

THE MIGRATION OF ABOLITION THEORY*

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This Article considers whether and how theories of abolition developed by criminal law scholars are transferrable to the realm of immigration enforcement. A key question is how abolitionist principles might be employed in support of critiques of the United States' immigration regulatory regime in the same way that these principles have been deployed in denouncing racialized policing and an injurious, industrialized prison system. This Article makes two contributions: First, it identifies and illuminates a methodology adopted by critical and decarceral criminal law scholars: (i) denouncing the harms of a structural system, (ii) identifying the normative justification(s) for this system, and (iii) proposing alternatives that might adequately, or in a superior way, satisfy those principles, ideally in a more humane, equitable, and cost-efficient manner. Second, this Article demonstrates the exigent necessity of mapping this methodology onto the logic of immigration enforcement. To do so, this Article highlights the challenges that confront abolitionists in the complementary arenas of immigration scholarship and activism. Importantly, scholars have omitted the key step of unearthing possible normative justifications for immigration enforcement. Many have begun proposing alternative systems without first considering whether immigration restrictions have any normative foundation upon which to stand. This Article elucidates some possible operating principle(s) of the immigration regulatory system and critiques each in turn. Finally, this Article concludes with a clarion call urging clarification by scholars and activists about which aspect of immigration enforcement merits abolition—detention, deportation, or exclusion—if not all three.

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INTRODUCTION

Critiques directed at immigration enforcement in the United States have tilled fertile ground for discussions of abolition.¹ This Article responds to the call issued by Angélica Cházaro, “invit[ing] scholarship and advocacy that move in a new direction, one which reorganizes responses to deportation toward the goal of its downfall.”² However, there remains some discord among scholars

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

2. Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1051 (2021) [hereinafter Cházaro, *The End of Deportation*].

about what should be abolished,³ what strategies would be most effective in pursuing abolition, and whether those strategies adhere to the ideology and form of abolition theory. This Article identifies a missing step in the methodological reasoning as being a core reason for the diffuse perspectives on this issue. Scholars have been quick to offer solutions without first agreeing about the animating purpose(s) or normative justification(s) that have been used to support a policy of immigration enforcement in the first place. This Article offers a proposal for how to reconcile and refocus the conversation about abolition in the immigration legal scholarship so that scholars and activists may more effectively communicate with each other. To do so, this Article draws upon the three-part process observable in the abolition scholarship of criminal law scholars, who first identified the harm of the current system. These scholars then proceeded to exhume the underlying rationale for why the carceral system exists, identifying a normative purpose for jails and prisons—a societal desire for “safety.” Last, and most crucial to the key tenets of abolition, scholars and activists have proposed an assortment of alternatives that satisfy this societal goal of “safety” in a more humane, equally or more effective, and less expensive way. This Article seeks to apply that same methodology to the work of abolition in the context of immigration, and to identify the challenges of mapping that same framework of abolition theory onto this new context.

Part I explains the evolution of calls for abolition of carcerality as a hallmark of the criminal legal system.⁴ It identifies the path that scholars and activists have taken, from critiquing the harms of the carceral complex, to providing a pathway away from reliance on prisons to solve concerns about

3. Compare Kevin R. Johnson, *Open Borders*, 51 UCLA L. REV. 193, 263–65 (2003) [hereinafter Johnson, *Open Borders*] (calling for the abolition of borders completely), and KEVIN R. JOHNSON, *OPENING THE FLOODGATES* 169–71 (2007) [hereinafter JOHNSON, *OPENING THE FLOODGATES*] (calling for “liberal admissions policy” with “the legal presumption that a noncitizen can enter the country unless it can be demonstrated that he or she would pose a danger to the national security and public safety”), with César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 256 (2017) [hereinafter Hernández, *Abolishing Prisons*] (arguing that “immigration imprisonment is inherently indefensible and should be abolished”), and Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2143, 2150 (2017) (advocating for “community-based alternatives involving case management” instead of immigration detention). See generally Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199 (2021) [hereinafter Boaz, *Practical Abolition*] (limiting denunciations to more narrow auspices of immigration law, seeking, for example, the abolition of immigration detention).

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

safety.⁵ This analysis continues to a secondary step, by which scholars have worked to unearth the rationale for such a system.⁶ If one were to imagine a world without a criminal legal system largely reliant on prisons, what might one identify as the normative purpose for implementing such a system? Scholars have roundly agreed that the carceral system is intended to promote safety.⁷ Consequently, the analysis then shifts to whether a carceral system satisfies that goal of safety. In finding that prison does not achieve this goal,⁸ carceral abolitionist scholars have worked to point out alternatives that would satisfy this goal of safety in ways that are equally or more effective, more humane, and less financially costly.⁹

Part II applies this same methodology to the realm of immigration enforcement. This Article asks that abolitionists question what the underlying rationale(s) for an immigration system in the United States might be, and whether those animating principles are justified based on the current system. While scholars and activists have begun to offer solutions that are couched in abolitionist terms, it is difficult to determine how those offerings can supplant the current enforcement system if the metric for which they are trying to solve is unclear. For reference, one can look to the arguments in support of prison

5. See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1613–14 nn.7–8 (2019) [hereinafter McLeod, *Envisioning Abolition Democracy*] (establishing that the term “abolition democracy” has been used by W.E.B. Du Bois and Angela Davis (first quoting W.E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 182–86 (1935); and then quoting ANGELA Y. DAVIS, *ABOLITION DEMOCRACY* 95–96 (2005))); see also ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 105–15 (2003) [hereinafter DAVIS, *ARE PRISONS OBSOLETE?*] (discussing an array of abolitionist alternatives to existing systems of policing and incarceration). As Professor McLeod states, activists are seeking to reimagine democracy “in genuinely liberatory terms.” McLeod, *Envisioning Abolition Democracy*, *supra*, at 1615. In this case, “[j]ustice in abolitionist terms involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably.” *Id.*

6. See generally VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* (2019) (discussing the ontological reasons that a state would choose to utilize criminal law).

