supra* note 139. In January 2016, ICE announced that it would employ a program for detention alternatives for families that otherwise would have been detained. See ICE, FACT SHEET: STAKEHOLDER REFERRALS FOR THE ICE/ERO FAMILY CASE MANAGEMENT PROGRAM (updated Jan. 8, 2016), archived at <http://perma.unl.edu/76V7-VYC5> (describing the Family Case Management Program (FCMP) that will be implemented on January 21, 2016, and utilize “qualified case managers to promote participant compliance with their immigration obligations”).
181. See discussion *supra* section III.A (regarding general criminal law statutes focusing on the imprisonment of the Black community post-Civil Rights Movement); section III.B (regarding the history and political practice of immigrant detention).
182. See *supra* Part III (regarding the history of mass incarceration); ALEXANDER, *supra* note 34, at 43–46 (discussing the strategies of early campaigns to strengthen the criminal law by vilifying communities of color, including Nixon’s famous clandestine remark during his 1968 campaign: “It’s all about those damn Negro-Puerto-Rican groups out there.”); section IV.A (discussing the powerful rhetoric that criminalizes immigrants and blames them for societal problems).
183. See *supra* Part III (regarding the War on Drugs and how it led to increased incarceration rates and more detention of immigrants); see also Sahar F. Aziz, *From the Oppressed to the Terrorist: Muslim-American Women in the Crosshairs of Intersectionality*, 9 HASTINGS RACE & POVERTY L.J. 191, 202 (2012) (discussing the targeting of Muslim people after the September 11 attacks: “The September 11th terrorist attacks recast Islam as a hostile political ideology, as opposed to a bona fide religion. As a result, what would otherwise qualify as ‘religiously driven ra-

practices that result in disproportionate rates of Blacks, Latina/os and immigrants being profiled, arrested, and jailed.<sup>184</sup> Moreover, and as was presented in detail in Part III, the mass incarceration and mass immigrant detention schemes are perpetuated in part by prison industry efforts to exploit societal and political oppressive norms against marginalized people, ultimately resulting in increased profits from imprisoning more people.

But immigrant detention is different than the generalized scheme of mass incarceration in important ways. First, the immigrant participates in the civil justice system in immigration court, governed by civil law and operating under civil procedural rules and safeguards. Although detention—the deprivation of liberty—and deportation are severe penalties that can result from an immigration official’s decision, the immigration system offers fewer protections than the criminal justice regime.<sup>185</sup> As one example, detained immigrants must seek out and pay for their lawyers, even if they are indigent. Not surprisingly, then, many do not have legal representation.<sup>186</sup> In the immigration system, immigrants’ rights to due process and their opportunities for bond are severely limited (if provided at all).<sup>187</sup> Fur-

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cial discrimination’ became legitimate safeguards to protect the homeland—a homeland that Muslims find increasingly antagonistic to their presence, despite their status as United States citizens.”)

184. See ALEXANDER, *supra* note 34, at 105–33 (discussing (1) how statutory, constitutional, and common law considerations all play a role in the focused policing, prosecution, and imprisonment of minority communities, including, for example, through codified categorization of severity of drug arrests; (2) Supreme Court jurisprudence upholding police practices of racial profiling and racially homogeneous jury composition; and (3) the reality of police discretion in targeted arrests); Johnson, *supra* note 65, at 589 (noting the parallels of the same type of targeting of Black communities directed at immigrants).
185. See, e.g., Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (describing the similarities but critical asymmetries between criminal justice norms and the immigration law system). “[F]eatures of the criminal justice model that can roughly be classified as enforcement have indeed been imported” into the immigration system. *Id.* However, features “that relate to adjudication—in particular, the bundle of procedural rights recognized in criminal cases—have been consciously rejected.” *Id.* Thus, to the extent that immigration law builds or imports criminal justice concepts, Legomsky argues that “immigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model while rejecting the criminal adjudication model in favor of a civil regulatory regime.” *Id.* at 469.
186. See Mark Noferi, *Deportation Without Representation: Immigrants Who Are Detained Should Have a Right to a Lawyer*, SLATE (May 15, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/05/the\\_immigration\\_bill\\_should\\_include\\_the\\_right\\_to\\_a\\_lawyer.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/the_immigration_bill_should_include_the_right_to_a_lawyer.html), archived at <http://perma.unl.edu/6X2N-ENTS>.
187. See, e.g., Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1301–04 (2010) (noting the emergence of a criminal immigration system that ensnares immigrants but does not provide them constitutional safeguards or afford

ther, there is only a limited right to judicial review of a governmental officer's decision to detain.<sup>188</sup> More practically, immigrants—as non-citizens—do not enjoy any metaphorical or literal voice to change the system, as they are unable to vote and often have no support system that can advocate on their behalf.<sup>189</sup> Instead, immigrants often do not speak English (or do not speak it well enough to adequately represent themselves in an adversarial court setting) and have few, if any, economic resources.<sup>190</sup> In this sense, the immigrant as a non-citizen colors the perceived identity as criminal in an even more severe way than imprisoned U.S. citizens. The following section elaborates on how non-citizen identity serves as another oppressive measure that contributes to the successful detention scheme.

### B. The Immigrant Is Not a Citizen

The identity of U.S. citizen and all that it entails elucidates the contrast with identity as non-citizen. At bottom, citizenship affords a political and social voice—the citizen can vote<sup>191</sup> and has the right to

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them the benefit of typical criminal adjudicatory processes, and using the 2008 Postville, Iowa ICE raids as one case study); Johnson, *supra* note 65, at 589 (noting the severe effects on immigrants caught up in the U.S.' "wars" on drugs and terror, and stating: "[N]oncitizens, with fewer legal protections under the U.S. Constitution and laws than American citizens, have proven to be the most vulnerable victims in the war on drugs and the war on terror. Unlike U.S. citizens, for example, noncitizens in both metaphorical wars can be subject to criminal sanctions and deported or excluded from the United States. . . . Ultimately, many of those directly affected had nothing to do with drugs or terrorism but simply constitute collateral human damage in the 'wars' on those two evils.").

188. See, e.g., Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL'Y REV. 429, 437–38 (2011) (discussing the ways in which detained immigrants are treated differently than those held in the general prison populations for criminal convictions: "There is neither automatic judicial oversight of immigration detention centers, nor independent review of ICE decisions to detain arriving asylum seekers. Unlike many prisoners, non-U.S. citizens detained by ICE are practically denied the chance at judicial review of their detention.").

189. See *infra* section IV.B.

190. See, e.g., COLUMBIA L. SCH. HUMAN RTS. INST. & NORTHEASTERN U. SCH. OF L. PROGRAM ON HUMAN RTS. & THE GLOBAL ECON., EQUAL ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES, INCLUDING IMMIGRATION PROCEEDINGS: RESPONSE TO THE SEVENTH TO NINTH PERIODIC REPORTS OF THE UNITED STATES TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (2014), archived at <http://perma.unl.edu/AYC3-ERDS> (acknowledging that Latina/o immigrants, who are more likely to be targeted for removal proceedings, are more likely to be poor, and therefore more likely to proceed without counsel in their immigration cases).

191. Interestingly, a citizen can lose his or her right to vote if convicted of a felony. See THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (Apr. 2014), archived at <http://perma.unl.edu/TEA3-P64X> ("Since the founding of the country, most states in the U.S. have enacted laws disenfranchising people currently or previously having been convicted of a felony."). In



speak out against the government. Citizenship status affords the holder assurance that (s)he is a lifelong member of the polity and, even if (s)he commits a criminal infraction, (s)he still cannot be excluded from the country. Thus, citizenship means freedom from the most basic worries about personal security and loss of family, property, or liberty.

The status as non-citizen, then, represents the opposite.<sup>192</sup> As Hiroshi Motomura concludes:

[T]he basic function of citizenship law is to decide that some individuals belong to society as full and formal members, while others are noncitizens and thus outsiders in some meaningful respects. Immigration law keeps some noncitizens out of the United States. It admits others but might later provide for their deportation. Under both U.S. and international law, a U.S. citizen must be allowed into the United States, and citizens cannot be deported. By regulating noncitizens but not citizens, immigration and citizenship laws inherently discriminate on the basis of citizenship.<sup>193</sup>

Thus, immigration and citizenship laws create the hierarchy that places citizens at top and outsider non-citizens at bottom.<sup>194</sup> And Congress creates and drafts the laws defining the contours of this membership. Through the constitutional mandates regarding birthright citizenship and as implemented by the complex network of laws, regulations, and policies that delineate the rules and procedures of birthright citizenship and of naturalization, Congress remains the gatekeeper. Indeed, absent a connection through a U.S. citizen parent,<sup>195</sup> an immigrant can achieve citizenship status only through naturalization, the process for which is codified in the INA.<sup>196</sup>

This legal and political hierarchy has social consequences, too. A dominant societal rhetoric surrounding topics of immigration reform and the influx and presence of undocumented immigrants in the United States focuses on the second-class status of non-citizens and

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this context, then, identity as criminal and the power of criminality outweighs this deeply rooted facet of citizenship identity.

192. The author has written about how the immigrant identity as non-citizen is one factor of political subordination that leads to stymied legislative reform because laws that benefit immigrants are deemed less important than laws that serve to benefit U.S. citizens, who are perceived as more worthy of legislative protections. See Olivares, *supra* note 24, at 277–82.

193. Hiroshi Motomura, *Who Belongs? Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 363 (2012).

194. See Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 451 n.10, 461–62, 489–90 (2000) (arguing that the concept of citizenship is always one of paramount importance that performs an enormous legitimizing function and that the word “citizenship” “communicates the highest political value”); see also Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 567–68 (2006) (articulating that while the grant of citizenship is significant because it guarantees certain constitutional rights, its real importance lies in its identification of the individual as “an equal member of the political community”).

