

# THE MIGRATION OF ABOLITION THEORY

*Matthew Boaz\**

## *Abstract*

*This Article considers whether and how theories of abolition developed by criminal law scholars are transferrable to the realm of immigration enforcement. A key question is whether abolitionist principles could be directed toward critiques of the regulatory regime controlling immigration in the United States in the same way that they have been directed at policing and prisons. This Article makes two contributions - first, it identifies a methodology adopted by criminal law scholars: (i) denouncing the harms of a structural system, (ii) identifying the normative justification for this system, and (iii) proposing alternatives that might adequately, or in a superior way, satisfy those principles, ideally in a more humane, equitable, and cost-efficient manner. Second, this Article demonstrates the challenging necessity of mapping this methodology onto the logic of immigration enforcement. In doing so, this Article identifies the challenges that confront abolitionists in the field of immigration scholarship and activism. Importantly, the scholarship has so far omitted this secondary step of identifying a normative justification for immigration enforcement, leapfrogging first to proposed alternatives. This Article proposes addressing this key step of identifying operating principle(s) of the immigration regulatory system, as well as urging clarification and distinction among scholars and activists about which aspect of immigration enforcement merits abolition - detention, deportation, or exclusion - if not all three. Finally, this Article concludes with a call to continue engagement with the abolition conversation as activists and scholars propose alternatives to the current immigration enforcement system, which is harmful, inefficient in its aims, and costly.*

---

\* Professor of Practice and Acting Director, Immigrant Rights Clinic, Washington & Lee University School of Law. JD, Georgetown University Law Center. Thanks to Ahilan Arulanantham, Richard Boswell, Amanda Frost, Leigh Goodmark, Amy Kimpel, Alex Klein, Marissa Jackson Sow, Kit Johnson, Grace Li, Hiroshi Motomura, Lindsay Nash, Rachel Rosenbloom, Ediberto Román, Maureen Sweeney, Sarah Sherman-Stokes, India Thusi, and Tania Valdez for their feedback on this project at various stages. I received valuable insight from participants at the Richmond Junior Faculty Forum, the Emerging Immigration Law Scholars Conference at George Washington School of Law, the Emerging Immigration Scholars Conference at UCLA, and the NYU Clinical Law Review Writing Conference. Thank you also to the dedicated work of my student research assistants - Nina Gagnon '24, Anika Maan '24, Jo Shin '24, and McClayne Thomas '24.

<b>INTRODUCTION .....</b>	<b>3</b>
<b>I. ABOLITION THEORY IN CRIMINAL LEGAL SCHOLARSHIP.....</b>	<b>12</b>
A. THE HARMS OF PRISON AND THE CARCERAL SYSTEM.....	14
B. AN ABOLITIONIST VIEW OF THE NORMATIVE PURPOSE OF CRIMINAL LAW .....	15
C. ABOLITIONIST ALTERNATIVES.....	20
1. <i>Investing in Community</i> .....	21
2. <i>Violence Interruption</i> .....	24
3. <i>Restorative Justice</i> .....	24
<b>II. MAPPING ABOLITION THEORY ONTO IMMIGRATION</b>	
<b>ENFORCEMENT .....</b>	<b>26</b>
A. THE HARM OF IMMIGRATION ENFORCEMENT .....	28
1. <i>Detention</i> .....	31
2. <i>Deportation</i> .....	32
3. <i>Exclusion</i> .....	35
B. ARENAS FOR ABOLITION.....	37
1. <i>Detention</i> .....	39
2. <i>Deportation</i> .....	40
3. <i>Exclusion</i> .....	42
C. A KEY OMISSION .....	43
<b>III. NORMATIVE JUSTIFICATIONS FOR IMMIGRATION</b>	
<b>ENFORCEMENT .....</b>	<b>44</b>
A. THE TROUBLE WITH TRANSFERENCE.....	44
B. FOUR POSSIBLE NORMATIVE PILLARS .....	46
1. <i>Economic Policy</i> .....	46
2. <i>(National) Security</i> .....	51
3. <i>(National) Identity</i> .....	54
4. <i>International Power and Influence</i> .....	58
C. THE SUM OF THE PILLARS .....	59
<b>CONCLUSION.....</b>	<b>60</b>

## INTRODUCTION

Critiques directed at immigration enforcement in the United States have tilled fertile ground for discussions of abolition.<sup>1</sup> This Article responds to the call issued by Angélica Cházaro, “invit[ing] scholarship and advocacy that move in a new direction, one which reorganizes responses to deportation toward the goal of its downfall.”<sup>2</sup> However, there remains some discord among scholars about what should be abolished,<sup>3</sup> what strategies would be most effective in pursuing abolition, and whether those strategies adhere to the ideology and form of abolition theory. This Article identifies a missing step in the methodological reasoning as being a core reason for the diffuse perspectives on this issue. Scholars have been quick to offer solutions without first agreeing about the animating purpose(s) or normative justification(s) that have been used to support a policy of immigration enforcement in the first place. This Article offers a proposal for how to reconcile and refocus the conversation about abolition in the immigration legal scholarship so that scholars and activists may more effectively communicate with each other. To do so, this Article draws upon the three-part process observable in the abolition scholarship of criminal law scholars, who first identified the harm of the current system. They then proceeded to exhume the underlying rationale for why the carceral system exists, identifying a normative purpose for jails and prisons – a societal desire for “safety.” Last, and most crucial to the key tenets of abolition, scholars and activists have proposed an assortment of alternatives that satisfy this societal goal of “safety” in a more humane, equally or more effective, and less expensive way. This Article seeks to apply that same methodology to the work of abolition in the context of immigration,

---

<sup>1</sup> See, e.g., Laila Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. 1597 *passim* (2022) (engaging deeply with the abolitionist scholarship in the context of immigration enforcement and working as a practicing attorney while supporting abolitionist ideals).

<sup>2</sup> Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1051 (2021).

<sup>3</sup> See Kevin R. Johnson, *Open Borders*, 51 UCLA L. REV. 193 (2003) (calling for the abolition of borders completely); see also KEVIN R. JOHNSON, *OPENING THE FLOODGATES* 169 (2007) (“The presence of undocumented immigrants in the United States is a plain reality . . . [b]order controls, as currently configured in the United States, simply waste billions of dollars, and result in thousands of deaths. They have not ended, and count end, unlawful immigration.”). Cf., e.g., César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141 (2017); Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199 (2021) (limiting denunciations to more narrow auspices of immigration law, seeking, for example, the abolition of immigration detention).

and to identify the challenges of mapping that same framework of abolition theory onto this new context.

Part I explains the evolution of calls for abolition of carcerality as a hallmark of the criminal legal system.<sup>4</sup> It identifies the path that scholars and activists have taken, from critiquing the harms of the carceral complex, to providing a pathway away from reliance on prisons to solve concerns about safety.<sup>5</sup> This methodology first identifies the myriad harms that accompany the United States' policy of imprisonment - separation of family members, violence, death, abhorrent conditions, sexual assault, and severe psychological pain.<sup>6</sup> Scholars have also noted the disparities in the populations upon whom these harms are inflicted - that they skew proportionally toward Black men, people of color, Indigenous populations,

---

<sup>4</sup> While prisons are the primary focus, scholars have also noted the intrinsic connection between policing, criminal courts, and other mechanisms of the carceral system with the possibility of achieving this goal. *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020) (critiquing the scholarly community for investing in efforts to reform policing, noting that doing so “relegitimizes their social function” rather than supporting efforts to “redress police violence by diminishing the scale, scope, and legitimacy of police function,” through efforts to defund and dismantle the police).

<sup>5</sup> *See* Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1614 n.7–8 (2019) (establishing that the term “abolition democracy” has been used by both Angela Davis, a long-time activist, and W.E.B. Du Bois) (citing W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 163-66 (Routledge 2017) (1935); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY* 95-96 (2005); *see also* ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 105-15 (2003) (discussing an array of abolitionist alternatives to existing systems of policing and incarceration)). As Prof. McLeod states, activists are seeking to reimagine democracy “in genuinely liberatory terms.” *Id.* at 1615. In this case, “[j]ustice in abolitionist terms involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably.” *Id.*

<sup>6</sup> *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1159–1160, 1159 n.12 (2015) (“[D]espite persistent and increasing recognition of the deep problems that attend U.S. incarceration and prison-backed policing, criminal law scholarship has largely failed to consider how the goals of criminal law . . . might be pursued by means entirely apart from criminal law enforcement.”) (citing Don Stemen, *Reconsidering Incarceration: New Directions For Reducing Crime 2* (Vera Inst. Just. Jan. 2007), [https://www.vera.org/downloads/publications/reconsidering-incarceration-new-directions-for-reducing-crime/legacy\\_downloads/veraincarc\\_vFW2.pdf](https://www.vera.org/downloads/publications/reconsidering-incarceration-new-directions-for-reducing-crime/legacy_downloads/veraincarc_vFW2.pdf) (proposing that “effective public safety strategies should move away from an exclusive focus on incarceration to . . . a more comprehensive policy framework for safeguarding citizens,” one that would incorporate reductions in unemployment, increases in real wage rates, and improved educational opportunities)).

the poor, and other historically marginalized groups.<sup>7</sup> Moreover, critics have identified unexpected externalities that accompany these harms - high recidivism rates, great expense to both the state and federal governments that employ them, and ongoing criticism that the U.S.'s prison policy is but one manifestation of systemic racism.<sup>8</sup> Still others have noted how the United States' approach to domestic policy - primarily using the cudgel of criminal laws - is a threat to the democratic identity of the country.<sup>9</sup> The carceral system of the U.S. has been thoroughly pilloried for the immense harm that it causes, especially to those who are subjected to imprisonment, but also to society as a whole.<sup>10</sup>

This analysis continues to a secondary step, by which scholars have worked to unearth the rationale for such a system.<sup>11</sup> If one were to imagine a world without a criminal legal system or prisons, what might one identify as the normative purpose for implementing such a system? Scholars have roundly agreed that the carceral system is intended to promote safety.<sup>12</sup> This

---

<sup>7</sup> See Pew Charitable Trusts, *Racial Disparities Persist in Many U.S. Jails*, PEW (May 16, 2023), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/05/racial-disparities-persist-in-many-us-jails>; see also Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>; see also Leah Wang, *The U.S. criminal justice system disproportionately hurts Native people: the data, visualized*, PRISON POLICY INITIATIVE (Oct. 8, 2021), <https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/>.

<sup>8</sup> See, e.g., DERECKA PURNELL, *BECOMING ABOLITIONISTS* (2021).

<sup>9</sup> See, e.g., ALEX S. VITALE, *THE END OF POLICING 197–220* (2018) (discussing “political policing”).

<sup>10</sup> See, e.g., Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 *STAN. L. & POL'Y REV.* 1, 14–16 (2022) (describing the “social harms of prison”); see also *CONTESTING CARCERAL LOGIC: TOWARDS ABOLITIONIST FUTURES* (Michael J. Coyle & Mechthild Nagel eds., 2022).

<sup>11</sup> See generally VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* (2019) (ontological discussion about the reasons that a state would choose to utilize criminal law).

<sup>12</sup> While public safety or security is widely recognized as the animating purpose of the carceral system (and the criminal legal system in general), some scholars dispute the universality of this understanding and identify policing and prisons as a form of social control that is exerted on the basis of race, class, and as a form of oppression directed at other marginalized and non-white communities. See, e.g., KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010); see also Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 *UCLA L. REV.* 1108, 1111 (2020) (demonstrating the “racist origins of modern policing” and claiming that “policing has been, and continues to be, about terrorizing and controlling the Black body”).

analysis is distinct from the philosophical reasons that might undergird theories of punishment - retribution, deterrence, etc., though there is some overlap in considering how these theories might support the implementation of a carceral system. Rather, the question here is for what ultimate end a carceral system might be implemented in a society where one does not previously exist. Consequently, the analysis then shifts to whether a carceral system satisfies that goal of safety. Here, scholars have noted that the utility of prisons, as they are implemented in the United States to address safety, is questionable.<sup>13</sup> Specifically, criminal legal scholars have noted that prisons, in addition to being inhumane, require great fiscal expense,<sup>14</sup> and do not produce the safety that is considered so desirable.

In reference to the data that exist on this matter, scholars have worked to point out alternatives that would satisfy this goal of safety in ways that are equally or more effective, more humane, and less financially costly.<sup>15</sup> Indeed, scholars and activists have put forth data-driven solutions that include community-supported interventions (such as violence interruption),<sup>16</sup> reallocation of policing expenses to other budget items such as creating more green space,<sup>17</sup> and post-hoc interventions that do not rely on imprisonment, such as restorative justice.<sup>18</sup> These alternative interventions have been

---

<sup>13</sup> See VICTORIA LAW, “PRISONS MAKE US SAFE”: AND 20 OTHER MYTHS ABOUT MASS INCARCERATION (2021).

<sup>14</sup> See, e.g., Rebecca Goldstein, *The Politics of Decarceration*, 129 YALE L. J. 446, 457, 465 (2019) (arguing that fiscal conservatism and “fiscal discipline” are effective leverage points in convincing conservative politicians to reconsider the extension of sentences or the construction of new jails, and citing to the example of former Gov. Nathan Deal of Georgia refusing the construction of a new jail based on his own beliefs in fiscal conservatism and the possibility of redemption). *But see* Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 B.Y.U. L. REV. 403, 409 (2022) (expressing concern that reduction of this analysis to “a cost-benefit analysis . . . equation narrowly defines the cost of a reform in fiscal terms while holding fast to a reductive notion of public safety that excludes the safety of those most directly impacted by the system itself”).

<sup>15</sup> *Alternatives to Incarceration in a Nutshell*, FAM. AGAINST MANDATORY MINIMUMS (FAMM) (Jul. 8, 2011), <https://famm.org/wp-content/uploads/FS-Alternatives-in-a-Nutshell.pdf>.

<sup>16</sup> See Christopher Lau, *Interrupting Gun Violence*, 104 B.U. L. REV. (forthcoming 2024) (on file with author) (discussing legal changes that might lead to the proliferation of violence interruption, an effective and community-based abolitionist and decarceral alternative).

<sup>17</sup> Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1230 (2015).

<sup>18</sup> See, e.g., Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L.J. 201 *passim* (2010) (explaining the concept of restorative justice and how it might be applied in various settings); see also Marcos Rolim, *Restorative Justice and*

implemented throughout the U.S., to great acclaim.<sup>19</sup> They serve as positive indications for how these systems might prove to be transformative, resulting in a shift away from a carceral system and toward one of prison abolition.

Part II applies this same methodology to the realm of immigration enforcement. There has been much scholarly interest in how the idea of abolition might be incorporated into the realm of immigration. Even before calls to Defund the Police became widespread, activists had already rallied in favor of Abolish[ing] ICE (Immigration and Customs Enforcement),<sup>20</sup> which conducts much of the interior immigration policing in the United States. Clever proposals have been submitted that seek to reduce the violence that has come to be associated with immigration policing.<sup>21</sup> Most of these calls

---

*Recidivism*, 36 REV. JUST. DIREITO 60 *passim* (2022) (finding a positive relationship between restorative justice and a reduction in recidivism across a broad collection of studies evaluating such correlations).

<sup>19</sup> Shannon M. Silva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL'Y PRAC. 77 (2015), <https://njdc.info/wp-content/uploads/2017/10/Restorative-Justice-Legislation-in-the-American-States-A-Statutory-Analysis-of-Emerging-Legal-Doctrine.pdf> (suggesting that all parties, including those identified as victims, demonstrate high satisfaction rates with the process).

<sup>20</sup> In fact, politicians have also taken up this mantle, including New York Sen. Kirsten Gillibrand, New York Rep. Alexandria Ocasio-Cortez, New Mexico Rep. Deb Harland (who later became the Secretary of the Interior under President Biden), and several candidates in Florida, Massachusetts, and Hawaii. See Sydney Ember & Astead W. Herndon, *How 'Abolish ICE' Went From Social Media to Progressive Candidates' Rallying Cry*, N.Y. TIMES (June 29, 2018), <https://www.nytimes.com/2018/06/29/us/politics/abolish-ice-midterms-immigration.html>. There has been similar success with a campaign entitled, Defund Hate, which seeks to defund ICE and CBP (Customs and Border Protection), led by a non-profit organization known as Detention Watch Network (DWN). DWN is “committed to divestment from . . . ICE [] and . . . CBP[], agencies that tear apart loved ones and harm our communities. Instead, we want our tax dollars used to strengthen our families and communities. We are committed to investment in education, housing, green infrastructure and health care programs that create thriving communities.” See #DefundHate, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/defundhate> (last visited Aug. 3, 2023). The Executive Director of DWN, Silky Shah has authored her own guide for why and how abolition might be incorporated into the realm of immigration enforcement. See Silky Shah, *The Immigrant Justice Movement Should Embrace Abolition*, THE FORGE (Mar. 4, 2021), <https://forgeorganizing.org/article/immigrant-justice-movement-should-embrace-abolition>.

<sup>21</sup> See, e.g., Kari Hong, *10 Reasons Why Congress Should Defund ICE's Deportation Force*, 43 HARBINGER 40 (2019) (outlining the ways in which defunding “the arrests, detentions, and deportations . . . of people *just* for being without status” component of ICE while continuing to fund Homeland Security Investigations, a separate part of the Department of Homeland Security’s policing force, would retain ICE’s ability to address public safety while reducing the harm of the agency); see also Peter L. Markowitz, *After ICE: A New Humane & Effective Immigration Enforcement Paradigm*, 55 WAKE FOREST L.

have been grounded in concern for how immigration enforcement, designed to address one’s civil status, has come to mirror and interact with criminal policing. This stands in contrast to other administrative compliance efforts such as how the IRS works to collect unpaid taxes.<sup>22</sup> Scholars suggested, for example, proportional responses, or enforcement efforts that distinguish between long-term residents with status and recent arrivals without status.<sup>23</sup> These proposals offer immense utility by pushing back on the unjust system that currently exists, while also producing generative ideas that promote radical reimagination of that system. However, methodologically, it seems that immigration scholars and activists have skipped over an important step - trying to identify the underlying normative justification for why immigration restrictions and enforcement might exist in the first place.

To be clear, this analysis differs from the question of what the U.S. immigration system currently privileges.<sup>24</sup> Rather, this Article aligns with scholarship that questions the presumption of state sovereignty.<sup>25</sup> Here, as a

---

REV. 89, 90 (2020) (offering an affirmative vision of immigration enforcement that “does not rely on detention, mass deportation, or a dedicated immigration police force at all”).

<sup>22</sup> See, e.g., Peter L. Markowitz, *Abolish ICE...and Then What?*, 129 YALE L.J. F. 130, 138–39 (2019) (pointing to the Internal Revenue Service (IRS) as a comparable administrative enforcement agency tasked with punitive enforcement). Prof. Markowitz marks the evolution from universal enforcement for non-payment of taxes, a task with which the IRS had originally been charged, to a current praxis which audits fewer than one percent of returns and prosecutors “only a couple hundred people” per year, while still enjoying “one of the world’s highest tax compliance rates.” *Id.*

<sup>23</sup> Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1 (2017); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622 (2015); Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 465 (2015); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009).

<sup>24</sup> Current preferences for entry and long-term status include a combination of family unity, opportunities for very skilled workers, and humanitarian efforts. The immigration legal system is vast and complex. This explanation is reductionist, but is being used as a formulaic placeholder, as opposed to a deep substantive analysis on this issue. See, e.g., Julia Gelatt, *Explainer: How the U.S. Legal Immigration System Works*, MIGRATION POL’Y INST. (MPI) (Apr. 2019), <https://www.migrationpolicy.org/content/explainer-how-us-legal-immigration-system-works>; see also *How the United States Immigration System Works*, AM. IMMIGR. COUNS. (Sept. 14, 2021), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works> (both providing recent comprehensive overviews of the allocation of visas and other forms of relief which grant admission and provided status, either temporary or permanent, and on what bases).

<sup>25</sup> See, e.g., Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1099–1101, 1099–1101 nn.284–85 & 291 (2021) (supporting Linda Bosniak’s concept of



thought exercise, one might consider the justifications for immigration restrictions were none to exist. This Article asks that abolitionists question what the underlying rationale(s) for an immigration system in the U.S. might be, and whether those animating principles are justified based on the current system. While scholars and activists have begun to offer solutions that are couched in abolitionist terms, it is difficult to determine how those offerings can supplant the current enforcement system if the metric for which they are trying to solve is unclear.

