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Beyond Borders: How Principles of Prison Abolition Can Shape the Future of Immigration Reform

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Beyond Borders: How Principles of Prison Abolition Can Shape the Future of Immigration Reform

Anna Hales*

This Note presents prison abolition theory and discusses how principles of abolition can be applied in the context of immigration enforcement and reform. In doing so, this Note argues for an “open borders” approach to immigration, presents several viewpoints on what such a regime may look like, and discusses how this vision can shape immigration reform efforts. In applying abolition theory to the immigration legal system, this Note uses a framework of three tenets of prison abolition. First, the assumptions upon which our current system of immigration enforcement is based, such as public safety and economic justifications, are open to questioning, and an alternate approach to migration is possible. Second, the immigration system exacts a human cost and infringes upon human dignity in ways that cannot be justified. Third, reform efforts are most effective when they envision a world beyond the current system of enforcement, rather than expanding the machinery of current enforcement efforts or merely shifting who is the target of immigration enforcement. Though it seems difficult to envision life without it, immigration enforcement as we know it is a recent invention and in many ways has proven ineffective at achieving its own purported goals. Further, the system results in significant human suffering in a myriad of ways, from the exploitation of those without status, to detention, to deportation, and beyond. As such, reform efforts that focus on who should be subject to immigration enforcement or how such enforcement should be carried out miss the opportunity to ask whether such enforcement should have a place in our society at all.

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INTRODUCTION

Prison abolition is a movement that advocates for moving beyond reliance on incarceration and punitive law enforcement responses to the social harms we conceptualize as crime.¹ Prison abolition is often used as an umbrella term, referring not only to the work of activist movements and advocacy groups² but also to the large body of writing and theory that has emerged on the subject.³ Pointing to the inhumanity of incarceration, its high economic cost, and its inadequacy as a response to the complex social issues that contribute to crime rates, abolitionists are critical of the ever-increasing role incarceration plays in American society.⁴ Instead, abolition movements generally advocate for positive social projects that address the root causes of crime and for restorative justice methods that focus on repairing harm rather than punishing or imprisoning offenders.⁵ As leading abolitionist activist and scholar Angela Davis writes, abolition asks us to “envision life beyond the prison.”⁶ On this point, abolition movements also stand in contrast to efforts focused solely on reforming imprisonment and the criminal legal system at large. From an abolitionist perspective, seeking to reform incarceration without questioning its necessity reinforces the idea that “nothing lies beyond the prison.”⁷

Prison abolition, despite gaining recent popularity in public discussion, is not a new concept. The tenets of prison abolition have a long history, dating back to eighteenth- and nineteenth-century discussions of prisons and policing as the main forms of punishment and responses to crime.⁸ Additionally, abolition theory draws

1. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015).

2. See, e.g., 8 TO ABOLITION, ABOLITIONIST POLICY CHANGES TO DEMAND FROM YOUR CITY OFFICIALS, https://static1.squarespace.com/static/5edbf321b6026b073fef97d4/t/5ee0817c955eaa484011b8fe/1591771519433/8toAbolition_V2.pdf [https://perma.cc/AB3C-XWMW].

3. See McLeod, *supra* note 1, at 1158–60.

4. *Id.*

5. See, e.g., 8 TO ABOLITION, *supra* note 2.

6. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 19 (2003).

7. *Id.* at 20.

8. See *id.* at 9; see also McLeod, *supra* note 1, at 1165–67.

significantly from the slavery abolition movement, such as the writings of W.E.B. Du Bois.⁹ Du Bois called for the abolition of slavery to be “a positive project,” requiring the creation of new institutions to empower those formerly enslaved, rather than merely a “negative one,” stopping at the eradication of the forced labor of slavery.¹⁰ Modern prison abolition theory similarly calls not only for the “negative” eradication of prisons but also for the “positive” creation of institutions of social support as a continuation of the work done by slavery abolitionists.¹¹ In fact, Davis points to prison abolition as the next step following the abolition of slavery, the abolition of lynching, and the abolition of segregation; each is an institution it was once impossible for many to imagine life without.¹²

Despite the movement’s historical ties, many heard the term “prison abolition” for the first time in recent news and public discourse. In the summer of 2020, following the killing of George Floyd by law enforcement officers in Minneapolis, the United States experienced nationwide protests and civic unrest in response to the continued brutality against Black Americans at the hands of police.¹³ In the wake of these protests, the nation seemed to face the question of racism and criminal justice in the United States with renewed energy, and mentions of prison abolition and calls to defund the police appeared in mainstream media.¹⁴ However, even before this, activists from the Black Lives Matter movement, scholars such as Ruth Wilson Gilmore, and even U.S. Representative Alexandria Ocasio-Cortez had begun to bring prison abolition more squarely into the public arena.¹⁵

This increased national discussion of more “radical” changes in the criminal context also mirrors the national conversation around immigration enforcement. In recent years, immigration enforcement has come under increased scrutiny following the Trump administration’s controversial family separation policy, under which

9. McLeod, *supra* note 1, at 1162.

10. *Id.*; see also W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 166–70 (Transaction Publishers 2013) (1935).

11. McLeod, *supra* note 1, at 1163.

12. See DAVIS, *supra* note 6, at 23–24.

13. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/> [<https://perma.cc/V89G-H99C>].

14. See Gabriella Paiella, *How Would Prison Abolition Actually Work?*, GQ (June 11, 2020), <https://www.gq.com/story/what-is-prison-abolition> [<https://perma.cc/7RZ4-YZZZ>]; Mariame Kaba, *Opinion, Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/6AZD-E93M>].

15. See *Black Lives Matter Co-Founder Patrisse Cullors Talks Prison Abolition, Therapy as Reparations, and Teaming Up with Angela Davis and Yara Shahidi*, TEEN VOGUE (Feb. 22, 2019), <https://www.teenvogue.com/story/black-lives-matter-patrisse-cullors-interview-prison-abolition-angela-davis-yara-shahidi> [<https://perma.cc/NTZ6-QBT9>]; Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/8965-HA7J>]; Joseph Wulfsohn, *Ocasio-Cortez Defends Tweet Promoting Idea of ‘Prison Abolition,’ Pushes ‘Just Alternatives to Incarceration,’* FOX NEWS (Oct. 7, 2019), <https://www.foxnews.com/media/aoc-prison-abolition-incarceration-tweets> [<https://perma.cc/4TKA-3KUZ>].

minor children were taken from their parents and placed in detention facilities as a result of a zero-tolerance policy of federally prosecuting all unlawful border crossings.¹⁶ Alongside this criticism has been increased discussion of more radical, abolition-minded immigration reform efforts, such as calls to abolish Immigration and Customs Enforcement (ICE) and to end immigration detention entirely.¹⁷

The application of principles of abolition theory to immigration enforcement makes sense given the similarities between the immigration and criminal legal systems. First, both the immigration and criminal legal systems have histories deeply rooted in race and racism. Immigration enforcement has a long history of expressly discriminatory policies, motivated by animus and prejudice towards specific racial groups:¹⁸

As plain-talking President Harry Truman put it when he unsuccessfully vetoed the Immigration and Nationality Act of 1952, the quota system was premised on the view “that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names. It was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Balts or Austrians. Such a concept . . . violates the great political doctrine of the Declaration of Independence that ‘all men are created equal.’”¹⁹

Further, individuals have historically been targets of immigration enforcement for even *perceived* nationality—based upon their race.²⁰ The modern immigration rhetoric of the Trump administration has been criticized as thinly veiled racism

16. See Maya Rhodan, *Here Are the Facts About President Trump’s Family Separation Policy*, TIME (June 20, 2018, 10:37 AM), <https://time.com/5314769/family-separation-policy-donald-trump/> [<https://perma.cc/4AZZ-J49T>]; Zolan Kanno-Youngs, *Trump Tried to Blur Responsibility for His Family Separation Policy in Final Debate*, N.Y. TIMES (Nov. 25, 2020), <https://www.nytimes.com/2020/10/23/us/politics/trump-child-separation.html> [<https://perma.cc/6MWP-433M>].

17. See Nicole Narea, *How “Abolish ICE” Helped Bring Abolitionist Ideas into the Mainstream*, VOX (July 9, 2020, 12:30 PM), <https://www.vox.com/policy-and-politics/2020/7/9/21307137/abolish-ice-police-immigrant-black-lives-matter> [<https://perma.cc/RJ5H-8GA7>]; César Cuauhtémoc García Hernández, *Opinion, Abolish Immigration Prisons*, N.Y. TIMES (Dec. 2, 2019), <https://www.nytimes.com/2019/12/02/opinion/immigration-detention-prison.html> [<https://perma.cc/RM4S-47ML>] [hereinafter García Hernández Op. Ed.].