195. INA § 301(c)–(h), 8 U.S.C. § 1401(c)–(h) (1994); *id.* § 309, 8 U.S.C. § 1409 (1988).

196. *Id.* §§ 310–47, 8 U.S.C. § 1458.

the prominence of protecting or securing the citizenship from their influence. Public outcries about defending “American” jobs from immigrant workers—both unskilled labor and more highly skilled employment—pervade the media.<sup>197</sup> Similarly, and despite the fact that undocumented immigrants are ineligible for most public benefits,<sup>198</sup> depictions of immigrants abusing the U.S. public welfare systems abound.<sup>199</sup> These anti-immigrant attitudes also embody xenophobic and nativist roots that influence the social and political language and narrative, ultimately informing legislative outcomes.

For example, as D. Carolina Nuñez explores in a linguistic analytic study, the connotations of “alien,” “immigrant,” and “citizen” “suggest a hierarchical understanding of membership and status in American English, where citizens rise to the top and aliens fall to the bottom of the status hierarchy.”<sup>200</sup> Based on her large-scale study of word usage in contemporary media, academic text, and other genres of literature, a clear narrative emerges:

[A]liens are non-human invaders or, at best, criminals. Immigrants are persons, but they are still outside the majority. They are ethnically different, poor, new, and otherwise not full members of the larger community. Citizens wear the crown in the membership hierarchy: they are ‘upstanding’ and ‘law-abiding’ members of the community.<sup>201</sup>

Public portrayals of the non-citizen easily equate him or her with the “illegal” or “illegal alien,” a pejorative term that serves to dehumanize

197. See, e.g., Karen Ziegler & Steven A. Camarota, *Despite Recent Job Growth, Native Employment Still Below 2007: BLS Data Shows All Net Employment Growth Has Gone to Immigrants*, CTR. FOR IMMIGRANTS STUD. (Dec. 2014), <http://cis.org/despite-recent-job-growth-native-employment-still-below-2007>, archived at <http://perma.unl.edu/28TD-6J5E>.

198. See *Overview of Immigrant Eligibility for Federal Programs*, NAT’L IMMGR. L. CTR., [http://www.nilc.org/table\\_ovrw\\_fedprogs.html](http://www.nilc.org/table_ovrw_fedprogs.html) (last updated Oct. 2011), archived at <http://perma.unl.edu/G44A-JSH6>.

199. See, e.g., *The O’Reilly Factor: Talking Points Memo* (Fox News television broadcast July 8, 2014) (discussing immigrants from El Salvador, Honduras, and Guatemala, O’Reilly commented: “[M]ore than 50% of immigrants from those three countries use at least one major welfare program once they get here. So the Obama Administration is allowing millions of people to come in without the skills necessary . . . to compete in the marketplace. That’s creating an underclass . . . .”); see also *Most Illegal Immigrant Families Collect Welfare*, JUDICIAL WATCH (Apr. 5, 2011), <http://www.judicialwatch.org/blog/2011/04/most-illegal-immigrant-families-collect-welfare/>, archived at <http://perma.unl.edu/Z7HM-VFXC> (“Surprise, surprise: Census Bureau data reveals that most U.S. families headed by illegal immigrants use taxpayer-funded welfare programs on behalf of their American-born anchor babies.”).

200. Nuñez, *supra* note 8, at 1550. For her research, Nuñez undertook a corpus linguistic study, i.e., “the study of large samples (‘corpora’) of natural language to identify patterns and trends in language,” using the Corpus of Contemporary American English to study the usage and context of “alien,” “immigrant,” and “citizen.” *Id.* at 1520.

201. *Id.* at 1550.

and ostracize immigrants from the citizenship.<sup>202</sup> In fact, by shortening the noun-modifying adjective dyad to just the adjective as noun—in other words, the “illegal alien” becomes the “illegal”—personhood is completely erased,<sup>203</sup> ultimately converting the immigrant to a thing, easily commodified as a good or exploited for labor or service.

To be sure, this discussion regarding the dichotomy between citizen and non-citizen is not to suggest that the distinction should be meaningless. Hiroshi Motomura asserts that discrimination based on citizenship is inherent in a system of citizenship, which serves in part to foster civic solidarity and to bolster social and political order.<sup>204</sup> Yet, as Motomura continues, the integration of immigrants within the spectrum of citizenship—as future citizens—promotes ideals of equality while preserving this important national and civic solidarity.<sup>205</sup> Thus, the incorporation of immigrants into a broader conception of citizenship is critical to a more just immigration system.

But such incorporation may be little more than an ideal, especially as the reality of immigrant identity in the United States is indeed marked by factors of inequality as compared with U.S. citizens. Immigrants in the United States experience high rates of poverty and food insecurity and low rates of educational attainment.<sup>206</sup> Many do not speak or write English fluently<sup>207</sup> and, if employed, often have low-wage jobs and little job security.<sup>208</sup> Their position as an economic, educational, and social underclass exacerbates the political subordination they experience and eases the way for political and corporate exploitation.

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202. See Painter, *supra* note 8, at 667.

203. *Id.* at 667–68 (describing the effect of this grammatical shorthand: “This shorthand phrase allows an adjective embodying the mask of illegality to become a noun describing the person, conveying the fact that our society deems other aspects of personhood in this context to be irrelevant. A different and more specific noun is ordinarily used to describe an object illegally imported into the jurisdiction or illegally manufactured in the jurisdiction, such as an illegal drug or an illegal rendition of a copyrighted movie, but an illegal person can simply be referred to as an ‘illegal.’”).

204. See Motomura, *supra* note 193, at 355 (describing the civic ordering benefits of national borders defining “citizenship”).

205. *Id.* at 356 (detailing the ways in which immigrants should be conceived of as future citizens (i.e., “Americans in waiting”) such that the concept of citizenship remains robust while also inclusive of principles of equality).

206. See, e.g., Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrant and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 26, 2015), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>, archived at <http://perma.unl.edu/J7AQ-MHVJ>.

207. See KATHERINE E. GARRETT, ROBERT WOOD JOHNSON FOUND., *LIVING IN AMERICA: CHALLENGES FACING NEW IMMIGRANTS AND REFUGEES* 5 (2006), archived at <http://perma.unl.edu/8AP6-U927>.

208. *Id.* at 9.

In this regard, it is striking to examine the dehumanizing and profit-centered language used by corporate prison entities in discussing their detention practices. In one infamous example from the earliest days of the private prison industry, one of the founders of CCA boasted of their operational goals, declaring that the prison business was “just like you were selling cars, or real estate, or hamburgers.”<sup>209</sup> More recently, in its 2014 disclosure reporting form to the Securities and Exchange Commission, CCA detailed its involvement with the family residential centers housing mother and children immigrants and noted that the operation of these facilities was more costly than general prisons and had unique management risks, stating:

Providing this type of residential service subjects us to new risks and uncertainties that could materially adversely affect our business, financial condition, or results of operations. For instance, the new contract mandates offender to staff ratios that are higher than our typical contract, requires services unique to this contract (e.g. child care and primary education services), and limits the use of security protocols and techniques typically utilized in correctional and detention settings. These operational risks and others associated with privately managing this type of residential facility could result in higher costs associated with staffing and lead to increased litigation.<sup>210</sup>

The disclosure continues and discusses the recent lawsuit against DHS regarding the continued detention of mothers and children for the DHS-stated purpose of serving as a deterrent for future migration.<sup>211</sup> The District Court for the District of Columbia granted the plaintiffs’ injunction, holding that the government may not rely on deterrence as a reason to continue to hold the immigrants.<sup>212</sup> The CCA disclosure mentions the lawsuit and how it represents a potentially risky future for the company:

[I]t is possible that this or other lawsuits could adversely affect the contract, including changes to the contract that are less beneficial to us or which impose costs (such as to repurpose the facility for other detainees), or an outright termination of the contract. Any adverse decision with regard to this contract could materially affect our financial condition and results of operations.<sup>213</sup>

The immigrant, then, is simply a commodity, representing profits to be gained or lost depending on whether or not governmental policy shifts towards alternatives to detention rather than continued imprisonment. Even with the increased numbers of mothers and children immigrants, which ultimately sparked a measure of public and political outcry, the rhetoric on their illegality and lack of citizenship dehumanizes them, with one newspaper headline stating, for example:

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209. DIRTY THIRTY, *supra* note 101, at 1.

210. Corrections Corp. of Am., Annual Report (form 10-K) (Feb. 25, 2015), *archived at* <http://perma.unl.edu/8DVM-FCZW>

211. *See id.* (discussing *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015)).

212. *See Johnson*, 80 F. Supp. 3d 164.

213. *See Annual Report*, *supra* note 210.

“Flood of Illegal Immigrants to Pour into [New York City] Schools.”<sup>214</sup> Evoking images of raging, uncontained waters rather than schoolchildren seeking an education, the media perception fuels and is fueled by dominant public narratives. Thus, by casting immigrants as outsiders and outcasts that are affiliated with lawlessness, physical and mental feebleness, and immoral or depraved conduct, laws, and policies that target immigrants (like the INA provisions on detention) or treat them in an inhumane manner (like the corporatization of detention facilities) actually match the societal perception.

As Nuñez writes regarding the immigrant alien imagery:

Such imagery threatens the humanity with which we treat noncitizens. “By distinguishing between aliens and persons, society is able to reconcile the disparate legal and social treatment afforded the two groups.” It is much more palatable to deny rights to an “alien” than it is to deny rights to a “person.” . . . In short, an “alien” does not belong. She is not a member, and she has few rights.<sup>215</sup>

Adding this to the immigrant’s literal political silence by disenfranchisement and other oppressive forces due to perceived criminality and racial subordination, the law’s response to detain them is unsurprising. With the additional presence of corporate influence benefiting from their detention, the path to higher rates of incarceration is smoothed.

### C. The Immigrant Is a Person of Color

Racial and ethnic discriminatory practices that have prevented immigrants of color from achieving access to American society have also served to create a system of oppression. Indeed, inextricably intertwined with identities of criminality and non-citizen, the identity as a person of color serves as a powerful subordinating force that further allows for both the individual’s continued informal marginalization and formalized incarceration, perpetuated by targeted political and corporate influences.