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

8. See VICTORIA LAW, “PRISONS MAKE US SAFER”: AND 20 OTHER MYTHS ABOUT MASS INCARCERATION *passim* (2021).

9. See generally FAMS, *AGAINST MANDATORY MINIMUMS, ALTERNATIVES TO INCARCERATION IN A NUTSHELL* (2011) (identifying and describing some of the most frequently used alternatives to incarceration, including drug courts, probation/community corrections, halfway houses, home confinement/electronic home monitoring, fines and restitution, community service, sex offender treatment and civil commitment, mental health courts, restorative justice, boot camp, and public shaming).

abolition, which center around measurements of incarceration rates, rates of criminal activity, and other measures of community well-being. Abolitionists support efforts to reduce incarceration rates while maintaining low rates of criminality and improving measures of community well-being. There is not a similar metric for immigration enforcement—the question of its being has simply been presumed, without regard to its purpose.

Part III highlights the complexity that accompanies the importation of abolition theory from the criminal legal sphere into the immigration sphere. Prison abolitionists agree with nonabolitionists about both the normative justification for the carceral system (public safety) and that there is a problem that needs to be solved. Their disagreement is about the solution. However, immigration enforcement abolitionists do not necessarily concede that there is a problem to solve. This additional layer complicates the analysis of what normative justifications might be supported by abolitionists or reformists. If there is not broad agreement among scholars (abolitionists or not) about whether immigration (or even certain subsets of migration) is a problem to solve, then the foundation for initiating these conversations remains unstable.

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

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

I. ABOLITION THEORY IN CRIMINAL LEGAL SCHOLARSHIP

While the concept of abolition is not new,¹⁰ it has established a stronghold in both scholarly and advocacy movements,¹¹ seeking to diminish and eventually discard the carceral system.¹² As part of the movement in support of prison abolition, criminal law scholars and advocates have focused first on the harm of the current penal system as it is structured in the United States.¹³ Next, abolitionists have rooted out the normative purpose of this system, taking policymakers at their word—that criminal laws are designed to promote safety in communities.¹⁴ By identifying safety as a normative justification for the

10. See Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1576 (2019) (“The long historical praxis of abolition is grounded in a Black radical genealogy of revolt and transformative insurgency against racial chattel enslavement and the transatlantic trafficking of captive Africans.”); see also Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019) (finding abolition as the only solution which can dismantle a system of “criminal procedure and punishment in the United States [that] still function[s] to maintain forms of racial subordination that originated in the institution of slavery”). See generally Brendan McQuade, *Histories of Abolition, Critiques of Security*, 45 SOC. JUST. 1 (2018) (providing a comprehensive and global overview of various abolition movements).

11. Professor Amna Akbar highlights the need to incorporate and refer to policymaking guidance from affected communities in crafting an abolitionist horizon. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 405, 408 nn.7–8 (2018) [hereinafter Akbar, *Radical Imagination*] (noting that “[b]y studying not only the critiques offered by radical social movements, but also their visions for transformative change, the edges of law scholarship can be expanded,” while referring to the utility of looking to the Movement for Black Lives’ policy platform (citing *Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/> [<https://perma.cc/STM3-BM9F>] (calling for a comprehensive, intersectional revision of many aspects of domestic policy in the United States—including the abolition of the death penalty, the abolition of all jails, prisons, and immigration detention, and the demilitarization of law enforcement))).

12. These efforts are not limited to scholarship. The #defundthepolice slogan emphasizes the desire to reallocate state and federal funding from policing toward other community efforts that support public safety. See *Alternatives to Police Services: Let’s Reimagine a New System.*, #DEFUNDTHEPOLICE, <https://defundthepolice.org/alternatives-to-police-services/> [<https://perma.cc/RN99-XVUG>]. Others have called for the abolition of the criminal courts because they “legitimate the activities of police and prisons, even legalizing violent and otherwise illegal activities through the creation of legal fictions” while also “contribut[ing] to unique forms of state violence, social control, and exploitation.” Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 5 (2022).

13. The literature on this topic is vast, but for some seminal works, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7–8 (2012) (describing the massive growth in the United States’ prison population over the past four decades); DAVIS, *ARE PRISONS OBSOLETE?*, *supra* note 5, at 105–15; and PETER K. ENNS, *INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD* 5–15 (2016) (articulating the extreme costs of the criminal justice system and the social harms that result from its widespread use in the United States).

14. Not all scholars subscribe exclusively to this notion. Indeed, others continue to point to the connection of policing’s history with that of monitoring and limiting the movement of both enslaved individuals and Black people in general. As other groups became more prominent in the United States, if they were categorized as nonwhite, they too were monitored. Therefore, policing can be seen as a form of social control exerted on specific subgroups within a population, while remaining under the auspices of official state power. See generally KEVIN KENNY, *THE PROBLEM OF IMMIGRATION IN A*

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

Prison abolitionists highlight the disconnect between policy goal and outcome and propose alternatives. If safety is not satisfied by a harmful carceral system, the call for its abolition takes on a more coherent framing. But, as many abolitionists have rightly stated, abolition is focused not only on the demise of a harmful system, but also on what is yet to come—what might supplant a system of justice rooted in carcerality and yet satisfy the goals of safety.¹⁵ This focus on creation over destruction is integral to abolitionist theory and praxis. Identifying new forms for promoting safety can help alleviate the fear and anxiety that may accompany discussions about the absence of prisons. In the prison abolition context, advocates and scholars have focused on solutions that are: (1) less harmful, (2) equally or more effective, and (3) more cost-efficient. Examples include greening spaces in cities, supporting community-based violence interruption organizations, and supporting restorative justice initiatives.¹⁶ This part will trace the key tenets of abolition theory in the context of the carceral system—identifying the harms, illustrating the normative principles underlying the system, and highlighting the proposed abolitionist solutions that could supplant the carceral system.

Indeed, most scholars conclude that there is a problem that must be addressed—that there is at least some antisocial or violent behavior that, if left unmanaged, will have negative societal effects. Where carceral abolitionists differ from other criminal law scholars is that they disagree about the solution to this problem. Their solution moves outside of the sphere of tweaks and

SLAVEHOLDING REPUBLIC: POLICING MOBILITY IN THE NINETEENTH-CENTURY UNITED STATES (2023) (analyzing how regulation of enslaved and free Black people's movement produced a national immigration policy between the period of the American Revolution and the end of Reconstruction).