By modeling this approach on that of the carceral abolition theorists, one will be able to determine if a proposed alternative satisfies that underlying goal in a more humane, equally or more effective, and less expensive way.<sup>26</sup> However, whereas carceral abolition is primarily focused on eliminating prisons, “immigration enforcement” has a much more expansive meaning, encompassing three distinct, though related, areas in which abolitionist may be directing their attention: (1) immigration detention, (2) deportation, and (3) exclusion via borders. Those who consider themselves abolitionists might focus on one or more than one of these areas, but each area of immigration enforcement is subject to its own vicissitudes that are worthy of exploration.

---

“inverting the burden” to prove sovereignty, and supporting the call from other scholars to extend the question of sovereignty to the historical period that predates settler colonialism in the U.S., and urging scholars to reconsider the interconnectedness of questions of sovereignty, and the complexity of “attempting to resolve the status of immigrants with calls for membership on lands wrested from Indigenous people”) (citing Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 *YALE J.L. & HUMAN.* 51, 78 (2016) (finding that the nation-state is rendered “a relative constant through history, permanent and immovable, resistant to the creative actions and political agency of individuals and collectivities) (citing also to DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 63-90 (2007) (describing the Trail of Tears as well as fugitive slave laws as the “[a]ntecedents” of American deportation policy)) (citing also to Leti Volpp, *The Indigenous as Alien*, 5 *U.C. IRVINE L. REV.* 289, 290 (2015) (“Immigration law, as it is taught, studied, and researched in the United States, imagines away the fact of preexisting [I]ndigenous peoples.”)); *see also* Tendayi Achiume, *Migration as Decolonization*, 71 *STAN. L. REV.* 1509 (2019) (critiquing the exception to border sovereignty that is afforded to refugees and asylum seekers but denied to economic migrants, proposing that such a distinction blurs quickly through a decolonial lens, and supporting international migration as a “political act”); *see also* HARSHA WALIA, *BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM* (2021).

<sup>26</sup> Regarding the issue of sovereignty, overlaps with the carceral system are clear. For example, Prof. Dylan Rodriguez criticizes the episodic nature with which police brutality is viewed - an aberration as opposed to being part of a “general historical continuity of power relations that structure U.S. state institutions and the social-economic formations within which they perform their sovereignty.” Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 *HARV. L. REV.* 1575, 1604 (2019).

This distinction makes the question of abolitionist thinking in the context of immigration enforcement more complex than the singular narrative framework of seeking prison abolition.

Last, clarity regarding these normative justifications is necessary so that the circle of support for abolition might be expanded. While enthusiasm for the abolition of immigration enforcement and exclusion remains marginal,<sup>27</sup> there have been major positive developments in efforts to one component of immigration enforcement - detention.<sup>28</sup> For that to happen, the interests of less radical individuals must be considered. Such an appeal has proved successful elsewhere in the carceral context. Oklahoma, arguably the most

---

<sup>27</sup> Approximately 1/5th of respondents in a recent poll supported completely eliminating ICE. Elaine Godfrey, *What 'Abolish ICE' Actually Means*, THE ATLANTIC (Jul. 11, 2018), <https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/> (citing polls from Kevin Robillard & Daniel Marans, *Abolishing ICE Isn't Very Popular (Yet)*, HUFFPOST (Jul. 2, 2018), [https://www.huffpost.com/entry/abolishing-ice-not-popular-yet\\_n\\_5b3a3916e4b08c3a8f6c803d](https://www.huffpost.com/entry/abolishing-ice-not-popular-yet_n_5b3a3916e4b08c3a8f6c803d)). A survey of prominent Democratic candidates prior to the 2018 midterms also found only two willing to support the abolition of ICE. See *Would You Redistribute the Responsibilities of Immigrations and Customs Enforcement (ICE) to Other Agencies? If So, Would ICE Be Abolished?*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/policy-2020/immigration/abolish-ice/> (last visited Aug. 3, 2023); see also Daniella Diaz, *These Democrats Want to Abolish ICE*, CNN (Jul. 3, 2018, 10:57 AM), <https://www.cnn.com/2018/07/02/politics/abolish-ice-democrats-list/index.html>.

<sup>28</sup> The Biden Administration has been working feverishly to create strong Alternatives to Detention (ATD) program. Adam Shaw, *Nonprofit That Backs Defunding ICE to Oversee DHS Pilot Program Aiding Illegal Immigrants*, FOX NEWS (Oct. 20, 2022, 2:56 PM), <https://www.foxnews.com/politics/nonprofit-backs-defunding-ice-oversee-dhs-pilot-program-aiding-illegal-immigrants>. However, while such a program should theoretically reduce the number of individuals being held in immigration detention, that is not currently the case, as there are nearly 30,000 individuals being held in facilities across the United States. See *ICE Detainees*, TRAC IMMIGR., [https://trac.syr.edu/immigration/detentionstats/pop\\_agen\\_table.html](https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html) (last visited Aug. 3, 2023). In addition, the Biden Administration has considered re-implementing family detention, though it shied away from the idea after vociferous negative feedback from the public and advocacy groups. See Eileen Sullivan & Zolan Kanno-Youngs, *U.S. Is Said to Consider Reinstating Detention of Migrant Families*, N.Y. TIMES (Mar. 6, 2023), <https://www.nytimes.com/2023/03/06/us/politics/biden-immigration-family-detention.html>; see also Ted Hesson, *US Family Immigration Detention Won't Restart 'At This Time,' Official Says*, REUTERS (Apr. 18, 2023, 5:23 PM), [reuters.com/world/us/us-family-immigration-detention-wont-restart-at-this-time-official-says-2023-04-18/](https://www.reuters.com/world/us/us-family-immigration-detention-wont-restart-at-this-time-official-says-2023-04-18/). But perhaps more troubling is that the ATD program has resulted in a massive amplification in the number of people being monitored by ICE—nearing 300,000. See *Alternatives to Detention (ATD)*, TRAC IMMIGR., [https://trac.syr.edu/immigration/detentionstats/atd\\_pop\\_table.html](https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html) (last visited Aug. 3, 2023).

conservative state in the U.S., where local politicians exerted significant effort to lower the prison population in order to reduce the fiscal costs of the carceral system in the state.<sup>29</sup> Whether such accord could be reached across the aisle remains to be seen in the context of immigration, but by identifying these animating principles, this Article seeks to begin that conversation.

Part III highlights the complexity that accompanies the importation of abolition theory from the criminal legal sphere into the immigration sphere. Criminal law scholars broadly agree on the normative justification for the carceral system – public safety. Indeed, most scholars conclude that there is a problem that must be addressed – that there is at least some antisocial or violent behavior that, if left unmanaged, will have negative societal effects. Where carceral abolitionists differ from other criminal law scholars is that they disagree about the solution to this problem. Their solution moves outside of the sphere of tweaks and reforms and invites a wholly new perspective using the lens of decarceration. Here, the problem to everyone is clear – public safety requires some sort of intervention to prevent harm to and support communities so that they feel secure. This approach does not map onto critiques of immigration enforcement as neatly as abolitionist activists and scholars would prefer.

Prison abolitionists agree with non-abolitionists about both the normative justification for the carceral system (public safety) and that there is a problem

---

<sup>29</sup> See Taylor Miller Thomas & Megan McCrink, *How Oklahoma Popped Its Prison Bubble, In Charts*, POLITICO MAG. (Apr. 23, 2020, 5:00 AM), <https://www.politico.com/interactives/2020/justice-reform-decarceration-in-oklahoma/>. However, those efforts have proved to be more challenging to maintain in the long term because of other punitive policies that mar the re-entry process for many who are released from prisons. See Adam Kemp, *Oklahoma Has Tried to Lower Its Incarceration Rate. But Many Obstacles Face the Newly Released*, PBS NEWS HOUR (Dec. 27, 2022, 2:02 PM), <https://www.pbs.org/newshour/nation/oklahoma-has-tried-to-lower-its-incarceration-rate-but-many-obstacles-face-the-newly-released>. Though there are local progressive efforts that are seeking to remedy these issues and were recently supported and signed into law by a conservative majority. See Ray Carter, *Expungement Reform Signed into Law*, OKLA. COUNCIL PUB. AFFS. (OCPA) (May 5, 2022), <https://www.ocpathink.org/post/independent-journalism/expungement-reform-signed-into-law>. Such measures were supported by a larger national effort, Right on Crime, with the Oklahoma Director of the organization noting that this “[e]xpungement reform allows individuals to move on from their past while reducing costly recidivism.” See Marilyn Davidson, *Right On Crime Applauds the Passage of Oklahoma’s HB 3316 Expungement Reform*, RIGHT ON CRIME (Apr. 28, 2022), <https://rightoncrime.com/right-on-crime-applauds-the-passage-of-oklahomas-hb-3316-expungement-reform/>.

that needs to be solved. Their disagreement is about the solution. However, immigration enforcement abolitionists do not necessarily concede that there is a problem to solve. This additional layer complicates the analysis for what normative justifications might be supported by abolitionists or reformists. If there is not broad agreement among scholars (abolitionists or not) about whether immigration (or even certain subsets of migration) is a problem to solve, then the foundation for initiating these conversations remains unstable.

This Article offers and interrogates several possible normative pillars that policymakers and others have relied upon to support immigration enforcement regimes in the U.S. Each of these normative values has several subheadings under which are gathered diverse concerns: (1) Economic Policy, (2) (National) Security, (3) (National) Identity, and (4) International Power and Influence, with a more in-depth explanation to follow.

This Article concludes by affirming the need to apply a methodological approach to conversations about immigration enforcement abolition that mirrors the predecessor conversations about prison abolition. Scholars have already identified the harms that accompany immigration detention, deportation, and exclusion. While scholars have also begun presenting proposals about what might be built up from the ruins of a harmful immigration enforcement system, there is first a need to incorporate and examine a key missing step in the methodology – identifying the normative purpose(s) of the immigration system. Secondarily, greater clarity should be drawn among the different types of abolition being proposed: detention, deportation, and/or exclusion. Both advocates and scholars are interested in which of these various proposals adhere to the ideology of abolition and whether their implementation might cause additional harm or reify the damaging system. By identifying the distinct types of abolition in the context of immigration, and by reckoning with these proposed normative pillars, more fertile ground is produced for these conversations.

## I. ABOLITION THEORY IN CRIMINAL LEGAL SCHOLARSHIP

While the concept of abolition is not new,<sup>30</sup> it has gained a stronghold in

---

<sup>30</sup> “The long historical praxis of abolition is grounded in a Black radical genealogy of revolt and transformative insurgency against racial chattel enslavement and the transatlantic trafficking of captive Africans.” Rodriguez, *supra* note 26, at 1576. See also Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019) (finding

both scholarly and advocacy movements,<sup>31</sup> seeking to diminish and eventually discard the carceral system.<sup>32</sup> As part of the movement seeking prison abolition criminal law scholars and advocates first focus on the harm of the current penal system as it is structured in the United States.<sup>33</sup> Next, abolitionists have rooted out the normative purpose of this system, taking policymakers at their word - that criminal laws are designed to promote safety in communities.<sup>34</sup> By focusing on safety as a normative justification for the

---

abolition as the only solution which can dismantle a system of “criminal procedure and punishment in the United States [that] still function[s] to maintain forms racial subordination that originated in the institution of slavery”). *See also* Brendan McQuade, *Histories of Abolition, Critiques of Security*, 45 SOC. JUST. 1 (2018), <https://www.jstor.org/stable/26677654> (providing a comprehensive and global overview of various abolition movements).

<sup>31</sup> Prof. Amna Akbar highlights the need to incorporate and refer to policymaking guidance from affected communities in crafting an abolitionist horizon. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018) (noting that [b]y studying not only the critiques offered by radical social movements, but also their visions for transformative change, the edges of law scholarship can be expanded,” referring to the utility of looking to the Movement for Black Lives’ policy platform) (citing *A Vision for Black Lives: Policy Demands for Black Power, Freedom, and Justice*, M4BL, <https://m4bl.org/policy-platforms/> (last visited Aug. 3, 2023) (calling for a comprehensive, intersectional revision of many aspects of domestic policy in the U.S.—including the abolition of the death penalty, the abolition of all jails, prisons, and immigration detention, and the demilitarization of law enforcement)).

<sup>32</sup> These efforts are not limited to scholarship. The #defundthepolice slogan emphasizes the desire to reallocate state and federal funding from policing toward other community efforts that support public safety. *See Alternatives to Police Services: Let’s Re-Imagine a New System*, #DEFUNDTHEPOLICE, <https://defundthepolice.org/alternatives-to-police-services/> (last visited Aug. 3, 2023). Others have called for the abolition of the criminal courts because they “legitimate the activities of police and prisons, even legalizing violent and otherwise illegal activities through the creation of legal fictions . . .” while also contributing to “unique forms of state violence, social control, and exploitation. . .” Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 5 (2022).

<sup>33</sup> The literature on this topic is vast, but some seminal works include: MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 105–15 (2003); PETER K. ENNS, *INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD* (2016).

<sup>34</sup> Not all scholars subscribe exclusively to this notion. Indeed, others continue to point to the connection of policing’s history with that of monitoring and limiting the movement of both enslaved individuals and Black people in general. As other groups became more prominent in the United States, if they were categorized as non-white, they too were monitored. Therefore, policing can be seen as a form of social control exerted on specific subgroups within a population, while remaining under the auspices of official state power. *See generally* KEVIN KENNY, *THE PROBLEM OF IMMIGRATION IN A SLAVEHOLDING REPUBLIC: POLICING MOBILITY IN THE 19<sup>TH</sup>-CENTURY UNITED STATES* (2023) (analyzing how regulation of enslaved and free black people’s movement produced a national

creation of prisons and policing, abolitionists have also found a metric by which to critique the outcomes of the carceral system as a policy decision.

Prison abolitionists highlight the disconnect between policy goal and outcome and propose alternatives. If safety is not satisfied by a harmful carceral system, the call for its abolition takes on a more coherent framing. But, as many abolitionists have rightly stated, abolition is focused not only on the demise of a harmful system, but also on what is yet to come - what might supplant a system of justice rooted in carcerality, and yet satisfy the goals of safety. This focus on creation over destruction is integral to abolitionist theorizing and praxis. Identifying new forms of promoting safety can help alleviate the fear and anxiety that may accompany discussions about the absence of prisons. In the prison abolition context, advocates and scholars have focused on solutions that are: (i) less harmful, (ii) equally or more effective, and (iii) more cost-efficient. Examples include greening spaces in cities, supporting community-based violence interruption organizations, and supporting restorative justice initiatives. This Part will discuss how each of these solutions helps to satisfy the goals of safety in a way that is less harmful, more effective, and more cost-efficient.

#### A. *The Harms of Prison and the Carceral System*

The harms of the carceral system in the United States are well documented. Michelle Alexander's book, *The New Jim Crow*, traces the expansion of the U.S. population from 300,000 to over 2 million over the course of 30 years.<sup>35</sup> This publication was formative for a new generation in the way that they thought and talked about the role of criminal law as a function of society, and even led to bans in prison.<sup>36</sup> But the idea of prison abolition was nearly achieved prior to this boom in the prison population.<sup>37</sup>

---

immigration policy between the period of American Revolution and the end of Reconstruction).

<sup>35</sup> Alexander *supra* note 33, at 1–19.

<sup>36</sup> Jonah E. Bromwich, *North Carolina Prisons Drop Ban on 'New Jim Crow'*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/us/new-jim-crow-north-carolina.html>.

<sup>37</sup> See Joshua Dubler & Vincent Lloyd, *Think Prison Abolition in America is Impossible? It Once Felt Inevitable*, GUARDIAN (may 19, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/may/19/prison-abolition-america-impossible-inevitable> (“In April 1972, a moratorium [on the construction of new prisons] was endorsed by the board of the National Council on Crime and Delinquency, a centrist criminal justice thinktank, as well as by the National Advisory Commission on Criminal

The harms of prison that were present nearly half a century ago remain present today.

Incarceration leads to poorer health outcomes,<sup>38</sup> fewer employment opportunities,<sup>39</sup> and intensive stigmatization within a community and society at large.<sup>40</sup> The massive infrastructure required to support the mass incarceration of individuals in the United States is decried as the “prison industrial complex,”<sup>41</sup> which denotes the financial incentives for corporations, and the people to whom they lobby, to maintain the current carceral system.<sup>42</sup> In general, scholars have spent significant time identifying the harms of prisons in the United States, laying the foundation for drastic change, in the form of abolition.

### *B. An Abolitionist View of the Normative Purpose of Criminal Law*

An integral step in the call for prison abolition has been identifying the normative purpose of the criminal legal system. Debates on this topic typically focus on the purpose of punishment and whether its purpose should be retribution, rehabilitation, or some other rationale. Instead, abolitionists disavow punishment as a starting point.<sup>43</sup> By offering a willingness to engage

---

Justice a year later. The latter commission, operating under the Department of Justice, added a call for the closure of all juvenile prisons, and it explicated the emerging consensus about American prisons: ‘There is overwhelming evidence that these institutions create crime rather than prevent it.’”).

<sup>38</sup> See Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage To Mental Health*, PRISON POL’Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> (demonstrating that this is especially true of mental health).

<sup>39</sup> See *Expanding Economic Opportunity for Formerly Incarcerated Persons*, WHITE HOUSE (May 9, 2022), <https://www.whitehouse.gov/cea/written-materials/2022/05/09/expanding-economic-opportunity-for-formerly-incarcerated-persons/> (“Individuals with criminal records face substantial challenges in the labor market.”).

<sup>40</sup> See Bridget Brew et al., *Sticky Stigma: The Impact of Incarceration on Perceptions of Personality Traits and Deservingness*, 100 SOC. FORCES 1910 (Jul. 29, 2021), <https://academic.oup.com/sf/article/100/4/1910/6329819> (providing quantitative evidence of the nature and impact of the stigma on incarcerated people and their families).

<sup>41</sup> Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC (Dec. 1989), <https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/>.

<sup>42</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

<sup>43</sup> See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019) (“Whereas conventional accounts of legal justice emphasize the administration of justice through individualized adjudication and corresponding punishment or

in the conversation with a more expansive imagination, punishment is no longer seen as the only option. Abolitionists consider what problem the carceral system seeks to resolve.<sup>44</sup> It appears that scholars and activists have coalesced around an identifiable policy objective - public safety.<sup>45</sup> Comprehensively, this means that communities feel safe, free from violence, and empowered to redress transgressions in a way that does not beget more violence.<sup>46</sup> The following section addresses some methods for achieving these ends,<sup>47</sup> but this section focuses on what agreement exists among abolition scholars and activists regarding public safety as a goal and how the

---

remuneration (most often in idealized terms starkly at odds with actual legal processes), abolitionist justice offers a more compelling and material effort to realize justice—one where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence.”).

<sup>44</sup> See, e.g., Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J. F. 848, 854–56 (2019) (“Choices about what is a crime and what is not are made by politicians and within the economic, social, and racial systems in which politicians exist.”) (cited in Rachel Barkow, *Promise or Peril?—The Political Path of Prison Abolition in America*, WAKE FOREST L. REV., 2 n.3 (forthcoming 2023) (on file with author) (“There are, of course, some core mala in se harms that are universally recognized across societies as crimes even if there is debate beyond that core about what should be included.”)).

<sup>45</sup> “A rhetoric and logic of safety production is likely helpful for the long-term sustenance for the politics of the #Defund movement. Without consistent messaging and data that support the positive safety returns of investing in alternatives to policing, policymakers who push reducing police funding to invest in alternatives to policing leave themselves vulnerable to backlash.” Monica C. Bell et al., *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1314 (2021). Harvard has created an entire Institute on Policing, Incarceration & Public Safety, connecting the three ideas. Brandon M. Terry & Elizabeth Hinton, *Institute on Policing, Incarceration & Public Safety*, HUTCHINS CTR. AFR. & AFR. AM. RSCH., <https://hutchinscenter.fas.harvard.edu/policing-incarceration-and-public-safety> (last visited Aug. 3, 2023).

<sup>46</sup> Some scholars seek to extend this abolitionist ethos even further, noting that personal safety should not be the limit, and that freedom from physical violence at the hands of the police is simply one piece of the puzzle. See Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 692 (2022) (“Simply eliminating policing, with no further change, does not address our culture of violence and its underlying conditions.”) (agreeing with scholars who cite material insecurity as one major contributor to violence).