To be sure, the history of immigration law and policy is a history of racial and ethnic discrimination.<sup>216</sup> At its earliest, federal immigration law developed in part as a reaction to Chinese immigration, with the intent to stop the flow of Chinese people into the United States. In the 1889 case of *Chae Chan Ping v. United States*,<sup>217</sup> the U.S. Su-

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214. Susan Edelman & Isabel Vincent, *Flood of Illegal Immigrants to Pour into NYC Schools*, N.Y. POST (Nov. 23, 2014), <http://nypost.com/2014/11/23/city-schools-warned-of-plans-to-enroll-2350-migrant-children/>, archived at <http://perma.unl.edu/NK38-VZK3>.

215. Nuñez, *supra* note 8, at 1555 (quoting Johnson, *supra* note 8, at 273).

216. The author has written about the discriminatory history of immigration law along racial and ethnic lines. See Olivares, *supra* note 24, at 264–70. This section uses information from and builds upon that previous work.

217. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

preme Court upheld congressional plenary power to restrict the immigration of Chinese immigrants to the United States, echoing much of the same tenor as in present-day restrictionist narratives, though with obvious and explicit racist goals<sup>218</sup>—as opposed to the current implicit racism pervading the anti-immigrant rhetoric. Chinese immigrants were initially welcomed in the west coast, or at least tolerated, as they provided cheap or indentured labor for the railroad and gold mining industries.<sup>219</sup> But as their numbers increased, and as they began to compete with U.S. citizens for jobs and assert themselves more permanently in U.S. cities and communities, “the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace.”<sup>220</sup> Moreover, the Court continued in *Chae Chan Ping*:

The differences of race added greatly to the difficulties of the situation. . . . [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living.<sup>221</sup>

Thus, the Court upheld the federal Chinese Exclusion Act, in part because the “presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; . . . their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization.”<sup>222</sup>

Though perhaps shocking in comparison to contemporary mores, this formal racism in immigration law continued throughout the nineteenth and into the twentieth centuries, targeting Asian, Latina/o, and African immigrants and other members of the “Black race,” while protecting immigration from western and northern Europe.<sup>223</sup> As one

218. *See id.*

219. *See id.*; *see also* Lakshmi Gandhi, *A History of Indentured Labor Gives ‘Coolie’ Its Stings*, NPR (Nov. 25, 2013), <http://www.npr.org/sections/codeswitch/2013/11/25/247166284/a-history-of-indentured-labor-gives-coolie-its-sting>, *archived at* <http://perma.unl.edu/6LZC-29CR> (explaining the origin of the pejorative term “coolie” to denote Chinese immigrants employed in the American railroad industry); *Immigration, Railroads, and the West*, HARVARD U. LIBR. OPEN COLLECTIONS PROGRAM, <http://ocp.hul.harvard.edu/immigration/railroads.html> (last visited Feb. 16, 2016), *archived at* <http://perma.unl.edu/P5J7-KYDV> (describing immigrants’ work on American railroads between 1789 and 1930).

220. *See Chae Chan Ping*, 130 U.S. at 595.

221. *Id.*; *see also* Motomura, *supra* note 193, at 368–69 (noting one effect of *Chae Chan Ping* on later immigration law and policy: “One common justification offered for such laws was these groups’ alleged unwillingness or inability to integrate into U.S. society. . . . This attitude toward integration was evident in various racial restrictions embedded in citizenship laws, which only became expressly race-neutral in 1952.”).

222. *Chae Chan Ping*, 130 U.S. at 595.

223. *See* IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 27 (10th ed. 2006) (noting the passage of the Chinese Exclusion Act in 1882, the creation of the “Asiatic barred zone” in 1917, a Senate bill excluding “all members

example, intending to stymie the immigration of people of color who had maintained relatively high levels of immigration in the early 1900s, the Immigration Act of 1924 created a national origins quota system that restricted the annual immigration of people from any particular country to no more than 2% of the number of noncitizens from that country who were represented in the 1890 U.S. census.<sup>224</sup> The quota intended to “confine immigration as much as possible to western and northern European stock”<sup>225</sup> and to slow down the immigration from southern and eastern European countries.

The explicit preference for northern European and other white immigrants continued through much of the twentieth century.<sup>226</sup> With the belief that white immigrants would more easily assimilate into a dominant “American” culture,<sup>227</sup> policies regarding immigration and naturalization were centered on prioritizing white people and ostracizing immigrants of color.<sup>228</sup> These pervasive efforts to keep out immigrants of color manifested in various ways, including the targeting of Latina/o immigrants—especially Mexicans—who constitute the majority of the Latina/o immigrants.<sup>229</sup> As a historical example, during the Great Depression, Mexican immigrants, many of whom had come to the United States to work in agricultural and other manual labor

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of the African or black race,” and a quota system designed to limit immigration to western and northern Europeans); Motomura, *supra* note 193, at 368 (similarly discussing the racialized history of the laws); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1120, 1127–30 (1998).

224. See Johnson, *supra* note 223, at 1127–28 (recognizing that Congress passed the quota system after passing legislation requiring a literacy test that excluded all illiterate aliens over the age of sixteen).

225. LÓPEZ, *supra* note 223, at 27 (internal quotation marks omitted).

226. See Motomura, *supra* note 193, at 369–71; Johnson, *supra* note 223, at 1129–30 (recognizing that the national origins quota system was designed to preserve the traditional cultural and sociological balance of the United States); LÓPEZ, *supra* note 223, at 27 (stating that the restriction on immigration to the United States on the basis of race lasted from 1880 until 1965).

227. See Motomura, *supra* note 193, at 369 (discussing the connection between racial restrictions and naturalization and the ways in which these restrictions evinced a political understanding that white immigrants would easily assimilate, integrate, and ultimately choose to be U.S. citizens).

228. See *id.*; Johnson, *supra* note 223; LÓPEZ, *supra* note 223.

229. Immigrants from Mexico have long constituted the largest group of Latina/o immigrants in the United States, comprising 28% of all immigrants in 2013—far above El Salvador, the nation with the second largest total group of Latina/o immigrants in the United States at 3%. See *Largest U.S. Immigrant Groups Over Time, 1960–Present*, MIGRATION POL’Y INST., <http://www.migrationpolicy.org/programs/data-hub/charts/largest-immigrant-groups-over-time> (last visited Oct. 12, 2015), archived at <http://perma.unl.edu/4NFQ-Y8XR> (presenting the U.S. immigrant population as a moving pie chart relevant to the country of origin up to 2013).

jobs left vacant by World War I, were deported in record numbers.<sup>230</sup> Having received temporary lawful status for the sole purpose of providing cheap labor for the United States through the Bracero program, which operated from 1924 until its formal end in 1964, millions of Mexican immigrants and others of Mexican ancestry were forcibly removed at various points during its operation and at the program's end.<sup>231</sup> Many of those deported were U.S. citizens.<sup>232</sup>

By the time the Immigration Act of 1965 finally repealed the national origin quota system (which had effectively prohibited the immigration of people of color) and replaced the provisions with race-neutral language,<sup>233</sup> immigration law and policy had condemned immigrants of color in such oppressive ways that the discriminatory effects continued.<sup>234</sup> Moreover, the end of the national origin quota changed the demographic makeup, most notably by increasing the

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230. See Motomura, *supra* note 193, at 370; S. POVERTY L. CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES (2013 ed.), archived at <http://perma.unl.edu/RM8T-MRAC> (explaining that World War I brought migration from Europe largely to a halt and created a greater demand for Mexican labor, and with the advent of the Great Depression Mexican workers were seen as a threat to American jobs, leading to their forcible deportation).

231. LÓPEZ, *supra* note 223, at 27 (citing U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 10 (1980)) (suggesting that the mass deportation of approximately 500,000 Mexican immigrants was spurred by the economic distress of the Great Depression); see also Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 2, 4 (2005) (noting that up to 1 million people were removed); Vázquez, *supra* note 115, at 621–22 (discussing the repatriation of Mexican immigrants and their forcible removal during "Operation Wetback," which began in 1954). Vázquez also writes about the racialized and oppressive mechanisms at work in the temporary immigration labor provisions that targeted Mexican immigrants during this time:

Temporary worker programs ensured that Latinos remained temporary and marginalized . . . . Latinos were tied to their employer, they were tied to a specific occupation, wages were low, and they could not remain permanently in the United States. Furthermore, they could not bring their spouse or children as such actions might cause them to try to reside permanently in the country.

*Id.* at 620.

232. See LÓPEZ, *supra* note 223, at 27; Johnson, *supra* note 231, at 4.

233. INA, Amendments, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.); see also Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 2–3 (2009) [hereinafter *Race and Class*] (adding that the 1960s Civil Rights Movement led to the elimination of the quota system in the 1965 INA amendments); Johnson, *supra* note 223, at 1131 (same).

234. See, e.g., *Race and Class*, *supra* note 233, at 2 (exploring the historical connections between race and poverty in anti-immigrant legislation, which continued to oppress immigrants after the repeal of the quota system: "At bottom, U.S. immigration law historically has operated—and continues to operate—to prevent many poor and working noncitizens of color from migrating to, and harshly treating those living in, the United States.").



numbers of Asian and Latina/o immigrants.<sup>235</sup> At that point, then—the formalized racism of immigration law having been dismantled—the oppressive mechanisms became more implicit and facially neutral. Yolanda Vázquez asserts, for example, that Congress continues to exercise its plenary power to uphold racially discriminatory immigration laws “on the basis of national security and absolute sovereign power.”<sup>236</sup> Similarly, as proxies to racially motivated discrimination, other laws and policy provisions credit the protection of American jobs from immigrant competition and of American cities and towns from supposed alien criminal threats.

Examples of these laws and policies abound both in the historical record and in contemporary times. For example, the Immigration and Nationality Act of 1965 restricted the number of people who could migrate from the Western Hemisphere to only 120,000 individuals per year.<sup>237</sup> The emphasis of this particular limitation was purposeful as “part of a compromise to those who feared a drastic upswing in Latin American immigration. Consequently, Congress coupled more generous treatment of those outside of the Western Hemisphere with less generous treatment of Latin Americans.”<sup>238</sup> Moreover, the Immigration Act of 1965 imposed an annual immigration limit of 20,000 people from each foreign country,<sup>239</sup> which detrimentally and disparately affected immigrants of color from certain developing countries, like Mexico, the Philippines, and India.<sup>240</sup> As the ceiling pertained to Mexicans, for example, the 20,000-person limit worked to drastically reduce Mexican immigration.<sup>241</sup> Moreover, the fervor against

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235. See Motomura, *supra* note 193, at 370; Johnson, *supra* note 8, at 282.