15. See, e.g., Allegra McLeod, *Abolition and Environmental Justice*, 69 UCLA L. REV. 1536, 1536 (2023) (calling for environmental justice to be incorporated into the abolitionist movement as part of the conception of “meaningful public safety”); Jamelia N. Morgan, *An Abolitionist Critique of Quality-of-Life Policing*, 69 UCLA L. REV. 1624, 1627 (2023) (criticizing the trend of policing “disability in public,” which “refers to the ways in which coerced compliance with norms for appearing, walking, talking, thinking, or otherwise existing, render disabled people more vulnerable to citation, arrests, or imprisonment even where such conduct is linked to, or caused by, disabilities[;]” the result of such policing is that “[d]isabled people have been suspected of criminal activity, arrested, jailed, and even killed for a variety of harmless and innocent behaviors linked to disability”); Sandy Hudson, *Building a World Without Police*, 69 UCLA L. REV. 1646, 1669 (2023) (noting that “[t]he most heavily policed communities are not the safest, and the safest communities are not policed[.]” and calling for other tools, such as urban planning and civic investment in communities, as alternatives to supplant the tool of policing).

16. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1224–29 (2015) [hereinafter McLeod, *Prison Abolition and Grounded Justice*] (surveying “an array of preventative projects,” including economic reprioritization, decriminalization of certain offenses, the creation of safe harbors, alternative livelihood programs, universal design of public spaces, and urban redevelopment).

reforms and invites a wholly new perspective using the lens of decarceration. Here, the problem to everyone is clear—public safety requires some sort of intervention to prevent harm to and support communities so that they feel secure. This approach does not map onto critiques of immigration enforcement as neatly as abolitionist activists and scholars would prefer.

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

The harms of the carceral system in the United States are well documented. Michelle Alexander's book, *The New Jim Crow*, traces the expansion of the United States' prison population from 300,000 to over two million over the course of thirty years.¹⁷ This publication was formative for a new generation in the way that they thought and talked about the role of criminal law as a function of society, and even led to bans of the book in prison.¹⁸ The idea of prison abolition was nearly achieved prior to this boom in the prison population.¹⁹ But the harms of prison that were present nearly half a century ago remain present today, including separation of family members, violence, death, abhorrent conditions, sexual assault, and severe psychological pain.²⁰

Scholars have noted the disparities in the populations upon whom these harms are inflicted and that they skew disproportionately toward Black men, people of color, Indigenous populations, the poor, and other historically marginalized groups.²¹ Moreover, critics have identified unexpected

17. ALEXANDER, *supra* note 13, at 1–19.

18. Jonah E. Bromwich, *North Carolina Prisons Drop Ban on 'New Jim Crow'*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/us/new-jim-crow-north-carolina.html> [<https://perma.cc/YQ7P-X98U> (staff-uploaded, dark archive)].

19. See Joshua Dubler & Vincent Lloyd, *Think Prison Abolition in America Is Impossible? It Once Felt Inevitable*, GUARDIAN (May 19, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/may/19/prison-abolition-america-impossible-inevitable> [<https://perma.cc/Y2F2-RRDF>] (“In April 1972, a moratorium [on the construction of new prisons] was endorsed by the board of the National Council on Crime and Delinquency, a centrist criminal justice thinktank, as well as by the National Advisory Commission on Criminal Justice a year later. The latter commission, operating under the Department of Justice, added a call for the closure of all juvenile prisons, and it explicated the emerging consensus about American prisons: ‘There is overwhelming evidence that these institutions create crime rather than prevent it.’”).

20. See McLeod, *Prison Abolition and Grounded Justice*, *supra* note 16, at 1159–60, 1159 n.12 (“[D]espite persistent and increasing recognition of the problems that attend incarceration and punitive policing in the United States, criminal law and criminological scholarship almost uniformly stop short of considering how the professed goals of the criminal law . . . might be approached by means entirely apart from criminal law enforcement.”).

21. See PEW CHARITABLE TRS., RACIAL DISPARITIES PERSIST IN MANY U.S. JAILS *passim* (2023), https://www.pewtrusts.org/-/media/assets/2023/05/racial_disparities_persist_in_many_us_jails_brief_digital.pdf [<https://perma.cc/D4Z2-YZ8Q>]; see also ASHLEY NELLIS, SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 6–11 (2021); Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POL’Y INITIATIVE (Oct. 8, 2021), <https://www.prisonpolicy.org/blog/2021/10/08/indigenousspeoplesday/> [<https://perma.cc/B8P3-VA6U>].

externalities that accompany these harms—high recidivism rates, great expense to both the state and federal governments that employ them, and ongoing criticism that the United States’ prison policy is but one manifestation of systemic racism.²² Still others have noted how the United States’ approach to domestic policy—primarily using the cudgel of criminal laws—is a threat to the democratic identity of the country.²³ The carceral system in the United States has been thoroughly pilloried for the immense harm that it causes, especially to those who are subjected to imprisonment, but also to society as a whole.²⁴

Incarceration leads to poorer health outcomes,²⁵ fewer employment opportunities,²⁶ and intensive stigmatization within a community and society at large.²⁷ The massive infrastructure required to support the mass incarceration of individuals in the United States is decried as the “prison industrial complex,”²⁸ which denotes the financial incentives for corporations, and the people whom they lobby, to maintain the current carceral system and its residual harms.²⁹ In general, scholars have spent significant time identifying the harms of prisons in the United States, laying the foundation for drastic change, in the form of abolition. Specifically, criminal legal scholars have noted that

22. See, e.g., DERECKA PURNELL, *BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM* 4 (2021) (“Mass incarceration, I learned, was a manifestation of a much larger, interwoven set of structures of oppression that we had to dismantle.”).

23. See, e.g., ALEX S. VITALE, *THE END OF POLICING 197–220* (2017) (discussing “political policing”).

24. See, e.g., Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 *STAN. L. & POL’Y REV.* 1, 14–16 (2022) (describing the “social harms of prison”).

25. See Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL’Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> [<https://perma.cc/2KKA-NZEJ>] (demonstrating that this is especially true of mental health).

26. See *Expanding Economic Opportunity for Formerly Incarcerated Persons*, WHITE HOUSE (May 9, 2022), <https://www.whitehouse.gov/cea/written-materials/2022/05/09/expanding-economic-opportunity-for-formerly-incarcerated-persons/> [<https://perma.cc/84TJ-ANQL>] (“Individuals with criminal records face substantial challenges in the labor market.”).