18. See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 210 (2003) (“In *The Chinese Exclusion Case*, for example, the Court upheld an infamous nineteenth century law prohibiting immigration from China . . .” (footnote omitted)).

19. *Id.* at 217 (quoting PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1952-1953, at 443 (1966)).

20. See Eli J. Kay-Oliphant, Comment, *Considering Race in American Immigration Jurisprudence*, 54 EMORY L.J. 681, 701–02 (2005) (“[F]ollowing World War II, during ‘Operation Wetback,’ it is speculated that 1 million Mexicans and U.S. citizens who looked like Mexicans were deported in response to undocumented immigration and labor competition. Crucially important in these examples is that many American citizens were deported simply because they looked like they belonged to the group that was to be deported.” (footnote omitted)).

against the Mexican, and more broadly Latinx, communities.²¹ Even those immigration policies that are not expressly discriminatory often have racial impacts, which are “often hidden by the opaque technicalities of the immigration laws.”²² The immigration system not only disproportionately deports Latin-American males in terms of sheer numbers but has also been demonstrated to function in a way that is disproportionately anti-Black.²³

The criminal legal system, though different in its origins, also shares a history that is inextricably intertwined with America’s legacy of racism—specifically, anti-Black racism.²⁴ Many have highlighted the role that criminal law played in the continuing oppression of Black communities following the abolition of slavery.²⁵ Black Codes—legislation passed in former slave states—criminalized behavior such as “vagrancy” and “absence from work.”²⁶ This created crimes “for which only black people could be ‘duly convicted’” and consequently led to a sharp rise in Black prison populations.²⁷ Despite the eradication of explicit racial distinctions in criminal law, the criminal legal system continues to operate in a racially disparate manner:

African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and they are more likely to experience lengthy prison sentences. African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely. As of 2001, one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos—compared to one of every seventeen white boys.²⁸

These disparate impacts permeate every step of the criminal legal system and continue to be explored as complex social and political phenomena, from the

21. See Julissa Arce, *Trump’s Anti-Immigrant Rhetoric Was Never About Legality — It Was About Our Brown Skin*, TIME (Aug. 6, 2019, 4:47 PM), <https://time.com/5645501/trump-anti-immigration-rhetoric-racism/> [<https://perma.cc/KH6M-Y8XT>].

22. Johnson, *supra* note 18, at 219.

23. Angélica Cházaro, *The End of Deportation*, UCLA L. REV. (forthcoming 2020–21) (manuscript at 39) (on file at SSRN).

24. See DAVIS, *supra* note 6, at 28 (“Particularly in the United States, race has always played a central role in constructing presumptions of criminality.”).

25. *Id.*; McLeod, *supra* note 1, at 1163 (“In the aftermath of slavery in the United States, reconstruction fell far short of this mark in many respects, and criminal law administration played a central role in the brutal afterlife of slavery.”).

26. DAVIS, *supra* note 6, at 28; McLeod, *supra* note 1, at 1188–89.

27. DAVIS, *supra* note 6, at 28–29 (“As a consequence of the shifts provoked by the institution of the Black Codes, within a short period of time, the overwhelming majority of Alabama’s convicts were black.”); DU BOIS, *supra* note 10, at 451 (“The whole criminal system came to be used as a method of keeping Negroes at work and intimidating them. Consequently there began to be a demand for jails and penitentiaries beyond the natural demand due to the rise of crime.” (emphasis omitted)).

28. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1 (2018).

relationship between poverty, segregation, and policing,²⁹ to the racial impact of drastic sentencing disparities between crack and powder cocaine,³⁰ to inconsistencies in the imposition of the death penalty based on the race of the defendant and victim.³¹

The racial histories of the immigration system and criminal legal system, as well as the two systems' similarities and differences, are rich topics, any of which could be the subject of an entire paper on its own. This Note briefly summarizes them only to demonstrate that the principles which guide abolition in the criminal context can be aptly applied to reform efforts in the immigration context as well.

Second, and related, both systems seek to categorize individuals—to determine who “belongs” in society and who does not—with serious consequences for individuals who are placed into certain categories. Immigration law “has been understood as the study of the acquisition of membership and its corresponding rights and privileges.”³² The Immigration and Nationality Act (the legislation which governs immigration law) contains provisions meticulously detailing who is subject to immigration detention,³³ who is subject to removal or deportation,³⁴ and who is eligible for forms of relief like asylum.³⁵ The role of an immigration judge or agency official is then to parse exactly where an individual falls within this complex system of buckets. As such, immigration enforcement is engaged in a practice of categorization and labeling; there are those who may be granted citizenship and its corresponding rights and those who may not.³⁶ Similarly, the criminal legal system seeks to determine whether someone should be found guilty and labeled as a criminal, bearing not only the moral culpability of that label but also the practical consequences that follow as well. Often included in those consequences is incarceration, a fate reserved for those who are categorized as criminal.³⁷ Both the

29. *Id.* at 3 (“Absent meaningful efforts to address societal segregation and disproportionate levels of poverty, U.S. criminal justice policies have cast a dragnet targeting African Americans. The War on Drugs as well as policing policies including ‘Broken Windows’ and ‘Stop, Question, and Frisk’ sanction higher levels of police contact with African Americans.”).

30. Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1029–30 (2010) (“Partly as a result, in 2000, black men were more likely to be in prison or jail (7.9 percent) than were white men in the high crime ages of twenty to forty who never completed high school (6.7 percent). For young black men who failed to complete high school, the incarceration rate soared to 32.4 percent, meaning that at any given point nearly one in three languished behind bars.”).

31. This issue was famously explored by the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

32. Cházaro, *supra* note 23, at 10.

33. Immigration and Nationality Act, Pub. L. No. 82-414, §§ 235–236, 66 Stat. 163, 198–200 (1952) (codified as amended at 8 U.S.C. §§ 1225–1226).

34. *Id.* § 237.

35. *Id.* § 208.

36. Cházaro, *supra* note 23, at 11 (“The practice of immigration law has thus also been the practice of sorting noncitizens between those who can be properly kept in an outer circle, far from US citizenship, and those who can be included in the inner circles.”).

37. See DAVIS, *supra* note 6, at 16 (“The prison therefore functions ideologically as an abstract site into which undesirables are deposited . . .”).

immigration system and the criminal legal system expend significant government resources categorizing and labeling individuals. In both cases, these labels have a significant impact on people's lives: possible detention and deportation in the immigration context, and possible incarceration and other consequences of conviction in the criminal context. Given these structural similarities, many tenets of prison abolition can also be applied to the immigration system.

This Note critiques immigration enforcement using principles found in prison 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.

I. QUESTIONING NATURALIZED ASSUMPTIONS

Abolitionists often face the initial task of convincing others that a different world is possible, that institutions like prison are not inevitable or unchanging parts of society, and that people can—and should—imagine a different approach to addressing harm.³⁸ Underlying abolition theory is the urge to envision a society that has moved beyond the prison, a task which may be difficult given the prominent and seemingly necessary role prisons play in our society and collective psyches.³⁹ When a concept or institution has become so ingrained in our ways of thinking that it seems natural, it is often referred to as being “naturalized.”⁴⁰ Abolitionists acknowledge that incarceration has become naturalized—it is taken for granted as the natural solution to the problems crime creates.⁴¹ As such, in order to advocate for a vision of the future without prisons, it is necessary to challenge the assumption that prisons play an essential and irreplaceable role in a safe society.⁴² Abolitionist writing undertakes this task by pointing to the history and development of the carceral system,⁴³ questioning its relationship to public safety,⁴⁴ and challenging its effectiveness at achieving its purported goals.⁴⁵

38. See, e.g., *id.* at 10 (“The prison is considered so ‘natural’ that it is extremely hard to imagine life without it. It is my hope that this book will encourage readers to question their own assumptions about the prison.”).

39. *Id.* at 18–19 (“It has become so much a part of our lives that it requires a great feat of imagination to envision life beyond the prison.”).

40. See César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1453–54 (2015) (“[I]t shows why and how imprisonment has become a normal, routine, and self-replicating feature of immigration policing—that is, *why and how immigration imprisonment has naturalized.*” (emphasis added)).

41. See DAVIS, *supra* note 6, at 15 (“On the whole, people tend to take prisons for granted. It is difficult to imagine life without them.”).