<sup>47</sup> Whether a reform meets the framework for being truly “abolitionist” might require that it, “(1) shrinks the system doing harm; (2) relies on modes of political, economic, and social organization that contradict prevailing arrangements and gesture at new possibilities; (3) builds and shifts power into the hands of those directly impacted, who are often Black, brown, working class, and poor; (4) acknowledges and repairs past harm; and (5) improves, or at least does not harm, the material conditions of directly impacted people.” Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544 (2022).



parameters of that goal are defined.<sup>48</sup>

Part of the pushback against abolition involves concerns that the complete or piecemeal dismantling of a policing force will lead to anarchy and chaos within a particular jurisdiction.<sup>49</sup> It is this concern that many scholars have spent ample time addressing.<sup>50</sup> As Prof. Brandon Hasbrouck explains, “[r]ather than a society without a means of protecting public safety, abolitionists desire a society where the entire public is safe.”<sup>51</sup> Indeed, this idea of safety is much more expansive than one might initially consider.<sup>52</sup>

---

<sup>48</sup> Perhaps this movement has partially been inspired by pushback from others to satisfy this goal. One study has found that “support for policing reform depends on people’s beliefs about how proposed policies would affect crime and public safety.” Mike Cummings, *Resistance to ‘defund’ or ‘abolish’ the police rooted in policy proposals*, YALE NEWS (Feb. 4, 2022), <https://news.yale.edu/2022/02/04/resistance-defund-or-abolish-police-rooted-policy-proposals> (describing a study that analyzed public support for major policy changes—including abolition and defunding the police—as hinging heavily on whether public safety would suffer).

<sup>49</sup> See Cummings, *supra* note 48 (“Our findings suggest that support for policing reform depends on people’s beliefs about how proposed policies would affect crime and public safety,” said Huber, the Forst Family professor of Political Science in Yale’s Faculty of Arts and Sciences.”); see also Paige E. Vaughn et al., *Mass Support for Proposals to Reshape Policing Depends on the Implications for Crime and Safety*, 21 CRIMINOLOGY & PUB. POL’Y 125 (2022). In particular, members of the Black community in Washington, DC have voiced this concern. See JAMES FORMAN JR., *LOCKING UP OUR OWN* (2017). *But see* JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015) (describing an epidemic of murder in Black communities disproportionately high in comparison to demographic population data, and a stunning number of which remain unsolved each year - the vast majority). These accounts display the inadequacy of the current system—that it does not do what it purports to do, and yet exerts great harm on the communities most in need of its protection.

<sup>50</sup> Prof. Paul Butler of Georgetown University Law Center spent several months at the end of 2019 and the beginning of 2020 (prior to the COVID-19 pandemic) delivering a lecture entitled, “Prison Abolition, and a Mule,” in which he worked to explain the harms of prison, and explain how decarceration, or the gradual reduction in the number of people in prison, could be a pathway to prison abolition. Paul Butler, Professor, GEO. L. CTR., *Jefferson Lecture at University of California Berkeley: How Prison Abolition Would Make Us All Safer*, BERKELEY NEWS (Jan. 17, 2020), <https://news.berkeley.edu/2020/01/17/berkeley-talks-paul-butler/>. He reserves for the audience the idea of “a dangerous few,” who might need to be physically separated from society for some period of time. *Id.* But, he cautions, this number is vastly smaller than our current prison population and would undoubtedly require separation for a much smaller amount of time than our current incarceration model requires. *Id.*

<sup>51</sup> Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685 (2022).

<sup>52</sup> See, e.g., Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725 (2022) (describing the centuries through which politicians have identified public safety as their primary function, but also limiting the definition of safety to mean protection from violent harm, whereas “[f]or most people, being safe depends on much more: food, clean water and air, housing, a basic income, and the means to obtain that income through an education and

In sum, abolitionists claim that policing does not actually solve many of the problems that it seeks to solve and that, often, incases additional harm to marginalized communities.<sup>53</sup> The initial violence is left unresolved and additional violence is heaped upon it.<sup>54</sup> In response, abolitionists seek to find alternatives to the carceral system that might satisfy these same desires for safety.<sup>55</sup> Indeed, this is an alternative lens through which to view safety, one that “requires us to look at public safety not as a zero-sum game between liberty and security, but as a collaborative promotion of life, liberty, and pursuit of happiness for all.”<sup>56</sup>

In acknowledging this revised vision of safety, prison and policing abolitionists have turned to innovative solutions to address this centralized goal.<sup>57</sup> The following section describes some of the efforts that abolitionists

---

a job” and finding that it might even include “health care . . . and freedom from discrimination,” and arguing that a more capacious understanding of public safety is needed).

<sup>53</sup> See Hasbrouck, *supra* note 51, at 686–88 (describing a series of recent incidents in which police failed to protect incidents of mass violence, while also detailing another series of recent incidents in which police killed, shot, or injured individuals while on duty, and concluding that “[p]olice perpetuate unjust violence rather than protecting the public from it”). Prof. Hasbrouck claims that, “[p]olicing as public safety persists because the few people it was designed to protect - mostly wealth, white men—still reap its benefits . . .” and stating that, “[t]hrough policing, the few may buy their security at the expense of the liberty and security of the many.” *Id.* at 688.

<sup>54</sup> See McLeod, *Envisioning Abolition Democracy*, *supra* note 43, at 1638 (“Although the primary objection to penal abolition is that murder, rape, and child sexual assault demand a criminal prosecutorial response, the truth is that the criminal process fails to respond at all to many of these most egregious forms of wrongdoing, and when it does, the redress available through the criminal process is typically deeply inequitable, violent, and at odds with any conception of meaningful amends or principled accountability.”).

<sup>55</sup> See *id.* at 1615 (“Justice for abolitionists is an integrated endeavor to prevent harm, intervene in harm, obtain reparations, and transform the conditions in which we live.”); see also *id.* at 1615 n.17 (citing Barnard Ctr. for Rsch. on Women, *Reina Gossett + Dean Spade (Part z): Prison Abolition + Prefiguring the World You Want to Live In*, YOUTUBE (Jan. 7, 2014), <https://www.youtube.com/watch?v=XDQIWiuJ8uQ> [[https://perma.cc/5\\_KCJ-SM\\_7\\_7](https://perma.cc/5_KCJ-SM_7_7)]). As Mariame Kaba explains, “I am looking to abolish what I consider to be death-making institutions, which are policing, imprisonment, sentencing, and surveillance. And what I want is to basically build up another world that is rooted in collective wellness, safety, and investment in the things that would actually bring those things about.” Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, THE NEW YORKER (May 7, 2021), [newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition](https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition).

<sup>56</sup> Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685 (2022).

<sup>57</sup> Indeed, “[e]ven if abolitionist goals cannot be achieved, their perspective helps change overall perceptions and thus moves the Overton window to embrace much broader downsizing of prisons and investment in communities than would take place without the abolitionist challenge.” Barkow, *supra* note 44, at 3.

have promoted to meet this goal of safety.<sup>58</sup> They have centered around a new conception of justice, which, “for abolitionists, is grounded in paying careful attention to experienced harm and its aftermath, addressing the needs of survivors, and holding people who have perpetrated harm accountable in ways that do not degrade but seek to reintegrate, while understanding the root causes of wrongdoing and working to address them.”<sup>59</sup> This process involves prefiguration<sup>60</sup> and/or radical imagination<sup>61</sup> - seeking to conceive of a

---

<sup>58</sup> One journalist explains to skeptics of carceral abolition, “Most of those who rally to the cause do not advocate a world where no one answers your 911 call and serial killers are set loose.” Bill Keller, *What Do Abolitionists Really Want?*, THE MARSHALL PROJECT (in collaboration with Bloomberg Opinion) (Jun. 13, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want>. Rather, abolitionists have two main goals: (1) “devolving responsibility for public safety to local communities. (“Civilianizing safety,” some experts call it.) One reason New York City has reduced its crime rate while simultaneously slashing arrests, incarceration and law-enforcement overreach is that the city has a nonprofit network on the ground, some of it subsidized by the city, to combat violence and to help the formerly incarcerated safely reenter society,” and second, “to redistribute government spending from police and prisons to narrowing the underlying, crime-breeding inequalities of wealth and opportunity. [Abolitionists] would instead invest in housing, education, jobs and health—a goal that seems remote in the current political environment.” *Id.*

<sup>59</sup> McLeod, *Envisioning Abolition Democracy*, *supra* note 43, at 1646.

<sup>60</sup> See Sameer Ashar, *Pedagogy of Prefiguration*, YALE L.J. F. 871 n.8 (forthcoming 2023) (on file with the author) (quoting Harsha Walia in defining prefiguration as “the idea [that] we have to build our movement cultures and . . . institutions in the model of the world we are seeking to create.”); see also Veryl Pow, *Grassroots Movement Lawyering: Insights from the George Floyd Rebellion*, 69 UCLA L. REV. 80, 111 (2022) (tracing acts of prefiguration to slave rebellions and “the establishment of autonomous settlements by runaway slaves”). Prefiguration finds good company, for example in the Afrofuturism movement. See, e.g., I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 3, 3 n.9 (2019) (“While our collective imaginings too often fall far short of a convincing alternative future, Afrofuturism has been proposing ways forward for decades.”) (citing to Amah-Rose McKnight-Abrams, *The New Afrofuturism*, VICE: GARAGE (Feb. 9, 2018, 12:08 PM), [https://garage.vice.com/en\\_us/article/437wq3/the-new-afrofuturism](https://garage.vice.com/en_us/article/437wq3/the-new-afrofuturism)); see also Bennett Capers, *Free-ing Criminal Justice*, 120 MICH. L. REV. 999, 1008-09 (2022) (“Prompted by projections that the United States will likely be a ‘majority-minority’ country by the year 2044, I have been exploring what criminal justice might look like then, or in the ensuing years when people of color wield political and economic power.”); see also Matthew Boaz, *Speculative Immigration Policy*, 37 GEO. IMMIGR. L.J. 183 (2023) (“[S]peculative [fiction] visions could serve as a platform for radical imagination about future U.S. immigration policies.”).

<sup>61</sup> See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 412 (2018) (Referring to the radical contemporary racial justice movements as something not seen since “the civil rights, Black power, and Chicano movements of the 1960s and the 1970s,” and calling for a reframing of how we view the criminal legal system to instead conceived of “policing, jail, and prison as the primary mode of governing Black, poor, and other communities of color in the United States,” with law as the infrastructure). These movements are “working to build another state—another world even—organized differently

reshaped society that does not yet exist, primarily by “looking to the bottom.”<sup>62</sup> The process may be slow and incremental,<sup>63</sup> but must be grounded in certain abolitionist principles, namely that interim steps to transformational change satisfy the definition of “non-reformist reforms,” which “move toward system change, rather than reifying and strengthening the carceral state.”<sup>64</sup>

### C. Abolitionist Alternatives

In support of these abolitionist goals, scholars and activists have sought to build better infrastructures of communities, intervene actively to prevent

---

than the one we have inherited . . . [and] aiming to use the law as a tool to build that alternative future.” *Id.* Such a moment calls for “a radical imagination, where the scale of deep critique is matched with a scale of grand vision.” *Id.*

<sup>62</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 323, 324 (1987) (noting the disconnect between Critical Legal Studies and the voices of the disaffected and offering, “that those who have experienced dissemination speak with a special voice to which we should listen,” and noting that “adopting the perspective of those who have seen and felt the falsity of the liberal promise . . . can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice”).

<sup>63</sup> “Organizers and activists must continue to experiment, to calibrate their arguments and actions, and to secure liberty as best they can, even if sometimes only in fits and starts. Progress toward that goal is not, and could never be, a clean, straight line.” Hasbrouck, *Reimagining Public Safety*, *supra* note 51, at 692. Indeed, we cannot doubt “the potential of local social-change project . . . to prefigure and thereby being to realize incrementally the sort of change world few would want to live in.” HARSHA WALIA, UNDOING BORDER IMPERIALISM (2013) (cited in McLeod, *Envisioning Abolition Democracy*, *supra* note 43, at 1622–23 n.61).

<sup>64</sup> Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597, 1606 nn.43–44 (2022) (referring to definitions establish in Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98 (2020) and Shiu-Ming Cheer, *Moving toward Transformation: Abolitionist Reforms and the Immigrants' Rights Movement*, 68 UCLA L. REV. Discourse 68, 72–73 (2020), clarifying the criteria for an abolitionist reform as: (1) having a broad transformative vision that prefigures a different world, (2) cutting across issue areas and has the potential for building across movements, (3) leading people to question whether an existing institution meets people’s needs, and (4) building the capacity for individuals to fight for more reforms and justice). However, other scholars have criticized the rejection of what abolitionists have termed “reformist reforms.” “For example, many abolitionists reject calls to invest in improvements to prisons or put in place greater staffing, even if doing so would improve the lives of currently incarcerated people, on the view that this additional funding ultimately expands the role of prisons in society and leads to incarceration being more entrenched overall.” Barkow, *supra* note 44, at 6–7 (noting that such a failure to compromise could itself result in further retrenchment and the loss of opportunities to shift the system in a way that “runs the risk of sacrificing too many reforms that would benefit people currently suffering from incarceration for a utopia that will ultimately not materialize.”).

crime within specific communities, and offer alternatives to the criminal legal system after a harm has occurred. Building better community infrastructure includes the greening of spaces, the development of mutual aid, and the diversion of state and city funding away from policing and prisons and toward the provision of needed services and support. Violence interruption and intervention (outside of the policing space) has also proven to be effective in a number of cities, where the majority of violence is committed by a small number of individuals and often in a cycle of building retribution. Intervening early on can stop the cycle and prevent harm. Finally, alternatives to the criminal legal system include efforts to build restorative justice practices.<sup>65</sup> Not only do these avoid a system focused on punishment, but they also help to build and strengthen communities, offering a form of redress for the victim or survivor of the harm.<sup>66</sup> Each of these proposals seeks to substitute itself as one component of the carceral machine, while satisfying this more comprehensive idea of safety and security in a way that is more humane, equally or more effective,<sup>67</sup> and less expensive. The results and possibilities are powerful to consider.

### 1. Investing in Community

A key aspect of safety and security is creating spaces that discourage negative social behaviors and encourage positive social behaviors. Effective methods include “greening” projects in urban spaces and mutual aid efforts within specific communities. Both ideas build upon the invest/divest framework in which resources are diverted from carceral budgets and

---

<sup>65</sup> See Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (Jun. 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> (suggesting towns to use restorative-justice models instead of imprisoning people).

<sup>66</sup> “Instead of asking what law was broken, who broke it, and what punishment is warranted — as our punitive system does — restorative justice asks who was harmed, what do they need, and whose obligation is it to meet those needs.” Jerusalem Demsas, *The Promise—and Problem—of Restorative Justice*, VOX (Mar. 23, 2022, 5:00 AM), <https://www.vox.com/22979070/restorative-justice-forgiveness-limits-promise> (referring to the evaluative model developed by Impact Justice, a criminal reform group, information available at: <https://rjdtoolkit.impactjustice.org/establish-a-foundation/restorative-justice/>).

<sup>67</sup> Once concern for abolitionists is data that demonstrates that the hiring of additional officers can actually reduce homicide levels. See *Pessimistic Police Abolition*, 136 HARV. L. REV. 1156, 1157–58 (2023) (encouraging the development of police alternatives while also recognizing that, as of yet, those alternatives “have not yet matched policing’s anticrime effect”). *But see* McLeod, *Prison Abolition and Grounded Justice*, *supra* note 17, at 1228 (noting that homicide rates have also decreased in communities that have implemented interruption programs, with one community experiencing a 50% decline).

directed toward life-affirming institutions.<sup>68</sup>

The notion of “broken windows” policing, in which low-level offenses are prosecuted at high rates to deter high-level or dangerous offenses, has largely been discredited.<sup>69</sup> But the observation that criminalized activity may take place at a higher rate in urban areas that suffer from disrepair and actual broken windows remains pertinent. It is the response that abolitionists take issue with. The underinvestment in poor communities in cities is the issue itself, not the fact that low-level offenses go unpoliced. Putting a finer point on the issue - a more productive response to broken windows in a community might be to repair the windows rather than arrest individuals for turnstile-jumping in the subway.

Such alternatives include “greening” projects - efforts to engage community members in urban areas that “might otherwise be desolate, particularly those plagued by violence,” and to work toward making those spaces more habitable.<sup>70</sup> Studies find that “[u]rban redevelopment is a . . . way to promote security, even from violent crime.”<sup>71</sup> The promotion of “orderliness” through a non-policing approach remains “consistent with an abolitionist ethic” while also “empower[ing] . . . impacted communities to

---

<sup>68</sup> See Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 COLUM. J. RACE & L. 601 *passim* (2022) (exploring how mutual aid evades the harms associated with “family policing” and indicating improvements in child safety are directly related to material investment in marginalized families).

<sup>69</sup> See, e.g., Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1629 (2012) (analyzing extensively the empirical literature on “zero-tolerance” or “broken windows” policing and concluding that “[o]n the available evidence, a sensible conclusion is that the probability of generating a beneficial self-fulfilling prophecy with broken windows policing is uncertain, low or confined in important ways”); see also John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA* 207, 228 (Alfred Blumstein & Joel Wallman eds., 2000) (“Overall, the evidence is mixed on the efficacy of generic zero-tolerance strategies in driving down rates of violent crime, though serious questions have been raised about their effects on police-community relations.”); see also BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001) (analyzing the empirical evidence in support of broken windows policing and concluding the claims made in support of the theory on the basis of this evidence are false); see also McLeod, *Prison Abolition and Grounded Justice*, *supra* note 17, at 1203 n.231 (explaining that zero tolerance policing practices probably do not explain much of the drop in crime in the 1990s because crime went down everywhere, even in places where police departments did not implement new policing strategies).

<sup>70</sup> McLeod, *Prison Abolition and Grounded Justice*, *supra* note 17, at 1230.

<sup>71</sup> *Id.* at 1230–31 (citing studies from the University of Pennsylvania in which the redevelopment of vacant lots in Philadelphia correlated with a reduction in certain gun crimes and assaults, while improving the sense of safety and security among local residents).

seek security and justice in other terms than through criminalization and incarceration.”<sup>72</sup>

Another community-oriented abolitionist approach is the call for investing in mutual community aid.<sup>73</sup> This idea builds upon the notion that one’s liberation is bound up in the liberation of all disempowered people.<sup>74</sup> It is a vision of collective safety as opposed to individualized safety.<sup>75</sup> This move toward communal support is an important one, resulting in some successful experiments,<sup>76</sup> and producing visions of what alternatives to policing and prisons might look like.<sup>77</sup> Some note that, if the concept of safety and security is expanded, “mutual aid programs, [along with a] focus on

---

<sup>72</sup> *Id.* at 1231 (noting that there are other design-oriented regulatory changes that can also discourage criminalized activity without resorting to policing).

<sup>73</sup> See Roberts, *supra* note 30, at 47 n.275 (citing McLeod, *Envisioning Abolition Democracy*, *supra* note 43, at 1628–33) (highlighting the work of organizers at the Cure Violence program in Chicago to identify community conflicts and provide community-led mediation; at the Oakland Power Projects in Oakland to train residents in de-escalation and other tactics; and at the White Bird Clinic’s Crisis Assistance Helping Out on the Streets (CAHOOTS) program in Eugene, Oregon, which is operated through a central city ambulance dispatch “in cases of ‘drug and substance abuse, poverty-related issues, and mental health crises’ without involving police,” *id.* at 1630 (quoting Rachel Herzog, *Big Dreams and Bold Steps Toward a Police-Free Future*, in WHO DO YOU SERVE, WHO DO YOU PROTECT?: POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 111, 156 (Maya Schenwar et al. eds., 2016))).

<sup>74</sup> This language is typically credited to the aboriginal activist, Lilly Watson, though she is uncomfortable claiming sole authorship. Michael F. Leone, *Etiquette for Activists*, YES! (May 20, 2004), <https://web.archive.org/web/20110807061453/http://www.yesmagazine.org/issues/a-conspiracy-of-hope/etiquette-for-activists>. An example of this mutual struggle can be seen in the Movement for Black Lives’ policy platform, which implicates the need to create greater protections for workers, end the imprisonment of immigrants, and provide protections for, women, members of the LGBTQ community, and individuals with disabilities. MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/> (last visited Aug. 3, 2023).

<sup>75</sup> See Hasbrouck, *Reimagining Public Safety*, *supra* note 51, at 690 (seeking to expand “the notion of public safety to also include those things vital to the safety of the *community*” and analogizing to the “the expansion from restorative justice to transformative justice: not only must individuals be made whole, but communities must be protected by preventing future harms”).

<sup>76</sup> For a collection of some of these efforts, see ONE MILLION EXPERIMENTS, <https://millionexperiments.com/> (last visited Aug. 3, 2023).