27. See Bridget Brew, Frances Alani, Anita Li & Christopher Wildeman, *Sticky Stigma: The Impact of Incarceration on Perceptions of Personality Traits and Deservingness*, 100 *SOC. FORCES* 1910, 1910 (2021) (providing quantitative evidence of the nature and impact of the stigma on incarcerated people and their families).

28. Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC (Dec. 1989), <https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/> [<https://perma.cc/U39Q-ATTA> (staff-uploaded, dark archive)].

29. See generally WENDY SAWYER & PETER WAGNER, PRISON POL’Y INITIATIVE, *MASS INCARCERATION: THE WHOLE PIE 2023* (2023), https://www.prisonpolicy.org/factsheets/pie2023_allimages.pdf [<https://perma.cc/SR7V-HG4T>] (using data to demonstrate both the scale of the prison industry and mass incarceration in the United States and the systems that profit from increased incarceration).

prisons, in addition to being inhumane, require great fiscal expense,³⁰ and do not produce the safety that is considered so desirable.³¹

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

An integral step in the call for prison abolition has been identifying the normative purpose of the criminal legal system. Debates on this topic typically focus on the purpose of punishment and whether its purpose should be retribution, rehabilitation, or some other rationale. Instead, abolitionists disavow punishment as a starting point.³² By offering a willingness to engage in the conversation with a more expansive imagination, punishment is no longer seen as the only option. Abolitionists consider what problem the carceral system seeks to resolve.³³ It appears that scholars and activists have coalesced around

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

31. Penologists, criminologists, sociologists, law professors, and others roundly agree that the reasons for spikes and drops in the rate at which crimes are committed are myriad and frequently unidentifiable. The role of prisons in decreasing crime is correlative in some cases, but only marginally. In the words of one scholar, Professor Jeremy Travis:

When you quadruple the incarceration rate, as we did in this country over a period of four decades, the key question is whether this big investment in prison resulted in a significant decline in crime. The conclusion of our [National Academy of Sciences] committee was that there is no clear answer from a scientific point of view.

PEW CHARITABLE TRS., WEIGHING IMPRISONMENT AND CRIME 3 (2015) (alteration in original), https://www.pewtrusts.org/~media/assets/2015/02/pspp_qa_experts_brief.pdf [https://perma.cc/B6VG-WXXV]. Even the Department of Justice admits that “[s]ending an individual convicted of a crime to prison isn’t a very effective way to deter crime.” NAT’L INST. OF JUST., U.S. DEP’T OF JUST., FIVE THINGS ABOUT DETERRENCE 1 (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf> [https://perma.cc/ZU9K-T754]; see also Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1049 (2008) (noting that prisons may cause a net increase in crime).

32. See McLeod, *Envisioning Abolition Democracy*, *supra* note 5, at 1616 (“Whereas conventional accounts of legal justice emphasize the administration of justice through individualized adjudication and corresponding punishment or remuneration (most often in idealized terms starkly at odds with actual legal processes), abolitionist justice offers a more compelling and material effort to realize justice—one where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence.”).

33. See, e.g., Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 854–56 (2019) (“Choices about what is a crime and what is not are made by politicians and within the economic, social, and racial systems in which politicians exist.”); see also Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST

an identifiable policy objective—public safety.³⁴ Comprehensively, this means that communities feel safe, free from violence, and empowered to redress transgressions in a way that does not beget more violence.³⁵ The following section addresses some methods for achieving these ends,³⁶ but this section focuses on what agreement exists among abolition scholars and activists regarding public safety as a goal and how the parameters of that goal are defined.³⁷

Part of the pushback against abolition involves concerns that the complete or piecemeal dismantling of a policing force will lead to anarchy and chaos

L. REV. 245, 249 n.4 (2023) (“There are, of course, some core *mala in se* harms that are universally recognized across societies as crimes even if there is debate beyond that core about what should be included.”).

34. See Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1314 (2021). Professors Bell, Beckett, and Stuart explain:

A rhetoric and logic of safety production is likely helpful for the long-term sustenance for the politics of the #Defund movement. Without consistent messaging and data that support the positive safety returns of investing in alternatives to policing, policymakers who push reducing police funding to invest in alternatives to policing leave themselves vulnerable to backlash.

Id. Harvard has created the entire Institute on Policing, Incarceration & Public Safety, connecting the three ideas. *Institute on Policing, Incarceration & Public Safety*, HUTCHINS CTR. FOR AFR. & AFR. AM. RSCH., <https://hutchinscenter.fas.harvard.edu/policing-incarceration-and-public-safety> [https://perma.cc/3L42-4SZT].

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

36. Whether a reform meets the framework for being truly “abolitionist” might require that it,

(1) shrinks the system doing harm; (2) relies on modes of political, economic, and social organization that contradict prevailing arrangements and gesture at new possibilities; (3) builds and shifts power into the hands of those directly impacted, who are often Black, brown, working class, and poor; (4) acknowledges and repairs past harm; and (5) improves, or at least does not harm, the material conditions of directly impacted people.

Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1544 (2022).

37. Perhaps this movement has been partially inspired by pushback from others to satisfy this goal. One study has found that “support for policing reform depends on people’s beliefs about how proposed policies would affect crime and public safety.” Mike Cummings, *Resistance to ‘Defund’ or ‘Abolish’ the Police Rooted in Policy Proposals*, YALE NEWS (Feb. 4, 2022), <https://news.yale.edu/2022/02/04/resistance-defund-or-abolish-police-rooted-policy-proposals> [https://perma.cc/96D9-VQ8D] (describing a study that analyzed public support for major policy changes—including abolition and defunding the police—as hinging heavily on whether public safety would suffer).

within a particular jurisdiction.³⁸ Many scholars have spent ample time addressing this concern.³⁹ As Professor Brandon Hasbrouck explains, “[r]ather than a society without a means of protecting public safety, abolitionists desire a society where the entire public is safe.”⁴⁰ Indeed, this idea of safety is much more expansive than one might initially consider.⁴¹

In sum, abolitionists claim that policing does not actually solve many of the problems that it seeks to solve and, often, causes additional harm to marginalized communities.⁴² The initial violence is left unresolved and