42. See *id.* at 9–10.

43. See *id.* at 26–27.

44. See Cházaro, *supra* note 23, at 38.

45. See McLeod, *supra* note 1, at 1199–205.

Many aspects of our immigration system have similarly become naturalized.⁴⁶ Immigration enforcement is often viewed as essential to public safety⁴⁷ and justified by concerns that regulating the migration of individuals into the country is necessary to prevent societal collapse or social ills.⁴⁸ As with incarceration, it may therefore be difficult to envision a future in which the United States' approach to migration is radically different. The rhetoric of abolition theory can be used to challenge the assumption that immigration enforcement as it exists today plays an irreplaceable role in a safe society. In the following sections, this Note will use principles of abolition theory to question the naturalized assumptions of the immigration system by (1) exploring the history of how these institutions developed, (2) challenging the connection between criminal and immigration enforcement and public safety, and (3) examining the efficacy of criminal and immigration enforcement efforts.

A. History and Efficacy

One method by which abolitionists question the naturalized acceptance of the prison is by highlighting the history and development of incarceration in the United States. This can help frame incarceration and the prison system as a man-made institution that has been developed, reformed, and expanded throughout U.S. history, rather than an inevitable and unchanging fact of life.⁴⁹ The penitentiary, an institution where individuals faced incarceration *as* punishment, was itself a reform replacing capital and corporal punishment:

Imprisonment itself was new neither to the United States nor to the world, but until the creation of this new institution called the penitentiary, it served as a prelude to punishment. People who were to be subjected to some form of corporal punishment were detained in prison until the execution of the punishment. With the penitentiary, incarceration became the punishment itself. . . . [T]he penitentiary was generally viewed as a progressive reform, linked to the larger campaign for the rights of citizens.⁵⁰

46. See García Hernández, *supra* note 40, at 1500 (“Viewed as part of the state’s efforts to keep the public safe, immigration imprisonment has come to be seen as a necessary component of government operations.”); Cházaro, *supra* note 23, at 4 (“Even pro-immigrant advocates take the continued existence of deportation as a necessary mechanism for enforcing immigration laws for granted.”).

47. García Hernández, *supra* note 40, at 1500 (“The rhetoric of criminality has similarly locked DHS into viewing its immigration law enforcement efforts . . . as critical to public safety, and therefore necessary.”).

48. See Johnson, *supra* note 18, at 244 (“History teaches that the cyclical fear of a flood of immigrants of different races destroying U.S. society has never been justified.”).

49. See John Washington, *What is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/archive/what-is-prison-abolition/> [https://perma.cc/X53X-A25F] (“Though this is a frightening tacking of stock, given the historically unprecedented boom in incarceration . . . it’s also a liberating thought: If change is possible in one direction, it might be possible in the other.”).

50. DAVIS, *supra* note 6, at 26–27.

Imprisonment as punishment is therefore only the latest and currently accepted answer to the question of how to address crime, itself a product of movements seeking to create a more humane society.⁵¹ Far from foreclosing the possibility of change, this history, when viewed from an abolitionist perspective, supports the idea that societal institutions that were once taken for granted can be left behind.⁵²

Abolitionists also point to the changes the prison system has undergone since its imposition, most notably the massive expansion in incarceration and criminal law enforcement beginning in the 1970s.⁵³ Over the last several decades of the twentieth century, the prison population expanded from less than two hundred thousand in the early 1970s to more than two million in the early 2000s—a ten-fold increase.⁵⁴ Abolitionists have written much about this rise in incarceration and the complex social factors behind it, attributing it to factors such as shifts in the U.S. economy⁵⁵ and political and media messaging about crime.⁵⁶ Pointing to this massive expansion additionally puts the scope, and recency, of the carceral state into perspective.⁵⁷ The current model of mass incarceration—under which unprecedented numbers of individuals are locked away—has not always been a reality. As with the imposition of the prison itself, these historical changes support the abolitionist idea that society can, and will, change its institutions and ideals: “If change is possible in one direction, it might be possible in the other.”⁵⁸

51. *See id.* at 40 (“[I]ncarceration within a penitentiary was assumed to be humane—at least far more humane than the capital and corporal punishment inherited from England and other European countries.”).

52. *See id.* at 22–23 (comparing the naturalization of prison to the naturalization of slavery pre-abolition: “The prison is not the only institution that has posed complex challenges to the people who have lived with it and have become so inured to its presence that they could not conceive of society without it”).

53. *See* McLeod, *supra* note 1, at 1194.

54. *Id.* (“In 1972 . . . there were 196,000 inmates in all state and federal prisons in the United States By 1997, however, the prison population had surged to 1,159,000 and in 2002 there were a record 2,166,260 people housed in U.S. prisons and jails.” (citations omitted)).

55. *See id.* (“This transformation in the U.S. economy contributed substantially to the emergence of a population that would be permanently unemployed or underemployed. In turn, federal, state, and local governments invested greater resources in coercive mechanisms of social control, prioritizing criminal law enforcement over other social projects”); DAVIS, *supra* note 6, at 91 (“In the context of an economy that was driven by an unprecedented pursuit of profit, no matter what the human cost, and the concomitant dismantling of the welfare state, poor people’s abilities to survive became increasingly constrained by the looming presence of the prison.”).

56. *See* DAVIS, *supra* note 6, at 91 (“[E]lected officials and the dominant media justified the new draconian sentencing practices, sending more and more people to prison in the frenzied drive to build more and more prisons by arguing that this was the only way to make our communities safe from murderers, rapists, and robbers.”).

57. *See id.* at 11 (“When I first became involved in antiprison activism during the late 1960s, I was astounded to learn that there were then close to two hundred thousand people in prison. Had anyone told me that in three decades ten times as many people would be locked away in cages, I would have been absolutely incredulous.”).

58. Washington, *supra* note 49.

These same principles can be applied in the immigration context as well. The government's approach to immigration has varied widely throughout the nation's history, with the current regime of enforcement only developing over the last several decades.⁵⁹ Throughout the nation's first century, the approach was generally one of open borders, favoring admission.⁶⁰ Since then, the rhetoric, scope, and targets of immigration enforcement have fluctuated, shifting in response to racial politics and times of national hardship.⁶¹ As with the history of incarceration in the United States, these historical shifts reflect that immigration policy is not unchanging or inevitable.

The Immigration Act of 1924⁶² created the infamously xenophobic "quota system," under which entry was capped, or barred completely, based on an individual's country of origin, favoring immigration from northern and western Europe.⁶³ This system was in place until the passage of the Immigration and Nationality Act of 1965,⁶⁴ which eradicated the national origin quotas and created seven "preference" categories for admission to the United States, notably favoring family ties and creating a specific category for refugees.⁶⁵ In 1986, Congress passed the Immigration Reform and Control Act,⁶⁶ which granted amnesty to nearly three million people but enacted harsher restrictions on the employment of undocumented individuals.⁶⁷

59. See Johnson, *supra* note 18, at 212, 214; Kari Hong, *10 Reasons Why Congress Should Defund ICE's Deportation Force*, 43 HARBINGER 40, 57 (2019).

60. Johnson, *supra* note 18, at 214; *Early American Immigration Policies*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 30, 2020), <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/early-american-immigration-policies> [<https://perma.cc/V5GF-FS82>].

61. See Kay-Oliphant, *supra* note 20, at 701 ("During the Great Depression, Mexicans and Mexican Americans faced mass deportation justified by national economic woes and labor arguments eerily similar to those used against Chinese immigrants earlier in history."); Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 262 (2018) ("[Following September 11, 2001] the INS announced that it would soon begin apprehending and interrogating thousands of undocumented Middle Eastern immigrants who apparently ignored deportation orders, seeking ways to prosecute anyone who had ties to terrorism.").

62. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

63. See Anna Diamond, *The 1924 Law That Slammed the Door on Immigrants and the Politicians Who Pushed it Back Open*, SMITHSONIAN MAG. (May 19, 2020), <https://www.smithsonianmag.com/history/1924-law-slammed-door-immigrants-and-politicians-who-pushed-it-back-open-180974910/> [<https://perma.cc/A9LR-TTFM>].

64. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

65. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 225 (2007).

66. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

67. The bill offered amnesty for anyone who had entered the country prior to 1982. Following its enactment, 2.9 million undocumented individuals came forward. *A Reagan Legacy: Amnesty for Illegal Immigrants*, NPR (July 4, 2010, 2:12 PM ET), <https://www.npr.org/templates/story/story.php?storyId=128303672> [<https://perma.cc/N46N-VVZM>].

