

## BOOK REVIEW

### YEARNING TO BREATHE FREE: MIGRATION-RELATED CONFINEMENT IN AMERICA

MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS. César Cuauhtémoc García Hernández. 2019. 190 pages.

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#### INTRODUCTION

When Diego Rivera Osorio was three years old, just over 1,000 nights had passed since he was born.<sup>1</sup> For 650 of those nights, Diego slept inside a prison outside of Philadelphia. On some mornings, he woke up and went to court. But for each of those nights, Diego went to sleep behind bars. The toddler had not been accused of a crime. He and his mother, Wendy Osorio Martinez, were detained at the Berks Family Residential Center<sup>2</sup> while they awaited an immigration judge’s decision

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† Assistant Professor, California Western School of Law. I owe deep gratitude to Professor César Cuauhtémoc García Hernández. His research and scholarship are significant contributions to this field and have pushed me to think critically about my own work. He and I, along with Carrie Rosenbaum and Jennifer Chacón, were in conversation about this book during an Author Meets Reader session at the Law and Society’s 2020 Annual Meeting, and our dialogue refined this piece. I also thank the editors of *Cornell Law Review*, including Gabriela Markolovic, Nicholas Pulakos, and Victor Flores, who have diligently and skillfully prepared this piece for publication during especially unsettled times. Any and all errors are mine.

<sup>1</sup> CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 1–2 (2019).

<sup>2</sup> “Family residential center” is among the many euphemisms the federal government uses to refer to the spaces in which it confines people whose lives intersect in some way with the nation’s administrative immigration law

about whether to allow them to stay in the United States or to deport them to Honduras, where Wendy had faced threats of kidnapping and assault two years earlier.

Diego's story is one of many accounts from American immigration imprisonment that have permeated public consciousness. Photographs of children and adults crowded on floors under aluminum foil blankets<sup>3</sup> and huddled behind chain-link fences<sup>4</sup> in carceral spaces across the country have dominated domestic media coverage in recent years. Wrenching accounts of family separation,<sup>5</sup> poor medical care,<sup>6</sup> outbreaks of and deaths resulting from infectious disease,<sup>7</sup> and physical and sexual abuse,<sup>8</sup> dominate the stories underneath

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enforcement system. Others include "service processing centers" and "tender age shelters." For many of the people who are detained in these spaces, the conditions are like, if not worse than, the conditions in the average state or federal penitentiary built to confine people who have been convicted of criminal offenses. See René Lima-Marín & Danielle C. Jefferis, *It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955, 956 (2019).

<sup>3</sup> E.g., Fernanda Santos, *Photos Offer Glimpse Inside Arizona Border Detention Centers*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/us/photos-show-conditions-in-arizona-border-detention-centers.html> [<https://perma.cc/9BSE-7UYH>]; Molly Redden, *Why are Immigration Detention Facilities so Cold?*, MOTHER JONES (July 16, 2014), <https://www.motherjones.com/politics/2014/07/why-are-immigration-ice-detention-facilities-so-cold/> [<https://perma.cc/7SVU-JPM7>].

<sup>4</sup> E.g., Assoc. Press, *Detained Immigrants Sue over Conditions, Medical Care*, NBC NEWS (Aug. 20, 2019), <https://www.nbcnews.com/news/us-news/detained-immigrants-sue-over-conditions-medical-care-n1044316> [<https://perma.cc/TE3S-AEBT>]; Rep. Jackie Speier, *The Immigration Detention Center I saw in Texas isn't just a Crisis – it's a Nightmare*, NBC NEWS (July 25, 2019), <https://www.nbcnews.com/think/opinion/immigration-detention-center-i-saw-texas-isn-t-just-crisis-ncna1034631> [<https://perma.cc/A9B4-4G2P>].

<sup>5</sup> See, e.g., Hajar Habbach, Kathryn Hampton, & Ranit Mishori, "You will Never See Your Child Again": *The Persistent Psychological Effects of Family Separation*, PHYSICIANS FOR HUMAN RIGHTS (Feb. 25, 2020), <https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/> [<https://perma.cc/T2CE-EZ8K>] (detailing the "traumatic" effects of family separation on 17 adults and nine children).

<sup>6</sup> E.g., Renuka Rayasam, *Trump Administration sued over poor Medical care in Immigration Centers*, POLITICO (Aug. 19, 2019), <https://www.politico.com/story/2019/08/19/trump-administration-sued-medical-care-immigration-centers-1467605> [<https://perma.cc/UTN9-T3YK>].

<sup>7</sup> See, e.g., Letter from Project South, et al. to Joseph V. Cuffari, Inspector Gen., Off. of the Inspector Gen., DEPT OF HOMELAND SECURITY (Sept. 14, 2020), available at <https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf> [<https://perma.cc/M55N-C6KQ>] (noting the "jarring medical neglect" within an immigration detention center).

<sup>8</sup> E.g., Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual->

reporting of until recently ever-increasing daily detention populations.<sup>9</sup> With those vivid images and the present state of immigration detention among the issues at the forefront of our collective consciousness, the toddler's story is where Professor César Cuauhtémoc García Hernández opens his book *Migrating to Prison: America's Obsession with Locking Up Immigrants*. In fewer than two-hundred pages, the book then skillfully and gracefully takes the reader on a rich, decades-long journey of xenophobia and racism, profiteering, and oppression, against a backdrop of an era not so long ago in which the United States demonstrated the country did not *have* to rely on incarcerating people for their migration-related activity. It simply chooses to do so.