236. Vázquez, *supra* note 115, at 626.

237. Pub. L. No. 89-236, 79 Stat. 921 (repealed 1976); see also Johnson, *supra* note 223, at 1131 (noting the immigration limits on peoples from the Western Hemisphere after Congress dissolved immigration barriers based on race).

238. Johnson, *supra* note 223, at 1132; see also Vázquez, *supra* note 115, at 631 (describing how the Immigration Act of 1965 curtailed legal immigration from Latin American countries).

239. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, sec. 2, 79 Stat. 911, 911–12 (codified as amended at INA § 202(a), 8 U.S.C. § 1152(a) (1986)); see also Johnson, *supra* note 223, at 1333 (noting the various caps Congress has placed on immigration from the developing world). The 1990 Immigration Act altered this quota and instituted a world-wide ceiling of 675,000 immigrants, while also changing the per-country limitations. See Michael J. Greenwood & Fred A. Ziel, *The Impact of the Immigration Act of 1990 on U.S. Immigration*, U.C. DAVIS, <http://migration.ucdavis.edu/mn/cir/greenwood/combined.htm> (last visited Aug. 5, 2015), archived at <http://perma.unl.edu/PQ2X-H4MK>. Moreover, the Western Hemisphere restrictions were repealed by the INA amendments of 1976. INA Amendments of 1976, Pub. L. No. 94-571, sec. 2, 90 Stat. 2703, 2703 (codified as amended at INA § 201(a), 8 U.S.C. § 1151(a) (2009)).

240. See Johnson, *supra* note 223, at 1333.

241. See Vázquez, *supra* note 115, at 631 nn.195–96 (citing MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 261 (2004)) (explaining the shift in immigration rates after the 1976 INA amendments: “[I]n the

Latina/o immigration in the 1960s and into the 1970s (and particularly directed still at Mexicans at this point) was emphasized by court decisions, which constitutionally upheld immigration checkpoint stops that target people based on their apparent Mexican ancestry,<sup>242</sup> and a state law provision targeting the employment of undocumented Mexicans.<sup>243</sup> As Mexican migration continued, Congress responded with the Immigration Control and Reform Act of 1986 (IRCA), which, among other provisions, included sanctions against employers for hiring undocumented workers<sup>244</sup> and disproportionately affected Mexican immigrants.<sup>245</sup>

More recently, immigration regulations implicitly targeting people of color include federal enforcement efforts like Secure Communities,<sup>246</sup> the purpose of which was to join local law enforcement agencies with ICE to catch and deport criminal aliens.<sup>247</sup> State efforts to

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early 1960s, 200,000 Mexicans were admitted under the Bracero program and 35,000 permanent residents each year.”).

242. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976). In his dissent, Justice Brennan argued the illogic of the majority opinion. *Id.* at 572 (Brennan, J., dissenting) (“The process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same ‘suspicious’ physical and grooming characteristics of illegal Mexican aliens.”).
243. See *De Canas v. Bica*, 424 U.S. 351, 357 (1976) (noting the deleterious effects of illegal immigration on working conditions and competitive markets for Americans and the special problem of California, which enacted the employment provision: “These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico.”).
244. See Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360–74 (codified as amended at 8 U.S.C. § 1324a (2012)); see also Leticia R. Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. ST. L.J. 305, 330 (2012) (outlining the discriminatory immigration-targeted provisions of this time period and how the implementation of such laws, including IRCA, bolstered the “illegal alien” narrative: “With more than a million workers of Mexican national origin working [in] the United States, the status of ‘illegal’ was inevitable.”).
245. See Saucedo, *supra* note 244, at 330.
246. See Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2050 (2007) (appropriating \$200 million to the Department of Homeland Security to enhance efforts to remove aliens from the United States after they are deemed deportable for being convicted of a crime or sentenced to imprisonment).
247. See *Secure Communities: Get the Facts*, ICE, <http://www.ice.gov/secure-communities#a1> (last visited July 30, 2015), archived at <http://perma.unl.edu/SF5B-R48U> (attempting to resolve “confusion” about the mandatory nature of the Secure Communities program by clarifying that jurisdictions “cannot opt out” of the program); see also Press Release, U.S. Dep’t of Homeland Sec., *ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide*, ICE (Apr. 14, 2008), <http://www.ice.gov/news/releases/0804/080414washington.htm>, archived at <http://perma.unl.edu/8A2J-M52U> (adding that one of the most important features of the plan is the distribution of integration technology that will link local law enforcement agencies to DHS and Federal Bureau of Investigations (FBI) biometric databases).

curtail immigration, like the now largely defunct S.B. 1070 Arizona law<sup>248</sup>—or the perceived ill effects of immigrants on their states—have also served as a facially neutral proxy to profile immigrants of color, particularly Latina/os. Using the cloak of securing the borders against terrorist threats, efforts like Secure Communities and S.B. 1070 disproportionately targeted immigrants of color for arrest, detention, and deportation.<sup>249</sup> Indeed, many decried these efforts, asserting that the measures unconstitutionally deputize local law enforcement regimes with federal immigration authority and serve as a proxy for racial profiling practices.<sup>250</sup> Advocates filed lawsuits and utilized other forms of advocacy to eventually discontinue and revamp Secure Communities and to dismantle most parts of S.B. 1070.<sup>251</sup> Yet, these historical and contemporary efforts highlight the fact that, although neither federal nor local laws explicitly and formally include racially or ethnocentrically prohibitive provisions, the practical effect of law and policy is to continue to disparately oppress immigrants of color and, particularly, Latina/os.

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248. See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

249. See Vázquez, *supra* note 115, at 650 (discussing how Secure Communities targeted a disproportionate number of Latino men); Ramos, *supra* note 130, at 341 (concluding that communities intimidate residents with the Secure Communities program by placing people typically unnoticed by ICE in removal proceedings, which creates a fearful group of second-class citizens).

250. See, e.g., Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2 (2011) (asserting that S.B. 1070 was the legislature's attempt to rid the state of people who are or appear to be Latino); Ramos, *supra* note 130, at 329 (proffering that the goal of Secure Communities is to propagate racial bias through a flawed correlation of people of Mexican descent with undocumented immigrants); Daniel Denvir, *The ICE Man: Obama's Backdoor Arizona-Style Program*, SALON (July 17, 2010, 7:01 AM), [http://www.salon.com/2010/07/16/immigration\\_safe\\_communities\\_obama](http://www.salon.com/2010/07/16/immigration_safe_communities_obama), archived at <http://perma.unl.edu/SG5W-P3Q9> (pointing out the contradiction between the Obama administration's condemnation of Arizona's SB 1070 with its support for the federal Secure Communities program, which in some cases has had the same effect of racializing and criminalizing immigrants as did the Arizona bill).

251. As discussed above, DHS terminated the Secure Communities program in November 2014 and replaced it with the Priority Enforcement Program (PEP). See *supra* note 130. As PEP was unveiled, however, some noted that the differences between it and Secure Communities were small. See, e.g., Jon Greenberg, *Fox News Host: Obama Ended Program for Tracking Undocumented Immigrants*, TAMPA BAY TIMES PUNDIT FACT (July 8, 2015), <http://www.politifact.com/punditfact/statements/2015/jul/08/harris-faulkner/fox-news-host-obama-ended-program-tracking-undocum/>, archived at <http://perma.unl.edu/59DU-YR5Y> (noting that the main difference between PEP and Secure Communities is that PEP is more about conviction than arrest); see also *Arizona v. United States*, 132 S. Ct. 2492 (2012) (enjoining as federally preempted all provisions of Arizona Law S.B. 1070 except the provision that allowed for officers to check the immigration status of arrestees).

Nowhere is this oppressive regime more evident than in the deportation and detention rates of Latina/o immigrants. In 2014, 96.7% of the immigrants deported were from just eight Latin American countries: (1) Mexico (56% of the total removals); (2) Guatemala; (3) Honduras; (4) El Salvador; (5) the Dominican Republic; (6) Ecuador; (7) Nicaragua; and (8) Colombia.<sup>252</sup> Indeed, the next two countries whose citizens were most affected by ICE removal have populations of people predominantly of color: Jamaica and Brazil.<sup>253</sup> Interestingly, DHS did not document in its 2014 Enforcement Report the demographics of the *detained* immigrant populations. The 2013 ICE Enforcement Report, however, notes that of the 440,557 immigrants detained in 2013, 90% of them were from just four Latin-American countries: Mexico (56%), Guatemala, Honduras, and El Salvador.<sup>254</sup> Geographic proximity and poverty rates in these countries certainly play a large role in who initially migrates to the United States—after all, general demographic data from 2012 suggests that 81% of undocumented immigrants hail from those same four countries, with Mexico accounting for a majority of that percentage.<sup>255</sup>

Yet, as detailed above, the historical and contemporary statutory and political obstacles to lawful migration for poor immigrants of color from these countries, and the enforcement mechanisms that uphold a system targeting these same populations certainly drive the overwhelming numbers of Latina/o deportation and detention (96% and 90%, respectively). Moreover, and as also explored above, the connections between unauthorized immigrant presence and criminality—which, according to DHS, is one of the priority areas for detention and deportation policy<sup>256</sup>—have not been established.<sup>257</sup> Finally, it bears repeating that the vast majority of those detained and eventually re-

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252. See 2014 ICE ENFORCEMENT REPORT, *supra* note 50, at 9.

253. See *id.*; see also *The World Factbook: Ethnic Groups*, CENT. INTELLIGENCE AGENCY, <http://www.cia.gov/library/publications/the-world-factbook/fields/2075.html> (last visited Oct. 15, 2015), *archived at* <http://perma.unl.edu/A7U3-P3KQ> (noting the predominance of people of color in Jamaica and Brazil).