In 1996, Congress passed two immigration reform laws that created the harsh statutory scheme we see today.⁶⁸ These laws moved the United States toward more restrictive immigration enforcement in several ways. First, the bills expanded the list of crimes that made an individual eligible for deportation and limited judicial review of the deportation process.⁶⁹ Second, these laws also made it more difficult to gain legal status, or permission to stay in the United States.⁷⁰ By removing vehicles to gain lawful status, these purely legal changes contributed to the “size and permanence” of the community of undocumented immigrants; the presence of “illegal immigrants” was then perceived as a problem that required intervention of law enforcement and the creation of ICE.⁷¹ Accompanying these shifts have been increases in both immigration detention⁷² and deportation numbers.⁷³

As a creature of administrative law, immigration policy and enforcement has also shifted with each presidential administration. Notable examples include Obama’s Deferred Action for Childhood Arrivals (DACA) program, which temporarily shields individuals brought to the United States as children from deportation,⁷⁴ and Trump’s “travel ban,” which barred entry into the United States

68. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

69. Dara Lind, *The Disastrous, Forgotten 1996 Law That Created Today’s Immigration Problem*, VOX (Apr. 28, 2016, 8:40AM), <https://www.vox.com/2016/4/28/11515132/iirra-clinton-immigration> [https://perma.cc/YCJ3-PHK4].

70. *See id.*

71. Hong, *supra* note 59, at 57 (“If the government suddenly made it very difficult to obtain driver’s licenses and then described anyone who drove without a license as ‘illegal drivers,’ the public might be more inclined to spend billions of dollars each year to arrest and jail the drivers—which has been our country’s immigration policy for the past 20 years.”).

72. In 1994, the daily average of individuals in immigration detention was 6,785. ALISON SISKIN, CONG. RSCH. SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2004), <https://trac.syr.edu/immigration/library/P2.pdf> [https://perma.cc/BM7P-Q9PC]. In 2019, this number reached more than 50,000. U.S. IMMIGR. & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf> [https://perma.cc/SR9F-27E2].

73. In 1980, only 18,013 individuals were ordered removed over the course of the year; by 2017, this number had climbed to almost 300,000. OFF. OF IMMIGR. STAT., U.S. DEP’T OF HOMELAND SEC., 2017 YEARBOOK OF IMMIGRATION STATISTICS 103 tbl.39 (2019).

74. The program amounts to prosecutorial discretion; individuals who were brought to the United States as children without documentation can apply for a two-year exemption from deportation and permission to work in the United States. There is no path to citizenship provided by the program, and individuals are required to re-apply at the end of each period. Individuals who have been convicted of any felony or qualifying misdemeanor are barred from receiving DACA. *Consideration for Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca> [https://perma.cc/3853-LJHK] (Feb. 4, 2021).

by individuals from several predominantly Muslim countries;⁷⁵ both were achieved through executive orders.

Immigration law has therefore been in flux throughout the nation's history; the goals, ideals, and scope of immigration enforcement has varied widely, often changing drastically from previous norms. The current structures of enforcement are not eternal, inevitable, or irreplaceable. As in the prison abolition context, this history supports the idea that society's approach to issues like migration can be reshaped in the future as they have been in the past.

B. *Questioning Narratives of Public Safety*

Another method abolitionists use to denaturalize incarceration is questioning the relationship between the criminal legal system and public safety.⁷⁶ It may be difficult to conceptualize a world without incarceration or a punitive criminal system if it is assumed that such things are essential to keep individuals safe from harm. One way that abolitionist writing challenge this assumption is by examining how society generally thinks about crime⁷⁷: specifically, questioning whether crime is a consistent and meaningful way to categorize behavior.⁷⁸

Yet what is crime? The concept has sustained intense scrutiny from critical criminologists. They have pointed out that crime—and law, which defines crime—are deeply contingent, reflecting the biases of their time, and they challenge the equation of “harm” and “crime” by pointing out the intense harm inflicted by actions never designated as crime such as war, pollution, or systemic medical neglect. These challenges render “crime” conceptually incoherent. It certainly survives as a category of experience for participants or police, but critical thinkers cannot maintain it as a category of analysis.⁷⁹

Abolitionists often distinguish crime from “harm.”⁸⁰ Acts of harm do take place in our society, but what we consider crime is shaped by political narratives, media messaging, and often prejudice.⁸¹

75. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017), <https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states> [<https://perma.cc/8CP7-79G3>].

76. See DAVIS, *supra* note 6, at 14 (“Why were people so quick to assume that locking away an increasingly large proportion of the U.S. population would help those who live in the free world feel safer and more secure? . . . Why do prisons tend to make people think that their own rights and liberties are more secure than they would be if prisons did not exist?”).

77. See Washington, *supra* note 49 (“When we no longer call something a crime, we can define the phenomena differently, and we can respond to [it] differently” (quoting Justin Piché)).

78. Cházaro, *supra* note 23, at 37.

79. *Id.* at 38 (quoting Micol Seigel, *Violence Work: Policing and Power*, 59 RACE & CLASS 15, 17 (2018)).

80. See CRITICAL RESISTANCE, THE CR ABOLITION ORGANIZING TOOLKIT 21 (2004), <http://criticalresistance.org/wp-content/uploads/2012/06/CR-Abolitionist-Toolkit-online.pdf> [<https://perma.cc/HV34-F7SE>].

81. *Id.* (“Many years ago sociologist Mark Fishman did a study that is still meaningful to today. Fishman looked at how the media created fictional ‘crime waves’ with racially coded images. In a time when there was no evidence of an increase in violence against elderly New Yorkers, Fishman found

There are a number of acts that cause harm to others but which are not classified as criminal, are not regulated through the criminal legal system, and for which actors do not face incarceration or criminal conviction. One example, in addition to those listed above, is wage theft, in which employers withhold pay from their employees. The majority of wage theft claims are handled not by the criminal legal system but by the Department of Labor as a regulatory matter.⁸² According to the Department's statistics, investigations resulted in an average of \$1,120 for each employee due back wages in 2020.⁸³ One can imagine how the situation would be handled differently were an employee to steal \$1,000 from his or her employer.

In addition to questioning what gets categorized as crime, abolitionists also question who gets labeled as a "criminal." Given the breadth of federal and state criminal codes, most people have likely violated the law at some point in their lives through behavior like jaywalking, driving without a seatbelt, consuming alcohol before the legal age, unintentionally trespassing, and other behaviors ranging from the routine to the imprudent.⁸⁴ Abolitionists point to this as indication that those who are lawbreakers make up a much larger category than those who are ultimately labeled as criminals.⁸⁵ From an abolitionist perspective, who is labeled as a "criminal" is not a perfect reflection of only those who engage in unlawful behavior but is impacted by factors such as race, class, or residence in a neighborhood with significant police presence.⁸⁶ In raising these arguments, abolitionists highlight that these labels are constructed; there is harm that does not equal crime, there is crime

that the three main newspapers of the city along with five local TV stations reported an upswing of violence targeting the elderly. The elderly were usually reported as being mugged, raped, and murdered by black or Latino youth with long criminal records.").

82. Luke Darby, *Is Your Employer Stealing From You?*, GQ (Nov. 8, 2019), <https://www.gq.com/story/wage-theft> [<https://perma.cc/PR4L-Y65W>] ("Typically, enforcement of wage theft laws falls to the Department of Labor . . ."); see also *How to File a Complaint*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/contact/complaints> [<https://perma.cc/5VKV-U5FG>] (last visited July 6, 2021) ("The U.S. Department of Labor's Wage and Hour Division (WHD) is responsible for administering and enforcing some of the nation's most important worker protection laws.").

83. *Wage and Hour Division Data*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/data> [<https://perma.cc/3GEM-D495>] (last visited July 6, 2021).

84. See Hong, *supra* note 59, at 56 ("It is likely that the vast majority of Americans have, at one time or another, exceeded the speed limit, jaywalked, consumed alcohol before the age of majority, stolen office supplies from an employer, used illegal drugs, or committed other similarly pedestrian violations.").

85. DAVIS, *supra* note 6, at 112 ("Radical criminologists have long pointed out that the category 'law-breakers' is far greater than the category of individuals who are deemed criminals since, many point out, almost all of us have broken the law at one time or another.").

86. See Larry Schwartzol, *From the Fair Housing Act to Ferguson: Where You Live Impacts How You're Policed*, ACLU (Jan. 20, 2015, 1:08 PM), <https://www.aclu.org/blog/speakeasy/fair-housing-act-ferguson-where-you-live-impacts-how-youre-policed> [<https://perma.cc/MFA5-XZ4S>] ("Intensive residential segregation very often leads to concentrated poverty, a lack of municipal services, and failing schools – all of which contribute to an increase in certain crimes while also breeding stereotypes about disorder and criminality. These dynamics contribute significantly to the biased policing in predominately black or Latino neighborhoods.").

that causes little harm, and there is room to envision a society that takes a different approach to harm, in all its forms.