*Migrating to Prisons* offers two significant contributions, among many. One, it provides a well-sourced, yet accessible, overview of the rise, fall, and rise again of migration-related confinement in the United States from a perspective not often taken but one that is critical to understanding an elemental feature of American incarceration: a perspective that de-silos conversations about civil detention versus punitive incarceration and looks simply to the act of confining.<sup>10</sup> The popularized notion of “immigration detention” focuses on the detention centers run by U.S. Immigration and Customs Enforcement or “ICE.” ICE enforces civil immigration law and, thus, confines people in “civil” immigration detention facilities.<sup>11</sup> But for many migrating people who have reached, and others who attempt to reach, the United States, the formal

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abuse.html [https://perma.cc/L48R-EXA7]; Sam Levin, *He was Undocumented. Now he's Exposing Detention Center Abuse*, THE GUARDIAN (Oct. 29, 2019), https://www.theguardian.com/us-news/2019/oct/29/he-was-undocumented-now-hes-exposing-detention-center-abuse [https://perma.cc/N2WG-JLP7].

<sup>9</sup> See, e.g., Emily Kassie, *Detained: How the US Built the World's Largest Immigrant Detention System*, THE GUARDIAN (Sept. 24, 2019), https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump [https://perma.cc/NP2Y-RVLF] (“Children sleeping on floors, changing other children's diapers. Families torn apart at the border. Migrants crammed into fetid detention centers. These have become familiar sights as people fleeing gang violence, domestic abuse and poverty arrive on the southern border of the United States. Many will join more than 52,000 immigrants confined in jails, prisons, tents and other forms of detention – most of them for profit.”).

<sup>10</sup> See GARCÍA HERNÁNDEZ, *supra* note 1.

<sup>11</sup> I say “so-called” here because I question the premise that nonpunitive detention is possible. See generally Danielle C. Jefferis, *The Civil Detention Fallacy* (2020) (unpublished manuscript) (on file with author) (asserting the notion of “civil”—or non-criminal—detention is a fallacy because physical confinement is inherently punitive); Lima-Marin & Jefferis, *supra* note 2 (questioning the possibility of a nonpunitive system of immigration detention).

distinction between civil and criminal law holds little meaning. “Where the power of civil law ends, the power of criminal law begins.”<sup>12</sup> Professor García Hernández examines the ways in which civil law and criminal law overlap and intersect to lead to the same place: behind prison walls.<sup>13</sup> *Migration to Prison* weaves together facts, data, and stories to illustrate for the reader the progression of the United States as a country in which the federal government largely stayed out of immigration regulation for much of its early history, to one in which the federal government relied on immigration imprisonment in only unusual circumstances, to a nation whose federal and state governments confine nearly half a million people each year in detention centers, prisons, and jails for migration-related conduct.<sup>14</sup> This analysis compels the reader to examine who is incarcerated in the United States—and why—and question the justifications for keeping those people locked up.

Two, the book offers a vision of a different future. The United States has demonstrated in its not-so-distant past that the government may—and, indeed, can—regulate immigration without relying on prisons.<sup>15</sup> As Professor García Hernández illustrates, for most of America’s history, the government did not lock people up for migration-related conduct: “Today, immigration imprisonment is the norm, yet in the United States, while confinement has long been a central feature of criminal proceedings, it has been an anomaly when it comes

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<sup>12</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 7.

<sup>13</sup> *Id.* at 11 (“Despite the historically unprecedented scale of immigration imprisonment, its sheer scope is often overlooked in conversations about immigration and criminal justice, and when it is mentioned, advocates, journalists, and academics tend to split confinement into two types: civil immigration detention and punitive criminal incarceration. Supposedly, civil detention doesn’t punish; criminal incarceration does. While accurate as a matter of formal law, this distinction is a farce on the ground. It fails to reflect the reality of immigration policing and the lived experience of migrants. Whatever the law says, the conduct that leads to immigration imprisonment and the conditions of confinement are largely identical across the civil/criminal divide. And no matter its formal label, immigration imprisonment often has devastating effect on those detained, their families, and their communities.”).

<sup>14</sup> *See id.* at 10-11 (“During the last thirty years, both the federal and state governments have increasingly tapped their powers to incarcerate people for how they move across borders. As a result, the United States has the world’s largest immigrant detention system, in which upward of half a million people annually now spend time locked up because the government claims they violated immigration law.”); *see also* Evangeline Dech, *Nonprofit Organizations: Humanizing Immigration Detention*, 53 CAL. W. L. REV. 219, 220 (2017) (noting that “400,000 people each year” are detained by the Department of Homeland Security).

<sup>15</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 9.

to immigration-law enforcement.”<sup>16</sup> In recent decades, however, deliberate changes in laws and executive policies, including administrative “enforcement priorities,”<sup>17</sup> have resulted in the United States incarcerating more than half a million people each year for the ways in which they move across borders.<sup>18</sup> And while the image of a country without immigration prisons may be difficult to conjure today in light of separated families, deaths in detention, and an ever-growing detention apparatus, *Migrating to Prisons* compels us to try. The book demands that we take a close look at the reasons for and the consequences of a dominant feature in America’s carceral system, that we interrogate and deconstruct the reasons for punishing—either expressly or impliedly—predominately black and brown bodies<sup>19</sup> for their movement across borders. *Migrating to Prisons* reveals that this country has demonstrated its proverbial walls do not come crashing down when migrating people retain their freedom, so why do we rely so heavily today on migration-related confinement? The answer lies in conscious and intentional policy choices and a public appetite for harsh border control and punishment, particularly people of color. This book gives us forceful

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<sup>16</sup> *Id.*; see also *id.* at 9–10 (“For most of the nation’s history, we did not lock up so many people for the act of migration. More often than not government agents turned a blind eye to migrants who flouted the law, either letting them into the United States or sending them back quickly and, in comparison to today, painlessly. If they committed a crime, they were expected to serve their sentence; afterward, they could return to their communities in the United States. In effect, immigration law and criminal law were separate, and citizenship played no role in whether people ended up behind bars.”).