38. *See id.* (quoting a researcher’s statement that “[o]ur findings suggest that support for policing reform depends on people’s beliefs about how proposed policies would affect crime and public safety”); *see also* Paige E. Vaughn, Kyle Peyton & Gregory Huber, *Mass Support for Proposals to Reshape Policing Depends on the Implications for Crime and Safety*, 21 *CRIMINOLOGY & PUB. POL’Y* 125, 138 (2022). In particular, members of the Black community in Washington, D.C., have voiced this concern. *See* JAMES FORMAN JR., *LOCKING UP OUR OWN* 10–11 (2017). *But see* JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* 5–6, 8–12 (2015) (describing an epidemic of murder in Black communities disproportionately high in comparison to demographic population data, and a stunning number of which remain unsolved each year—the vast majority). These accounts display the inadequacy of the current system—that it does not do what it purports to do, and yet exerts great harm on the communities most in need of its protection. *See id.*

39. Professor Paul Butler of Georgetown University Law Center spent several months at the end of 2019 and the beginning of 2020 (prior to the COVID-19 pandemic) delivering a lecture entitled, “Prison Abolition, and a Mule,” in which he worked to explain the harms of prison and how decarceration, or the gradual reduction in the number of people in prison, could be a pathway to prison abolition. *See, e.g., Berkeley Talks: Paul Butler on How Prison Abolition Would Make Us All Safer*, UC BERKELEY NEWS (Jan. 17, 2020), <https://news.berkeley.edu/2020/01/17/berkeley-talks-paul-butler/> [<https://perma.cc/BWD7-9LMZ>]; *Prison Abolition, and a Mule*, WASH. & LEE UNIV. SCH. L. SCHOLARLY COMMONS (Feb. 19, 2020), <https://scholarlycommons.law.wlu.edu/smithlecture/1/> [<https://perma.cc/C737-ADVG>]. Butler reserves for the audience the idea of “a dangerous few,” who might need to be physically separated from society for some period of time. *Berkeley Talks Transcript: Paul Butler on How Prison Abolition Would Make Us All Safer*, UC BERKELEY NEWS (Jan. 17, 2020), <https://news.berkeley.edu/2020/01/17/berkeley-talks-transcript-paul-butler/> [<https://perma.cc/9QLH-S8R6>]. But, he cautions, this number is vastly smaller than our current prison population and would undoubtedly require separation for a much smaller amount of time than our current incarceration model requires. *Id.*

40. Hasbrouck, *Reimagining Public Safety*, *supra* note 35, at 685.

41. *See, e.g.,* Barry Friedman, *What Is Public Safety?*, 102 *B.U. L. REV.* 725, 725 (2022) (describing the centuries through which politicians have identified public safety as their primary function, but also limited the definition of safety to mean protection from violent harm, whereas “[f]or most people, being safe depends on much more: food, clean water and air, housing, a basic income, and the means to obtain that income through an education and a job” and finding that it might even include “health care . . . and freedom from discrimination,” and arguing that a more “capacious” understanding of public safety is needed).

42. *See* Hasbrouck, *Reimagining Public Safety*, *supra* note 35, at 686–88 (describing a series of recent incidents in which police failed to protect incidents of mass violence, while also detailing another series of recent incidents in which police killed, shot, or injured individuals while on duty, and concluding that “[p]olice perpetuate unjust violence rather than protecting the public from it”). Professor Hasbrouck claims that, “[p]olicing as public safety persists because the few people it was designed to protect—mostly wealth, white men—still reap its benefits” and states that, “[t]hrough policing, the few may buy their security at the expense of the liberty and security of the many.” *Id.* at 688.

additional violence is heaped upon it.⁴³ In response, abolitionists seek to find alternatives to the carceral system that might satisfy these same desires for safety.⁴⁴ Indeed, this is an alternative lens through which to view safety, one that “requires us to look at public safety not as a zero-sum game between liberty and security, but as a collaborative promotion of life, liberty, and pursuit of happiness for all.”⁴⁵

In acknowledging this revised vision of safety, prison and policing abolitionists have turned to innovative solutions to address this centralized goal.⁴⁶ The following section describes some of the efforts that abolitionists have promoted to meet this goal of safety.⁴⁷ These efforts have centered around a new conception of justice, which, “for abolitionists, is grounded in paying careful attention to experienced harm and its aftermath, addressing the needs of survivors, and holding people who have perpetrated harm accountable in ways that do not degrade but seek to reintegrate, while understanding the root causes of wrongdoing and working to address them.”⁴⁸ This process involves

43. See McLeod, *Envisioning Abolition Democracy*, *supra* note 5, at 1638 (“Although the primary objection to penal abolition is that murder, rape, and child sexual assault demand a criminal prosecutorial response, the truth is that the criminal process fails to respond at all to many of these most egregious forms of wrongdoing, and when it does, the redress available through the criminal process is typically deeply inequitable, violent, and at odds with any conception of meaningful amends or principled accountability.”).

44. See *id.* at 1615 (“Justice for abolitionists is an integrated endeavor to prevent harm, intervene in harm, obtain reparations, and transform the conditions in which we live.”); see also *id.* at 1615 n.17 (citing Barnard Ctr. for Rsch. on Women, *Reina Gossett + Dean Spade (Part 1): Prison Abolition + Prefiguring the World You Want to Live In*, YOUTUBE, at 00:32 (Jan. 7, 2014), <https://www.youtube.com/watch?v=XDQJWiuJ8uQ> [<https://perma.cc/28QU-E2P8>] (on file with the North Carolina Law Review)). As Mariame Kaba explains, “I am looking to abolish what I consider to be death-making institutions, which are policing, imprisonment, sentencing, and surveillance. And what I want is to basically build up another world that is rooted in collective wellness, safety, and investment in the things that would actually bring those things about.” Keeanga-Yamahatta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [<https://perma.cc/7AGC-RA59> (dark archive)].

45. Hasbrouck, *Reimagining Public Safety*, *supra* note 35, at 685.

46. Indeed, “[e]ven if the abolitionist goal . . . cannot realistically be achieved, the abolitionist perspective could help change overall perceptions . . . [and] move the Overton window . . . for broader downsizing of prisons and investment in communities than would take place without the abolitionist challenge.” Barkow, *supra* note 33, at 250–51.