<sup>77</sup> See Michael Haber, *COVID-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOY. L. REV. 61 *passim* (2020) (citing the research of sociologists and observing the presence of mutual aid groups dating back centuries and spread through nearly every culture and continent, with one seeing “mutual aid [a]s a universal, nearly-irrepressible and trans-historical instinct shared by humans . . . , a common thread between . . . Indigenous cultures, medieval and early modern European villages, and industrial labor unions”).

material security are every bit as important as . . . anti-violence organizing.”<sup>78</sup> Such programs seek to support public health by disaggregating economic need from criminalized acts - seeking to provide access to healthcare, childcare, housing, and work. They find “their heritage in programs like the Black Panther Party’s free breakfasts.”<sup>79</sup> In sum, abolitionists acknowledge that, while creating conditions for freedom from violence is a crucial need, the concept of safety is much more expansive and indeed connected to the ability to prevent and avoid criminalized activity within a community.

## 2. Violence Interruption

Despite the community interventions mentioned above, violence can and does still occur. Abolitionists still seek to avoid policing as an immediate response, relying instead on community members and their knowledge of interpersonal conflicts to prevent escalating violence. In Chicago, for example, “peacekeepers” from an organization known as “Flatlining Violence Inspires Peace” seek to reduce the risk of gun violence in the most violence-prone neighborhoods, providing and training and resources to members of the community, which have “demonstrated greater efficacy than criminal law enforcement in curbing violence in the communities where they operate.” These positive results have been replicated in Baltimore,<sup>80</sup> Boston, and California.<sup>81</sup> Such successes should not be taken lightly. They demonstrate a way to prevent serious violence before it can happen and at a statistically significant rate.

## 3. Restorative Justice

The final example of an abolitionist alternative to policing is the usage of restorative justice.<sup>82</sup> Instead of focusing on retribution, restorative justice

---

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 720 (referring to how community organizers identify the disconnect between “a neoliberal economic order” and the needs of individual communities to have dependable access to the “material goods and necessities” that are a “precondition for the full realization of human fulfillment and the full liberation of oppressed communities in America”).

<sup>80</sup> McLeod, *Prison Abolition and Grounded Justice*, *supra* note 17, at 1228 n.334 (citing to Daniel W. Webster et al., *Effects of Baltimore's Safe Streets Program on Gun Violence: A Replication of Chicago's CeaseFire Program*, 90 J. URB. HEALTH 27 (2012)).

<sup>81</sup> Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1312 (2021) (exploring the significant positive effect of the Cure violence program, which has demonstrated a decrease in shootings by “up to twenty-four percent” and saw a “drop in retaliatory homicides in four of eight communities”).

<sup>82</sup> “Restorative justice requires, at minimum, that we address victims' harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and



offers an opportunity for redemption.<sup>83</sup> Those who enter the criminal legal system will also exit it. Restorative justice considers how an individual might seek forgiveness within a community – acknowledging the commission of harm and seeking readmission to their neighborhood, school, or community without the ostracization that comes from participation in the penal system.<sup>84</sup> The goal of restorative justice is to provide repair between parties and to reduce recidivism, resulting in safety for both individuals, as well as the larger community.<sup>85</sup>

This development of solutions is integral to the abolitionist movement. Offering positive ideas urges the movement forward, providing a unifying vision.<sup>86</sup> It can also allay fears about institutional absence that provokes

---

communities in this process." HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 23 (2002) (cited in Alexander Afnan, *An Abolitionist Vision: Reclaiming Public Safety from a Culture of Violence*, 28 VA. J. SOC. POL'Y & L. 1, 48 n.200 (2021)).

<sup>83</sup> Indeed, the process of restorative and transformative justice, "more fundamentally confront[s] the dynamics that drive particular young people in communities to engage in violence." Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 552 (2022). Some organizations seek to extend the practices of restorative justice beyond singular incidents of interpersonal violence by "conven[ing] peace circles in communities impacted by violence, bringing high-risk young men and women together to make connections to one another and address the root causes of violence in their communities." *Id.* See also *id.* n.121 (referring to Circles and Ciphers, a youth-led Chicago-based organization, information available at: CIRCLES AND CIPHERS, <https://perma.cc/9BB9-KTY3>).

<sup>84</sup> See Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y. L. SCH. L. REV. 69 (2019) (discussing the success of a restorative justice project administered by the District of Columbia's prosecutor's office).

<sup>85</sup> It is worth noting that the data on restorative justice is still limited and subject to critiques. Some concerns arise over how these programs are typically administered - requiring participation with the threat of prosecution frequently looming. Others raise concerns about requiring the victims or survivors of violence, particular in the case of domestic violence or sexual violence. Still others note that deciding how to evaluate these programs is itself notoriously difficult. Some note the high level of victims' satisfaction rates, but others point to the fact that self-selecting participation could artificially inflate those numbers. If recidivism is the ultimate measure, then the numbers are promising, if for no other reason than they remain at or below the recidivism rates that accompany participation in the juvenile system, which produces more harm and is more expensive. For a comprehensive overview of these concerns, and responses to them, see Demsas, *supra* note 66, <https://www.vox.com/22979070/restorative-justice-forgiveness-limits-promise>.

<sup>86</sup> Using the term "prefigurativism," identified as "a commitment to using processes in organizing and building a social change movement that are themselves already constructing the world they want to see." Pow, *Grassroots Movement Lawyering*, *supra* note 60, at 86 n.19 (citing Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 295, 323–24 (2016)) See also Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021) (identifying the role of lawyers in "movement lawyering" and

discomfort among those new to the concept.<sup>87</sup> Whereas abolitionist thinking requires such visions, there is more methodological analysis needed to lay foundation for generative visions beyond immigration enforcement.

## II. MAPPING ABOLITION THEORY ONTO IMMIGRATION ENFORCEMENT

Scholars and advocates have made significant headway in conversations about prison abolition and the decarceration movement. Their focus is now primarily reimagining what a just society might look like. This view beyond the abolitionist horizon has produced generative answers to what might replace the prison system. Indeed, if there is one misconception about abolition worth clarifying, it is the idea that abolition seeks only to tear down existing institutions. Rather, “abolition is about presence, not absence. It is about building life-affirming institutions” in place of prior harmful ones.<sup>88</sup> Abolitionists have primarily focused on promoting new systems that address safety concerns while diminishing the associated harms that we have come to associate with the prison industrial complex.

The abolitionist scholarship in the immigration sphere is approaching the horizon, much like the abolitionist scholarship in the criminal sphere did before it. Indeed, an analogous line of reasoning is helpful in considering how to frame and construct an abolitionist vision of the immigration legal system in the U.S.<sup>89</sup> Indeed, many scholars have already begun pursuing the first step in this analysis, identifying the connection between the struggles to address the harms of the carceral system and those of the immigration enforcement system.<sup>90</sup> This Article seeks to extend and expand upon the current

---

highlighting the use of prefiguration in establishing a common outlook and goal).

<sup>87</sup> See Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199 (2022).

<sup>88</sup> Karis Clark, *Abolition Is*, MICH. DAILY (Apr. 19, 2021), <https://www.michigandaily.com/michigan-in-color/abolition-is/> (quoting Ruth Wilson Gilmore).

<sup>89</sup> See e.g. Anna Hales, *Beyond Borders- How Principles of Prison Abolition Can Shape the Future of Immigration Reform*, 11 U.C. IRVINE L. REV. 1415, 1421 (2021) (connecting the lessons learned from carceral abolitionists and seeking to apply those lessons to immigration enforcement abolition theory by “(1) analyzing and questioning the underlying assumptions upon which immigration regulation is based and exploring what alternative conceptions could look like, (2) examining the high human cost of immigration enforcement, and (3) discussing how these principles can shape movements that seek to challenge the immigration system”).

<sup>90</sup> See Jennifer Chacón M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 742 (2015) (“The susceptibility of certain noncitizens to banishment in the form of deportation is mirrored by the exposure of other liminal populations to banishment in the form of spatial exclusion and susceptibility to incarceration.”) (cited by Cházaro, *The End of Deportation*, *supra* note 25, at 1095).

scholarship by reiterating the call for abolitionist thinking in the immigration space.<sup>91</sup> However, this Article makes plain that part of the methodology utilized in the prison abolition scholarship has been overlooked in the immigration space – identifying the normative justifications for the immigration enforcement regime.

Much agreement exists about the harms inherent in the current immigration system - the harsh detention features,<sup>92</sup> the removal process that is extensively punitive,<sup>93</sup> and the arbitrary (and vacillating) ways in which people are precluded from entering the US.<sup>94</sup> But there exists little consensus about the purpose of the immigration system. This question is not whether immigration detention, expulsion, or exclusion are permitted to exist, or who gets to make those decisions, or even who gets to review those decisions. Interpretations of permissibility are largely settled.<sup>95</sup> Instead, this Article argues that there is a need to invert the presumption of sovereignty.<sup>96</sup> There

---

<sup>91</sup> Echoing Angélica Cházaro’s invitation for “scholarship and advocacy that move in a new direction, one which reorganizes responses to deportation toward the goal of its downfall.” Cházaro, *The End of Deportation*, *supra* note 25, at 1051.

<sup>92</sup> See, e.g., Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141 (2017); Cesar Cuauhtemoc Garcia Hernandez, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1382-92 (2014); Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199 (2021).

<sup>93</sup> See, e.g., Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213 (1958-1959); Robert Nolan, *Deportation as Punishment: Plenary Power Re-Examined*, 52 CHI.-KENT L. REV. 466 (1975); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011) (identifying the Supreme Court’s discomfort with the consequential nature of deportation, while also refusing to label it as punishment, and thus incorporating a new requirement regarding the responsibilities of public defenders and the like to advise their clients about the possibility of deportation, *Padilla v. Kentucky*, 559 U.S. 356 (2010)).

<sup>94</sup> Shalini Bhargava Ray, *The Emerging Lessons of Trump v. Hawaii*, 29 WM. & MARY BILL RTS. J. 775 (2021) (noting the unpredictability and changing nature of the interpretation of claims brought by immigrants, the distinctions made between different types of immigrants and the related right they may be able to draw upon, and the reluctance of the judiciary to interfere with the executive’s plenary power, even when seemingly blatantly violative of constitutional rights).

<sup>95</sup> Adam Cox, for example, finds this to be an important clarification to make, stating that the canonical early Supreme Court cases, including *Chae Chan Ping* and other cases from the Chinese Exclusion Act era, “were not about open borders arguments, and as a result they have little or nothing to say about what might justify restrictions on migration.” Adam B. Cox, *Three Mistakes in Open Borders Debates*, in *IMMIGRATION, EMIGRATION, AND MIGRATION* (Jack Knight ed. 2017).

<sup>96</sup> See, e.g., Cházaro, *The End of Deportation*, *supra* note 25, at 1097 n.278 (supporting the effort to “force sovereignty to justify itself, both on its own terms and as an excuse for the practice of deportation.”) (citing Linda Bozniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 453 (2000)).

should be no insistence of immigration regulation as inherent or required. Instead, we should presume that migration is “natural” in that it occurs historically, with regularity, and frequently because of state action.<sup>97</sup> To interrupt this process requires some justification.<sup>98</sup>

A challenge in mapping abolition theory onto immigration enforcement is that there is a distinction between the type of activity that the government is seeking to regulate with criminal law and the activity it seeks to regulate with immigration law. In the criminal legal space, the idea of safety rests on the presumption that there is at least some criminalized activity which will make certain individuals or communities less safe. Interpersonal harm is what the carceral system seeks to address, even if it does so in an over inclusive and expensive way that perpetuates new harms. Immigration regulation is not so simple. There is not a singular “harm” to be addressed, though some of the normative rationale seek to create that ethos. Therefore, one hurdle is how and whether to acknowledge that immigration regulation does not address an innate harm at all but seeks to do something else entirely.

This Part focuses on the harms of the immigration enforcement regime. It focuses on the distinct areas of detention, deportation, and exclusion. It then addresses some critiques of each of these components of the enforcement system, before concluding that a set of normative pillars could be a helpful way to consider the animating principles of immigration restrictions.

#### A. *The Harm of Immigration Enforcement*

Immigration enforcement, detention, and exclusion collectively manifest an extraordinary amount of harm directed at those seeking to migrate to the

---

<sup>97</sup> See SONIA SHAH, *THE NEXT GREAT MIGRATION* (2020) (exploring the history of human migration due to war, ethnic and racial strife, and also the innate desire to explore, while also discussing the coming cataclysm of climate changes that will spur on even greater numbers of migration); see also Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 *YALE L.J. F.* 312 (2020-2021) (exploring U.S.-specific examples).

<sup>98</sup> Adam Cox interrogates the distinction between “selection rules” and “regulatory rules” indicating that both are implicated in institutional design with regard to immigration policy.” Adam B. Cox, *Immigration Law's Organizing Principles*, 157 *U. PA. L. REV.* 341 (2008).

United States,<sup>99</sup> noncitizens present in the U.S.,<sup>100</sup> their family members,<sup>101</sup> and the communities in which they live and work. As the role of the Department of Security (DHS) has expanded, so too have its subagencies – Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), among others.<sup>102</sup> The result has been exorbitant spending,<sup>103</sup> increased surveillance targeting both citizens and noncitizens,<sup>104</sup>

---

<sup>99</sup> See, e.g., Abel Rodriguez, *Lethal Immigration Enforcement*, CORNELL L. REV. (forthcoming 2024) (on file with the author) (noting that 853 border crossers died in the attempt, while many also perish in immigration detention).

<sup>100</sup> See Michael D. Shear, *Biden Said He'd Veer From Trump on Immigration. The Reality Is More Complicated*, N.Y. TIMES (May 8, 2023), <https://www.nytimes.com/2023/05/08/us/politics/biden-trump-immigration-title-42.html> (identifying the ways in which policies of the Trump administration that were criticized by President Biden as a candidate have been embraced and furthered by his administration).

<sup>101</sup> See Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019) (describing the way that “family separation,” while most egregious when it occurs at the border as a form of deterrence, is in fact woven into the entire system of immigration enforcement in the United States and that this pervasive separation is infrequently acknowledged because it is a “slow death” or “slow violence” as opposed to the “spectacular violence” that occurs in border separations).

<sup>102</sup> In 2013, during the Obama administration, the U.S. spent more money on immigration enforcement (approximately \$18 billion) than all other forms of federal law enforcement combined (about \$14 billion). Julia Preston, *Huge Amounts Spent on Immigration, Study Finds*, N.Y. TIMES (Jan. 7, 2013), <https://www.nytimes.com/2013/01/08/us/huge-amounts-spent-on-immigration-study-finds.html> (reporting on the Migration Policy Institute’s lengthy report, available here: <https://www.migrationpolicy.org/pubs/enforcementpillars.pdf>). Relatedly, the 2024 budget for the Department of Homeland Security is \$103.2 billion, of which \$1.2 billion alone is dedicated to maintaining the system of immigration detention. U.S. DEP’T HOMELAND SEC., BUDGET IN BRIEF (2024). The Biden administration sought \$25 billion for immigration enforcement, a more than 150% increase from a decade ago. See Mark Akkerman, *Global Spending on Immigration Enforcement Higher than Ever and Rising*, MIGRATION POL’Y INST. (May 31, 2023), <https://www.migrationpolicy.org/article/immigration-enforcement-spending-rising>. For thorough reporting on immigration enforcement spending from 2003 - 2019, see *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL, (Jan. 20, 2021), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security>.

<sup>103</sup> “Since the creation of the Department of Homeland Security (DHS) in 2003, the federal government has spent an estimated \$333 billion on the agencies that carry out immigration enforcement.” *The Cost of Immigration Enforcement and Border Security*, *Id.* A 2023 fiscal year overview of the budget for Immigration and Customs Enforcement (ICE), one of the agencies responsible for immigration enforcement, tallies in at over \$8 billion dollars. DEP’T HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW (2023), [https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf).

<sup>104</sup> See Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 1–2 (2014) (“At virtually every stage of the process of migrating or traveling to, from, and within the United States, both noncitizens and U.S. citizens are now subject to collection and analysis of

and the regular execution of a singular, draconian punishment – exclusion or expulsion from the United States for years, decades, or even permanently.<sup>105</sup> The compounded harms – family separation, outlandish spending, and the perpetuation of xenophobia and racism via the belief that immigrants are somehow tangibly different from native-born or naturalized citizens – are unsustainable, unnecessary, and due for a reckoning. As a result, many scholars, activists, affected communities, and even some politicians, have issued calls for the conversation around abolition to be incorporated into the sphere of immigration enforcement.<sup>106</sup>

The effort to incorporate abolitionist thinking into the conversations about immigration enforcement is burgeoning, but still at an emerging stage.<sup>107</sup> Part of refining and clarifying the end goals of the application of abolition theory to immigration enforcement is to identify the structure of which activists and scholars might be seeking abolition. There are three distinct areas, though each is interrelated. There are three distinct areas in which abolition theory might apply: (i) immigration detention, (ii) deportation, and (iii) exclusion. This Part addresses the harms of each.

---

extensive quantities of personal information for immigration control and other purposes.”).

<sup>105</sup> See Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009) (explaining the origins of deportation as a singular solution, its decoupling from criminal sanctions, and the various reasons why other options should exist, particularly for long-established residents in the United States); see also Daniel Kanstroom, *Smart(er) Enforcement*, *supra* note 23, at 465.

<sup>106</sup> “In comparison to a decade ago, immigrant rights groups are currently demanding more radical policy reforms that fundamentally challenge the ICE enforcement regime. This profound shift in political demands demonstrates the ways in which social movement activism can fundamentally alter the legal landscape. Like the BLM movement, the movement for immigrant rights is increasingly looking to overhaul an existing institutional system premised on racial and economic inequality. While the demands may lack political palatability or face backlash, these more radical approaches seep into the mainstream agenda. They serve as an important counterpoint to the more easily accomplished reforms and are part of the continued cycles of evolution that will be necessary for realizing justice for immigrants.” Jennifer J. Lee, *Immigration Disobedience*, 111 CALIF. L. REV. 71, 116 (2023).

<sup>107</sup> Much of the thinking in this field is connected to established ideas about policing and prisons in the criminal context, and also sees the connection between the criminal legal system and narratives about immigration enforcement: “An expansive understanding can better take account of how racial violence permeates liberal democracies both as a notion and an action, leading communities to unconsciously adopt a notion of ‘safety . . . predicated on banishment, mass criminalization, [and] policing.” Sharry Aiken & Stephanie J. Silverman (2021) *Decarceral Futures: Bridging Immigration and Prison Justice towards an Abolitionist Future*, *Citizenship Studies*, 25:2, 141-161, 149DOI: 10.1080/13621025.2021.1890405

## 1. Detention

Considering the harm of immigration detention makes for the smoothest application of abolitionist thinking.<sup>108</sup> Immigration detention centers are, essentially, jails.<sup>109</sup> Many of them are operated by private prison companies and are designed to be interchangeable – eligible for both contracts from both ICE and from county, state, and federal criminal prison contracts.<sup>110</sup> As such, immigration detention results in many of the same harms that are present in prisons – violence, death, psychological trauma, stigma, and harms to family members.<sup>111</sup> Many of the same techniques for compliance used in prisons are also used in immigration detention centers – solitary confinement,<sup>112</sup> low-

<sup>108</sup> See Hernandez, *supra* note 3, at 246 (identifying imprisonment as a “central feature of immigration law enforcement,” and issuing “the first . . . call for the abolition of immigration imprisonment in the United States”).

<sup>109</sup> See Boaz, *supra* note 3, at 205 –15 (describing the dehumanization that occurs in immigration detention, the speed with which contagious disease spreads, and the abuse that occurs in immigration detention facilities, whose standards of care are even less rigorous than many prisons); see also Hernandez, *supra* note 92 (critiquing the distinction that courts have drawn between “civil” and “criminal confinement,” and decrying the artificiality and blurred boundaries between these two systems as both ephemeral and causing additional harm).

<sup>110</sup> This “flexibility” is a business strategy embraced after the Obama Administration ended all federal prison contracts with private companies. The Trump Administration reinstated those contracts, but the Biden Administration again terminated them. See Carrie Johnson, *Biden Ended Contracts with Private Prisons. So One May Turn To House Immigrants*, NPR (Sep. 15, 2021), available at: <https://www.npr.org/2021/09/13/1036576308/biden-ended-contracts-with-private-prisons-so-one-may-turn-to-house-immigrants>; see also Jamiles Lartey, *Think Private Prison Companies Are Going Away Under Biden? They Have Other Plans*, THE MARSHALL PROJECT (Nov. 17, 2020), <https://www.themarshallproject.org/2020/11/17/think-private-prison-com> (providing a more extensive report about the business strategies of CoreCivic and GEO Group describes this “diversification”).