<sup>17</sup> See Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 666 (2015) (discussing discretion inherent to Executive’s immigration-law enforcement authority and citing 6 U.S.C. § 202(5) (2012) (charging the Secretary of Homeland Security with “[e]stablishing national immigration enforcement policies and priorities”)); Executive Order: Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017) (Trump Administrative executive order effectively negating Obama Administration’s enforcement priorities regarding certain categories of immigration-law violations and declaring the Executive branch’s policy is to enforce immigration laws “against all removable aliens” (emphasis added)) [<https://perma.cc/UM7J-FA8W>].

<sup>18</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 10–11; see also Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L. J. 144, 160 (2020) [hereinafter Jefferis, *Constitutionally Unaccountable*] (“The average daily population of people in immigration confinement has also increased exponentially in the past two decades”).

<sup>19</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 12 (“With all the hysteria about drugs, terrorism, and gangs, it’s no wonder that the vast majority of people locked inside immigration prisons are people of color. Not only does policing disproportionately focus on black and brown migrants, but immigration enforcement does, too, but immigration enforcement does too, despite the presence of plenty of Canadian and European migrants who are also violating immigration law.”).

evidence and justification to demand something different.<sup>20</sup>

*Migrating to Prison* assumes a primary position among the growing body of legal scholarship that focuses on the role of incarceration in immigration regulation. This Review explores two key contributions of the book, while situating the work among other scholarship on immigration-related confinement, including my own.<sup>21</sup> Part I traces the rise, fall, and subsequent rise (again) of immigration imprisonment in the United States. Part II describes the scope of immigration detention pursuant to both civil and criminal legal authority and the poor, largely unchecked, conditions inside the facilities incarcerating people for migration-related reasons. Part III examines the book's normative proposal: that abolishing immigration imprisonment is possible and should be pursued. This Review concludes by offering that *Migrating to Prisons* is an integral piece of a multi-faceted, growing body of literature that challenges the legal—and moral—foundations of migration-related confinement.

## I

### GIVE ME YOUR TIRED, YOUR POOR, YOUR HUDDLED MASSES<sup>22</sup>

The United States boasts the largest prison population in the world—more than 2.2 million people in this country are behind bars on any given day.<sup>23</sup> This figure includes people incarcerated pursuant to criminal legal authority (that is, people who have been accused and convicted of crimes) and those confined pursuant to civil legal authority, which includes those people in the custody of federal immigration-law

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<sup>20</sup> See *infra* Part III.

<sup>21</sup> See generally Jefferis, *Constitutionally Unaccountable*, *supra* note 18 (discussing “for-profit, civil immigration detention” and examining “the absence of a constitutional tort remedy”); see also Danielle C. Jefferis, *Delegating Care, Evading Review: The Federal Tort Claims Act and Access to Medical Care in Federal Private Prisons*, 80 L.A. L. REV. 37 (2019) [hereinafter Jefferis, *Delegating Care, Evading Review*] (highlighting how the “the Federal Tort claims Act’s independent-contractor exception” is used to evade the “nondelegable duty of care owed to prisoners in its custody”); see also Lima-Marin & Jefferis, *supra* note 2 (questioning the possibility of a nonpunitive system of immigration detention).

<sup>22</sup> Emma Lazarus, *The New Colossus*, reprinted in THE WORLD OF EMMA LAZARUS 178–79 (H.E. Jacob ed., 1949); see generally Walt Hunter, *The Story Behind the Poem on the Statue of Liberty*, ATLANTIC (Jan. 16, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-story-behind-the-poem-on-the-statue-of-liberty/550553/> [https://perma.cc/B5HB-FF3C] (noting the story of the creation of the poem “The New Colossus”).

<sup>23</sup> See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [https://perma.cc/4X9Y-4AJK]; Dech, *supra* note 14, at 221.

enforcement agencies.<sup>24</sup>

Migration-related confinement pursuant to both criminal and civil legal authority is a significant component of this American system of mass incarceration.<sup>25</sup> As *Migrating to Prisons* highlights, more people are locked up on charges for crimes based on their movement across borders than those charged with any other federal crime.<sup>26</sup> And the federal government's civil immigration detention system is the fastest-growing component of the American system of mass incarceration: until recently, due largely to the pandemic, the number of people confined in the custody of civil immigration enforcement agencies each year was approximately double the number of people in federal criminal custody.<sup>27</sup>

The United States' reliance on a sprawling system of prisons to accommodate migration-related confinement has not always been so, as *Migrating to Prison* explains: "For the first one hundred years of the nation's history, the federal government was not heavily involved in immigration law."<sup>28</sup> The regulation of movement was left to the states. States criminalized certain types of movement by particular people,

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<sup>24</sup> *Id.* at 220.

<sup>25</sup> See generally Jefferis, *Constitutionally Unaccountable*, *supra* note 18 (discussing civil immigration confinement).

<sup>26</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 8 ("In fiscal year 2018 alone, 105,692 people were prosecuted for a federal immigration crime [illegal entry or illegal reentry]. Defendants charged with these immigration offenses end up jailed while they wait for the courts to hear their cases more often than do defendants charged with any other federal crime. They are locked up more often than people accused of violence, and they're imprisoned more often than people suspected of the kind of white-collar crimes that might leave them with cash to disappear with.").