254. See Simanski, *supra* note 46, at 6.

255. See BRYAN BAKER & NANCY RYTINA, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR. STATS., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, at 5 (Mar. 2013), *archived at* <http://perma.unl.edu/CT3V-FNYC> (estimating that 81% of the undocumented immigrant population in the United States were from Mexico, El Salvador, Guatemala, and Honduras; 59% were from Mexico); see also *Immigration Detention: Behind the Record Numbers*, CTR. FOR MIGRATION STUD. (Feb. 13, 2014), <http://cmsny.org/immigration-detention-behind-the-record-numbers/>, *archived at* <http://perma.unl.edu/UM4Q-4W2R> (noting the large percentage of detainees coming from the same four Central American countries).

256. See ICE ENFORCEMENT REPORT 2014, *supra* note 50, at 5.

257. See *supra* section IV.A; see also Vázquez, *supra* note 115, at 605 (discussing how crime rates are actually decreasing while rates of immigrant detention increased).

moved do not have criminal records or have records of minor infractions.<sup>258</sup> Thus, there is seemingly no correlation between the demography of unauthorized immigrants and the rates of detention and deportation of Latina/o immigrants if the DHS focus is really on removing dangerous criminal aliens.<sup>259</sup> Moreover, the emphasis on demographic trends obscures the long-standing and well-established racially discriminatory motives of immigration law and policy.<sup>260</sup>

In fact, the criminal immigrant focus is all but absent in the current practice of detaining mothers and children. Housed in minimum security “family residential centers,” the mother and children immigrants are not deemed criminal threats by DHS,<sup>261</sup> though, as noted, they may be associated with rhetorical and stereotypical markers of criminality. Despite the lack of actual criminality, however, the women and children remain detained at a cost of approximately \$266 per day, per person<sup>262</sup>—money paid by American taxpayers to corporate prison industry entities. Not surprisingly, 97% of the apprehended and detained “family units” (i.e., mothers and children) are from the four same Latin-American countries that constitute the general detained population: Guatemala, Honduras, El Salvador, and Mexico.<sup>263</sup>

Indeed, the markers of subordinated racial identity of these women and children reinforce the dominate narrative upholding the disparate incarceration of women of color. As Kimberlé W. Crenshaw asserts, “[R]ace, gender, or class hierarchies structure the backdrop against

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258. *See supra* section IV.A.

259. In July 2015, DHS reinforced its priority scheme for removals. *See* Jerry Markon, *Obama Administration Scales Back Deportations in Policy Shift*, WASH. POST (July 2, 2015), [http://www.washingtonpost.com/politics/dhs-scales-back-deportations-aims-to-integrate-illegal-immigrants-into-society/2015/07/02/890960d2-1b56-11e5-93b7-5eddc056ad8a\\_story.html](http://www.washingtonpost.com/politics/dhs-scales-back-deportations-aims-to-integrate-illegal-immigrants-into-society/2015/07/02/890960d2-1b56-11e5-93b7-5eddc056ad8a_story.html), archived at <http://perma.unl.edu/N2EL-MLY6> (“The [DHS] has taken steps to ensure that the majority of the United States’ 11.3 million undocumented immigrants can stay in this country, with agents narrowing enforcement efforts to three groups of illegal migrants: convicted criminals, terrorism threats or those who recently crossed the border.”). Although these priority areas essentially mirror prior enforcement goals, it remains to be seen whether the demographics of detained and removed immigrants will change pursuant to this latest proclamation.

260. *See, e.g., supra* section IV.B; Vázquez, *supra* note 115, at 643–50 (discussing how focusing on perceived criminality of Latinos ignores the effects of historical racism).

261. *See* ICE FAMILY RESIDENTIAL STANDARDS, *supra* note 178.

262. *See* Chairwoman Mikulski Releases Summary of Emergency Supplemental Funding Bill, SENATE APPROPRIATIONS COMM. (July 23, 2014), <http://www.appropriations.senate.gov/news/minority/chairwoman-mikulski-releases-summary-of-emergency-supplemental-funding-bill>, archived at <http://perma.unl.edu/8ALJ-247B>.

263. *See* Southwest Border Unaccompanied Alien Children, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last visited Oct. 15, 2015), archived at <http://perma.unl.edu/55MB-YNQX> (providing data for fiscal year 2014).

which punitive policies interact” with other “social forces that situate women of color within contexts structured by various social hierarchies and that render them disproportionately available to certain punitive policies and discretionary judgments that dynamically reproduce these hierarchies.”<sup>264</sup> In the context of the detained mothers, the Latina immigrant is at the height of intersectional marginalization (and the lowest part of the dominant hierarchy) as a non-citizen person of color—and a woman judged by societal forces as a bad mother for taking incredible risks in making the journey to the United States. Crenshaw notes of immigrant women:

[T]hey frequently face gendered double standards in that the sacrifices they sometimes make for their children—leaving them with relatives, working long hours to send money home, saving money so that they can be reunited with their children—are perceived negatively in women when the same behaviors in men would be considered heroic.<sup>265</sup>

Ultimately, these subordinating forces and societal judgments work to strengthen the family detention machine.

Thus, the current system of facially neutral immigration laws and policies operate to further subordinate immigrants of color, much like the general criminal justice system targets people of color to fuel the profit-driven phenomenon of mass incarceration, as discussed above.<sup>266</sup> The profit motives of corporate-run immigrant detention centers similarly reap the benefits of the implicit legal and societal methods to ensure the continued subordination of people of color. Moreover, as non-citizens who are equated with criminality, the immigrant amounts to an easily commodifiable entity, as long as the carceral system operates as a profit-driven industry.

## V. DISRUPTING THE INTERSECTIONS: PATH TO CHANGE

As this Article asserts, the toxicity of immigrant detention is powered by the intersection of the corporatization of the prison industry, the political and societal narrative against immigrants, and the intersectionality of immigrant-subordinated identity. Each of these ingredients adds critical fuel to the current machine of immigrant detention, as evinced by the recent governmental incarceration of mothers and children. Part V therefore argues that reform measures must work to disrupt these connections between profitability and oppression.

Two paths to change are presented here. First, at its simplest, the INA must be amended to restrict immigrant detention to the most

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264. Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1427 (2012).

265. *Id.* at 1449.

266. *See supra* section III.A.

critical cases. But, more fundamentally and as a second concurrent or parallel path, law and policy must eschew corporate profit as a goal in immigrant detention, such that corporate industries are either banned from the prison business or leave the business due to decreased profits in the face of increased scrutiny. In this regard, this Part discusses a case study of how the pharmaceutical industry changed its practices of manufacturing and selling drugs to U.S. states that used them for lethal injections. This change in practice resulted from social and political advocacy, as well as pressure against the companies that were profiting from the drug sales. The following analysis proposes placing similar pressure on legislators to end the practice of contracting with for-profit entities to build and operate detention facilities. It also proposes erasing the profit goals of detention altogether, so that the current default to detention is not merely replaced by “alternatives to detention” that are also for-profit. This Part concludes that advocates should pursue these paths to end the inhumane and unjust reliance on immigrant detention.

#### A. Reforming the INA and ICE Implementation

At bottom, the simplest (though not perhaps the politically easiest or most viable) path to reform is to amend the relevant INA provisions, the operating guidelines regarding the mandatory and discretionary detention of immigrants, or both. The punishment of detention as a denial of one’s physical liberty and freedom should be instituted as a last resort for those criminal immigrants who legitimately pose the greatest risk of violence or other serious threat to the community. As García Hernández argues, moving from a default regime of detention to a process that actually encapsulates the civil nature of immigrant detention would result in a system that incorporates individualized hearings regarding a person’s dangerousness, particularities of the person’s alleged wrongdoing, and his or her likelihood of returning to a later hearing.<sup>267</sup> Yet, reform resulting in a wide diminution of reliance on detention does not have to necessarily include statutory reform, but could instead involve revisiting the means of implementing the law.<sup>268</sup> Thus, rather than utilize prisons, jails, and other detention centers, ICE could use alternative means to

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267. García Hernández, *supra* note 24, at 1400–15 (arguing therein for statutory reform that disentangles civil immigration detention processes from the criminal justice norms that have come to characterize the current detention system).

268. *See, e.g., id.* at 1406–09 (discussing, among other possible solutions, the reevaluation of using supervised custody more broadly and ending the practice of using traditional correction facilities); Torrey, *supra* note 85, at 128–31 (arguing for a reinterpretation of the “custody” as detention mandate); *supra* note 26 and accompanying text (discussing how INA § 236(c), which mandates “custody,” could be administratively interpreted to mean something other than physical detention).

ensure compliance with the INA's intent in adjudicating and effectuating removals, or providing immigration relief, when appropriate.<sup>269</sup>

Furthermore, when resorting to detention, ICE must redouble its efforts to regulate the operation and management of detention centers to ensure total compliance with safety and health regulations. Recent DHS efforts to amend and strengthen its detention guidelines in the wake of immigrant protests and hunger strikes in some of the detention centers illustrate that DHS can be responsive to calls for needed reform.<sup>270</sup> In short, there is nothing magical about the current system of immigration detention; the ways in which immigrants are held can occur through other less-intrusive and more humane means.

Broad statutory or regulatory reform, change in implementation, or both would ease the burdens and effects of detention, which would result in less corporate gain from the practice. Another path to change, however, would be to attack this nefarious corporatization of the prison industry at its source. In other words, law and policy must break the intersection between corporate profit and immigrant detention.

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269. See, e.g., García Hernández, *supra* note 24, at 1407–09; Torrey, *supra* note 85, at 132–33; Das, *supra* note 29, at 159–63 (arguing for detention reform that provides a structure based on more individualized inquiry rather than broad ineffective procedures).