<sup>111</sup> See KRISTINA SHULL, *DETENTION EMPIRE: REAGAN’S WAR ON IMMIGRANTS AND THE SEEDS OF RESISTANCE 1* (2022) (describing the rise of immigration detention centers during the Reagan administration and the immense harms associated with its continued use); see also MARK DOW, *AMERICAN GULAG* (2004), (providing an earlier account of many of these same horrors).

<sup>112</sup> Rebeka Wolf, *New Complaint Shows ICE’s Use of Solitary Confinement is Excessive*, IMMIGR. IMPACT (Jul. 14, 2023), <https://immigrationimpact.com/2023/07/14/complaint-aurora-ice-solitary-confinement/?emci=c2d5becf-8022-ee11-a9bb-00224832eb73&emdi=8869df1e-e123-ee11-a9bb-00224832eb73&ceid=8556462> (discussing a recent complaint filed in the Federal District Court of Colorado that cites the regular and punitive use of solitary confinement, as well as using the threat of solitary confinement as a form of promoting compliance from detainees); see also *Invisible in Isolation, The Use of Segregation and Solitary Confinement in Immigration Detention*, NAT’L IMMIGRANT JUST. CTR. (Sep. 2012), <https://immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation->

wage work,<sup>113</sup> uniforms, numbers instead of names, barred cells, and the constant threat of sexual assault.<sup>114</sup> Efforts to speak out about these harms are also under threat of suppression.<sup>115</sup> While a central feature of immigration enforcement today, detention is a relatively new phenomenon, one that has not existed for much of the U.S.'s history.<sup>116</sup> Such a return seems possible.

## 2. Deportation

Deportation occurs in myriad ways. It can be perfunctory, drawn out and painful, and ultimately, deadly. A series of articles have pointed out the recent

---

The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012\_7.pdf (providing a lengthy report from a decade ago detailing how widespread and regular this practice has been in immigration detention facilities, even with official ICE policy discouraging its use).

<sup>113</sup>Eduardo Medina, *Immigration Detainees Are Owed \$17 Million in Back Pay, Jury Says*, N.Y. TIMES (Oct. 31, 2021), <https://www.nytimes.com/2021/10/31/us/immigrant-detainee-minimum-wage.html> (reporting that a jury found that GEO Group was liable for \$17.3 million “in back pay to immigration detainees who were denied minimum wage” while detained at a Tacoma, WA facility, having been paid only \$1 a day); *see also* Farida Jhabvala Romero, *ICE Detainees Making \$1 a Day Sue Over Alleged Wage Theft*, KQED (Jul. 16, 2022), <https://www.kqed.org/news/11919749/ice-detainees-making-1-a-day-sue-over-alleged-wage-theft>; *see also* Lautaro Grinspan, *ICE detainees say they were forced into labor in Ga., file lawsuit*, ATLANTA JOURNAL-CONSTITUTION (Aug. 26, 2022), <https://www.ajc.com/news/georgia-news/ice-detainees-say-they-were-forced-into-labor-in-ga-file-lawsuit/ECLTIVQNMVE6LKOFKXQBWCCVUA/> (examining a similar lawsuit that has been filed by detainees at the Bakersfield, CA facility also owned by GEO Group, wherein those who refuse to participate in work are frequently threatened with being placed in solitary confinement).

<sup>114</sup>Habitual sexual misconduct by officials employed by immigration detention centers has occurred in Georgia and Texas. *See* José Olivares, “The Worst Day of My Life:” ICE Jail Nurse Sexually Assaulted Migrant Women, Complaint Letter Says, THE INTERCEPT (July 13, 2022), <https://theintercept.com/2022/07/13/ice-stewart-detention-sexual-misconduct/>, and Lomi Kriel, *ICE Guards “Systematically” Sexually Assaulted Detainees in an El Paso Detention Center, Lawyers Say*, PROPUBLICA (Aug. 14, 2020) <https://www.propublica.org/article/ice-guards-systematically-sexually-assault-detainees-in-an-el-paso-detention-center-lawyers-say>; *see also* Nicole Lue et al., *Trends in Sexual Assault Against Detainees in US Immigration Detention Centers, 2018-2022*, 329 JAMA (No. 4) 338 (2023) (detailing a recent study that found that over 70% of ICE facilities had sexual assault allegations reported (this number comprehensively includes allegations against other detainees and detention facility officials), although the study itself acknowledges that this data may be less inclusive because it is supplied by ICE).

<sup>115</sup>*See* Alina Das, *Immigration Detention and Dissent: The Role of the First Amendment on the Road to Abolition*, 56 GA. L. REV. 1433 (2022) (identifying the necessity of preserving the First Amendment right to identify, and voice complaints about, the harms that occur, for example, in immigration detention centers).

<sup>116</sup>*See* CÉSAR CUAUTHÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 55–74 (2019).



deaths of individuals who were deported after losing their cases in immigration court.<sup>117</sup> They include: a trans woman,<sup>118</sup> a man who had had “[s]everal uncles and cousins . . . assassinated,”<sup>119</sup> another who could not stand to remain in immigration detention after seven months,<sup>120</sup> and countless others.<sup>121</sup> Frankly, as Angélica Cházaro announces, “deportation is violence.”<sup>122</sup> As Stella Burch Elias notes, immigration laws and policies of the United States have been transformed, reifying the Department of Homeland Security as an organization that has “inspired terror in immigrant communities, particularly among immigrants of color.”<sup>123</sup>

---

<sup>117</sup> Austin Kocher, a legal geographer at Syracuse University, compiled these reports. Austin Kocher, *Asylum Seeker Killed in Guatemala After Omaha Immigration Judge Ordered Him Deported*, SUBSTACK (July 14, 2023), <https://austinkocher.substack.com/p/asylum-seeker-killed-in-guatemala>.

<sup>118</sup> Her death was the 34<sup>th</sup> killing of a member of the LGBTQ community in Honduras in 2022, though more than 434 LGBTQ individuals have been killed there since 2009. See Muri Assunção, *Trans woman killed in Honduras months after deportation from U.S.: reports*, N.Y. DAILY NEWS (Oct. 20, 2022), <https://www.nydailynews.com/news/world/ny-transgender-honduras-killed-months-after-deportation-us-miami-20221021-xzk2cbmzjhsdexxmyjbfkfkhee-story.html>

<sup>119</sup> See Jeremy Turley, *America’s toughest road to asylum runs through the Omaha immigration court*, FLATWATER FREE PRESS (Jul. 6, 2023), <https://flatwaterfreepress.org/americas-toughest-road-to-asylum-runs-through-the-omaha-immigration-court/> (discussing the case of a man who came with his family to the U.S. from Guatemala in the early 1990s and was returned there, despite barely speaking English. His case is one of the many denied in Omaha, NE, where the immigration court denies 96% of the cases it hears).

<sup>120</sup> See Kevin Sieff, *When death awaits deported asylum seekers*, THE WASH. POST (Dec. 26, 2018), <https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/> (“Ronald Acevedo waited eight months for asylum in Arizona. Days after he was deported, he was found dead in the trunk of a car.”).

<sup>121</sup> Much of the recent coverage around this issue has focused on the harms that occurred during the Trump administration but reporting on the Obama administration found that at least 83 U.S. deportees were murdered upon their return to El Salvador, Guatemala, and Honduras between Jan. 2014 and Oct. 2015. See Sarah Stillman, *When Deportation Is a Death Sentence*, THE NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> (highlighting primarily the harms in immigration policy following the election of Donald Trump), and Sibylla Brodzinky and Ed Pilkington, *US government deporting Central American migrants to their deaths*, THE GUARDIAN (Oct. 12, 2015), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> (“Guardian investigation into consequences of Obama’s migration crackdown reveals US deportees have been murdered shortly after return to EL Salvador, Guatemala and Honduras, with study saying as many as 83 killed since 2014.”).

<sup>122</sup> Cházaro, *supra* note 2, at 1070–83 (noting that shifting the analysis away from whether deportation is punishment to a focus “on deportation as violence . . . allows for questioning the civility of both the process and end of deportation”).

<sup>123</sup> See Stella Burch Elias, *Law as a Tool of Terror*, 107 IOWA L. REV. 1 (2021) (“The Department of Homeland Security was transformed from an organization dedicated to

Most individuals are expelled from the United States discretionarily - meaning that the federal government is not obligated to remove them from its territory, though it has the authority to do so.<sup>124</sup> Currently, the undocumented population hovers around approximately 10 million people,<sup>125</sup> though even more are subject to precarity because of temporary statuses.<sup>126</sup> The question thus is whether the federal government actually needs to or should be removing anyone from the United States whom it is not required to do so under current federal law. Past administrations have taken different tacks - the Obama administration abided by a slogan of “felons not families,”<sup>127</sup> while the Trump administration embraced a less disciplined and

---

combatting terrorism to an organization that instead inspired terror in immigrant communities, particularly among immigrants of color.”). *But see* Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. TIMES (Feb. 21, 2023), <https://www.nytimes.com/2023/02/21/us/biden-asylum-rules.html> (explaining that hopes in the Biden Administration have proved less fruitful than desired, given Biden’s implementation of an asylum policy that would expel individuals seeking asylum at the border without following a particularized, difficult path involving a glitchy app, and identifying ways that the policy might violate international law).

<sup>124</sup> This discretionary authority has been much debated and subject to significant scrutiny. The authority of the executive has been questioned in a partisan way and on a regular basis for much of the past fifteen years. *See e.g.*, *Deferred Action for Childhood Arrivals*, 86 Fed. Reg. 53736 (Sept. 28, 2021), and *Jeh Charles Johnson, U.S. Dep’t of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 4* (2014), and 42 U.S.C. §265, and *Proclamation No. 9645*, 82 Fed. Reg. 45,161 (Sept. 24, 2017), and *Biden v. Texas*, No. 21-954 (U.S. Jun. 30, 2022).

<sup>125</sup> *See* Miriam Jordan, *Many Undocumented Immigrants Are Departing After Decades in the U.S.*, N.Y. TIMES (Mar. 13, 2023), <https://www.nytimes.com/2023/03/01/us/undocumented-immigrants-exodus-us.html> (“The current undocumented population has stayed relatively constant at about 10.2 million over the past several years after peaking at nearly 12 million in 2008, even with the large number of new arrivals at the border.”).

<sup>126</sup> *See* Afghans and Ukrainians who entered the U.S. with parole, recipients of DACA (who have been subject to threats and attempts to revoke their lawful status), recipients of TPS (who were also subject to threats and successful efforts to revoke their status during the Trump administration), and others. It also remains worth mentioning that any Legal Permanent Resident can quickly find themselves in danger of removal from even minor offenses, such as shoplifting or drug possession.

<sup>127</sup> This distinction was roundly criticized, though it did introduce a more concrete form of prosecutorial discretion, which has been embraced by the Biden administration. The foresight of this approach was to focus limited resources in a way that might appeal to a broader audience - though partisans on both sides were ultimately unsatisfied. *See* *Biden Administration Announces New Prosecutorial Discretion Policy*, Catholic Legal Immigr. Network (June 28, 2021), <https://www.cliniclegal.org/resources/removal-proceedings/biden-administration-announces-new-prosecutorial-discretion-policy> (“ICE

coherent plan, with the then director of ICE stating plainly that undocumented immigrants broadly “should be afraid.”<sup>128</sup> The constant threat of deportation promotes existential harm. As a federal policing agency, ICE is limited almost exclusively by executive authority under the plenary power.<sup>129</sup> Because of this, the threat of deportation hangs like a pendulum swinging wildly between realms of enforcement and relief.<sup>130</sup>

### 3. Exclusion

Borders throughout the world,<sup>131</sup> but especially in the United States,<sup>132</sup>

---

Principal Legal Advisor John D. Trasviña issued a memo to ICE Office of the Principal Legal Advisor . . . . Generally, the memo encourages OPLA attorneys to focus agency resources on cases that fall within one of the three priority categories, and to exercise prosecutorial discretion in non-priority cases.”), see Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016), <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> (“President Obama has often been referred to by immigration groups as the ‘Deporter in Chief’ . . . . ‘Felons, not families . . . ,’ Obama said in November 2014 when announcing his executive action on immigration.”).

<sup>128</sup> Tal Kopan, *ICE director Undocumented immigrants ‘should be afraid’*, CNN POLITICS (June 16, 2017), <https://www.cnn.com/2017/06/16/politics/ice-immigrants-should-be-afraid-homan/index.html>.

<sup>129</sup> See Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 476 (2009) (discussing the “inherent executive authority over immigration that has been implicit since the plenary power took shape”). *But see* Hallie Ludsin, *Frozen in Time: The Supreme Court’s Outdated, Incoherent Jurisprudence on Congressional Plenary Power over Immigration*, 47 N.C.J. INT’L L. 433, 435 (2022) (relying on developments in international law and the ceding of complete sovereignty over international affairs as indicative that both the authority for and the justification for the ways in which the U.S. manages its immigration policy is equally as outmoded as the concept of absolute sovereignty).

<sup>130</sup> See e.g. Kelly Lytle-Hernández, *Amnesty or Abolition? Felons, Illegals, and the Case for a New Abolition Movement*, BOOM: J. CAL., Winter 2011, at 54, 66 (“Today it is the criminal justice system that render the substance of citizenship, itself, unpredictable. In other words, a path to citizenship for undocumented immigrants in an era of mass incarceration may not be as valuable as it seems if pursued without a challenge to the inequities of mass incarceration . . . .”); see also Cházaro, *supra* note 2, at 1050, n. 43) (describing the link between the violence of the state in both the areas criminal law and immigration law).

<sup>131</sup> In June of 2023, a boat overloaded with individuals seeking refuge in Italy capsized in the Mediterranean Sea. Perhaps as many as 750 people drowned. While this incident occurred halfway around the world, the policies that led to it emanate directly from the United States. Imogen Piper et al., *Tracing a tragedy: How hundreds of migrants drowned on Greece’s watch*, WASH. POST (July 5, 2023), <https://www.washingtonpost.com/world/interactive/2023/greece-migrant-boat-coast-guard/tracing-the-capricious-inaction-that-led-to-the-drowning-of-hundreds-of-migrants/>.

<sup>132</sup> See Gloria Oladipo, *Texas trooper says they were told to push children into Rigo Grande and deny migrants water*, GUARDIAN (Jul. 18, 2023), <https://www.theguardian.com/us-news/2023/jul/18/texas-troopers-inhumane-migrants->

are the genesis of frequent death and despair.<sup>133</sup> The United States has not always clung so tightly to these ideas of immigration restrictions.<sup>134</sup> But violence is now omnipresent at the border.<sup>135</sup>

The lethality of borders is uncontested. In his seminal work, *The Land of Open Graves*, anthropologist Jason De León catalogues the sites of migrants deaths in the Sonoran Desert that have resulted from the U.S.'s policy in the late 1990s of "Prevention Through Deterrence," wherein it made border crossing along known routes more difficult.<sup>136</sup> The result has been over 8,000 deaths in the desert since 1998.<sup>137</sup> This lethality is on view everywhere in the immigration enforcement regime, but especially in the "hardening" of the border.<sup>138</sup> The border patrol has been subject to significant critique because of the way in which it operates to militarize the U.S. border.<sup>139</sup>

While the Trump administration elevated public awareness of the violence of the border through its separation of families,<sup>140</sup> the Biden

---

greg-abbott-border-initiative (showing how state governments are directly participating in this).

<sup>133</sup> See generally SHOBA SIVAPRASAD WADHIA, *BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP* (2019) (discussing the Muslim Ban, the effort to reduce the number of refugees admitted to the United States, and the use of expedited removal to prevent the entry of immigrants and to expel recent entries as if they had never entered U.S. territory).

<sup>134</sup> See Charles D. Weisselberg, *Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 941 n. 23 (1995) (noting that there was a time when the US government "cordially recognize[d] the inherent and inalienable right of man to change his home and allegiance."). Special thanks to Aaron Reichlin-Melnick for bringing this quotation to my attention.

<sup>135</sup> See Cházaro, *supra* note 2, at 1071 (2021) (citing Ruth Wilson Gilmore, *Fatal Couplings of Power and Difference: Notes on Racism and Geography*, 54 PRO. GEOGRAPHER 15, 16, (2002)) (calling for a movement to see deportation as violence, suing Ruth Wilson Gilmore's description of violence as "the cause of premature deaths").

<sup>136</sup> JASON DE LEÓN, *THE LAND OF OPEN GRAVES* 172 (2015)

<sup>137</sup> James Verini, *How U.S. Policy Turned the Sonoran Desert Into a Graveyard for Migrants*, N.Y. TIMES MAG. (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/magazine/border-crossing.html>; cf. *How Policy Turned the Sonoran Desert Into A Weapon*, KINO BORDER INITIATIVE (June 10, 2021), <https://www.kinoborderinitiative.org/policy-weaponized-desert/> (noting that the total number of migrant deaths investigated by Pima County (Arizona) in 1994 was 11).

<sup>138</sup> Abel Rodriguez, *Lethal Immigration Policy*, CORNELL L. REV. (forthcoming 2024) (manuscript on file with author) (identifying the ways in which lethality is reified and legitimized through political posturing and inhumane immigration policy)

<sup>139</sup> See REECE JONES, *NOBODY IS PROTECTED: HOW THE BORDER PATROL BECAME THE MOST DANGEROUS POLICE FORCE IN THE UNITED STATES* (2022).

<sup>140</sup> See Elliot Spagat, *US Identifies 3,900 children separated at border under Trump*, AP News (Jun. 8, 2021), <https://apnews.com/article/az-state-wire-donald-trump-immigration-lifestyle-government-and-politics-54e2e5bbff270019d8bda3c81161c7c7> (reporting that

administration has rivalled it with incidents such as its almost caricature-like abusive treatment of Haitian migrants.<sup>141</sup> Indeed, both administrations relied on Title 42 and other measures to deny entry to and rapidly expel migrants during the COVID-19 pandemic.<sup>142</sup> The mythos of the border has long been used to justify the litany of deaths, injuries, and other violence that accompany it.<sup>143</sup>

### *B. Arenas for Abolition*

These harms make clear the need for at least considering an abolitionist approach. Instructive terminology from scholarship identifies abolitionist reforms as “improvements that win real, material changes and get us closer to systemic change rather than incrementally improving and thereby reifying existing structures.”<sup>144</sup> Alternative terms include “transformative reforms, non-reformist reforms, and revolutionary reforms.”<sup>145</sup> This is where the distinction between regular reforms and non-reformist reforms is important to delineate.<sup>146</sup> An example is instructive, and here I will not shy away from

---

between 3,900 and 5,500 children were separated from their parents during the Trump presidency).

<sup>141</sup> Eileen Sullivan and Zolan Kanno-Youngs, *Images of Border Patrol’s Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES (Oct. 19, 2021), available at: <https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html> (“Images of Border Patrol agents on horses, pushing back Haitian migrants crossing the Rio Grande to try to reach U.S. soil, have prompted outrage among Democrats and called into question President Biden’s decision to swiftly deport thousands who had been arriving en masse at a small Texas border town.”).

<sup>142</sup> See Justo Robles, *Title 42 migration restrictions have ended, but Biden’s new policy is tougher*, GUARDIAN (May 13, 2023), <https://www.theguardian.com/us-news/2023/may/13/title-42-migration-biden-new-policy-tougher> (showing that even when the Title 42 restrictions ended, the Biden administration put into place equally restrictive rules for asylum seekers that seem to violate the rule of international law).

<sup>143</sup> See e.g. Nick Miroff, *The border wall Trump called unclimbable is taking a grim toll*, WASH. POST (Apr. 29, 2022), <https://www.washingtonpost.com/national-security/2022/04/29/trump-border-wall-injuries-deaths/> (highlighting new research from journal JAMA Surgery, which notes a massive five-fold increase in serious injuries from border wall falls after the height of border walls was raised, as well as 16 deaths, where there had previously been none).

<sup>144</sup> Shiu-Ming Cheer, *Moving toward Transformation: Abolitionist Reforms and the Immigrants’ Rights Movement*, 68 UCLA L. REV. (DISCOURSE) 68, 71 (2020).

<sup>145</sup> *Id.*

<sup>146</sup> For an in-depth and practical analysis of drawing the line and the challenge of determining whether a reform is non-reformist or, see generally Lalia L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CALIF. L. REV. 1597, 1631–36 (2022). For example, if Not represent people? See Michael Kagan, *In Defense of Deportation Defense*, 56 U.C. DAVIS L. REV. (ONLINE) 1 (2022) (grappling with the critique that providing counsel is not

the most contentious one. Among immigration scholars and advocates, there have been prolonged calls for both universal representation and for the creation of independent immigration courts.