<sup>27</sup> See *id.*; Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2142 (2017). But see FY 2020 ICE Statistics, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/detention-management> [<https://perma.cc/U7T5-B6BP>] (file last downloaded Sept. 22, 2020) (on file with the author), (reporting 20,018 people in ICE custody); Spencer S. Hsu, *Number of migrant family members detained by ICE plunges 39% in a week*, WASH. POST (Apr. 13, 2020), [https://www.washingtonpost.com/local/legal-issues/number-of-migrant-family-members-detained-by-ice-plunges-39percent-in-a-week/2020/04/13/2d5c4d9a-7d9d-11ea-9040-68981f488eed\\_story.html](https://www.washingtonpost.com/local/legal-issues/number-of-migrant-family-members-detained-by-ice-plunges-39percent-in-a-week/2020/04/13/2d5c4d9a-7d9d-11ea-9040-68981f488eed_story.html) [<https://perma.cc/KL7M-A2EY>].

<sup>28</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 21; see also Jefferis, *Constitutionally Unaccountable*, *supra* note 18, at 150 ("So-called civil detention—that is, nonpunitive incarceration—in the United States is nearly as old as the country's founding. From the enslavement of millions of people from Africa to the forced displacement of indigenous people to the internment of Asian Americans and others during the first half of the twentieth century, the federal government has a long history of confining people pursuant to powers outside of the criminal process. But in the immigration sphere, the federal government did not always default to detention.").

including enslaved or formerly enslaved Black people, people migrating from China, and others arriving on ships.<sup>29</sup> But states and localities focused rarely on regulating movement across international borders.<sup>30</sup> By the middle of the nineteenth century, however, growing racism directed at people who had migrated from China prompted federal action: through a series of laws that amounted to little more than thinly veiled attempts at controlling the movement of people from China to and within the United States, the federal government assumed primary responsibility for regulating immigration.<sup>31</sup>

Early on, federal officials enforced federal immigration law by requiring transoceanic ships to keep all passengers on board until officials decided whether to permit each person to enter the country.<sup>32</sup> This system became quickly unmanageable, as ship captains and their shipping corporations demanded a different process. In a short time, the federal government adopted the “entry fiction”—a person could disembark a ship and set foot on U.S. territory but not be considered “admitted” to the United States until she was formally processed by immigration authorities.<sup>33</sup> This legal fiction permitted the establishment of detention centers on the land around major harbors, including Ellis Island in New York and Angel Island in California, thus allowing passengers to disembark ships but detaining them while they were processed.<sup>34</sup> The entry fiction persists in immigration law to this day.

In the wake of World War II, the federal government took another look at its discriminatory immigration laws and policies and relaxed the requirements for migration to the United States. By 1954, the government “had all but abandoned its detention policy.”<sup>35</sup> In January 1955, fewer than five people in immigration custody were seeking entry into the country.<sup>36</sup> Professor García Hernández explains,

This was not a fluke but rather the result of deliberate policy

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<sup>29</sup> *Id.* at 21–23.

<sup>30</sup> *Id.* (“Adopting a variety of strategies, states, counties, and towns regulated movement across borders. Sometimes they focused on the external borders of the United States. Mostly they didn’t. In those days, borders between states were at least as important as borders between countries.”).

<sup>31</sup> *Id.* at 22–23.

<sup>32</sup> *Id.* at 24.

<sup>33</sup> *Id.* at 25.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 46.

<sup>36</sup> *Id.* at 8.

choices. Announcing the policy shift, the attorney general said this was a step toward a “humane administration of immigration laws.” Writing for a majority of the Supreme Court, Justice Tom Clark, a man who had coordinated the forced internment of Japanese Americans during World War II, commented that the government’s no-detention policy “reflects the human qualities of an enlightened civilization.” And for the next quarter century, few migrants were confined at any point. When confinement did occur, it was short-lived; most people were released while immigration courts heard their cases. In fact if not in law, the United States came remarkably close to abolishing immigration imprisonment.<sup>37</sup>

This abolitionist approach came to an end, though, with the Mariel Boatlift in the early 1980s and anti-drug hysteria, which spurred drastic shifts in immigration law. In little time, the government’s “detention as the exception” approach reverted to detention as the rule.<sup>38</sup>

## II

### THE NEW COLOSSUS<sup>39</sup>

As stated above, the United States boasts the largest prison population in the world.<sup>40</sup> More than 2.2 million people are confined across the country in state and federal prisons, jails, juvenile detention centers, and immigration detention centers.<sup>41</sup> Of those millions behind bars, a substantial portion of them are locked up due to their migration-related activity: more people are charged with committing federal immigration crimes than any other federal crime,<sup>42</sup> and the nation’s civil immigration detention system—a sweeping, multi-agency affair—is the fastest-growing component of the American

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<sup>37</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 46–47.

<sup>38</sup> *Id.* at 55–74; *see also* Jefferis, *Constitutionally Unaccountable*, *supra* note 18, at 150–53 (detailing a history of the federal government’s use of “civil detention” within the “immigration sphere”).

<sup>39</sup> Lazarus, *supra* note 23.

<sup>40</sup> *See* Dech, *supra* note 14.

<sup>41</sup> *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLY INITIATIVE (March 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/4X9Y-4AJK>].