Examining these labels is useful in the immigration context as well, given the rhetorical ties between the two systems⁸⁷ and the increasing role criminal history plays in immigration law.⁸⁸ An individual's criminal record is determinative of whether he or she must be placed in immigration detention,⁸⁹ is eligible for various forms of relief,⁹⁰ or is subject to deportation.⁹¹ This reliance on criminal history implicates the same questions addressed above regarding our conception of crime and criminality.

For example, it is worth questioning the emphasis on criminal history within the immigration system more broadly and the narrative of public safety tied to immigration. Much of this discourse focuses on crime rates, finding resoundingly that undocumented immigrants commit crimes at a lower rate than U.S. born citizens.⁹² However, limiting the discussion to these grounds misses the opportunity to question whether it makes sense for immigration law to draw lines based on criminal history. Many other factors considered in immigration proceedings are tied to equities, such as family ties⁹³ and length of time spent in the United States.⁹⁴ Yet an individual's criminal record can disqualify him or her from forms of relief he or she would otherwise be eligible for based on these equities.⁹⁵ This means individuals are often deported due to criminal history despite spending decades in the United States and having significant family ties to the country. This is a harsh penalty even by the standards of the overtly punitive criminal legal system. It may be that such harsh penalties are intended to act as a deterrent to criminal behavior, but that is undermined by the fact that many statutes are enacted retroactively, such as with the 1996 amendments.⁹⁶

87. García Hernández, *supra* note 40, at 1500 (“The rhetoric of criminality has similarly locked DHS into viewing its immigration law enforcement efforts – among which imprisonment stands out – as critical to public safety, and therefore necessary.”).

88. See *supra* note 85 and accompanying text.

89. Immigration and Nationality Act § 236(c), 8 U.S.C. § 1226(c) (effective Mar. 12, 2021).

90. *Id.* § 240A(a), 8 U.S.C. § 1229b(a) (effective Mar. 14, 2021).

91. *Id.* § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (effective Dec. 26, 2020).

92. See Melinda Wenner Moyer, *Undocumented Immigrants Are Half as Likely to Be Arrested for Violent Crimes as U.S.-Born Citizens*, SCI. AM. (Dec. 7, 2020), <https://www.scientificamerican.com/article/undocumented-immigrants-are-half-as-likely-to-be-arrested-for-violent-crimes-as-u-s-born-citizens/> [<https://perma.cc/9DTP-HJYT>]; Alex Nowrasteh, *Illegal Immigrants and Crime – Assessing the Evidence*, CATO INST. (March 4, 2019, 1:16 PM), <https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence> [<https://perma.cc/MSN3-S59Z>].

93. *Green Card for Family Preference Immigrants*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-family-preference-immigrants> [<https://perma.cc/FQ94-Z35X>] (Mar. 19, 2021).

94. Immigration and Nationality Act § 240A(b)(1)(A), 8 U.S.C. § 1229b(b)(1)(A) (effective Mar. 14, 2021).

95. Immigration and Nationality Act § 240A(a), 8 U.S.C. § 1229b(a), (b)(1)(C) (effective Mar. 14, 2021).

96. Lind, *supra* note 69.

Just as crime, public safety, and criminality can be examined in the criminal law context, these concepts can be similarly examined with regard to immigration law. Though harm occurs in society, there is room to question how and why we determine what harm constitutes crime and whether this bears a reasonable relationship to public safety.

C. Efficacy

A third assumption, which many take for granted, is that punishment and incarceration are effective methods of redressing harm, reducing crime, and promoting public safety.⁹⁷ There is understandable resistance to envisioning a future without prisons if one feels prisons are adequately fulfilling their designed role. Abolitionists therefore emphasize the many ways in which the criminal legal system and incarceration fall short of this promise.

For example, abolitionists highlight that the conditions of incarceration are in many ways incompatible with rehabilitation.⁹⁸ Incarcerated individuals are removed from familial and social connections, subjected to dehumanizing conditions, and many are placed in isolation.⁹⁹ Far from being conducive to personal growth or mental and emotional stability, abolitionists suggest such conditions have the opposite effect: individuals face dehumanization and violence while incarcerated and barriers to employment and assimilation after incarceration that make them more, not less, likely to engage in future harmful acts.¹⁰⁰ In fact, abolitionists see evidence of the relative success of more rehabilitative prison programs not as a reflection of prison's efficacy but as an indication that similar programs would be even more effective in less punitive settings.¹⁰¹

Additionally, abolitionists point to the inadequacy of punitive policing and incarceration for addressing the complex social factors that contribute to crime.¹⁰² As Alex S. Vitale, author of the abolitionist-minded book *The End of Policing*, illustrated in an interview:

A friend of ours, they had their car stolen. The police actually recovered it and arrested the driver. So they were like, "See? We need police." And I said, "Well, let's dig a little deeper here. What do we know about the person who got arrested that stole your car?" "Uh, the police said that he'd been arrested a bunch of times and there was drug paraphernalia left in the car?"

97. See DAVIS, *supra* note 6, at 12–15.

98. See DAVIS, *supra* note 6, at 27 ("[T]he contention that prisoners would refashion themselves if only given the opportunity to reflect and labor in solitude and silence disregarded the impact of authoritarian regimes [on] living and work.").

99. See McLeod, *supra* note 1, at 1173–74.

100. *Id.* at 1203.

101. *Id.* at 1204.

102. *Id.* at 1159 ("Apart from the inhumanity of incarceration, there is good reason to doubt the efficacy of incarceration and prison-backed policing as means of managing the complex social problems they are tasked with addressing, whether interpersonal violence, addiction, mental illness, or sexual abuse.").

And I'm like, Hmm. So we tried policing a bunch of times with this guy. Did it prevent your car from getting stolen? No. Is this person stealing cars because they have a drug problem? Probably. Is sending them to jail over and over again fixing their drug problem? No. Okay, if we want to reduce vehicle thefts, the first time that we come in contact with this person, we've got to start trying to address what's driving their problematic behavior.¹⁰³

As abolitionists contend, and the quote above illustrates, the criminal legal system is ill-equipped to address the underlying social issues of mental illness, homelessness, addiction, and poverty.¹⁰⁴ There is therefore room to imagine a less punitive, and more effective, approach to these issues.

There is good reason to question the efficacy of the immigration enforcement system as well. Despite increased enforcement efforts over the past forty years, millions of undocumented immigrants remain living and working in the United States.¹⁰⁵ In fact, this can arguably be connected directly to harsh immigration enforcement; inflexible policies make those who enter the United States more likely to stay, in order to avoid the increased risk of back and forth border crossings.¹⁰⁶

There are many factors that drive migration to the United States, such as economic incentives and family ties.¹⁰⁷ Many of those who enter the United States have already spent significant time here, resulting in family members with citizenship status, deep ties to the community, and connections to economic opportunities.¹⁰⁸ As enforcement efforts can do little to alter these realities, they have understandably been ineffective at achieving enforcement's purported goals.

Leading immigration scholar Kevin R. Johnson compares immigration enforcement to the government's efforts to enforce prohibition.¹⁰⁹ Both systems disproportionately target poor and working-class individuals for enforcement,¹¹⁰ attempt to control behavior that the average person does not consider to be criminal conduct,¹¹¹ and seek what prove to be ultimately untenable, unachievable goals.¹¹²

Additionally, there is room to question whether immigration enforcement is aligned with the country's, or government's, interests. Immigrants—with or without legal status—play a valuable role in the country's economy and communities.¹¹³

103. Madison Pauly, *What a World Without Cops Would Look Like*, MOTHER JONES (June 2, 2020), <https://www.motherjones.com/crime-justice/2020/06/police-abolition-george-floyd/> [https://perma.cc/P9CK-UDSV].

104. See Washington, *supra* note 49.

105. Johnson, *supra* note 18, at 246.

106. Elizabeth M. Bruch, *Open or Closed: Balancing Border Policy with Human Rights*, 96 KY. L.J. 197, 227 (2007).

107. Johnson, *supra* note 18, at 250.

108. *Id.* at 250–51; García Hernández, *supra* note 40, at 1457.

109. See Johnson, *supra* note 18, at 246–50.

110. *Id.* at 246–47.

111. *Id.* at 248–49.

112. *Id.* at 250.

113. See ARLOC SHERMAN, DANILO TRISI, CHAD STONE, SHELBY GONZALES & SHARON PARROTT, CTR. ON BUDGET & POL'Y PRIORITIES, IMMIGRANTS CONTRIBUTE GREATLY TO

Immigration enforcement efforts such as raids and deportation of undocumented workers disrupt not only families and individuals but also towns and entire industries.¹¹⁴ That is not to say that economic justifications are the primary, or best, reason to question a regime of immigration enforcement but rather that immigration enforcement as an effective and essential function of the government is vulnerable to questioning on the very grounds that justify it.