While the dismantling of one system is necessary to make space for another, viewing this dismantling in tandem with the construction of its replacement can help provide a unifying form around which some consensus and unification can coalesce. It is a challenging mental feat to grip onto the unknown. Prefiguration is necessary.<sup>147</sup> Abolitionist thinking requires radical imagination about what *will* exist in the future in addition to what will not exist. This abolitionist horizon has gained favor among criminal legal theorists in the abolition space, and it is helpful to incorporate that thinking here.<sup>148</sup> Below, this Article groups together and provides a brief overview of the abolition efforts directed at immigration detention, deportation, and exclusion.

Currently, there is some concern about how abolitionist ideas in the context of one area of enforcement may further retrench the mechanisms of enforcement in other contexts. For example, efforts to end immigration detention via alternatives to detention may further strength the immigration surveillance system and do little to offer safety from removal.<sup>149</sup> Others note that attempts to provide representation to individuals in removal proceedings,<sup>150</sup> even as a way of mitigating removal in some cases and potentially diminishing the number of individuals detained,<sup>151</sup> could itself be

---

abolitionist; asking what do we do in the meantime otherwise?).

<sup>147</sup> Sameer Ashar, *Pedagogy of Prefiguration*, 132 YALE L.J. (FORUM) (2023).

<sup>148</sup> “[Nandita] Sharma argues that analyzing the links between slavery and immigration controls, on the one hand, and the links between the incarceration of subordinated citizens and those classified by States as ‘migrants,’ on the other, strengthens contemporary social justice struggles for No Borders. Indeed, in view of this history, Sharma makes a compelling case that prison abolition and No Borders spring from the same well of undoing and ultimately ending state controls on human mobility.” Aiken, *supra* note 107, at 150 (2021).

<sup>149</sup> See generally Sarah Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages*, Colo. L. Rev. (forthcoming 2024) (manuscript on file with author), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4192032](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192032).

<sup>150</sup> See Boaz, *supra* note 3, at 233–34 (2021) (providing an overview of the scholarship on the due process right to counsel, generally and for specifically delimited classes); See also The Fairness to Freedom Act, S.1187, 118th Cong. (2023) (introducing The Fairness to Freedom Act, introduced to the Senate Judiciary Committee in April 2023 by Senator Kirsten Gillibrand); see also *The Fairness to Freedom Act*, KIRSTEN GILLIBRAND U.S. SEN. FROM N.Y. (2023), <https://www.gillibrand.senate.gov/wp-content/uploads/2023/04/SUMMARY-Fairness-to-Freedom-Act-of-2023-1.pdf> (providing an overview of the act and the troubles it may face passing in the current Congress).

<sup>151</sup> See Boaz, *supra* note 3, at 199 (articulating a possible avenue for the abolition of

subject to critique - namely that it is little more than an argument “that deportation is being maldistributed - that there is a contradiction between with the rule of law requires, what due process requires, and the way that deportation is currently being meted out.”<sup>152</sup>

## 1. Detention

Immigration detention has been the primary target for abolitionists writing and working in the immigrant rights space.<sup>153</sup> It is easiest to conceptualize the absence of immigration detention because there are lengthy periods of time in U.S. history when such detention simply did not exist. The rise in the usage of immigration detention mirrors the U.S.’s efforts to be ‘tough on crime’ by launching a ‘War on Drugs’ and implementing policies that led to a massive increase in the number of individuals being held in prison. This shift is historically observable and fits most neatly into the narrative of decarceral efforts – much in the same way that prisons should be

---

immigration detention by diverting federal funding away from detention and toward the provision of counsel which corresponds with both nearly perfect attendance rates at hearings and a significantly higher likelihood of success in the outcomes of the substantive case).

<sup>152</sup> Cházaro, *supra* note 2, at 1113. This same critique applies to the effort to introduce independent immigration courts - i.e. courts and judges not situated within the administrative system, and therefore not subject to shifts in the political winds that occur with changes in the executive. *See* ALISON PECK, *THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION* (2021) (providing an engrossing history of how the immigration courts ended up in the Department of Justice after having originated in the Department of Labor). Prof. Peck also shares past proposals that have been offered to remove the immigration courts from beneath the direct authority of the Attorney General, who is under the direct authority of the President; these proposals range from the creation of a new subagency, to a new agency, to an Article I Court. *See id.* at 160–66 (providing also Prof. Peck’s strongest support for an Article I court). Critics have identified the capture of immigration courts as a major impediment to independent decision making. Scholars have proposed both Article I and Article III courts, each of which would provide different levels of autonomy, with a rationale focused on consistency, predictability, and insulation from the political branches. There is also political support for this reform, with legislation also pending in Congress; for example, a recent bill made it out of the House Judiciary Committee in 2022, seeking to establish an Art. I court, similar to the U.S. Tax Court system. House Judiciary Committee Passes Lofgren’s Legislation to Reform the U.S. Immigration Court system, U.S. CONGRESSWOMAN ZOE LOFGREN (May 12, 2022), <https://lofgren.house.gov/media/press-releases/house-judiciary-committee-passes-lofgren-s-legislation-reform-us-immigration> (detailing this legislation introduced by Congresswoman Lofgren).

<sup>153</sup> “Today, the movement for immigrant rights demand reforms that go beyond earned legalization. While they still seek pathways to citizenship, their policy demands now include defunding ICE and Customs and Border Enforcement (CBP), repealing laws that criminalize immigration, ending immigration detention, and ending contracts with private companies that participate in immigration enforcement.” Lee, *supra* note 106, at 117.

abolished (or vastly diminished), so, too, do immigration detention centers no longer need to exist.<sup>154</sup>

Immigration detention is supposed to function solely to ensure that individuals appear at their proceedings. However, over the last several decades, it has also served as a form of punishment.<sup>155</sup> Scholars writing in this area agree that immigration detention causes harm, is inordinately expensive, and its policy objectives can be satisfied elsewhere – via community-supported compliance efforts, alternatives-to-detention (including monitoring), or simply via the provision of counsel. While there is agreement about the need for detention to end, how to go about implementing its end has less of a consensus. For example, some note that the programs that have led to a decrease in the detained population have incorporated other, new harms – such as the creation of a vast surveillance network, reifying the state with the power to continue to conduct enforcement.<sup>156</sup>

## 2. Deportation

Abolishing deportation has received less scholarly attention, though interest in the idea is rising. Scholars have primarily focused on the concept of deportation as a form of banishment, a state response that has historically been viewed as punishment. Yet, the Supreme Court has consistently held, for nearly a century and a half, that deportation is not punishment and therefore those subject to deportation cannot access the same rights that would be afforded to individuals subject to state punishment. The result is that the executive retains significant power to remove any non-citizen for nearly any reason, even if such conduct would result in relatively minor sanctions for a U.S. citizen. Eisha Jain explains that this approach has “paved the way for people who fit a racial stereotype to be treated as foreign, regardless of their actual immigration status.”<sup>157</sup> As a result, some scholars

---

<sup>154</sup> “There is no evidence that detention centres promote safety and security in local communities or lead to lower numbers of newcomers. Despite popular rhetoric about detention’s deterrent effects, demographic evidence finds that restrictive immigration measures like detention do not stop inflows, decrease permanent settlement, or increase ‘voluntary’ deportations.” Aiken, *supra* note 107, at 145.

<sup>155</sup> See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. (SIDEBAR) 42, 44–49 (2010) (“Immigration detention has embraced the ‘aesthetic’ and ‘technique’ of incarceration, evolving for many detainees into a quasi-punitive regime far out of alignment with immigration custody’s permissible purposes.”).

<sup>156</sup> See Sarah R. Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages* 4 (B.U. Sch. L. Rsch. Paper Series No. 23-6), [https://scholarship.law.bu.edu/faculty\\_scholarship/3224/](https://scholarship.law.bu.edu/faculty_scholarship/3224/) (highlighting the harms that come from “digital cages” in the form of surveillance that supplants immigration detention).

<sup>157</sup> Eisha Jain, *Policing the Polity*, 131 YALE L. J. 1794, 1804 (2022) (detailing the



have called for the abolition of deportation, calling it a form of violence, and attacking the arbitrary nature in which it is implemented.

The push here has largely centered around the harm that is directed at individuals who have resided in the United States for a significant period and who would be subject to separation from their communities and families.<sup>158</sup> In addition, others have pointed out that the inadequate structure and interpretation of asylum law frequently leads to the removal of individuals back to a country where they will be subject to severe harm or even death. Interestingly, there has also been an effort directed at solidarity – expanding protections against deportation for a broader swath of the population, as opposed to privileging one group over another.<sup>159</sup> Some scholars have sought to split the difference, offering up policy proposals that would offer different forms of enforcement, for example, by mimicking the actions of the IRS in collecting taxes,<sup>160</sup> and focusing on compliance.<sup>161</sup>

This means that the work of the administrative state would shift toward moving the myriad people who are eligible for status into conformance with some available status, thus obviating the need for removal proceedings. This compliance focus would be more akin to the work already being done by USCIS, with some structured incentives to ensure that those who could gain status do in fact do so. But this carrot also comes with a stick. Failure to obtain status could still result in removal, though some have proposed gradations in responses, such as civil fines.<sup>162</sup> Whether these proposals satisfy the

---

history of race-based immigration policing in the United States).

<sup>158</sup> See e.g. Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008) (distinguishing between “exclusion” and “expulsion” proceedings and arguing for additional protections for those subject to the latter).

<sup>159</sup> Rather than throw segments of their community under the bus, activists reimagine an altogether different immigration system. In this way, immigration disobedience connects to BLM and other social movements that demand radical reconfiguration of the prevailing systems because of systemic racial and economic inequality.” Lee, *supra* note 106, at 118.

<sup>160</sup> See generally Peter Markowitz, *Rethinking Immigration Enforcement*, 73 FLA. L. REV. 1033 (2021), and Markowitz, *supra* note 22.

<sup>161</sup> See Frost, *supra* note 23, at 3 (“The immigration bureaucracy could adopt a cooperative enforcement model similar to that used by other federal agencies, under which government officials would proactively assist a subset of unauthorized immigrants come into compliance with the law.”); see also Ryo, *supra* note 23, at 630 (discussing an approach to immigration law that would “broaden our base of empirical knowledge about the individuals whose behavior the law seeks to regulate, in order to develop more principled, sustainable, and effective policies that engender greater voluntary compliance”).

<sup>162</sup> See Kanstroom, *supra* note 23, at 491 (“Two things should be immediately apparent about graduated sanctions: First, they seek to implement goals not only of retribution and deterrence, but also rehabilitation, with due recognition for proportionality. Second, they

abolitionist ethic is challenging to say. They certainly promote the regularization of status for people who may currently be undocumented, but they also indicate that some subsection of individuals would likely still be subjected to removal from the United States. This outcome does not sit well with other scholars who note that many will simply not have a pathway to regularize and thus will be left out of such a compliance scheme, while still suffering the same harms of marginalization that existed before.

### 3. Exclusion

The final area of abolition concerns the state's efforts to exclude individuals from the United States. Here, scholars advocate for open, or at least more permeable, borders. More than two decades ago, Kevin Johnson attempted to bring this discussion into the mainstream.<sup>163</sup> More contemporary scholars have continued to build upon these deep critiques of sovereignty and the philosophy of borders.<sup>164</sup>

Abolishing exclusion, also known as pursuing “open borders,” or variations on that theme, is considered the most radical in the progression of abolition efforts. Yet, it also receives praise from a group of strange bedfellows, who would typically not align on other areas of policymaking.<sup>165</sup>

---

tend to be post-hoc guidelines for judges who exercise discretion.”); *see also* Banks, *supra* note 23, at 1656 (examining deportation in the context of existing jurisprudence that governs other excessive civil penalties, such as excessive fines).

<sup>163</sup> Johnson, *supra* note 3, at 196 (“In making a case for open borders, this Article calls for consideration of no less than a revolutionary change in immigration law.”); *see also* KEVIN JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 169 (2007) (stating that “[t]he presence of undocumented immigrants in the United States is a plain reality . . .” and “[b]order controls, as currently configured in the United States, simply waste billions of dollars, and result in thousands of deaths. They have not ended, and count end, unlawful immigration”).

<sup>164</sup> See, for example Achiume, *supra* note 25, PETER SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008); Steven Sacco, *Abolishing Citizenship: Resolving the Irreconcilability between “Soil” and “Blood” Political Membership and Anti-Racist Democracy*, 36 *GEO. IMMIGR. L.J.* 693 (2022), REECE JONES, *OPEN BORDERS: IN DEFENSE OF FREE MOVEMENT* (2019); RUTGER BREGMAN, *UTOPIA FOR REALISTS* (2014), and BRYAN CAPLAN AND ZACH WEINERSMITH, *OPEN BORDERS: THE SCIENCE AND ETHICS OF IMMIGRATION* (2019), for a growing list of advocates for open or less restrictive borders, and their works; See also, for example ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM* (2020), for a strong critique of the origins of theories of sovereignty, denouncing any historical universal understanding, and providing practical reasons (and ways) for why we might abandon the current immigration regime to permit freer international migration.

<sup>165</sup> See SARAH SONG, *IMMIGRATION AND DEMOCRACY* 189 (2019) (describing how “[l]abor-market protectionists might find themselves on the same side as restrictive

Libertarian scholars, for example, have focused on the economic benefits of opening borders and the inadequacy of political theory in justifying the exclusion of people when goods and money freely cross borders every day.<sup>166</sup> Still others cite the moral harm that comes from excluding individuals who might benefit from relocating to a wealthier and safer part of the world. Finally, many point to the gruesome history of U.S. immigration policy and the racism<sup>167</sup> that has contributed to colonialism, xenophobia, and the perpetual subjugation of non-white people in the United States<sup>168</sup> and throughout the world.

### C. A Key Omission

What is distinct about immigration enforcement abolition is that migration is not a per se harm. Consider Mariame Kaba's observation that criminal law regulates some behavior that need not be criminalized and does not regulate other behavior that perhaps should be.<sup>169</sup> The lines drawn are mostly policy oriented as opposed to innate. The same artificiality extends to immigration regulation. But whereas real violence might need to be prevented in the wake of prison/policing abolition, the abolition of immigration enforcement has a much more tangential connection to these alleged harms. While it is true that some individuals and groups share the concern that the absence of immigration detention, deportation, and/or exclusion could lead to societal harms, such perceptions are due to caustic narratives and not data. "Immigration" is simply not a harm in the same way that "criminal activity" might be considered a harm.

---

nationalists in supporting immigration restrictions. On the other side, immigrant rights advocates are joined by proponents of the free market in their commitment to open borders").

<sup>166</sup> Even scholars who acknowledge that states may have a right to sovereignty or an obligation to consider the desires of their internal political communities may decide not to exercise sovereignty to exclude the flow of migrants. *See, for example* David Miller, *National Responsibility and Global Justice* 201–30 (2012), for a sample of this scholarship.

<sup>167</sup> *See* Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 *Nw. U. L. REV. ONLINE* 1, 21 (2021) ("Differences among immigrant rights advocates exist on the necessary and essential law and policy changes. Nonetheless, building a racial justice coalition backing a set of positive immigration reforms will be an essential prerequisite for meaningful change."); *See also* Sharry Aiken, *supra* note 107, at 148–50 (quoting Nandita Sharma: 'from the start, [immigration and carceral controls] have been racist [and] have organized and enforced the immobility of those who are hegemonically regarded as "not belonging" to the "nation."').

<sup>168</sup> *See* Jain, *supra* note 158, at 1814 (describing the Supreme Court's jurisprudence in *U.S. v. Martinez-Fuerte* (1976), which permitted the perception of "Mexican appearance" as a proxy for illegality, and critiquing this widespread concept of racial appearance as a proxy for belonging in the United States).

<sup>169</sup> MARIAME KABA, *WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* (2021).

### III. NORMATIVE JUSTIFICATIONS FOR IMMIGRATION ENFORCEMENT

This Part addresses the question of why the United States has immigration laws. Interestingly, the answer to this question has been quite difficult to pin down.<sup>170</sup> Frequently, this scholarly analysis veers into the realm of political theory, philosophical query, and international law. This Article seeks to draw upon the scholarship from these various fields in identifying normative reasons that are relied upon to justify immigration enforcement. While this premise is often presumed,<sup>171</sup> I argue that it is worth interrogating. Again, presupposing that the baseline is a world in which no immigration limits exist, let us reconsider how each of these norms would be reframed. If we imagine immigration policy as a question of why people should be detained, expelled, or excluded, as opposed to a question of why they should be let into the United States, this presumption shifts our thinking.

#### A. *The Trouble with Transference*

Even the politically correct terminology “irregular migration” belies the idea that migration itself is not the problem. The desire to relocate is driven by numerous factors: violence, market structure, family, and plenty of other incentives to leave and disincentives to stay in one’s homeland.<sup>172</sup> To divorce these push/pull factors<sup>173</sup> from the inability of the current regulatory system to adequately address them is not the fault of the people seeking to move themselves and their families.<sup>174</sup> The fact of people wanting or needing to

---

<sup>170</sup> Kit Johnson, *Theories of Immigration Law*, 46 Ariz. State L.J. 1211, 1211–12 (2014) (“Legal scholarship lacks a comprehensive account of the theoretical underpinnings of immigration law.”).

<sup>171</sup> See, for example A Nation Without Borders Will Cease to be a Nation, TOM MCLINTOCK UNITED STATES CONGRESSMAN (Sept. 21, 2022), <https://mcclintock.house.gov/newsroom/columns/a-nation-without-borders-will-cess-to-be-a-nation>, for a claim from Rep. Tom McClintock that “the United States is already a nation without borders,” resounding a statement from former President Trump made in support of his effort to build a contiguous wall separating the United States from Mexico.

<sup>172</sup> See Kit Johnson, *Can We Act Globally While Thinking Locally: Responding to Stella Burch Elias, the Perils and Possibilities of Refugee Federalism*, 67 AM. U. L. REV. 217, 225 (2017) (“Consider the human context of these states’ exclusionary efforts. Refugees and asylees are individuals who, by definition, have been or would be persecuted in their home country because of politics, religion, nationality, race, or group membership. To put it more plainly, they have been chased from their homes and have nowhere else to go.”).

<sup>173</sup> See e.g. Mario Bruzzone, *Understanding Migration: Why “Push Factors” and “Pull Factors” Do Not Explain Very Much*, U.S. COMM. FOR REFUGEES AND MIGRANTS (Jul. 7, 2020), <https://refugees.org/wp-content/uploads/2020/12/7.27.20-Policy-Brief.pdf> (noting that “push” factors have long mattered more than “pull” factors).

<sup>174</sup> See Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*,

relocate from one place to another remains fixed.<sup>175</sup> The intended destinations, the quantity of individuals, and the reasons may have evolved, but the fundamental fact of human movement is a constant. International scholars have long been seeking to address this issue and have even proposed an International Migrants Bill of Rights.<sup>176</sup> Efforts to recognize human movement as natural and worthy of protection are already underway, but the efforts to prohibit and limit movement are already in place. Yet, the history of these restrictions is relatively short.

This Part supports the proposed movement of the presumption away from restrictions and toward free movement. If the baseline were to be no restrictions, then the restrictions themselves must be justified. If the human activity is natural, then there must be some justification for placing limitations upon it. It is this consideration which is missing from the conversation regarding abolition of immigration restrictions in the United States. This new foundation for initiating conversations requires the conception of a world without immigration regulations to serve as a starting point for justifying the implementation of immigration regulations in the first place.<sup>177</sup> Put more simply, if immigration restrictions did not exist, what reasons would the United States (or other countries) have for putting restrictions in place? When viewed from this new perspective, the abolition movement can engage with the normative assumptions that serve as foundational pillars for immigration law in the United States.

---

109 CALIF. L. REV. 63, 101–03 (2021) (describing the involvement of the United States in Central American states and how this involvement led to “push” factors developing in the region, for which the U.S. now refuses to claim responsibility).

<sup>175</sup> See Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 622 (2017) (explaining that “[m]igration events are classified as crises because of the utility of the rhetoric for a variety of actors,” implying “an unanticipated problem with a discrete cause rather than a long-term and systemic complex of issues”).

<sup>176</sup> *International Migrants Bill of Rights Program*, CORNELL UNIV. SCH. L., <https://www.lawschool.cornell.edu/academics/centers-programs/international-migrants-bill-of-rights-program/#:~:text=The%20International%20Migrants%20Bill%20of%20Rights%20Principles%3A,which%20the%20migrant%20is%20present>.