47. One journalist explains to skeptics of carceral abolition, “[m]ost of those who rally to the cause do not advocate a world where no one answers your 911 call and serial killers are set loose.” Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> [<https://perma.cc/NU2F-KG84>]. Rather, abolitionists have two main goals: (1) “devolving responsibility for public safety to local communities,” also known by some experts as “civilianizing safety,” and (2) “redistribut[ing] government spending from police and prisons to narrowing the underlying, crime-breeding inequalities of wealth and opportunity.” *Id.* Abolitionists “would instead invest in housing, education, jobs and health—a goal that seems remote in the current political environment.” *Id.*

48. McLeod, *Envisioning Abolition Democracy*, *supra* note 5, at 1646.

prefiguration⁴⁹ or radical imagination⁵⁰—seeking to conceive of a reshaped society that does not yet exist, primarily by “looking to the bottom.”⁵¹ The process may be slow and incremental⁵² but must be grounded in certain abolitionist principles, namely that interim steps to transformational change satisfy the definition of “[n]on-reformist reforms,” which “move toward systemic change, rather than reifying and strengthening the carceral state.”⁵³

49. See Sameer M. Ashar, *Pedagogy of Prefiguration*, 132 YALE L.J.F. 869, 871 n.8 (2023) (quoting Harsha Walia: “Prefiguration is the idea [that] we have to build our movement cultures and . . . institutions in the model of the world we are seeking to create.” (alteration in original)); see also Veryl Pow, *Grassroots Movement Lawyering: Insights from the George Floyd Rebellion*, 69 UCLA L. REV. 80, 111 (2022) (tracing acts of prefiguration to slave rebellions and “the establishment of autonomous settlements by runaway slaves”). Prefiguration finds good company, for example, in the Afrofuturism movement. See, e.g., I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 3 (2019) (“[W]hile our collective imaginings too often fall far short of a convincing alternative future, Afrofuturism has been proposing ways forward for decades.”); Bennett Capers, *Free-ing Criminal Justice*, 120 MICH. L. REV. 999, 1008–09 (2022) (“Prompted by projections that the United States will likely be a ‘majority-minority’ country by the year 2044, I have been exploring what criminal justice might look like then, or in the ensuing years when people of color wield political and economic power.”); Matthew Boaz, *Speculative Immigration Policy*, 37 GEO. IMMIGR. L.J. 183, 183 (2023) [hereinafter Boaz, *Speculative Immigration Policy*] (“[S]peculative [fiction] visions could serve as a platform for radical imagination about future U.S. immigration policies.”).

50. See Akbar, *Radical Imagination*, *supra* note 11, at 412 (referring to the radical contemporary racial justice movements as something “not seen since the civil rights, Black power, and Chicano movements of the 1960s and 1970s,” and calling for a reframing of how we view the criminal legal system to instead conceive of “policing, jail, and prison as the primary mode of governing Black, poor, and other communities of color in the United States,” with law as the infrastructure). These movements are “working to build another state—another world even—organized differently than the one we have inherited” and “aiming to use the law as a tool to build that alternative future.” *Id.* Such a moment calls for “a radical imagination, where the scale of deep critique is matched with a scale of grand vision.” *Id.*

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

52. “Organizers and activists must continue to experiment, to calibrate their arguments and actions, and to secure liberty as best they can, even if sometimes only in fits and starts. Progress toward that goal is not, and could never be, a clean, straight line.” Hasbrouck, *Reimagining Public Safety*, *supra* note 35, at 692. Indeed, we cannot doubt that “[b]eing grounded in local community struggles is critical . . .” HARSHA WALIA, UNDOING BORDER IMPERIALISM 139 (2013); McLeod, *Envisioning Abolition Democracy*, *supra* note 5, at 1622–23, 1623 n.61 (discussing Harsha Walia’s description of prefiguration).

53. Hlass, *supra* note 1, at 1606; Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98 (2020) (defining non-reformist reforms as “provid[ing] a framework for thinking about reforms that aim to build grassroots power as they redress the crises of our times”); Shiu-Ming Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants’ Rights Movement*, 68 UCLA L. REV. DISCOURSE 68, 72–73 (2020) (clarifying the criteria for an abolitionist reform as: (1) having a broad transformative vision that prefigures a different world, (2) cutting across issue areas and has the potential for building across movements, (3) leading people to question whether an existing institution meets people’s needs, and (4) building the capacity for individuals to fight for

C. *Abolitionist Alternatives*

In support of these abolitionist goals, scholars and activists have sought to build better infrastructures of communities, intervene actively to prevent crime within specific communities, and offer alternatives to the criminal legal system after a harm has occurred. Building better community infrastructure includes the greening of spaces,⁵⁴ the development of mutual aid, and the diversion of state and city funding away from policing and prisons and toward the provision of needed services and support.⁵⁵ Violence interruption and intervention (outside of the policing space) have proven to be effective in a number of cities, where the majority of violence is committed by a small number of individuals and often in a cycle of building retribution.⁵⁶ Intervening early on can stop the cycle and prevent harm.⁵⁷ Finally, alternatives to the criminal legal system include efforts to build restorative justice practices.⁵⁸ Not only do these avoid a

more reforms and justice). However, other scholars have criticized the rejection of what abolitionists have termed “reformist reforms.” Barkow, *supra* note 33, at 246.

For example, many abolitionists reject calls to invest in improvements to prisons or put in place greater staffing, even if doing so would improve the lives of currently incarcerated people, on the view that this additional funding ultimately expands the role of prisons in society and leads to incarceration being more entrenched overall.

Id. at 246–47 (noting that such a failure to compromise could itself result in further retrenchment and the loss of opportunities to shift the system in a way that “runs the risk of sacrificing too many reforms that would benefit people currently suffering from incarceration for a utopia that will ultimately not materialize”). *But see* Daniel S. Harawa, *In the Shadows of Suffering*, 101 WASH. U. L. REV. 1847, 1853 (2024) (arguing that the positioning of reform in contrast to abolition is misguided and proposing that both approaches can be used in tandem to ease human suffering).

54. McLeod, *Prison Abolition and Grounded Justice*, *supra* note 16, at 1230.

55. *See, e.g.*, Robert H. Ambrose, Note, *Decarceration in a Mass Incarceration State: The Road to Prison Abolition*, 45 MITCHELL HAMLINE L. REV. 732, 760–61, 760 n.208, 761 n.215 (2019) (first citing Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 849 (2017) (articulating examples of investment in mental health services in Miami that resulted in a decrease in incarceration and a significant savings in the city budget, as well as pointing to community design and an increase in green space resulting in fewer public disorder offenses); then citing Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 366–67 (2005); and then citing James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://www.perma.cc/AXJ2-KQH5> (dark archive)]).