<sup>42</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 8, 82–83 (“[T]he federal criminal justice system also busies itself imprisoning migrants . . . In the last years of the Obama administration, just shy of 100,000 people charged with a federal immigration crime were booked into the custody of the U.S. Marshals Service . . . Just about everyone charged with a federal immigration crime is eventually convicted, and when that happens, migrants are usually sentenced to prison.”).

system of mass incarceration.<sup>43</sup> Multiple components of executive-branch agencies are responsible for executing federal civil immigration laws and are statutorily authorized—and in some cases statutorily required—to confine people whose lives in some way touch those laws.<sup>44</sup> Moreover, many states wield their criminal law to target people on the basis of their immigration status, including but not limited to Arizona with its infamous “show me your papers” provision.<sup>45</sup>

Conditions in prisons, jails, and immigration detention facilities across the country are poor, at best. Looking just to ICE confinement, in recent years ICE detainees have succumbed to “limb amputations, serious illness and infections,” and death.<sup>46</sup> Indeed, ICE has acknowledged publicly at least 185 deaths in its immigration prisons between October 2003 and July 2018.<sup>47</sup> At least twenty-four people have died in the agency’s custody since 2017.<sup>48</sup> The agency’s mismanagement of the pandemic caused by the novel coronavirus in many facilities has prompted intervention by federal courts,<sup>49</sup> with one court finding “ICE’s conduct and attitude toward its detainees at [one particular facility] since the pandemic began have shown beyond doubt that ICE cannot currently be trusted to prevent constitutional violations

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<sup>43</sup> See Dech, *supra* note 14, at 221; GARCÍA HERNÁNDEZ, *supra* note 1, at 82 (“Created in 2003 out of the Immigration and Naturalization Service, ICE has a \$7.5 billion budget and twenty thousand law enforcement officers at its disposal. Most of that money—\$4.2 billion in 2019—goes to its Enforcement and Removal Operations unit. When most people think of ICE, they’re thinking of ERO. These are the SWAT team-style forces that bang on doors, demanding entry. In any given year, ICE detains somewhere in the vicinity of 400,000 people waiting to learn whether they will be allowed to remain in the United States.

<sup>44</sup> *Id.* at 221–23.

<sup>45</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 83–84 (“S.B. 1070 certainly stands as Arizona’s most publicized effort to penalize immigration-law violations, but it was not the first time that the state did so. Since the early 2000s, the state has repeatedly attempted to incarcerate migrants . . . S.B. 1070 spurred a series of copycat laws in Alabama, Georgia, and elsewhere.”).

<sup>46</sup> Jefferis, *Constitutionally Unaccountable*, *supra* note 18, at 173.

<sup>47</sup> EMILY RYO & IAN PEACOCK, *THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES* at 5 (2018).

<sup>48</sup> Gaby del Valle, *The Trump Administration has let 24 People Die in ICE Custody*, VICE NEWS (June 10, 2019), [https://www.vice.com/en\\_us/article/3k3jd3/the-trump-administration-has-let-24-people-die-in-ice-custody](https://www.vice.com/en_us/article/3k3jd3/the-trump-administration-has-let-24-people-die-in-ice-custody) [<https://perma.cc/9PRP-GRAU>].

<sup>49</sup> See, e.g., *Ferreyra v. Decker*, No. 20-cv-3170 (S.D.N.Y., May 22, 2020) (granting the release of petitioners who were being lawfully detained by Immigration and Customs Enforcement in county jails where COVID-19 cases had been identified); *Fraihat v. ICE*, No. 5:19-cv-1546 (C.D. Cal., Apr. 20, 2020); *Coronel v. Decker*, No. 20-cv-2472 (S.D.N.Y., Mar. 27, 2020).

at these particular facilities without judicial intervention.”<sup>50</sup> And in September 2020, accounts surfaced of unwanted hysterectomies being performed on women confined in one privately run ICE prison.<sup>51</sup>

The American Immigration Lawyers Association and the American Immigration Council have lodged multiple complaints regarding ICE’s failure to provide adequate medical and mental health care in its contract facilities.<sup>52</sup> The groups’ 2018 complaint submitted to the Department of Homeland Security Inspector General recounts a troubling pattern of systemic failures to provide safe and secure conditions at the Aurora Detention Center in Aurora, Colorado, and immigration prisons across the country, particularly with respect to medical and mental health care:

[The U.S. Constitution, federal law, and detention standards] have failed to translate into consistently effective medical and mental health care. Instead, records from other detention facilities similar to Aurora reveal a general and longstanding pattern of frequent and severe deficiencies in care.

In a June 2014 report, the American Civil Liberties Union (ACLU) studied conditions at certain detention centers reserved for noncitizens who have been convicted of a crime. It found ‘numerous reports of medical understaffing and delayed care’ and was ‘gravely concerned about the ability of some [of these] prisons to provide timely care in urgent situations.’ A 2017 study of a wide range of detention facilities found health care deficiencies, regardless of whether medical care was supplied by private contractors (as at Aurora) or by [ICE Health Service Corps]. The same study—basing its conclusions on information in death reviews produced by ICE’s Office of Detention Oversight (“ODO”)—found that one-third of the detainee deaths between 2012 and 2015 were due at least in part to substandard medical care.<sup>53</sup>

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<sup>50</sup> *Zepeda Rivas v. Jennings*, No. 20-cv-2731 (N.D. Cal., June 9, 2020).

<sup>51</sup> *E.g.*, Caitlin Dickerson, *Inquiry Ordered Into Claims Immigrants Had Unwanted Gynecology Procedures*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/us/ICE-hysterectomies-whistleblower-georgia.html> [<https://perma.cc/P4AL-WKSJ>].

<sup>52</sup> Letter from Am. Immigr. Council & Am. Immigr. Law. Ass’n. to John Kelly, Inspector Gen., Off. of the Inspector Gen. et al. (June 4, 2018), *available at* [https://www.americanimmigrationcouncil.org/sites/default/files/general\\_litigation/complaint\\_demands\\_investigation\\_into\\_inadequate\\_medical\\_and\\_mental\\_health\\_care\\_condition\\_in\\_immigration\\_detention\\_center.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_demands_investigation_into_inadequate_medical_and_mental_health_care_condition_in_immigration_detention_center.pdf) [<https://perma.cc/REF7-UJAZ>].