<sup>177</sup> This assertion relies on the analysis presented by Angélica Cházaro of Linda Bosniak’s scholarship, supporting the effort to “force sovereignty to justify itself, both on its own terms and as an excuse for the practice of deportation.” Cházaro, *supra* note 2, at 1097 n.278 (citing Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 453 (2000)); *see also id.*, at 1096 n. 271 (2021) (citing Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 476 (2015)) (“[o]nce one accepts the basic legitimacy of the nation-state, then deportation of noncitizens as a tool of extended border control is both logically necessary and potentially legitimate so long as certain secondary questions are properly accounted for.”).

### B. Four Possible Normative Pillars

This Article offers four normative pillars that the United States can and does use to support both its establishment of immigration restrictions and its tailoring of those restrictions: (i) economic policy, (ii) (national) security, (iii) (national) identity, and (iv) international power and influence. This Part seeks to demonstrate why these four pillars stand together and what considerations are grouped within each category.<sup>178</sup> Moreover, this Part also offers initial critiques of each pillar - both as substantive categories and of the policy decision that the U.S. has implemented as a way of satisfying each pillar. This Part concludes by directing future abolitionist proposals to focus on these pillars as a central point of analysis in determining: (a) whether these pillars are worthy of undergirding a system of immigration restrictions, and (b) whether they might be satisfied in more humane, equally or more effective, and less costly ways.<sup>179</sup>

#### 1. Economic Policy

The pillar of economic policy concerns decisions about employment, the distribution of government resources to non-citizens, and the overall economic health of the United States. Many political and legal theorists identify economic policy as a major driver of immigration policy decisions. Interestingly, economists primarily conclude that more immigration would result in greater economic growth not only in the United States, but also in other states. From an economic perspective, immigration restrictions hinder the goal of economic prosperity - both domestically and internationally.

While abolitionist immigration policies would have extreme net positive effects worldwide,<sup>180</sup> this Article is primarily concerned with domestic

---

<sup>178</sup> Other scholars have provided distinctive but related groupings. Consider, e.g. Prof. Kit Johnson's "domestic interest theory," which would encompass both economic policy and national security, her "national values theory," which would correlate with national identity, and parts of her "global welfare theory" overlap with international power and influence. Kit Johnson, *supra* note 171, at 1212–13.

<sup>179</sup> Prof. Johnson notes that her proposal of specific immigration theories can promote a coalition of "political actors with disparate practical and ideological interests," while also noting how reforms might "achieve greater traction by either engaging the dominant theoretical perspective or utilizing multiple theoretical underpinnings." *Id.* A similar concept is at play here, though rather than having as a foundation the sovereign state beneficently granting membership, I offer the starting point of no immigration restrictions.

<sup>180</sup> See *Opening Borders Would Double World GDP, Economist Says*, WBUR (Aug. 06, 2018), <https://www.wbur.org/hereandnow/2018/08/06/open-borders-economy-workers>

perceptions.<sup>181</sup> Many legal scholars identify economics as a real concern for both U.S. citizens and policymakers.<sup>182</sup> Issues of employment, government assistance, taxes, and economic growth loom large in the conscience of many Americans. Indeed, many politicians strategize about how to leverage these concerns about a possible negative impact from an influx of immigration in favor of support for their candidacy.<sup>183</sup> Despite the falseness of this claim,<sup>184</sup> its resonance with some voters demonstrates its relevance.

Economic policy is a key pillar in constructing the narrative that there is

---

(containing an interview wherein economist Michael Clemens claims that easing border restrictions would as much as double world GDP).

<sup>181</sup> See, for example Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 294 (2013), for the argument that the possibility of “rights” being critical to the immigration legal system is coherent only insofar as it benefits the well-being of Americans.

<sup>182</sup> See *The Effects of Immigration on the United States Economy*, PENN WHARTON BUDGET MODEL (Jun. 27, 2016), <https://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy> (providing a statistical analysis of immigration since 1970 and the relative economic effects, finding that “[i]mmigrants in general – whether documented or undocumented – are net positive contributors to the federal budget.”); see also Catherine E. Shoichet, *Undocumented immigrants are paying their taxes today, too*, CNN (Apr. 18, 2023), <https://www.cnn.com/2023/04/18/us/undocumented-immigrants-taxes-cec/index.html> (reporting on the amount of taxes paid each year by undocumented immigrants, exceeding \$6 billion in federal taxes alone); see also Alex Nowrasteh, *The Fiscal Impact of Immigration in the United States*, CATO Inst. (Mar. 21, 2023) (“[I]mmigrants pay more in taxes than they consume in benefits, on average.”); see also Adi Gaskell, *The Economic Case for Open Borders*, Forbes (Jan. 19, 2021), <https://www.forbes.com/sites/adigaskell/2021/01/19/the-economic-case-for-open-borders/?sh=4df40c50444f> (advocating for an open borders approach because of the potential positive economic effect in the U.S. and internationally).

<sup>183</sup> Consider, for example, former President Trump’s efforts to court Black voters by vilifying immigrants as “tak[ing] jobs from hardworking African-Americans and Hispanic citizens.” He made this claim in 2014, 2015, 2016, and 2019. See, for example Aaron Blake, *Trump warns GOP on immigration: ‘They’re taking your jobs’*, WASH. POST (Mar. 6, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/03/06/trump-warns-gop-on-immigration-theyre-taking-your-jobs/>, and Josh Boak, *AP fact check: Trump plays on immigration myths*, PBS (Feb. 8, 2019), <https://www.pbs.org/newshour/politics/ap-fact-check-trump-plays-on-immigration-myths>, and *The Latest: Trump says immigrants are taking minorities’ jobs*, AP NEWS (Aug. 30, 2016), <https://apnews.com/article/09215cf7f37f4c6ea05f92f8c83e6125>, and Eugene Scott, *Trump’s claim that black Americans are hurt most by illegal immigration gets pushback*, WASH. POST (Jan. 9, 2019), <https://www.washingtonpost.com/politics/2019/01/09/trumps-claim-that-black-americans-are-hurt-most-by-illegal-immigration-gets-pushback/>, for reporting on Trump’s repeated invocation of this unsubstantiated claim.

<sup>184</sup> See *Do immigrants “steal” jobs from American workers?*, Brookings Institution (Aug. 24, 2017), <https://www.brookings.edu/blog/brookings-now/2017/08/24/do-immigrants-steal-jobs-from-american-workers/> (identifying these claims as falsehoods).

a need for immigration enforcement. The strongest voice in favor of this concern is George Borjas, an economist at Harvard, who claims that “[b]oth low- and high-skilled natives are affected by the influx of immigrants. But because a disproportionate percentage of immigrants have few skills, it is low-skilled American workers, including many blacks and Hispanics, who have suffered most from this wage dip.”<sup>185</sup> This rhetoric was picked up by former President Trump during and others in his administration, especially Stephen Miller,<sup>186</sup> the hardline, anti-immigrant policy advisor<sup>187</sup> who was behind such efforts as the Muslim Travel Ban,<sup>188</sup> the separation of children from their parents at the border,<sup>189</sup> and the massive decline in refugee admissions.<sup>190</sup> But economics is a much broader question than just the impact of immigration on low-wage workers.

The economic pillar considers employment needs from an employer perspective, wages from a labor perspective, and the distribution of government resources to non-citizens. From an employer perspective, there is currently a labor shortage, which would benefit from increased

---

<sup>185</sup> George J. Borjas, *Yes, Immigration Hurts American Workers*, POLITICO (Sept./Oct. 2016), <https://www.politico.com/magazine/story/2016/09/trump-clinton-immigration-economy-unemployment-jobs-214216/>.

<sup>186</sup> A fact check indicated that the data around this issue are contentious and that “the debate remains unsettled,” Amita Kelly, *FACT CHECK: Have Immigrants Lowered Wages For Blue-Collar American Workers?*, NPR (Aug. 4, 2017), <https://www.npr.org/2017/08/04/541321716/fact-check-have-low-skilled-immigrants-taken-american-jobs>.

<sup>187</sup> See Boaz, *supra* note 60, for an exploration of Miller’s ideological mindset, as well as other like-minded individuals in the Trump administration.

<sup>188</sup> See Sabrina Siddiqui, *Meet Stephen Miller, architect of first travel ban, whose words may haunt him*, GUARDIAN (Mar. 15, 2017), <https://www.theguardian.com/us-news/2017/mar/15/stephen-miller-new-trump-travel-ban> (“Miller was the policy’s 31-year-old architect and was at the center of the troubled first attempt to introduce a travel ban on seven Muslim-majority countries in late January.”).

<sup>189</sup> See McKay Coppins, *The Outrage Over Family Separation is Exactly What Stephen Miller Wants*, ATL. (June 19, 2018), <https://www.theatlantic.com/politics/archive/2018/06/stephen-miller-family-separation/563132/> (“[Miller] is, by all accounts, an avowed restrictionist, and he likely believes that separating children from their parents at the border will deter future illegal immigration.”).

<sup>190</sup> See Jonathan Blitzer, *How Stephen Miller Single-Handedly Got the U.S. to Accept Fewer Refugees*, NEW YORKER (Oct. 13, 2017), <https://www.newyorker.com/news/news-desk/how-stephen-miller-single-handedly-got-the-us-to-accept-fewer-refugees> (describing how Miller’s influence led to a forty-five thousand person, record low cap on refugees allowed in the U.S.).



migration.<sup>191</sup> However, employers also benefit from the ability to exploit undocumented workers<sup>192</sup> – meaning that immigration restrictions and the precarity in which those restrictions place undocumented workers can actually benefit employers.<sup>193</sup> Indeed, this is the source of wage drops that other economists bemoan.<sup>194</sup> Were the stasis to be no immigration restrictions, this benefit to employers and deficit for employees would disappear.<sup>195</sup> Nonetheless, many companies still advocate for an increase in authorized migration, indicating that not all companies wish to align with

---

<sup>191</sup> See Lydia DePillis, *Immigration Rebound Eases Shortage of Workers, Up to a Point*, N.Y. TIMES (Feb. 6, 2023), <https://www.nytimes.com/2023/02/06/business/economy/immigration-labor.html> (describing the hope that a resurgence in the influx of foreign-born workers will ease the labor shortage and its economic effects); see also Julia Ainsley, Joel Seidman and Didi Martinez, *Canada and the U.S. both face labor shortages. One country is increasing immigration.*, NBC NEWS (Jan. 7, 2023), <https://www.nbcnews.com/politics/immigration/canada-us-increasing-immigration-labor-shortage-rcna64691> (comparing Canada’s strategy to increase immigration to address the persistent labor shortage).

<sup>192</sup> See Daniel Costa, *Employers increase their profits and put downward pressure on wages and labor standards by exploiting migrant workers*, ECON. POL’Y INSTITUTE (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-immigration-policy/> (providing examples of direct exploitation, such as low wages and wage theft); see Susan Ferriss & Joe Yerardi, *Wage theft hits immigrants—hard*, PBS NEWS HOUR (Oct. 14, 2021), <https://www.pbs.org/newshour/economy/wage-theft-hits-immigrants-hard> (describing the rampant labor violations and intimidation faced by non-citizen workers in the U.S.). But see Walter Ewing, *Corrupt US Employers and Smugglers Are Exploiting Migrant Teens for Profit*, IMMIGR. IMPACT (Feb. 9, 2022), <https://immigrationimpact.com/2022/02/09/us-employers-smugglers-exploiting-migrant-teens/>, and Hannah Dreier, *As Migrant Children Were Put to Work, U.S. Ignored Warnings*, N.Y. TIMES (Apr. 17, 2023), <https://www.nytimes.com/2023/04/17/us/politics/migrant-child-labor-biden.html>, for examples of how this exploitation can also be indirect, for example, by creating a market for smuggling individuals across the border and subcontracting to companies that violate child labor laws.

<sup>193</sup> Travis P. Hill, *Big employers no strangers to benefits of cheap, illegal labor*, TEX. TRIB. (Dec. 19, 2016), <https://www.texastribune.org/2016/12/19/big-name-businesses-exploit-immigrant-labor/> (“‘We’ve realized that [employers] prefer for us being undocumented because we just keep our heads down to get jobs,’ Chunco said. ‘[We] can’t afford to complain. They take advantage of us being undocumented.’”).

<sup>194</sup> George J. Borjas & Hugh Cassidy, *The wage penalty to undocumented immigration*, 61 LABOUR ECON., no. 101757, 2019 at 1 (finding that undocumented individuals earn less than those who have lawful status and that the wage penalty increases as restrictions are tightened).

<sup>195</sup> See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1089–90 (2011) (arguing that both the Department of Labor and Immigration and Customs Enforcement should consider the policy implications of a massive workforce that suffers from the precarious immigration statuses).

support for maintaining a subordinated, undocumented workforce.<sup>196</sup>

Prof. Eric Posner has proposed that immigration law functions to “maximize the well-being of Americans,<sup>197</sup> . . . and promote . . . investment.”<sup>198</sup> Posner notes that immigration policy should be constructed around the concept of maximizing the national social welfare.<sup>199</sup> If the normative purpose of immigration is to improve the lives of citizens residing within the United States, then some intriguing options become available. Arguments that demonstrate how abolition immigration enforcement might produce economic benefits for U.S. citizens, for example, could gain traction. Other arguments that demonstrate how U.S. citizen families might suffer less because family members are not removed from or prohibited entry into the U.S. also begin to sound more appealing to a wider audience.

In sum, the economic pillar is a real concern, but likely insufficient on its own. As a pillar, however, its purpose remains unsatisfied by U.S. immigration policy. Despite the rhetoric of politicians raising the issue of economic harm in their conversations about increasing immigration restrictions,<sup>200</sup> such correlations are not supported by the data. As

---

<sup>196</sup> See Nathaniel P. Flannery, *In Pictures: Where Do Major U.S. Corporations Stand In The Immigration Debate*, FORBES (Sept. 17, 2013), <https://www.forbes.com/sites/nathanielparishflannery/2013/09/17/in-pictures-where-do-major-u-s-corporations-stand-in-the-immigration-debate/?sh=6caedb095dcf> (identifying the complex calculus that companies consider when determining what policies to support, but indicating that many large companies rely on immigrant labor and do not support efforts that would result in large-scale removal).

<sup>197</sup> Posner notes that consideration for the well-being of “foreigners,” which he identifies as “cosmopolitanism,” has essentially “no support in American public policy.” Posner, *supra* note 182, at 291. Given that public policy is frequently believed to be the voice of the people, I will defer to him on this assertion. Next, he frames this assertion to mean a focus primarily on the economic well-being of Americans, as evaluated through a series of positive contributions (filling labor gaps and paying taxes) and negative detractions (increasing demand on goods and driving up prices, accessing public resources and increasing “congestion” with regard to these resources). *Id.* at 292. Posner notes that the empirical net effect cannot be fully analyzed. But see, for example Jennifer M. Chacon, *Moving Forward*, 50 SW. L. REV. 208 (2021), for an alternative argument that the majority of economic studies find migration to be a positive good and that we simply ascribe to a narrative that immigrants (and particularly, refugees) are a societal burden to bear.

<sup>198</sup> Posner indicates that this is verified through the types of visas available - particularly with a focus on the exceptional, providing the example of preferential treatment for Olympic athletes. Posner, *supra* note 182, at 293.

<sup>199</sup> See *id.* at 291 (“The next question is how can immigration law be used to maximize the well-being of Americans.”).

<sup>200</sup> See Jasmine Garsd, *For many migrants being bused from New York City to other towns, hostility awaits*, NPR (June 20, 2023), <https://www.npr.org/2023/06/18/1181933592/for-many-migrants-being-bused-from-new->

demonstrated above, immigrants contribute to the financial welfare of the United States via payment of taxes, even when they cannot receive access to those same state-sanctioned supports. Moreover, economists nearly universally conclude that increases in migration into the United States (and across the world more broadly) would result in amplified economic growth and prosperity, while also reducing the ability of all employees to be exploited by capitalism. Moreover, a presumption of no immigration regulation would move the incentives that exist in the black market to traffic and smuggle individuals into the United States.<sup>201</sup> Therefore, while economic policy is a satisfactory goal and thus worthy of being erected as a pillar, it appears that the implementation of immigration restrictions does little to satisfy that goal, and in fact may harm our aims.

## 2. (National) Security

The pillar of (national) security focuses on terrorism, criminality, and the existential threat to the “rule of law.” However, each of these sub-tenets dissolves under further scrutiny. Though the task of immigration enforcement was incorporated into the newly created Department of Homeland Security in the early 2000s, immigration policy has proved to be a poor proxy for predicting and preventing potential terrorist attacks. Indeed, the terminology of “terrorism” is itself open to criticism and perhaps lacks utility. Relatedly, one major goal of immigration policy has been to address and respond to criminal activity more generally. While the legal repercussions for violations of the criminal code in the U.S. have had an outsized negative effect on the ability of an individual to remain in or enter the U.S., there is simply no correlation between one’s immigration status and the likelihood that they might engage in criminalized activity. The last concern under security is that of the existential threat to the “rule of law.” But, creating boundaries and then holding them up as justification for themselves presumes too much.

It is possible to infer some of the purpose of immigration legal system from its architecture - composed largely of detention, deportation, and exclusion. This framework suggests a major normative focus for immigration

---

york-city-to-other-towns-hostility-awaits (“At a nearby supermarket parking lot, Anthony Gerome says he’s concerned about the costs of taking people in. He points out that the U.S. economy is not great right now.”).

<sup>201</sup> Gulf Cartel, *How US Immigration Policy Foments Organized Crime on the US-Mexico Border*, INSIGHT CRIME (June 28, 2023), <https://insightcrime.org/investigations/unintended-consequences-us-immigration-policy-foments-organized-crime-us-mexico-border/>.

policy, which aligns with that of the criminal legal system – safety. Here, however, the concept of safety is a bit more nuanced, referring to both domestic criminality and national security.<sup>202</sup>

The conversation about national security has existed since the late 19<sup>th</sup> century and has carried forward to the present day.<sup>203</sup> Primarily, this has been done through the allegory of invasion.<sup>204</sup> The Supreme Court’s jurisprudence continues to echo both the ideas of foreign threat, and the ability of the executive to respond accordingly.<sup>205</sup> This idea of threat has grown even more elevated following the creation of the Department of Homeland Security,<sup>206</sup> and its charge of immigration enforcement. It is challenging now to have a conversation about immigration enforcement without implicating notions of foreign aggression, invasion, or terrorism, despite criticism that immigration status and potential threats to national security do not share sufficient overlap to be associated for the purpose of policymaking.<sup>207</sup> Within this morass, many

---

<sup>202</sup> “Admittedly, the complexities of immigration have long touched on several facets of our democracy, from economic production and resources to ‘internal security, relations with other states, and the national identity.’” See Ali Shan Ali Bhai, *A Border Deferred: Structural Safeguards against Judicial Deference in Immigration National Security Cases*, 69 Duke L.J. 1149, 1169 (2020) (citing CHRISTOPHER RUDOLPH, NATIONAL SECURITY AND IMMIGRATION: POLICY DEVELOPMENT IN THE UNITED STATES AND WESTERN EUROPE SINCE 1945 2 (2006)), for a discussion of national identity and relations with other states follows in the sections below.

<sup>203</sup> Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 1–2 (2010) (describing the history of this national security conversation).

<sup>204</sup> See *id.* (“The late nineteenth-century architects of the plenary power doctrine believed that the unchecked immigration of economically degraded, politically inassimilable, and racially unfit immigrants had created a state of national emergency.”).

<sup>205</sup> See Mark Tushnet, *Trump v. Hawaii: This President and the National Security Constitution*, 2018 SUP. CT. REV. 1, 1–2 (2018) (“The Chief Justice continued, ‘it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.’ The action ‘is well within executive authority . . . .’”); see also Karla McKanders, *Deconstructing Invisible Walls: Sotomayor's Dissents in an Era of Immigration Exceptionalism*, 27 WM. & MARY J. RACE GENDER & SOC. JUST. 95, 97 (2020) (“Justice Sotomayor’s immigration decisions provide a significant break in historical deference to executive actions and are forcing us to reconceptualized the ways in which the immigration system historically has abrogated the rights of immigrants of color.”).

<sup>206</sup> For a critique about the discourse surrounding “national security,” and the special privileges that national security law and lawyers receive in various judicial systems, see Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 3–5 (2021) (citing concerns about “[t]he absence of any real oversight [in national security law,] [which] means that those interpreting the law are almost exclusively the lawyers for the very same actors regulated by that law—members of the U.S. executive branch.”).