56. *See* Christopher Lau, *Interrupting Gun Violence*, 104 B.U. L. REV. 769, 772–78, 798 (2024) (articulating data that demonstrate the positive effect of local community groups to prevent retaliatory violence and diminish overall levels of gun violence, and illustrating anecdotal explanations of how legal changes could encourage such interventions).

57. *See id.*

58. *See generally* Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L.J. 201 (2010) (explaining the concept of restorative justice and how it might be applied in various settings); Marcos Rolim, *Restorative Justice and Recidivism*, 36 REVISTA JUSTIÇA DO DIREITO [REV. JUST. DIREITO] 60 (2022) (finding a positive relationship between restorative justice and a reduction in recidivism across a broad collection of studies evaluating such correlations); Mariame

system focused on punishment, but they also help to build and strengthen communities, offering a form of redress for the victim or survivor of the harm.⁵⁹ Each of these proposals seeks to substitute itself as one component of the carceral machine, while satisfying this more comprehensive idea of safety and security in a way that is more humane, equally or more effective,⁶⁰ and less expensive.⁶¹ The results and possibilities are powerful to consider.

1. Investing in Community

A key aspect of safety and security is creating spaces that discourage negative social behaviors and encourage positive social behaviors. Effective methods include “greening” projects in urban spaces and mutual aid efforts within specific communities. Both ideas build upon the invest/divest framework in which resources are diverted from carceral budgets and directed toward life-affirming institutions.⁶²

The notion of “broken windows” policing, in which low-level offenses are prosecuted at high rates to deter high-level or dangerous offenses, has largely been discredited.⁶³ But the observation that criminalized activity may take place

Kaba, *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/L89Y-VJA4> (staff-uploaded, dark archive)] (suggesting towns use restorative justice models instead of imprisoning people).

59. See Jerusalem Demas, *The Promise—and Problem—of Restorative Justice*, VOX (Mar. 23, 2022, 5:00 AM), <https://www.vox.com/22979070/restorative-justice-forgiveness-limits-promise> [<https://perma.cc/5ZWN-56VP>] (referring to the evaluative model developed by Impact Justice, a criminal justice reform group, and asserting, “[i]nstead of asking what law was broken, who broke it, and what punishment is warranted—as our punitive system does—restorative justice asks who was harmed, what do they need, and whose obligation is it to meet those needs”); see also Shannon M. Silva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL’Y PRAC. 77, 79 (2015) (suggesting that all parties, including those identified as victims, demonstrate high satisfaction rates with the process).

60. One concern for abolitionists is data that demonstrates that the hiring of additional officers can reduce homicide levels, though this suggests a distinction between policing and imprisonment. See Note, *Pessimistic Police Abolition*, 136 HARV. L. REV. 1156, 1157–58 (2023) (encouraging the development of police alternatives while also recognizing that, as of yet, those alternatives “have not yet matched policing’s anticrime effect”). But see McLeod, *Prison Abolition and Grounded Justice*, *supra* note 16, at 1228 (noting that homicide rates have also decreased in communities that have implemented interruption programs, with one community experiencing a fifty percent decline).

61. Catherine Julliard, Randi Smith, Nancy Anaya, Arturo Garcia, James G. Kahn & Rochelle A. Dicker, *Saving Lives and Saving Money: Hospital-Based Violence Intervention Is Cost-Effective*, 78 J. TRAUMA & ACUTE CARE SURGERY 252, 255–56 (2015).

62. See Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 COLUM. J. RACE & L. 601, 609–16 (2022) (exploring how mutual aid evades the harms associated with “family policing” and indicating improvements in child safety are directly related to material investment in marginalized families).

63. See, e.g., Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1620–29 (2012) (concluding, after reviewing the literature on “broken windows” policing, that “[o]n the available evidence, a sensible conclusion is that the probability of generating a beneficial self-

at a higher rate in urban areas that suffer from disrepair and actual broken windows remains pertinent.⁶⁴ Abolitionists take issue with the response. The underinvestment in poor communities in cities is the issue itself, not the fact that low-level offenses go unpoliced.⁶⁵

Alternatives to “broken windows” policing include “greening” projects—efforts to engage community members in urban areas that “might otherwise be desolate, particularly those plagued by violence,” and to work toward making those spaces more habitable.⁶⁶ Studies find that “[u]rban redevelopment is a . . . way to promote security, even from violent crime.”⁶⁷ The promotion of “orderliness” through a non-policing approach remains “consistent with an abolitionist ethic” while also “empower[ing] . . . impacted communities to seek security and justice in other terms than through criminalization and incarceration.”⁶⁸

Another community-oriented abolitionist approach is the call for investing in mutual community aid.⁶⁹ This idea builds upon the notion that one’s

fulfilling prophecy with broken windows policing is uncertain, low or confined in important ways”); *see also* John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA* 207, 228 (Alfred Blumstein & Joel Wallman eds., 2000) (“Overall, the evidence is mixed on the efficacy of generic zero-tolerance strategies in driving down rates of violent crime, though serious questions have been raised about their effects on police-community relations.”); Bernard E. Harcourt, *The Broken Windows Theory, in ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 59–89 (2001) (analyzing the empirical evidence in support of broken windows policing and concluding the claims made in support of the theory on the basis of this evidence are false); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPS. 163, 186–87 (2004) (explaining that zero tolerance policing practices probably do not explain much of the drop in crime in the 1990s because crime went down everywhere, even in places where police departments did not implement new policing strategies).

64. *See* Charles C. Branas, Eugenia South, Michelle C. Kondo, Bernadette C. Hohl, Philippe Bourgois, Douglas J. Wiebe & John M. MacDonald, *Citywide Cluster Randomized Trial to Restore Blighted Vacant Land and Its Effects on Violence, Crime, and Fear*, 115 PROC. NAT’L ACAD. SCIS. 2946, 2947 (2018).