<sup>53</sup> *Id.* at 7–8.

When the government failed to respond to the letter, the groups supplemented the complaint a year later, noting “the situation for individuals detained in the Aurora facility [are] measurably worse.”<sup>54</sup> The supplemental letter highlighted a 2018 OIG report “documenting ‘egregious’ conditions at ICE facilities, including the Aurora facility, in 2018” and discussed “[r]ecently leaked DHS documents containing an internal memo bearing the subject line, ‘Urgent Matter,’ [and indicating] that the deaths of multiple individuals detained in ICE custody were preventable.”<sup>55</sup> The organizations urged the government “to take immediate action and implement meaningful oversight mechanisms to improve medical and mental healthcare at the Aurora facility,” noting that “[u]ntil then, individuals will continue to needlessly suffer—and perish—in immigration detention facilities such as Aurora.”<sup>56</sup>

Poor medical and mental health care are not the only areas for concern in immigration prisons. Accounts of poor, unsafe, and/or degrading conditions reach every aspect of life in confinement, including sleep deprivation from lights that are kept on twenty-four hours per day, being forced to wear dirty clothing that results in infections, being fed food that is rotten,<sup>57</sup> and being subjected to “invasive strip searches” and the “overuse of solitary confinement.”<sup>58</sup>

While life in confinement is harsh and conditions are poor, the mechanisms to hold many carceral agencies accountable for improving conditions and adhering to higher standards are weak, at best. A full discussion of the constitutional and statutory protections, and their attendant enforcement mechanisms, that are and are not available to people incarcerated for migration-related reasons is beyond the scope of this piece. However, it is worth noting that ICE—one of the

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<sup>54</sup> Supplement to Letter from Am. Immigr. Council & Am. Immigr. Law. Assoc. to Jennifer Costello, Inspector Gen., Off. of the Inspector Gen. et al. at 1 (June 4, 2019), available at <https://www.aila.org/infonet/supplement-complaint-demands-government-action> [<https://perma.cc/6YLF-Z9QX>].

<sup>55</sup> *Id.* at 2.

<sup>56</sup> *Id.* at 10.

<sup>57</sup> Altaf Saadi, *Immigrants are Suffering in Detention. They Need Adequate Healthcare Now*, L.A. TIMES (Feb. 25, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-saadi-immigration-health-care-detention-facilities-2019025-story.html> [<https://perma.cc/K73W-KXFP>] (“Many of the individuals I met with said they experienced sleep deprivation from lights being kept on 24 hours a day. Some said they had to wear dirty prison uniforms that caused urinary and vaginal infections. Others complained of being served rotten or inadequate food, a violation of standards that has been repeatedly documented in inspection reports.”).

<sup>58</sup> Jefferis, *Constitutionally Unaccountable*, *supra* note 18, at 175.

agencies responsible for a significant portion of the confinement of migrants—has promulgated detention standards that purport to impose a check on the agency's prisons but contain no means of enforcement.<sup>59</sup> Litigation may be infeasible or unavailable, particularly against federal agencies like ICE, the U.S. Marshals Service, and the Federal Bureau of Prisons,<sup>60</sup> and external federal oversight efforts have been difficult to conduct and slow to progress.<sup>61</sup> This multi-jurisdictional, often unaccountable and harmful system is the New Colossus<sup>62</sup> of migration-related confinement in the United States.

### III

#### YEARNING TO BREATHE FREE<sup>63</sup>

The construction of the U.S. system of migration-related imprisonment as it exists today is the product of deliberate policy choices by the federal and state governments and a public appetite for harsh border control and punishment, particularly of people of color. The criminal code does not mandate the prosecution of federal immigration crimes, and states are not required to enact and/or enforce legislation that targets people for their movement across borders. Federal civil immigration law does not mandate *detention*. Pursuant to its mandatory authority, the government shall “take into custody”<sup>64</sup> any noncitizen who the government has “reason to believe is removable for almost every crime-based reason, including crimes involving moral turpitude, controlled substance offenses, and aggravated felonies,”<sup>65</sup> as well as “certain classes of ‘arriving aliens,’ including those seeking asylum who have not yet passed their credible fear

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<sup>59</sup> *Id.* at 148-49.

<sup>60</sup> See generally *id.*; Jefferis, *Delegating Care, Evading Review*, *supra* note 21; Jonathon Booth, *Ending Forced Labor in ICE Detention Center: A New Approach*, 34 GEO. IMMIGR. L.J. 573 (2020).

<sup>61</sup> See, e.g., U.S. House of Representatives, Committee on Homeland Sec., *ICE Detention Facilities: Failing to Meet Basic Standards of Care* (Sept. 21, 2020), <https://homeland.house.gov/imo/media/doc/Homeland%20ICE%20facility%20staff%20report.pdf> [<https://perma.cc/3V8X-ABEH>] (finding DHS fails to enforce internal oversight and frustrates cooperation with congressional oversight bodies; “Without full cooperation from ICE and its contractors, Congress cannot effectively evaluate conditions at ICE detention facilities.”).

<sup>62</sup> Lazarus, *supra* note 23.

<sup>63</sup> *Id.*

<sup>64</sup> Immigration and Nationality Act (INA) § 236(c)(1), 8 U.S.C. § 1226(c)(1) (2012).