Though both incarceration and immigration enforcement have been naturalized, abolition theory provides a pathway to question the assumption that these institutions are inevitable and irreplaceable. Both institutions have changed significantly throughout U.S. history, and the country's approach to both crime and immigration will undoubtedly continue to shift, making change—even radical change—possible. Further, there is room to question whether these institutions are essential to public safety or are working effectively to achieve their intended ends. In sum, a future where our approaches to harm and migration are radically different can be envisioned.

II. THE HUMAN COST OF ENFORCEMENT

Following the contention outlined in the previous Part that even naturalized institutions can be abolished, this Part will address the abolitionist argument that there is a moral imperative to do so. In addition to examining incarceration's history, relationship to harm, and efficacy, abolitionists highlight that it is an exceptionally cruel system.¹¹⁵ Rejecting the moral legitimacy of caging individuals,¹¹⁶ abolitionists argue that this cannot be justified as a response to harm.¹¹⁷

It is difficult to deny the immense suffering to individuals, families, and communities caused by mass incarceration.¹¹⁸ Time spent in prison or jail is itself harmful and dehumanizing. Individuals are deprived of liberty and many signifiers

U.S. ECONOMY, DESPITE ADMINISTRATION'S "PUBLIC CHARGE" RULE RATIONALE 2 (2019), <https://www.cbpp.org/sites/default/files/atoms/files/8-15-19pov.pdf> [<https://perma.cc/575Y-AMWG>].

114. See Hong, *supra* note 59, at 51–52; see also Stuart Anderson, *Immigration Raids: Do the Goals Make Economic Sense?*, FORBES (Aug. 15, 2019, 12:09 AM), <https://www.forbes.com/sites/stuartanderson/2019/08/15/immigration-raids-does-it-make-sense-to-shrink-the-us-labor-supply/?sh=1ae75ab34865> [<https://perma.cc/HY99-B74X>]; Tim Carman, *Planned ICE Raids Are Putting the Restaurant Industry on Edge*, WASH. POST (July 12, 2019, 6:15 PM), <https://www.washingtonpost.com/news/food/wp/2019/07/12/planned-ice-raids-are-putting-the-restaurant-industry-on-edge/> [<https://perma.cc/5RT4-R4XV>].

115. See McLeod, *supra* note 1, at 1173 (“Prisons are places of intense brutality, violence, and dehumanization.”).

116. See *id.* at 1164 (“Abolition instead entails a rejection of the moral legitimacy of confining people in cages, whether that caging is deemed ‘civil’ or whether it follows a failure to comply with technical terms of supervised release or a police order.”).

117. *Id.* at 1171 (“Reducing social risk by physically isolating and caging entire populations is not morally defensible, even if abandoning such practices may increase some forms of social disorder.”).

118. See Washington, *supra* note 49 (“How do you calculate . . . the impact on families and communities across our country when almost half of all adult black women in America have a family member locked up? Or that at least 80,000 people are, at any given time, resigned to some form of solitary confinement?”).

of personal identity, subjected to rigid and invasive controls, and burdened with minutely managed schedules and interactions—all backed by a constant threat of force.¹¹⁹ Violence and sexual assault are especially prevalent within prisons,¹²⁰ which abolitionists see as stemming from the inherent oppressiveness of the carceral environment.¹²¹ Abolitionists question the ethics and morality of responding to harm with more harm.¹²²

Beyond just imprisonment, the criminal legal system exacts a human cost and causes harm in other ways. People suffer from the “great indignit[ies]” of police encounters¹²³ and violence at the hands of police.¹²⁴ People are faced with the choice of paying costly bail or remaining in jail and possibly losing employment before ever having been convicted of a crime.¹²⁵ Those who are convicted face serious collateral consequences of criminal conviction even long after their sentences end.¹²⁶ These include the denial of welfare benefits, loss of eligibility for public housing, disenfranchisement,¹²⁷ and as discussed above, severe immigration consequences.¹²⁸ From an abolitionist perspective, this suffering is immoral and unethical, even when imposed upon those who have caused harm to others.¹²⁹

Immigration enforcement similarly causes significant human suffering.¹³⁰ As a system that permeates almost every aspect of people’s lives, it is difficult to capture the myriad ways immigration enforcement leads to unnecessary human suffering

119. See McLeod, *supra* note 1, at 1173–74.

120. Dave Gilson, *What We Know About Violence in America’s Prisons*, MOTHER JONES (July/Aug. 2016), <https://www.motherjones.com/politics/2016/06/attacks-and-assaults-behind-bars-cca-private-prisons/> [<https://perma.cc/4YDT-4F2Y>].

121. See McLeod, *supra* note 1, at 1180 (“[T]he environment of prison itself is productive of further violence as prisoners seek to dominate and control each other to improve their relative social position through assault, sexual abuse, and rape.”).

122. See Kushner, *supra* note 15 (“[I]n Spain people have decided that life has enough value that they are not going to behave in a punitive and violent and life-annihilating way toward people who hurt people.” (quoting Ruth Wilson Gilmore)); CRITICAL RESISTANCE, *supra* note 80, at 22 (“[S]hould everyone who harms get punished? But isn’t punishment a form of harm, especially punishment in the form of prisons?”).

123. *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968) (referring to a police “frisk” as “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly”).

124. See Spencer Bokart-Lindell, Opinion, *Why Is Police Brutality Still Happening?*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/opinion/minneapolis-police-brutality.html> [<https://perma.cc/62J8-ZEE5>].

125. See *Bail Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/bail-reform> [<https://perma.cc/TH77-JBLJ>] (last visited July 8, 2021).

126. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459 (2010).

127. *Id.*

128. See *supra* notes 68–73, 87–91 and accompanying text.

129. See DAVIS, *supra* note 6, at 16 (“We thus think about imprisonment as a fate reserved for others, a fate reserved for the ‘evildoers’ . . .”); McLeod, *supra* note 1, at 1170–71 (“A commitment to any significant degree of decarceration requires a willingness to abandon managing perceived risks of violence by banishing and relegating to civil death any person convicted of serious crime.”).

130. Johnson, *supra* note 18, at 215 (“Although arbitrary constructs, borders contribute to suffering and inequality that is difficult to justify.”).

and indignity. Strict border controls in major cities have led to more migrants attempting to cross in remote areas of the desert, where thousands have died from exposure, dehydration, and heat stroke.¹³¹ Once present in the United States, immigrants without status become an easily exploited workforce.¹³² Though most state and federal labor laws provide protection for undocumented immigrants, fear of deportation has a chilling effect on exercising these rights.¹³³ Even before encountering the system of immigration enforcement directly, the threat of deportation brings suffering and fear into the lives of undocumented immigrants.¹³⁴

Once individuals encounter the immigration system, they are subject to additional harm through detention and deportation. Despite not being ostensibly punitive in nature, immigration detention still exacts a significant emotional toll and constitutes a degradation of human dignity.¹³⁵ At the culmination of the process, many immigrants face deportation, a fate that even the Supreme Court has acknowledged to be a loss of “all that makes life worth living.”¹³⁶ The human costs of deportation also extend beyond the individual, as persons are torn away from families, communities, and workplaces.¹³⁷

The immigration system, like the criminal legal system, exacts an incredibly high cost of human suffering. Abolition theory invites us to question whether institutions that cause such significant harm should still have a place in our society.¹³⁸

III. INADEQUACY OF REFORM AND DISMANTLING THE MACHINE

Finally, abolition theory offers a vision of the future. Imagining a society beyond the prison also means imagining the institutions that would be developed to prevent and redress harm. Acknowledging that these changes cannot happen overnight, abolition theory also offers a framework for abolitionist reforms—steps

131. This strategy was intentional—immigration officials in the 1990s hoped the stricter controls would deter migrants from crossing once they realized how dangerous the more remote paths would be. James Verini, *How U.S. Policy Turned the Sonoran Desert into a Graveyard for Migrants*, N.Y. TIMES MAG. (Nov. 22, 2020), <https://www.nytimes.com/2020/08/18/magazine/border-crossing.html> [<https://perma.cc/L8YS-8MPY>].

132. Johnson, *supra* note 18, at 226.

133. Tom Spiggle, *Why Workplace Abuse Plagues Undocumented Workers*, FORBES (Aug. 22, 2019, 10:19 PM), <https://www.forbes.com/sites/tomspiggle/2019/08/22/why-workplace-abuse-plagues-undocumented-workers/?sh=23df232c49b2> [<https://perma.cc/2PR9-GRSV>].