<sup>207</sup> See Anthony J. DeMattee, Matthew J. Lindsay, & Hallie Ludsin, *An Unreasonable Presumption: The National Security/Foreign Affairs Nexus in Immigration Law*, 88 BROOK.

have argued that the policies are simply not defensible for the purposes cited.<sup>208</sup> Moreover, because of interpretations of the plenary power, the executive has nearly unchecked authority to regulate immigration simply by claiming that there are national security implications.<sup>209</sup> In short, this aspect of the (national) security pillar feels divorced from the facts. While national security is regularly held out as an important component of immigration enforcement, such a response is inchoate with the policy tools that are available.

A secondary component of the (national) security pillar is the question of domestic crime. An entire field has arisen to address the confluence of criminal law with immigration law – “cimmigration.”<sup>210</sup> The idea of linking the commission of crime with immigration is as historically pervasive as it is erroneous.<sup>211</sup> Despite study after study that eschew any connection between noncitizens and the propensity to commit criminalized acts in a particular location,<sup>212</sup> policy continues to be driven by some imagined connection

---

L. REV. 747, 751 (2023) (finding that “99.987 percent of immigration cases that do not involve those exceptional governmental interests,” i.e. national security or foreign affairs concerns, and concluding that it may be necessary to retain such “broad latitude in immigration cases involving bona fide national security and foreign affairs interests, but [that the government should] no longer enjoy the categorical judicial deference that it currently receives as a matter of course.”)

<sup>208</sup> See Kevin R. Johnson, *Protecting National Security through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 160 (2007) (arguing that efforts to support national security might benefit from an improved and more broadly administered legalization and admission regime), see also Lindsay, *supra* note 204, at 1–2 (discussing the ways in which the Supreme Court invented the legal construct of immigrant as a way of elevating the nation’s defense against “foreign aggression”)

<sup>209</sup> See e.g. Shawn E. Fields, *The Unreviewable Executive: National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 733 (2017) (“This Article endeavors to define [the outer limits of plenary power] and offers a new judicial review paradigm for constitutional challenges to immigration actions implicating [heretofore unchecked] national security interests.”).

<sup>210</sup> Juliet P. Stumpf, *Cimmigration and the Legitimacy of Immigration Law*, 65 ARIZ. L. REV. 113, 113 (2023) (“explor[ing] the significance of cimmigration for the procedural legitimacy of immigration law”).

<sup>211</sup> Many of these connections have foundations in racist ideologies. See Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 176 (2018) (“This interconnected, symbiotic relationship between racism, criminalization, and deportation pervades the earliest origins of crime-based deportation grounds that many people take for granted as legitimate parts of our immigration system today.”).

<sup>212</sup> Michael T. Light, Jingying He, & Jason P. Robey, *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-born US Citizens in Texas*, 117 PNAS 32340, 32340 (2020) (“We find that undocumented immigrants have substantially lower crime rates than native-born citizens and legal immigrants across a range of felony

between the two.

In conclusion, the pillar of (national) security presents an unsatisfactory rationale for its own existence. Like the pillar of economic policy, the idea of national security is an important one, but its correlation with immigration policy ranges from miniscule to non-existent. There are myriad ways in which to address this concern in more exacting ways that would not be overbroad and harmful. There is simply no data that presents a connection between criminality or national security and immigration status.

### 3. (National) Identity

Immigration law in the United States is inextricably bound up in questions of identity and assertions of belonging.<sup>213</sup> Supreme Court decisions about race have historically been central to the definition of who can access the mantle of citizenship in the U.S. and who cannot.<sup>214</sup> What identity has boiled down to, in the annals of immigration law, is race.<sup>215</sup> Specifically, the main concern among policymakers has been who gets access to whiteness, and by proxy, uncontested access to citizenship.<sup>216</sup>

---

offenses.”).

<sup>213</sup> Indeed, one critique of citizenship is that it is, “inherently, a normativizing project – [one] that regulates and disciplines the social body in order to produce model identities and hegemonic knowledge claims.” AMY L. BRANDZEL, *AGAINST CITIZENSHIP: THE VIOLENCE OF THE NORMATIVE* 5 (2016).

<sup>214</sup> See Joy Kanwar, *Stories from the Negative Spaces: United States v Thind and the Narrative of (Non)whiteness*, 74 *MERCER L. REV.* 801, 805–06 (2023) (describing the prevailing forces that “continue to work in the negative spaces to define who gets to become fully part of [the United States] and who does not”); see also Devon W. Carbado, *Yellow by Law*, 97 *CALIF. L. REV.* 633, 636–37 (2009) (discussing the history of race and skin color as a barometer of who can and cannot access citizenship), and also D. O. McGovney, *Race Discrimination in Naturalization*, 8 *IOWA L. REV.* 129, 129–130 (1922), for a startlingly vibrant criticism of the racism in “naturalization law” from over a hundred years ago.

<sup>215</sup> Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 *YALE L. J.* 1188, 1188–89 (2021) (sketching the ways in which race has corresponded with citizenship, borders, and immigration in the history of the United States). The United States is not alone in this idea of racialized borders. See generally E. Tendayi Achiume, *Racial Borders*, 110 *GEO. L.J.* 445 (2022), and John Reynolds, *Emergency and Migration, Race and the Nation*, 67 *UCLA L. REV.* 1768 (2021).

<sup>216</sup> See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006) (discussing the racial restrictions in the laws of citizenship, as well as the various ways in which race-consciousness and colorblindness have, in different eras, worked to bolster white supremacy). See also AMANDA FROST, *YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS* (2021) (observing the way in which the citizenship of certain individuals remains suspect, primarily due to racial categorization or solidarity with marginalized groups).

The idea of a comprehensive United States national identity is susceptible to both reductionism and overly complex analysis.<sup>217</sup> American identity is not monolithic,<sup>218</sup> and yet there are some who would prefer that it skew in that direction. Centuries of racism and xenophobia (including into the present) are the main culprits here<sup>219</sup> – a preference for one’s own being the central principle to this pillar that would permit or necessitate exclusion or deportation.<sup>220</sup> The presumption of a national identity develops only by defining who does not belong.<sup>221</sup> The idea of an interloper taking advantage of the beneficence of the United States also rings true to certain members of the population who in return feel entitled to decry such oversteps and seek retribution through more restrictive policies.<sup>222</sup>

---

<sup>217</sup> See MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 9 (2004) (discussing both the powerful influence of nationalism, but also referring to Benedict Anderson’s description of nations as “imagined communities”).

<sup>218</sup> See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

<sup>219</sup> See e.g. Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 *CATH. U. L. REV.* 921, 952–53 (2012) (tracking the history of racial hegemony in the U.S., namely from the Fugitive Slave Act to modern anti-immigration schemas and laws).

<sup>220</sup> Even references to other policy goals – such as linking crime to immigration prove illusory in the face of more deep-seated desires. See Das, *supra* note 212, at 176 (“[d]rawing on the early history of crime-based deportation” to argue that “criminal records have never been a neutral means for prioritizing immigrants for detention and deportation from the United States” . . . but, rather, “racial animus has driven the creation and development of crime-based deportation from the beginning.”)

<sup>221</sup> See Johnson, *supra* note 171, 1217 n. 16 (citing Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1119 (1998)) (“Racism, along with nativism, economic, and other social forces, has unquestionably influenced the evolution of immigration law and policy in the United States.”); see also Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 *B.C. L. REV.* 755, 761 (2000) (arguing that the country caps are an example of the “implicit and explicit racial biases [that] still pervade all four major avenues of legal immigration”).

<sup>222</sup> Consider, for example, Jeff Sessions’ claim that false asylum seekers were simply “saying the magic words” to gain entry into the United States. Sessions all cited the need to “close [the] loopholes [in the system],” a cry that has been echoed by other politicians. *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), OFF. PUB. AFFS., <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>; See also TESS WILKINSON-RYAN, *FOOL PROOF* (2023), for an analysis of why people are afraid of playing the fool, but also critiquing this natural inclination for its propensity to promote bad public policy.

The historic narrative implicates national identity quite frequently.<sup>223</sup> The way in which immigration detention, deportation, and exclusion are utilized in the United States demonstrates that it has both always been this way and that it has never been this exact way before. For example, the desire to subordinate some groups remains as present as it did in the 19<sup>th</sup> century,<sup>224</sup> while the subordination of other groups is relatively new.<sup>225</sup> What remains consistent is the violence with which these distinctions are created and enforced.<sup>226</sup>

It is difficult to reckon with this pillar. It does not offer utility for an analysis of what immigration policy should look like in the United States, but it does resonate with some groups.<sup>227</sup> Certainly the composition of a nation's

---

<sup>223</sup> See ERIKA LEE, *AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES* (2019) (describing efforts to marginalize and limit first the Chinese, then the “inferior races” of Europe, followed by the Mexicans, and concluding with a critique of Islamophobia).

<sup>224</sup> “The era of Chinese Exclusion left a legacy of race-based deportation. Yet it also had an impact that reached well beyond removal.” Jain, *supra* note 158, at 1807 (arguing that the requirement that people of “Chinese descent” retain a certificate of residence to avoid arrest, detention, and deportation, led to race-based subordination), *see also* Gabriel J. Chin, *Slave Law, Race Law*, 94 U. COLO. L. REV. 551, 552 (2023) (noting that “the Fugitive Slave Acts blessed by the Constitution are said to be antecedents of the Chinese Exclusion laws, which required Chinese people to carry identification”); *see also* David B. Oppenheimer et al., *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 22 (2016) (citing 4. U.S. Const. art IV, § 2, cl. 3, 5) (“The language of the Chinese Exclusion Acts—as well as the willingness of the federal judiciary to look the other way while state and federal governments restricted or forced the movement of racially designated groups—also drew from the Fugitive Slave Act of 1793 and from antebellum state laws that had regulated the migration of slaves.”).

<sup>225</sup> See, for example Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 20 (2014), for discussion on the infiltration and monitoring of Muslim communities by the FBI, ICE, and other law enforcement agencies in the aftermath of the Sept. 11, 2001, attacks, resulting in immigration enforcement efforts that clearly targeted Arabs and other mosque-attending communities.

<sup>226</sup> “Thinking outside of deportation—thinking beyond anyone’s banishment—requires letting go of an investment in the paradigm of membership through proximity to U.S. citizenship. Membership and belonging are premised on exclusion (and policing the exclusion) of those who do not make it into the inner circle, and such an exclusion, in the United States, has always been distributed with violence, along racial lines.” Cházaro, *supra* note 2, at 1087.

<sup>227</sup> For example, a racist conspiracy theory known as The Great Replacement has gained traction with political groups in the United States, France, Italy, and other countries grappling with the rise of right-wing nationalistic populist groups. See Nicholas Confessore & Karen Yourish, *A Fringe Conspiracy Theory, Fostered Online, Is Refashioned by the G.O.P.*, N.Y. TIMES (May 15, 2022), <https://www.nytimes.com/2022/05/15/us/replacement-theory->



identity does not require racial, ethnic, or religious divisions, but the history of U.S. nationalism does seem to gravitate toward and embrace those ideals. If national identity is to provide some utility, it must be re-evaluated. For example, Eisha Jain has argued that utilizing a “polity-centric” framework, “which treats immigration status as necessarily fluid rather than fixed” could help to shift conceptions of who is a natural participant in the membership community.<sup>228</sup>

Conformance with national ideals can be difficult in less “homogenous” states, but I argue that an effort should be made to resist the flattening of cultural ideas.<sup>229</sup> By acquiescing to this idea of the necessity of homogeneity as a requirement for a successful democratic society, we are missing an opportunity to demonstrate what is possible in a multi-racial, pluralistic society. Instead, by embracing an abolitionist goal, one can reject the notion that the racial, religious, and ideological diversity of the United States somehow weakens or destabilizes it. Such conclusions lack imagination. By being too rooted in this conclusion, an important opportunity is missed - the possibility that success is on the horizon - that identity can be multi-faceted, and that the strength of the United States is due to its ability to incorporate varied perspectives and promote communities within.<sup>230</sup> National identity does not require a national perspective. The idea of unity on every opinion or doctrine should frighten rather than invigorate. The ability to connect in a single way with someone with whom you differ on almost everything else is immensely powerful. Importantly, that point of connection need not be the

---

shooting-tucker-carlson.html (“[R]eplacement theory, once confined to the digital ever swamps of Reddit message boards and semi-obscure white nationalist sites, has gone mainstream [in the U.S.]”); see also Norimitsu Onishi, *In France, a Racist Conspiracy Theory Edges Into the Mainstream*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/world/europe/france-elections-pecresse-great-replacement.html> (describing great replacement theories rise in French political discourse in recent), see also Anchal Vohra, *Italy Now Has Conspiracy Theory as National Policy*, FOREIGN POL’Y (May 8, 2023), <https://foreignpolicy.com/2023/05/08/italy-meloni-great-replacement-conspiracy-theory-immigration/> (“[Italian Prime Minister] Meloni is the first Western European leader to espouse the great replacement [sic] theory, which claims that, instead of an organic movement driven by poverty and war, immigration to the West has been engineered.”).

<sup>228</sup> Jain, *supra* note 158, at 1833–34.

<sup>229</sup> See, for example, Norimitsu Onishi and Aida Alami, *The Quiet Flight of Muslims From France*, N.Y. TIMES (Feb. 13, 2022), <https://www.nytimes.com/2022/02/13/world/europe/france-election-muslims-islam-macron-zemmour-le-pen-pecresse.html>, for France’s struggles with this flattening.

<sup>230</sup> One scholar offers that, “[t]he best way to challenge the xenophobia of borders . . . is to undo their conceptual entanglement with collective identity. Borders are not fundamentally about collective identity, but rather about place.” PAULINA OCHOA ESPEJO, *ON BORDERS: TERRITORIES, LEGITIMACY, AND THE RIGHTS OF PLACE* ix (2020).

same for every person.

#### 4. International Power and Influence

The final pillar, international power and influence, stands ominously over the other pillars. It, alone, may be capable of providing singular support for the implementation of immigration restrictions.<sup>231</sup> Through this lens, immigration policy becomes a way to exercise discretion in support of other nations to which the U.S. wishes to demonstrate favor. At the same time, the U.S. can display considerable disfavor by limiting the entry of individuals from particular countries. In this way, U.S. immigration policy becomes a valuable good in itself, almost a bargaining chip through which the state can shape international policy in its favor.<sup>232</sup>

While the other pillars are subject to scrutiny regarding the mismatch between the purported rationales and the failure to satisfy those goals, international power is clearly and effectively asserted through U.S. immigration policy. This is evident in the way that current and past administrations have collaborated with Mexico, Honduras, Guatemala, and El Salvador to affect their desired immigration policies.<sup>233</sup> It is also clear in the way that the U.S. favors and facilitates entry from specific states via the Visa Waiver Program. This program permits individuals from 40 countries to freely travel into and out of the United States, staying for up to 6 months at a time.<sup>234</sup> For permanent access to the U.S., a class-based distinction exists – the wealthy are permitted to use their investment to produce a return of U.S. legal permanent residence and eventually citizenship.<sup>235</sup>

---

<sup>231</sup> Indeed, this is where the Supreme Court has situated its defense of sovereignty – “under the rubric of state relations,” with migrants viewed as “proxies for foreign troops,” despite the fact that “immigrants have historically pursued not the political interests of states, but individual and family improvement.” MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 11 (2004).

<sup>232</sup> For example, the U.S. has used additional border restrictions as a way of coercing Mexico, Honduras, Guatemala, and El Salvador into amplifying their own migration policing systems. See Stef W. Kight, *Mexico agrees to accept non-Mexican migrants rejected by U.S.*, AXIOS (May 3, 2023), <https://www.axios.com/2023/05/03/biden-mexico-migration-border-deportation-title-42>.

<sup>233</sup> See Anita Sinha, *Transnational Migration Deterrence*, 63 B.C. L. Rev. 1295, 1320 (2022) (describing how the United States has incentivized or coerced immigration collaboration with these countries).

<sup>234</sup> *Visa Waiver Program*, U.S. DEP’T STATE—BUREAU CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html>.

<sup>235</sup> *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 1,

While it is easier to identify the ways in which abolitionist policies could satisfy concerns about economic policy and national security, it is much more challenging to ask that international power and influence be yielded to satisfy an abolitionist goal. However, international scholars note that reducing immigration restrictions may actually have positive influential effect on an international level. Yielding in some way would not remove the lever of international influence but could perhaps promote more collaborative relations with neighboring countries, among others. Put more simply, the success of the Visa Waiver Program and other favorable immigration policies could more widely and generously be extended.

This pillar represents perhaps the strongest argument for immigration enforcement. When other scholars have asked for sovereignty to be justified, this may be the singular answer - a way for a country to imbue itself with power. However, there is a weakness - this power is not inviolable. Crafting a policy of immigration restrictions is much different from actually enforcing them. Here, there is a mismatch between what would be necessary for this to be an effective pillar (complete prevention of unauthorized migration) and what is possible (something decidedly less than complete enforcement). What is curious is how a border, even when pierced, somehow remains figuratively intact via posturing and signaling. It can be doled out to many, as long as it is not doled out to all. Still, this argument is subject to additional criticism. It seems possible that a territory or country could maintain its identity even with permeable borders - indeed the U.S. has done just that, despite a massive undocumented population.<sup>236</sup>

### *C. The Sum of the Pillars*

These pillars serve as the possible normative reasons for why the U.S. might try to justify a policy of immigration restriction. Both the economic

---

2023), <https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program>.

<sup>236</sup> Ironically, the majority of the undocumented population is composed of people who are visa overstays. See Richard Gonzales, *For 7th Consecutive Year, Visa Overstays Exceeded Illegal Border Crossings*, NPR (Jan. 16, 2019), <https://www.npr.org/2019/01/16/686056668/for-seventh-consecutive-year-visa-overstays-exceeded-illegal-border-crossings> (“[F]rom 2016-2017, people who overstayed their visas accounted for 62 percent of the newly undocumented, while 38 percent had crossed a border illegally.”).

and (national) security pillars remain worthy normative reasons to implement hypothetical immigration restrictions, but the data do not demonstrate a correlation between limiting entry and accomplishing the policy goals presented by those pillars. The pillar of (national) identity does not survive its own internal scrutiny – the concept is too disjointed and unclear to serve as a normative reason for implementing immigration restrictions. The final pillar, international power and influence, stands strongest against scrutiny. As a normative rationale, it does best to demonstrate a utility for sovereignty. Immigration restriction functions well as a way for the U.S. to demonstrate favor or ill will. But, if international power is the only pillar to stand up against scrutiny, then the U.S. is not functionally seeking to address a problem with its immigration policy. The harm created by immigration restrictions would then seem to come only out of a desire to have international influence. Yet, alone, a pillar is subject to the winds of change. It can sway and fall when poked and prodded. I call on scholars and activists to do just that.

Collectively, these four normative pillars are worthy of additional analysis. I have categorized other concerns under the umbrella of each of these pillars, but others may find those areas ripe for their own, more extensive analyses. Subjecting these pillars to scrutiny and critique is a worthy goal of its own, and even more so when it connects to the project of abolition.

#### CONCLUSION

The process of incorporating abolition theory into the realm of immigration law and policy is at an important nexus. Scholars and advocates have engaged deeply in the process of critique - identifying the harms associated with immigration detention, amplifying and reframing the violence that accompanies deportation, and questioning the manner in which exclusion from the United States occurs. Activists and researchers have also begun to offer creative and imaginative solutions that would mitigate the harms associated with detention, deportation, and exclusion, while also promoting structural societal benefits and reducing federal fiscal expenses. However, before it is possible to engage with meaningful proposals, the methodology of abolition theory in other fields - particularly criminal legal theory - requires the identification of an underlying rationale for the current immigration enforcement system. In submitting my own proposed normative pillars of immigration law - economic policy, (national) security, (national) identity, and international power and influence - I hope to propel these future conversations that might offer a vision beyond the abolitionist horizon. In crafting these visions, I also caution the need to identify onto which structure

of immigration enforcement the abolitionist lens is being mapped (detention, deportation, or exclusion), and I urge attention to the downstream effects of such a proposal. In sum, I find that abolition theory is an important exercise in identifying the policy goals of the United States' current regime of immigration enforcement. It appears eminently possible<sup>237</sup> that abolitionist thinking can provide a way to both interrogate and satisfy these normative pillars in a way that is more humane, equally effective, and less expensive. This thinking provides an opportunity to introduce creative ideas that might appeal more broadly across the political spectrum.

\* \* \*

---

<sup>237</sup> See generally Berkeley Talks, *Paul Butler on how prison abolition would make us all safer*, BERKELEY NEWS (Jan. 17. 2020), <https://news.berkeley.edu/2020/01/17/berkeley-talks-paul-butler/> (“Butler advocates abolishing prisons and finding alternative ways to deal with those who cause harm — something that he says would create a safer, more just society.”).