<sup>65</sup> *Id.*

determination.”<sup>66</sup> And pursuant to its discretionary authority, the government *may* arrest anyone it believes is removable from the United States and *may* detain the person pending a decision on his or her removability.<sup>67</sup> Thus, the law already allows for a dramatic departure from the current system of immigration detention, considering instead alternatives to detention<sup>68</sup>—many of which are underutilized<sup>69</sup> despite evidence that they are just as effective as detention<sup>70</sup> and cheaper.<sup>71</sup>

Rather, Professor García Hernández explains, broken-windows policing “created the foundation for the modern legal architecture of immigration imprisonment.”<sup>72</sup> Combined with the institutionalization of a narrative regarding the criminality of migrants,<sup>73</sup> in just about a half a century, the United States has gone from a country that had all but abolished immigration prisons to one that boasts the largest system of confinement in the world. With each step along the way, the “bad immigrant” narrative persists.<sup>74</sup> This narrative functions as a scaffold to the elevated notion of American sovereignty and the need for the law to protect the homeland at all costs, all but ensuring the shunning of any counterargument:

Today, almost two decades into the twenty-first century, imprisonment retains its central position in

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<sup>66</sup> *Id.*

<sup>67</sup> 8 U.S.C. § 1226(a)(1).

<sup>68</sup> Fatma E. Marouf, *supra* note 27, at 2155–70.

<sup>69</sup> *Id.* at 2155.

<sup>70</sup> See Am. Immigr. Law. Ass’n et al., *The Real Alternatives to Detention*, <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf> [<https://perma.cc/W9FA-3WG6>] (“ICE’s current [Alternatives to Detention] program and several community supported pilot programs have shown high rates of compliance with immigration check-ins, hearings and – if ordered – removal.”); Marouf, *supra* note 27, at 2157 (“A pilot study conducted by the Vera Institute of Justice in 2000 found that seventy-eight percent of asylum seekers who are released without any supervision comply with court proceedings.”).

<sup>71</sup> See Alex Nowrasteh, *Alternatives to Detention are Cheaper than Universal Detention*, CATO INSTITUTE (June 20, 2018), <https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention> [<https://perma.cc/VRJ8-DCTV>] (describing the use of various forms of electronic monitors, caseworkers, and monetary incentives as cheaper alternatives to detention).

<sup>72</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 67.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 70 (discussing the “rhetoric of migrant criminality that had come to dominate political conversations in the 1980s and 1990s” and its continuation in the aftermath of September 11, 2001).

the nation's immigration law-enforcement apparatus, but it can no longer be said to operate independently of other areas of law. It is instead firmly entrenched in the broader securitization regime, in which the government uses brute force as evidence that it remains in control and that the nation remains sovereign. In turn, the twenty-first-century pursuit of security builds off the decades-long fetishization of imprisonment. The prison is a social service, a public good—even a humanitarian gesture. The United States could, in the traditional criminal-law context, kill people, or, in the immigration context, let migrants die in the desert . . . That the United States chooses to imprison instead is a sign of graciousness: bare-knuckled, poisonous graciousness.<sup>75</sup>

Considerable work has been done to propose viable alternatives to incarceration, including releasing a person on her own recognizance (used often in the pre-trial, criminal law context),<sup>76</sup> granting a person parole<sup>77</sup> or bond,<sup>78</sup> imposing conditions of supervised release (telephone or in-person check-ins, for example),<sup>79</sup> mandating the use of electronic monitoring,<sup>80</sup> and employing community-based alternatives.<sup>81</sup> Certainly, employing an alternative to detention—avoiding the

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<sup>75</sup> *Id.* at 73.

<sup>76</sup> Marouf, *supra* note 27, at 2155–56 (“Those who are not a threat to public safety and present no flight risk may be released on their own recognizance, which does not require posting a bond or complying with supervision requirements. This option avoids restricting liberty and is the least expensive option.”).

<sup>77</sup> *Id.* at 2157.

<sup>78</sup> *Id.* at 2158–60 (“Bond is a highly effective means of ensuring appearance at court hearings, and it is available only to individuals who have been found not to pose a danger.”).

<sup>79</sup> *Id.* at 2160–61 (“An alternative that does not discriminate against indigent individuals is supervised release, which involves being released under an order that requires compliance with certain conditions. These conditions often include being required to check-in regularly with ICE, obtaining permission from ICE before leaving the city or state, keeping ICE informed of any address change, having a curfew, receiving random home visits by ICE, and obtaining travel documents to facilitate removal.”).

<sup>80</sup> *Id.* at 2161–64 (“The most restrictive and invasive alternative to being detained is the Intensive Supervision Appearance Program (ISAP), which involves electronic monitoring.”).

<sup>81</sup> *Id.* at 2164–70 (“Early explorations of community-based alternatives in the 1980s and 1990s involved partnerships between immigration authorities and faith-based organizations. These programs proved very successful . . . In other countries, community-based case management programs have proven to be effective alternatives to immigration detention.”).

use of incarceration—avoids many of the harms of confinement discussed above. These methods allow families and communities to stay intact.