270. See News Release, *ICE Announces Enhanced Oversight for Family Residential Centers*, ICE (May 13, 2015), <http://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers>, archived at <http://perma.unl.edu/Rf4Y-8KUL> (“[ICE] announced a series of actions to enhance oversight and accountability, increase access and transparency, and ensure its family residential centers continue to serve as safe and humane facilities for families pending the outcome of their immigration proceedings.”). The enhanced oversight was in response to reports of protests and hunger strikes by the women detained in the family residential centers. See, e.g., Wil S. Hylton, *A Federal Judge and a Hunger Strike Take on the Government's Immigrant Detention Facilities*, N.Y. TIMES (Apr. 10, 2015), <http://www.nytimes.com/2015/04/06/magazine/a-federal-judge-and-a-hunger-strike-take-on-the-governments-immigrant-detention-facilities.html>, archived at <http://perma.unl.edu/C83Y-PR6Q>. But as Maunica Sthanki writes regarding possible increased accountability in immigration detention, the compliance mechanisms may be just as hard to enforce. Sthanki, *supra* note 101, at 450 (“Detention standards provide guidelines for detainee care; however, the standards are unenforceable. The standards provide for medical care and forbid physical and sexual abuse; however, the standards do not create a remedy whereby a detainee can challenge the facility's adherence to the standard. Detention abuse is compounded by the near total privatization of immigration detention. Private-prison companies oversee almost every aspect of detainee life, and recent Supreme Court decisions limiting the liability of private-prison companies have virtually foreclosed an immigrant detainee's cause of action in federal court.”).



## B. Breaking the Corporate Connection to Detention

There is something unnerving (to many) about the practice of profiting from imprisoning people. The practice is commodification of human suffering at its peak, and has been criticized by an array of system actors and advocates. One state corrections commissioner predicted in 1985 that the use of private prisons would create unavoidable incentives for the prison to lobby for stricter crime laws, thereby locking up more people with taxpayers footing the ever-increasing tab.<sup>271</sup> Hillary Clinton, a candidate in the 2016 presidential election, decried the corporatization and profit-driven practice of immigrant detention, noting that the practice inevitably leads to higher rates of detention.<sup>272</sup> Michelle Alexander warns reformers of the entrenched private corporate interests that will oppose efforts to end mass incarceration: “[Private prisons] are deeply interested in expanding the market—increasing the supply of prisoners—not eliminating the pool of people who can be held captive for a profit.”<sup>273</sup> Geiza Vargas-Vargas similarly comments on the profit-driven incentives of private prison interests and their stronghold in the immigrant detention business, noting the racist similarities to the well-established mass incarceration regime.<sup>274</sup> All point to the conclusion that the practice of profit-driven detention should be ended on principled grounds of humanitarian and democratic goals of a society that protects the rights of the vulnerable and oppressed.

To accomplish this end, activists and advocates should concentrate on pushing corporate actors out of the business either through public and political pressure on the supply side—i.e., companies profiting off of immigrant detention—or on the demand side—i.e., governmental and public agencies contracting with and paying the companies to do so. As an example of the public pressure model on the supplier side (i.e., the corporations themselves), advocates can look to the recent

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271. See Torrey, *supra* note 85, at 124 (citing Kenneth F. Schoen, Editorial, *Private Prison Operators*, N.Y. TIMES (Mar. 28, 1985), <http://www.nytimes.com/1985/03/28/opinion/private-prison-operators.html>, archived at <http://perma.unl.edu/2Q3LW79J>).

272. See Elise Foley, *Hillary Clinton Goes Big on Immigration*, HUFFINGTON POST (May 5, 2015), [http://www.huffingtonpost.com/2015/05/05/hillary-clinton-immigration-reform\\_n\\_7217768.html](http://www.huffingtonpost.com/2015/05/05/hillary-clinton-immigration-reform_n_7217768.html), archived at <http://perma.unl.edu/QY8Z-744E> (discussing her views on immigration detention, among other topics). But Clinton’s presidential campaign also benefits from private prison campaign contributions. See, e.g., Lee Fang, *Private Prison Lobbyists Are Raising Cash for Hillary Clinton*, THE INTERCEPT (July 23, 2015, 12:49 PM), <http://firstlook.org/theintercept/2015/07/23/private-prison-lobbyists-raising-cash-hillary-clinton/>, archived at <http://perma.unl.edu/E9WD-YG5H> (revealing campaign contributions for Hillary Clinton’s 2016 presidential bid by a lobbyist for the GEO Group).

273. ALEXANDER, *supra* note 34, at 218.

274. Vargas-Vargas, *supra* note 109, at 358 (“[A]nti-immigration policy . . . is the next frontier in the incarceration of black and brown bodies.”).

targeting of the pharmaceutical industry, which brought about (albeit brief) change in the governmental execution of prisoners by lethal injection. To be sure, prisoners convicted of capital crimes and sentenced to death are an unpopular and ostracized population in the United States.<sup>275</sup> Yet there is a strong movement founded in humanitarian, religious, democratic, and justice rationales against the death penalty generally, and against the use of lethal injections to kill prisoners specifically.<sup>276</sup> The trajectory of this movement and how it worked to effectuate a halt to certain types of executions is illustrative.

In 1977, Oklahoma was the first state to use lethal injections to execute prisoners, considering the practice less brutal than the prior use of hanging, firing squad, or the electric chair<sup>277</sup> and basing its decision on a thin foundation of research into a three-drug cocktail.<sup>278</sup> Today, other death penalty states and the federal government also use lethal injection, which is now the dominant method of execution.<sup>279</sup> This three-drug cocktail included sodium thiopental, a general anesthetic that rapidly brings about unconsciousness, so as to render the person unable to feel conscious pain.<sup>280</sup> The World Health Organization has listed sodium thiopental as an approved and essential anesthetic for surgical procedures for many years.<sup>281</sup> But even though the injection cocktail was supposed to result in “painless” and “humane”

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275. See, e.g., Regina Austin, *“The Shame of It All”: Stigma and the Political Disfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 172 (2014).
276. See, e.g., Hugo Adam Bedau, *The Case Against the Death Penalty*, AM. CIVIL LIBERTIES UNION (last updated 2012), <http://www.aclu.org/case-against-death-penalty>, archived at <http://perma.unl.edu/BV7D-YDSV>.
277. See Kate Pickert, *A Brief History of Lethal Injection*, TIME (Nov. 10, 2009), <http://content.time.com/time/nation/article/0,8599,1815535,00.html>, archived at <http://perma.unl.edu/PE65-6YQ5>; S.M., *Death-Penalty Drugs: Dangerous Cocktails*, THE ECONOMIST (Apr. 29, 2015, 7:40 PM), <http://www.economist.com/blogs/democracynamerica/2015/04/death-penalty-drugs>, archived at <http://perma.unl.edu/E5FP-WKGM>.
278. See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Diminished the Death Penalty*, 76 FORDHAM L. REV. 49, 65, 74–75 (2007).
279. See *Lethal Injection*, DEATH PENALTY INFO CTR., <http://www.deathpenaltyinfo.org/lethal-injection?did=1686&scid=64> (last visited Apr. 11, 2016), archived at <http://perma.unl.edu/EJ9Q-QB9P> (noting that out of 1,411 executions conducted since 1976, 1,236 were carried out by lethal injection); see also Mary D. Fan, *The Supply-Side Attack on Lethal Injection & the Rise of Execution Secrecy*, 95 B.U. L. REV. 427, 436 (2015) (demonstrating how anti-death penalty activists successfully took their battle to the market by campaigning against lethal injection drug suppliers, causing a shortage of certain types of lethal injection drugs).
280. See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 98 (2002).
281. See WORLD HEALTH ORG., WHO MODEL LIST OF ESSENTIAL MEDICINES 18TH LIST (18th ed. Apr. 2013), archived at <http://perma.unl.edu/C4QB-3NN4>.

(or as humane as possible) executions, data-driven and anecdotal evidence showed that prisoners suffered through exceedingly long and physically agonizing executions even with the anesthetic.<sup>282</sup> Thus, this proof called into question the efficacy of sodium thiopental in the lethal-injection context.

Critics of the death penalty brought a legal challenge against the legal injection protocol, asserting that the practice amounted to “cruel and unusual punishment” when the sodium thiopental was improperly administered, causing the prisoners to experience excruciating pain once the other drugs were injected.<sup>283</sup> Yet, in 2008—just as the Supreme Court upheld the use of the death penalty in 1976<sup>284</sup>—the Court upheld the use of lethal injection via sodium thiopental, holding that the risks of improper administration of the anesthetic did not rise to a violation of the Eighth Amendment.<sup>285</sup>

Thus unable to secure a halt of the practice in the courts, anti-death penalty advocates took the fight to the marketplace. The aim of this supply-side attack was to persuade drug manufacturers to stop supplying sodium thiopental to states that were using it for executions.<sup>286</sup> Moreover, advances in anesthesiology had decreased the market demand for sodium thiopental in other sectors, and most European manufacturers had significantly cut production.<sup>287</sup> Thus, one company—Hospira, a U.S. pharmaceutical manufacturer—was left as the main provider of the drug.<sup>288</sup> Sensing an opportunity to eradicate the drug from the lethal injection market, anti-death penalty advocates used the media and political pressure to target Hospira—a movement that resulted in Hospira ceasing its U.S. production of sodium thiopental.<sup>289</sup> In response, though, Hospira sought alternative

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282. See Denno, *supra* note 278, at 124 n.40 (describing the two-hour execution of Christopher J. Newton in 2007).

283. See *Baze v. Rees*, 553 U.S. 35, 49 (2008); see also Fan, *supra* note 279, at 436–37 (describing the historical strategies of anti-death penalty advocates).

284. *Gregg v. Georgia*, 428 U.S. 153 (1976).

285. *Baze*, 553 U.S. at 56.

286. See Fan, *supra* note 279, at 438 (quoting Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J. (Jan. 22, 2011), <http://www.wsj.com/articles/SB10001424052748704754304576095980790129692>, archived at <http://perma.unl.edu/CQU9-X89L> (detailing the successful campaign by death penalty opponents against drug manufacturers supplying states with lethal injection drugs)).

287. *Id.* at 439.

288. See Erik Eckholm & Katie Zezima, *Drug Used in Executions Dropped by U.S. Supplier*, N.Y. TIMES, Jan. 22, 2011, at A11.