134. Cházaro, *supra* note 23, at 31 (“[D]eportability, the susceptibility to deportation that defines the immigrant experience, brings violence into migrants’ everyday lives.”).

135. García Hernández, *supra* note 40, at 1452 (“Evidence shows that migrants suffer unthinkable harms while imprisoned.”).

136. Cházaro, *supra* note 23, at 23 (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

137. See García Hernández, *supra* note 40, at 1460 (“In 2009, almost seventeen million children had at least one parent who was not a U.S. citizen, and roughly 5.1 million children, including four million U.S. citizens, had at least one parent who lacked authorization to be in the United States.”).

138. See DAVIS, *supra* note 6, at 10 (“Are we willing to relegate ever larger numbers of people from racially oppressed communities to an isolated existence marked by authoritarian regimes, violence, disease, and technologies of seclusion that produce severe mental instability?”).

which begin the process of working towards a different future without expanding or further naturalizing the current systems of enforcement. The following Part will explore both concepts by (1) introducing alternate approaches to harm and migration and (2) discussing how abolitionist ideals can shape reform efforts in both systems.

A. *Alternate Approaches*

At the core of the abolitionist message is not only tearing down prisons but also constructing a society where the prison is rendered obsolete.¹³⁹ The abolitionist vision of the future therefore generally includes two components: (1) social programs and resources designed to address the root causes of crime and promote social welfare¹⁴⁰ and (2) alternative methods of response for when harm does occur.¹⁴¹ No one institution would fulfill the role the criminal legal system is currently playing but rather, there would be “a constellation of alternative strategies.”¹⁴²

The first component focuses on considering the root causes of crime and making society safer for everyone. Abolitionists point to investment in and revitalization of education,¹⁴³ a health system that would provide accessible physical and mental health care,¹⁴⁴ and urban redevelopment and redesign of public spaces¹⁴⁵ as suggested social programs that would begin to occupy the societal space currently occupied by prisons.¹⁴⁶ These interventions, designed to address shared social problems, would render punitive criminal structures unnecessary in the long term.¹⁴⁷

The second component of an abolitionist future is finding alternative approaches to redressing harm. Here, abolitionists often point to restorative justice techniques.¹⁴⁸ Restorative justice focuses on accountability and repairing harm,

139. See Washington, *supra* note 49 (“[A] growing collection of activists and writers have not only been working . . . to tear down the cages, but to build a more equitable society in which we don’t need to rely on cages at all.”).

140. See DAVIS, *supra* note 6, at 106–07; McLeod, *supra* note 1, at 1224–32.

141. DAVIS, *supra* note 6, at 107.

142. *Id.*

143. *Id.*; McLeod, *supra* note 1, at 1225.

144. DAVIS, *supra* note 6, at 107.

145. McLeod, *supra* note 1, at 1229–32 (“[O]ne recent study of urban ‘greening’ projects, conducted by epidemiologists at the University of Pennsylvania School of Medicine, found that ‘greening was associated with reductions in certain gun crimes and improvements in residents’ perceptions of safety.’” (quoting Eugenia C. Gavin, Carolyn C. Cannuscio & Charles C. Branas, *Greening Vacant Lots to Reduce Violent Crime: A Randomised Controlled Trial*, 19 INJ. PREVENTION 198, 198 (2013))).

146. DAVIS, *supra* note 6, at 107–08 (“The creation of new institutions that lay claim to the space now occupied by the prison can eventually start to crowd out the prison so that it would inhabit increasingly smaller areas of our social and psychic landscape.”).

147. McLeod, *supra* note 1, at 1163.

148. DAVIS, *supra* note 6, at 113.

rather than retribution.¹⁴⁹ This approach is rooted in various indigenous and religious practices¹⁵⁰ and takes a more holistic view of healing a community following harm.¹⁵¹ This process focuses not only on providing closure and reparations to victims and their families but also on healing the offender, as “people who commit violence are hurt by the violence they commit.”¹⁵²

This framework can be applied in the immigration context well. First, an abolitionist immigration future may be one where the root causes of migration—that is, the factors that drive individuals to leave their homes to come to the United States, often at great personal peril—are adequately addressed. These factors can include violence, economic instability, and corruption in individuals’ countries of origin.¹⁵³ As in the prison abolition context, institutions designed to address these issues may be constructed to ultimately take up the “space” currently occupied by the massive machine of immigration enforcement.

Second, an abolitionist future may involve a response to the presence of noncitizens in the United States that does not rely on detention, deportation, or other restrictive measures. Some immigration scholars have envisioned what an open-borders approach to immigration may look like. One example is a system where a noncitizen is presumed to be admissible and therefore allowed to remain in the United States¹⁵⁴ unless the government meets the high burden of establishing that he or she poses a clear, imminent danger.¹⁵⁵ Another, more permissive, possibility may mirror the policy adopted for internal U.S. state borders, without numerical caps or controls on entry and exit.¹⁵⁶ A third model may mirror migration within the European Union, where there are some requirements and limitations, but the policy is largely one of free movement across borders.¹⁵⁷

An abolitionist future is one where the social and psychological space occupied by the prison is replaced with institutions designed to meet people’s needs, focused on welfare instead of punishment. Similarly, the space currently occupied by the massive immigration enforcement system could be occupied instead by systems that address the causes of migration, based on an approach to immigration that promotes free movement and presumes admissibility.

149. See Washington, *supra* note 49 (“The process is restorative because the goal is to restore the victim, their community, and the offender, to how they were before.”).

150. *Id.*

151. *Id.*

152. *Id.*

153. See Jen Kirby, *How to Address the Causes of the Migration Crisis, According to Experts*, VOX (July 17, 2019, 4:00 PM), <https://www.vox.com/2019/7/17/18760188/migration-crisis-central-america-foreign-policy-2020-election> [<https://perma.cc/X2S6-BT2N>].

154. Johnson, *supra* note 18, at 213.

155. *Id.* at 261.

156. Bruch, *supra* note 106, at 223.

157. *Id.* at 224–25.

B. Abolitionist Reforms

Acknowledging that these changes cannot happen overnight, abolitionist thinking does not reject all efforts at reform.¹⁵⁸ Rather, abolitionists push for reforms that move society closer to a world without prisons and punitive policing, as opposed to those that affirm the assumption that prison is an inevitability.¹⁵⁹ Critical Resistance, an abolition-minded activist movement, articulates the difference:

The abolitionist keeps a constant eye on an alternative vision of the world in which the PIC [(prison industrial complex)] no longer exists, while the reformist envisions changes that stop short of this. This simple difference often comes from more deeply rooted differences in how the PIC is critically understood. Abolitionist analysis leads to the conclusion that the PIC is fundamentally unjust and must be brought to an end. Reformist analysis typically leads to the conclusion that the PIC can be made just if certain changes are made.¹⁶⁰

Along with this is the caveat that to effectively pursue the goals of abolition, a reform should not result in increasing “the size, scope, or power” of the carceral or criminal systems.¹⁶¹ This principle is illustrated in recent efforts to reform policing, such as increased training efforts and funding to improve police-community relations:

The federal government also began to fund training and equipment for SWAT teams in the 1970s as part of the last round of major national policing reforms, which were intended to improve police-community relations and reducing police brutality through enhanced training. These reforms instead poured millions into training programs that resulted in the rise of SWAT teams, drug enforcement, and militarized crowd control tactics.¹⁶²

Similarly, the Omnibus Crime Control and Safe Streets Act of 1968 was originally intended by President Johnson to grant resources to the police to train, modernize, and focus on prevention and rehabilitation efforts.¹⁶³ However, the bill ended up granting the funding to states to use at their discretion, which led to “a massive expansion in police hardware, SWAT teams, and drug enforcement teams—and almost no money toward prevention and rehabilitation.”¹⁶⁴

158. See Kushner, *supra* note 15 (“Which isn’t to say that Gilmore and other abolitionists are opposed to all reforms. ‘It’s obvious that the system won’t disappear overnight,’ Gilmore told me. ‘No abolitionist thinks that will be the case.’”).

159. DAVIS, *supra* note 6, at 20 (“[F]rameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond the prison.”).

160. CRITICAL RESISTANCE, *supra* note 80, at 48.

161. *Id.* at 36.

162. ALEX S. VITALE, THE END OF POLICING 11 (2018).

163. *Id.* at 14.

164. *Id.*

Abolitionists therefore acknowledge that reform efforts often end up (1) further naturalizing the assumptions on which a system of enforcement is based and (2) allocating additional resources to those institutions. Institutions are then free to utilize those resources as they see fit, which is often in furtherance of policy goals motivated by the very assumptions abolition theory seeks to challenge.