However, with the exception of releasing a person on her own recognizance, each alternative still carries with it traces of confinement and its attendant harms. The use of electronic monitoring can restrict a person's freedom of movement in nontrivial ways, for example. Professor Fatima Marouf explains:

Although electronic monitoring is a cost-effective alternative, it is also more restrictive, more invasive of privacy, and a greater affront to dignity than any of the other alternatives discussed above. The GPS device must be charged for several hours a day, which means that participants in the program have to plug themselves into the wall, constraining their movement for hours at a time. This can be a degrading and dehumanizing experience. For participants who are pregnant or have young children, having to stay in one place for hours is especially difficult. Another drawback of the GPS device is that it is heavy and can become painful. Wearing an ankle bracelet is also stigmatizing, since society often assumes that individuals wearing ankle bracelets are criminals, which can lead to discrimination and create problems at work or in school.<sup>82</sup>

Parole, bond, and supervised release conditions can be particularly harmful to people with limited to no financial resources.<sup>83</sup> Immigration bonds do not take into consideration a person's ability to pay.<sup>84</sup> There is a statutorily mandated minimum of \$1,500 for all civilly imposed immigration bonds, and the median bond amount in FY2016 was \$8,000.<sup>85</sup> Professor Marouf notes, "The people most vulnerable to harm

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<sup>82</sup> *Id.* at 2163.

<sup>83</sup> See e.g., Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016) <https://www.prisonpolicy.org/reports/incomejails.html> [<https://perma.cc/492A-RW6J>] (noting "how money bail perpetuates an endless cycle of poverty and jail time"); see also HUMAN RIGHTS WATCH, "SET UP TO FAIL" THE IMPACT OF OFFENDER-FUNDED PRIVATE PROBATION ON THE POOR, (Feb. 2018), available [at https://www.hrw.org/sites/default/files/report\\_pdf/usprobation0218\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/usprobation0218_web.pdf) [<https://perma.cc/MQX2-87ZT>] (explaining the negative impact of "private probation" on "probationers"); see also Joseph Shapiro, *Measures Aimed at Keeping People out of Jail Punish the Poor*, NPR (May 24, 2014), <https://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor> [<https://perma.cc/A3Q2-3HDDH>] (noting how alternatives to incarceration can create debt).

<sup>84</sup> Marouf, *supra* note 27, at 2158.

<sup>85</sup> *Id.* at 2158–59.

in immigration detention are often the ones least likely to be able to post a bond. And when people are able to post a bond, the financial consequences for the family can be disastrous, resulting in the loss of housing or other necessities.”<sup>86</sup> And community-based alternatives have not been shown to be especially effective in the United States, despite examples of effective programs in other countries.<sup>87</sup>

Why not turn simply to alternatives to detention when the federal government has demonstrated that migration-related detention—or any form of government custody—is unnecessary? *Migrating to Prison* answers this question: because, one, shifting from one method of government control and coercion will not get us any closer to a world without immigration imprisonment than we are now.<sup>88</sup> Two, and more importantly, migration-related detention will continue at its current pace not because the law demands it but because the public demands it.<sup>89</sup> The public has come to accept the image of the law-breaking criminal “alien,” a dangerous figure we—native-born (usually white) Americans—must fear. We accept the false premise that migrants commit more crimes than those of us whose fortune just so happened to lead to our births within America’s borders. We accept as inevitable the structural features of a system that punishes people of color at greater and harsher rates than white people. In one of *Migrating to Prison*’s starkest wake-up calls, Professor García Hernández writes, “If we’re willing to lock up people, we’ll find a reason. Most of the time the targets will be people of color. We can call this a coincidence, but we would be lying to ourselves.”<sup>90</sup>

We must stop lying to ourselves. A world without immigration imprisonment must be built on a world in which migrants are viewed just as non-migrants are: complex, multifaceted—ordinary—humans who are driven, at least in part, by the human desire to improve their lot in life and who sometimes mess up.<sup>91</sup> In a particularly poignant passage, Professor García Hernández humanizes people who migrate in a way that is elevated above the “immigrant as hero” success stories (which too often fail to capture the majority of people who wind up in the immigration-law enforcement system and

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<sup>86</sup> *Id.* at 2159.

<sup>87</sup> *Id.* at 2168–70.

<sup>88</sup> GARCÍA HERNÁNDEZ, *supra* note 1, at 149.

<sup>89</sup> *Id.* at 160–62.

<sup>90</sup> *Id.* at 74.

<sup>91</sup> *Id.* at 159–61.

which entrench the companion “immigrant as criminal” narrative):

Like all of us, migrants mess up. On average, they commit less crime than do those of us born in the United States . . . But less crime doesn’t mean no crime. Some migrants steal, and others hurt people. Denying that reality is to hold migrants to an impossibly high bar. Politically, it’s also a losing strategy. Pointing to the exceptionally talented and saintly migrants as a model is a recipe for lumping mere mortals—that’s most of us—into the category of undesirable arrivals. Let’s stop sanctifying migrants and embrace the profound ordinariness that makes migrants, like citizens, human.<sup>92</sup>

When we fail to accept this premise, we fail to see the humanness of the people who were not born within the parameters of certain national borders. And when we fail to see their humanness, we fail to see the inhumanity in immigration imprisonment. “Immigration prisons have never been more widespread. If that is going to change, it won’t be because the law demands it. It will be because people demand it.”<sup>93</sup>

#### CONCLUSION

*Migrating to Prison* is a compact but comprehensive and compelling account of chapters in American history that we cannot ignore. Despite incarcerating the greatest numbers of people in the world, the United States has shown that incarcerating people for migration-related conduct is unnecessary. In just the middle of the last century, the country had all but abolished immigration imprisonment. Professor García Hernández illustrates this past for us and proposes a bold reimagining of the current state of immigration imprisonment. Indeed, a James Baldwin quote appears alone on one of the earliest pages of *Migrating to Prison*: “I know that what I am asking is impossible. But in our time, as in every time, the impossible is the least that one can demand . . .”<sup>94</sup> The book reminds us that demanding a world without immigration detention is *not* impossible; it has been done. And it can be done again.

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<sup>92</sup> *Id.* at 160.

<sup>93</sup> *Id.* at 163.

<sup>94</sup> *Id.* at i.