289. See Nathan Koppel, *supra* note 286 (describing the effects of Hospira’s announcement that it will stop producing lethal injection drug sodium thiopental in the U.S.); see also Jennifer Horne, Council of State Gov’ts, *Lethal Injection Drug Shortage*, CAPITOL IDEAS, [http://www.csg.org/pubs/capitolideas/enews/issue65\\_4.aspx](http://www.csg.org/pubs/capitolideas/enews/issue65_4.aspx) (last visited Oct. 15, 2015), archived at <http://perma.unl.edu/LPH2-Q69U> (explaining the current shortage of legal substances to facilitate lethal injections).

opportunities to produce the drug in Italy,<sup>290</sup> where capital punishment has been banned since 1889.<sup>291</sup> The Italian government, responding to activism, moved in December 2010 to ban Hospira from manufacturing the drug for capital punishment use.<sup>292</sup> As a result, Hospira, concerned about sanctions and its employees' potential liability, halted its global production of sodium thiopental.<sup>293</sup>

Prior to Hospira exiting the market, death penalty states prepared for a potential shortage of sodium thiopental and thus turned to European pharmaceutical companies for its supply.<sup>294</sup> Not surprisingly, global activism against the death penalty swung into motion and pressured the European corporations to ban sales of sodium thiopental to the states.<sup>295</sup> Initially, there was British support for continued sales to the United States on the basis that the drug had other surgical anesthetic uses.<sup>296</sup> Eventually, however, and faced with data that the U.S. prison system was in fact a primary customer of the drug, Britain

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290. See Associated Press, *U.S. Drug Maker Discontinues Key Death Penalty Drug*, FOX NEWS (Jan. 21, 2011), <http://www.foxnews.com/us/2011/01/21/drug-maker-discontinues-key-death-penalty-drug/#ixzz1BhqUF1xP>, archived at <http://perma.unl.edu/PV8E-2X48> (“Without providing details, [Hospira spokesman Dan] Rosenberg said the company’s state-of-the-art Italian factory was the only plant capable of manufacturing sodium thiopental.”).
291. 6 INDRO MONTANELLI & ROBERTO GERVASO, *STORIA D’ITALIA* 215 (S. Romano ed., 2010).
292. Emma Marris, *Death-Row Drug Dilemma*, NATURE (Jan. 27, 2011), <http://www.nature.com/news/2011/110121/full/news.2011.53.html>, archived at <http://perma.unl.edu/C2NL-S9WM>.
293. See Associated Press, *supra* note 290; see also Emma Draper, *Death Penalty: Stop Lethal Injection Project Case Briefing*, REPRIEVE (July 28, 2011), [http://www.repriev.org.uk/publiceducation/2011\\_02\\_03\\_lethal\\_injection\\_drugs/](http://www.repriev.org.uk/publiceducation/2011_02_03_lethal_injection_drugs/), archived at <http://perma.unl.edu/EZC6-KCCG> (describing the successful campaign in Italy); *Statement from Hospira Regarding Its Halt of Production of Pentothal (Sodium Thiopental)*, DEATHPENALTYINFO.ORG. (Jan. 21, 2011), <http://www.deathpenalty-info.org/documents/HospiraJan2011.pdf>, archived at <http://perma.unl.edu/XY4J-5WFZ> (reporting that Italian authorities ordered Hospira to control the use of their product to the ultimate end user in order to prevent use in capital punishment, something that Hospira could not do: “[T]he use of Pentothal in capital punishment procedures in the United States [was] a use Hospira has never condoned.”).
294. See Raymond Bonner, *Drug Company in Cross Hairs of Death Penalty Opponents*, N.Y. TIMES (Mar. 31, 2011), <http://www.nytimes.com/2011/03/31/world/europe/31iht-letter31.html>, archived at <http://perma.unl.edu/YS7V-SJB8>.
295. See Matt Ford, *Can Europe End the Death Penalty in America?*, THE ATLANTIC (Feb. 18, 2014), <http://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/>; archived at <http://perma.unl.edu/FC7G-HMDY>; Fan, *supra* note 279, at 439 (“European suppliers, including the major Danish pharmaceutical company Lundbeck and a small British drug wholesaler called Dream Pharma, soon found themselves the targets of a shaming campaign . . . with a series of critical articles.”).
296. See Ian Dunt, *Cable Under Fire for Allowing Execution Drug Sale*, POLITICS.CO.UK (Nov. 2, 2010), <http://www.politics.co.uk/news/2010/11/2/cable-under-fire-for-allowing-execution-drug->, archived at <http://perma.unl.edu/2ELN-752L>.

joined the sales ban.<sup>297</sup> Ultimately, in 2011, the entire European Union banned the export of sodium thiopental and seven other drugs used in lethal injections to the United States.<sup>298</sup> Other smaller international pharmaceutical companies also banned the sale of the drug to U.S. states, citing public pressure, risk of liability, and ethical concerns.<sup>299</sup> Thus, by 2011, the global campaign against corporate pharmaceutical suppliers of lethal injection drugs had achieved remarkable successes.<sup>300</sup>

And the campaign brought results. In the death penalty states, executions were routinely delayed or disrupted due to some combination of a shortage of the drug and the regulatory/legislative processes required in some states to substitute another chemical.<sup>301</sup> In Oklahoma, for example, there were relatively no obstacles to switch from sodium thiopental to pentobarbital, an anesthetic substitute; Oklahoma also considered executing prisoners with just nitrogen.<sup>302</sup> Tennessee only had to pass through a perfunctory departmental review to approve a new lethal injection protocol.<sup>303</sup> Maryland, California, Kentucky, and Ohio, on the other hand, have more complicated and time-consuming regulatory and review processes before approving new lethal injection cocktails.<sup>304</sup> Moreover, public advocacy efforts geared up again to focus on the pharmaceutical production and sale of pentobarbital, and used an organized, multinational movement involving social media, press releases, and stockholder publicity targets

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297. See Peter Walker, *Vince Cable Restricts Export of Drug Used in US Executions*, THE GUARDIAN (Nov. 29, 2010), <http://www.theguardian.com/science/2010/nov/29/sodium-thiopental-export-restrictions>, archived at <http://perma.unl.edu/W7DS-Y87C>.

298. See Ford, *supra* note 295; see also Juerden Baetz, *Europeans Frustrate U.S. Executions*, OTTAWA CITIZEN, Feb. 19, 2014, at A10 (“The EU then updated its export regulation in 2011 to ban the sale of eight drugs—including pentobarbital and sodium thiopental—if the purpose is to use them in lethal injections.”).

299. See Prasanna D. Zore, *Under Pressure, Indian Firm Stops Sale of Lethal Injection to US*, INDIA ABROAD, Apr. 15, 2011, at A21 (“Indian drug companies that were selling [sodium thiopental] . . . have announced that they will no longer sell the substance.”); Ford, *supra* note 295 (showing changing practices in Europe).

300. See Fan, *supra* note 279, at 439.

301. See Horne, *supra* note 289.

302. See Associated Press, *supra* note 290; Associated Press, *Death Penalty Complication: Pharmacists Group Discourages Providing Execution Drugs*, L.A. TIMES (Mar. 30, 2015), <http://www.latimes.com/nation/nationnow/la-na-nn-pharmacists-execution-lethal-injection-drugs-20150330-story.html>, archived at <http://perma.unl.edu/YC52-XDVV>; see also Horne, *supra* note 289 (describing the diminishing sources of death penalty drug substitutes).

303. See Horne, *supra* note 289 (comparing state regulatory processes to change death penalty-drug cocktail).

304. See *id.* Maryland abolished the use of the death penalty in 2013. *US: Maryland Abolishes Death Penalty*, HRW (May 2, 2013), <http://www.hrw.org/news/2013/05/02/us-maryland-abolishes-death-penalty>, archived at <http://perma.unl.edu/7HRT-HJ3W>.

against the drug.<sup>305</sup> The campaign resulted in pressuring at least one manufacturer to stop the sale of the drug for executions.<sup>306</sup>

The movement was dealt a new blow in 2015, however, when the Supreme Court upheld the use of another drug, midazolam, for lethal injections.<sup>307</sup> It remains to be seen, however, if the pressure on market forces can be heralded once again to combat this chemical and halt its corporate production and sale. Moreover, and relevant to the focus here, the anti-death penalty movement's successes provide useful analogies to the efforts to end immigrant detention. In this way, bringing societal and political pressure on the companies, shareholders, and other corporate actors may achieve an end to the widespread use of the practice.<sup>308</sup>

Similarly, public pressure should be waged against legislators and other policy actors to end the practice of contracting with for-profit corporations and agencies to detain immigrants. By attacking the demand side of the connection between corporate profit and governmental detention, advocates may accomplish success towards curbing, more heavily regulating, and ultimately ending reliance on the practice. As one example of such advocacy, groups of activists, researchers, academics, and journalists have used Freedom of Information Act (FOIA) requests to gain insights into the governmental contracts of the prison industry to expose the system and its contractual terms.<sup>309</sup>

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305. See Fan, *supra* note 279, at 440 (describing the partnerships between British and U.S. anti-death penalty advocacy groups such as Stop the Lethal Injection Project (SLIP) and Reprieve, which targeted the production of pentobarbital using social media, traditional media blasts, and stockholder organizing efforts to pressure the Dutch company Lendbeck to halt pentobarbital sales).