This phenomena occurs, in part, because institutions are inherently difficult to meaningfully reform.¹⁶⁵ Policy choices tend to determine future policy developments, meaning change is most likely to happen within the parameters of the current regime.¹⁶⁶ Additionally, institutions tend to adopt expansive views of their own authority, interpreting statutes and regulations in a manner that maximizes their power.¹⁶⁷

Two such policy decisions in the immigration context are immigration detention and deportation. Recent reform efforts regarding immigration detention have focused on debating the conditions of detention, the number of detention facilities, and which individuals should be subject to detention rather than questioning the practice of detaining undocumented immigrants.¹⁶⁸ These efforts, such as the Biden administration's pledge to reduce the time in detention for families seeking asylum,¹⁶⁹ are obviously improvements over harsher policies and may make a very real difference to the individuals they impact. However, abolitionists posit that there is room to move beyond the line drawing and to seek reforms that question immigration detention as a larger practice.

Debates over deportation often follow the same pattern.¹⁷⁰ Assuming that some deportations must take place limits reform efforts to impacting who is deported and under what circumstances.¹⁷¹ Such reforms "ultimately make[] a statement that this particular person should not be subject to these laws, but that

165. García Hernández, *supra* note 40, at 1498 (quoting Claus Offe, *Political Institutions and Social Power: Conceptual Explorations*, in RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE 9, 18 (Ian Shapiro, Stephen Skowronek & Daniel Galvin eds., 2006)).

166. *Id.* at 1499 ("A truly naturalized policy choice reinforces itself by, in part, determining future policy developments.").

167. *Id.* at 1505.

168. *Id.* ("DHS officials debate the contours of detention. They regularly consider the conditions of confinement, the most suitable locations for prisons, the cost of detention, and even the best number of people to confine. This constant reexamination of detention gives Agency officials the aura of self-critique.").

169. Franco Ordoñez, *Biden Administration Moves to Speed Up Processing of Migrants in Family Detention*, NPR (Mar. 4, 2021, 8:28 PM), <https://www.npr.org/2021/03/04/973860288/biden-administration-moves-to-speed-up-processing-of-migrants-in-family-detention> [https://perma.cc/5WFY-BLPS].

170. Cházaro, *supra* note 23, at 4 n.6 ("[Even] one of the most trenchant critics and scholars of the modern US deportation regime, exemplifies the reach of the common sense of deportation." (referencing Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 465 (2015))).

171. *Id.* at 5.

the laws themselves—and by extension, the values underlying the laws—are the right ones.”¹⁷²

Additionally, reform efforts often result in additional resources allocated to institutions and broad discretion to interpret how they should be used. Immigration scholar César Cuauhtémoc García Hernández offers the creation of the Department of Homeland Security’s (DHS) “Secure Communities” program¹⁷³ as an example:

The department created Secure Communities after Congress gave DHS money to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable.” Given the broad congressional command to “improve and modernize” identification measures, DHS could have created a program that led to little detention. It could, for example, have followed the congressional directive to focus on migrants who have previously been convicted of crimes, rather than almost everyone who comes into contact with police officers. In addition, DHS could have elected to track potentially deportable migrants through alternatives to detention. Instead, DHS took this vague congressional instruction to improve and modernize identification processes and launched a law enforcement program that identifies migrants well before a conviction and sentence could possibly be imposed—at the point when a migrant is booked into police custody.¹⁷⁴

By allotting additional funds to DHS and giving the agency discretion in how to use them, this reform expanded the scope and power of immigration enforcement. In contrast, abolition calls for changes that shrink the machinery of institutions and challenge the fundamental assumptions of a system of enforcement.

Immigration scholar Angélica Cházaro offers an example of a reform effort which embodies abolitionist ideals: a movement to delete a gang database in Chicago.¹⁷⁵ The database tracked individuals with possible gang affiliations, but the criteria was “murky” and there was no process provided for appealing placement in the database.¹⁷⁶ Yet individuals listed on the database faced dire consequences—denial of bond, denial of housing, and deportation.¹⁷⁷ Activists called for its erasure, rather than its improved management, which Cházaro points to as an example of abolitionist reform:

172. *Id.* at 65.

173. Under Secure Communities, an individual’s biometric data would be collected following a criminal arrest. The data would be sent to an FBI database, which shared information with DHS. If the database returned an immigration “hit,” ICE would be notified and could then take the individual into immigration detention. HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP’T OF HOMELAND SEC., TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS (2011), <https://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities.pdf> [<https://perma.cc/6P4U-7XR9>].

174. García Hernández, *supra* note 40, at 1501–02.

175. Cházaro, *supra* note 23, at 67–69.

176. *Id.* at 68.

177. *Id.*

While the campaign has focused on individual cases to highlight the injustices of the database, the demands generated are collective ones. . . . The campaign has avoided pushing a narrative of opposing the database on the basis of “innocent” Chicagoans being included in it, a move which would open the door to the “undeserving” remaining on a perfected database, and the “deserving” being removed. Instead, members of the campaign have pushed for its elimination as a tool of racial subordination, rather than its improved management.¹⁷⁸

Had the database been “reformed,” rather than erased, those who remained in the database would have still been subjected to the harsh consequences.

However, even “reformist” reforms often improve conditions for many, which may result in some tension for scholars, activists, and immigration lawyers. For example, immigration reform legislation is currently pending in Congress, backed by the Biden administration.¹⁷⁹ The U.S. Citizenship Act creates an “earned path to citizenship” by which qualifying undocumented individuals can register for initial legal status and then ultimately apply for citizenship.¹⁸⁰ If passed, this would undoubtedly improve conditions for many undocumented immigrants. Yet this provision also affirms the core assumptions of the immigration system. By providing additional pathways to lawful status, it confirms that those without status remain subject to immigration enforcement, detention, and deportation. The bill also contains crime-based grounds of ineligibility: individuals who have been convicted of a felony or three or more misdemeanors are ineligible for the “earned pathway.”¹⁸¹ Many of the most vulnerable would therefore be left out of this reform, similar to many other forms of immigration relief. Abolition asks us to hold space for both of these perspectives: we can appreciate the ways in which reforms reduce harm while still envisioning and working towards a version of the future where these institutions are radically different.

Ultimately, reforms that focus on the discussion of who should be the subject of immigration enforcement or how such enforcement efforts should be carried out miss the opportunity to challenge the fundamental assumption that immigration enforcement is justified at all. Further, such reforms contribute to the already complex machinery of immigration law.¹⁸² Such additions, while providing additional procedural protections for some, result in additional resources allocated to institutions without questioning whether the system is furthering societal goals

178. *Id.* at 69.

179. Hannah Miao, *House Won't Vote on Biden's Comprehensive Immigration Plan this Month, Will Focus on Smaller Bills*, CNBC (Mar. 4, 2021, 12:07 PM), <https://www.cnbc.com/2021/03/04/house-wont-vote-on-bidens-comprehensive-immigration-plan-this-month.html> [https://perma.cc/G9JB-SMCT].

180. U.S. Citizenship Act, H.R. 1177, 117th Cong. § 245B (2021).

181. *Id.* § 245G(c)(1)(A)(ii)–(iii).

182. See Johnson, *supra* note 18, at 203 (“Enforcement efforts could move beyond the morass of exclusion grounds, per country caps, ceilings on immigrant visas, and the many complexities of the [INA] that have made its enforcement unwieldy.”).

that justify the high human cost. Abolition principles can therefore provide a guide in shaping immigration advocacy, favoring movements that seek to question the need for enforcement rather than expand the resources and power of a system or affirming the underlying assumptions that enforcement is necessary.

CONCLUSION

Abolition theory provides an applicable framework to analyze immigration enforcement and conceptualize a different approach to migration. Though the necessity of strict immigration enforcement to a safe and functioning society may seem like a foregone conclusion, history shows otherwise. In reality, U.S. immigration policy has fluctuated widely, with the modern restrictionist approach only developing over the last several decades. Further, there is ample evidence that this approach not only has not met its purported goals but has also actively worked against the interests of the nation. In the place of this restrictionist regime, an approach that presumes that migration is lawful can be conceptualized. Further, the immigration system exacts an incredibly high human cost that makes its functioning additionally difficult to justify. These principles can animate immigration advocacy efforts by challenging the assumption that enforcement is necessary and avoiding reforms that only validate and expand the system of enforcement. As abolition theory encourages us to envision, there is something beyond immigration enforcement.¹⁸³

183. See DAVIS, *supra* note 6, at 19 (“[I]t requires a great feat of the imagination to envision life beyond the prison.”).