306. As a result of the organizing campaign, Lendbeck dropped from 17th to 40th on an annual ranking of the best companies in Denmark, and a pension fund sold its shares in the company, all of which led Lendbeck to stop the sales of pentobarbital for executions. See *id.*

307. *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

308. As one example of a successful public and media campaign, GEO Group had offered to donate \$6 million to Florida Atlantic University for the school to name their football stadium after the company. See Chris Kirkham, *GEO Group Stadium Deal Is Off; Private Prison Company Cites 'Ongoing Distraction' After Protests*, HUFFINGTON POST (Apr. 2, 2013), [http://www.huffingtonpost.com/2013/04/02/geo-group-stadium-private-prison\\_n\\_2999133.html](http://www.huffingtonpost.com/2013/04/02/geo-group-stadium-private-prison_n_2999133.html), archived at <http://perma.unl.edu/6MRD-U768>. Widespread protests by students, faculty, and activists ensued, arguing that the company violated human and civil rights; the national media picked up the story. *Id.* As a result, GEO Group pulled out of the deal. *Id.*

309. See, e.g., Beryl Lipton, *Does Your State Have a Deal with the Private Prison Industry?*, MUCKROCK (Jan. 5, 2015), <http://www.muckrock.com/news/archives/2015/jan/05/cca-private-prison-contract-map/>, archived at <http://perma.unl.edu/FB68-38WS>. The webpage presents an interactive map with a repository of contracts existing between states and private management companies. Other states, however, have legislation that prohibits the disclosure of correctional facility information through FOIA requests, citing the possibility of compromising security. *Id.* In contrast, some states' laws require that these contracts be publicly availa-

Other groups and publications have similarly utilized public media attacks aimed at the corporate prison industrial complex, including the harsh contractual quota provisions that many prison companies require of the governmental contracting agencies.<sup>310</sup>

Both types of investigation and public pressure help to bring to light the problems with privatizing and corporatizing the prison system as a profit-driven enterprise. Indeed, some states have statutory bans against entering into contracts with private corporations for the operation of their prison system. Despite this seemingly explicit proclamation against contracting with private industry, however, that result does not always follow. In Wisconsin, for example, Governor Scott Walker, who has a history of ties with the prison industry,<sup>311</sup> worked around the Wisconsin ban on private prison contracts by shipping Wisconsin prisoners out of state to private prisons in Ohio and Kentucky, thus still directing Wisconsin tax dollars to private prison companies.<sup>312</sup>

This example of demand-side public and political pressure that ultimately backfired in Wisconsin is further illustrative when considering “alternatives” to detention. Scholars and activists who have denounced the increased practice of immigrant detention point to other less costly and more humane alternatives, like monitoring or su-

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ble, thereby allowing the public to access the information without the need for a FOIA request. One nonprofit organization dedicated to exposing the inner workings of the prison industry has litigated under these state laws to access various types of information. See *Legal Action*, PRISON LEGAL NEWS, <http://www.prisonlegalnews.org/legal-action-map/> (last visited Aug. 7, 2015), archived at <http://perma.unl.edu/JU9R-A8M8>; see also César Cuauhtémoc García Hernández, *Vt. Superior Ct.: Private Prison Corporation Is Subject to State Open Records Law*, CRIMMIGRATION (Feb. 10, 2015, 4:00 AM), <http://crimmigration.com/2015/02/10/vt-superior-ct-private-prison-corporation-is-subject-to-state-open-records-law/>, archived at <http://perma.unl.edu/GMP7-3CF3> (describing one recent win by the Prison Legal News in Vermont to access information regarding private prison operations).

310. See, e.g., *Profit for Private Prison Corporations*, *supra* note 94 (discussing how the contracts include a 90% occupancy guarantee in Ohio for the next twenty years and a “staggering” 100% occupancy guarantee in Arizona); DETENTION WATCH NETWORK & CTR. FOR CONSTITUTIONAL RTS., *BANKING ON DETENTION: LOCAL LOCKUP QUOTAS & THE IMMIGRANT DRAGNET* (2015), archived at <http://perma.unl.edu/F2H7-F5XZ> (exploring the lockup quotas that guarantee the prison companies a set amount of revenue despite occupancy rates).

311. See, e.g., Scott Keyes, *How Scott Walker Built a Career Sending Wisconsin Inmates to Private Prisons*, THE NATION (Feb. 26, 2015), <http://www.thenation.com/article/how-scott-walker-built-career-sending-wisconsin-inmates-private-prisons/>, archived at <http://perma.unl.edu/WX78-2NV8> (discussing links between Walker and prison lobbying efforts, campaign contributions, and legislative amendments like the truth in sentencing laws that would increase prison sentences).

312. See *id.*

pervision.<sup>313</sup> These types of practices certainly present important and more attractive options than detention—allowing immigrants who present no criminal, terroristic, or flight threat to remain free and with their families while providing significant government savings.<sup>314</sup> Indeed, alternatives to incarceration have achieved widespread support, even from groups traditionally aligned with strict crime-control efforts.<sup>315</sup> It is perhaps not surprising, then, that the same prison industries currently profiting off immigrant detention are entering the market for privatized detention alternatives—including bond agencies and monitoring services.<sup>316</sup> In this regard, advocates must be vigilant against replacing the detention default with another system of for-profit supervision and monitoring, thereby risking the same panoply of problems that define the corporatization of a process that is best left for public regulation and operation.<sup>317</sup>

Each of these proposed solutions to the current overuse of detention provides possibilities for success, though none of them focuses on

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313. See MATH OF IMMIGRATION DETENTION, *supra* note 95 (“Given the predominately non-criminal make-up of the immigration detention population as well as the expense and civil rights concerns surrounding detention. . . . Many immigrants currently in ICE custody could be safely released and, if necessary, monitored with alternative methods, such as telephonic and in-person reporting, curfews, and home visits.”); DEMANDING DIGNITY, *supra* note 180 (noting the same type of alternatives); García Hernández, *supra* note 24, at 1409–12 (advocating similarly for detention alternatives while cautioning against possible downsides of their use).
314. See, e.g., MATH OF IMMIGRATION DETENTION, *supra* note 95 (discussing the exorbitant costs of detention in contrast to lower-cost alternatives).
315. See, e.g., Nicole Flatow, *What It Means that Even the Koch Brothers Want to Provide Lawyers to the Poor*, THINKPROGRESS.ORG (Oct. 27, 2014), <http://thinkprogress.org/justice/2014/10/27/3584354/kochs-indigent-defense/>, archived at <http://perma.unl.edu/Q86T-TLJY> (noting how the Koch Brothers, owners of Koch Industries and often decried for their conservative or libertarian efforts to increase corporate profits, have joined others in the effort to widen access to justice for criminal defendants and otherwise ameliorate the effects of mass incarceration); Nicole Flatow, *ALEC Doubles Down on Support for Less Draconian Prison Sentences*, THINKPROGRESS.ORG (Sept. 27, 2013), <http://thinkprogress.org/justice/2013/09/27/2692491/alec-doubles-down-on-support-for-shorter-prison-sentences/>, archived at <http://perma.unl.edu/3BFG-36GR> (discussing how the conservative American Legislative Executive Council, which historically drafted model legislation that worked to increase prison sentences, is more recently supporting efforts for prison alternatives).
316. See, e.g., James Kilgore, *The Spread of Electronic Monitoring: No Quick Fix for Mass Incarceration*, PRISON LEGAL NEWS (Apr. 9, 2015), <http://www.prisonlegalnews.org/news/2015/apr/9/spread-electronic-monitoring-no-quick-fix-mass-incarceration/>, archived at <http://perma.unl.edu/GU35-JBQF> (showing the rise of for-profit electronic monitoring systems that leave the monitored with fewer rights than prisoners).
317. See, e.g., García Hernández, *supra* note 24, at 1410–12 (discussing the complications with supervised release as an alternative to immigrant detention, including heightened government surveillance and increased risk of violation of release conditions, leading to severe consequences).



the important subordination theory that undergirds the connections between corporate profit and legislative enactment. Indeed, it may be that targeting corporate connections and the toxicity of such involvement in the prison business is the most viable narrative to effectuate real change, rather than focusing on the marginalized identity of the detained immigrant population. In this regard, political and public rhetoric that speaks to the majority normative could be the most likely to succeed, even if it does not accurately question the identity politics behind the prison machine.<sup>318</sup> To be sure, securing an end to unnecessary immigrant detention—much like the move to end the imprisonment of mothers and children—is a formidable goal that must be pursued through all means, albeit incomplete ones.

## VI. CONCLUSION

At some point, politics and profit give way to stark reality. The story of Mélida, a thirty-year-old mother who travelled with her four-year-old daughter from Guatemala and was eventually detained in the CCA-run family detention center in Dilley, Texas, presents a glimpse of that reality. Gang members murdered Mélida's sister-in-law.<sup>319</sup> When other members of the gang searched for her in retaliation for her family members' testimony in the murder trial, Mélida took her little girl, Estrella, and fled Guatemala for the United States.<sup>320</sup> After ICE apprehended them, the two spent nearly a year in family detention before their pro bono attorney successfully argued for their release.<sup>321</sup> In an interview during her tenth month in detention, Mélida, who saw her toddler daughter exhibit signs of physical and emotional distress while locked up, commented: "Sometimes I feel I am drowning in my own desperation . . . . I want to shut myself in a room and never come out."<sup>322</sup>

Stories like that of Mélida and Estrella abound and, indeed, are not just limited to mothers and children. The behemoth immigration

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318. In this regard, the words of Professor Derrick A. Bell, Jr. ring prophetic. As Professor Bell asserted in the context of *Brown v. Board of Education*, school desegregation happened when it finally did only because it served the interests of white people. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("Translated from judicial activity in racial cases both before and after *Brown*, this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.").

319. Preston, *supra* note 58.

320. *Id.*

321. *Id.*

322. *Id.* (internal quotation marks omitted).

prison complex incarcerates hundreds of thousands of immigrants every year, pursuant to congressional mandates and oppressive legislative reforms and further buoyed by decades of judicial deference. Moreover, the profit-driven corporatization of the prison industry fuels ever-increasing incentives for more detention. The corporate prison business capitalizes on societal and political rhetoric surrounding the “wars” on drugs and terrorism and the sound-bite politics that push for stricter criminal penalties. In the end, politicians are re-elected, and the corporations get richer.

The intersection of this profiteering corporate model with the well-established immigration detention regime is solid and built upon an important lynchpin—the continued subordination of immigrants. The social and political subordination of immigrants, who embody the marginalized identities of criminals, non-citizens, and persons of color, feed the profit-seeking carceral machine. Because immigrants are deemed unworthy of protection due to this powerful intersection of subordinated identities, corporatized monetary interests continue to exploit their continued detention for increased profits while calls for humanitarian protections are largely ignored.

But the stark reality of immigration detention—like the story of Mélida and Estrella—should not be ignored. Immigration reform must incorporate changes to the law and its implementation such that immigration detention is not the default answer. Moreover, looking to examples of movements that disrupted profiteering practices, immigrant advocates can redouble their efforts to target both the demand and supply side of profit-driven immigration detention so as to finally effectuate change and shake the intersectional foundation. Whichever path to change is followed, immigration detention as we now know it must end.