65. Sonali Kolhatkar, *An Abolitionist Makes a Case for “No More Police,”* YES MAG. (Oct. 3, 2022), <https://www.yesmagazine.org/social-justice/2022/10/03/police-safety-abolition> [https://perma.cc/4RZ4-JRL2].

66. McLeod, *Prison Abolition and Grounded Justice*, *supra* note 16, at 1230.

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

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

69. *See* Roberts, *supra* note 10, at 47 (highlighting the work of organizers at the Cure Violence program in Chicago to identify community conflicts and provide community-led mediation); *see also* McLeod, *Envisioning Abolition Democracy*, *supra* note 5, at 1628–33 (discussing the Oakland Power Projects which train residents in de-escalation and other tactics, and at the White Bird Clinic’s Crisis Assistance Helping Out on the Streets (CAHOOTS) program in Eugene, Oregon, which is operated through a central city ambulance dispatch “in cases of ‘drug and substance abuse, poverty-related issues,

liberation is bound up in the liberation of all disempowered people.⁷⁰ It is a vision of collective safety as opposed to individualized safety.⁷¹ This move toward communal support is an important one, resulting in some successful experiments,⁷² and producing visions of what alternatives to policing and prisons might look like.⁷³ Some note that, if the concept of safety and security is expanded, “mutual aid programs, [along with a] focus on material security are every bit as important as . . . anti-violence organizing.”⁷⁴ Such programs seek to support public health by disaggregating economic need from criminalized acts—seeking to provide access to healthcare, childcare, housing, and work. They find “their heritage in programs like the Black Panther Party’s free breakfasts.”⁷⁵ In sum, abolitionists acknowledge that, while creating conditions for freedom from violence is a crucial need, the concept of safety is much more expansive and indeed connected to the ability to prevent and avoid criminalized activity within a community.

2. Violence Interruption

Despite the community interventions mentioned above, violence can and does still occur. Abolitionists still seek to avoid policing as an immediate

and mental health crises’ without involving police”). These and other community-based projects are discussed in Candice Bernd, *Community Groups Work to Provide Emergency Medical Alternatives, Separate from Police*, in WHO DO YOU SERVE, WHO DO YOU PROTECT?: POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 151, 156 (Maya Schenwar, Joe Macaré & Alana Yu-lan Price eds., 2016).

70. This language is typically credited to the aboriginal activist, Lilla Watson, though she is uncomfortable claiming sole authorship. ‘Liberation’ and ‘You Are on Aboriginal Land,’ SOVEREIGN UNION—FIRST NATIONS ASSERTING SOVEREIGNTY, <http://nationalunitygovernment.org/content/liberation-and-you-are-aboriginal-land> [<https://perma.cc/726U-YYGP>]. An example of this mutual struggle can be seen in the Movement for Black Lives’ policy platform, which implicates the need to create greater protections for workers, end the imprisonment of immigrants, and provide protections for, women, members of the LGBTQ+ community, and individuals with disabilities. *Vision for Black Lives*, *supra* note 11.

71. See Hasbrouck, *Reimagining Public Safety*, *supra* note 35, at 690 (seeking to expand “the notion of public safety to also include those things vital to the safety of the community” and analogizing to the “the expansion from restorative justice to transformative justice: not only must individuals be made whole, but communities must be protected by preventing future harms”).

72. For a collection of some of these efforts, see ONE MILLION EXPERIMENTS, <https://millionexperiments.com/> [<https://perma.cc/BD5P-9QX7>].

73. See Michael Haber, *COVID-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOY. L. REV. 61, 62–64 (2020) (discussing the research of sociologists and observing the presence of mutual aid groups dating back centuries and spread through nearly every culture and continent, with one seeing “mutual aid [a]s a universal, nearly-irrepressible and trans-historical instinct shared by humans . . . , a common thread between . . . Indigenous cultures, medieval and early modern European villages, and industrial labor unions”).

74. Hasbrouck, *Reimagining Public Safety*, *supra* note 35, at 690.

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

response, relying instead on community members and their knowledge of interpersonal conflicts to prevent escalating violence.⁷⁶ In Chicago, for example, “peacekeepers” from an organization known as “Flatlining Violence Inspires Peace” seek to reduce the risk of gun violence in the most violence-prone neighborhoods. They provide training and resources to members of the community, which have “demonstrated greater efficacy than criminal law enforcement in curbing violence in the communities where they operate.”⁷⁷ These positive results have been replicated in Baltimore,⁷⁸ Boston,⁷⁹ and California.⁸⁰ Such successes should not be taken lightly. They demonstrate a way to prevent serious violence before it can happen at a statistically significant rate.

3. Restorative Justice

The final example of an abolitionist alternative to policing is the usage of restorative justice.⁸¹ Instead of focusing on retribution, restorative justice offers an opportunity for redemption.⁸² Those who enter the criminal legal system will also exit it. Restorative justice considers how an individual might seek

76. See Maria Cramer, *What Happened When a Brooklyn Neighborhood Policed Itself for Five Days*, N.Y. TIMES (June 4, 2023), <https://www.nytimes.com/2023/06/04/nyregion/brooklyn-brownsville-no-police.html> [<https://perma.cc/6GYH-5FLB> (staff-uploaded, dark archive)].

77. *Flip Program Kicks Off Covering 77 Hot Spots in 12 Neighborhoods*, CHI. CRED, <https://www.chicagocred.org/blog/flip-program-kicks-off-covering-77-hot-spots-in-12-neighborhoods/> [<https://perma.cc/EEA3-FCB6>].

78. McLeod, *Prison Abolition and Grounded Justice*, *supra* note 16, at 1228 (citing Daniel W. Webster, Jennifer Mendel Whitehill, Jon S. Vernick & Frank C. Curriero, *Effects of Baltimore’s Safe Streets Program on Gun Violence: A Replication of Chicago’s CeaseFire Program*, 90 J. URB. HEALTH 27, 37–39 (2012)).

79. Naomi Ishisaka, *What Seattle Can Learn from Boston and Detroit to Decrease Gun Violence*, SEATTLE TIMES (July 15, 2024, 6:00 AM), <https://www.seattletimes.com/seattle-news/law-justice/what-seattle-can-learn-from-boston-and-detroit-to-decrease-gun-violence/> [<https://perma.cc/Y9M7-CGY6> (staff-uploaded archive)].

80. Bell et al., *supra* note 34, at 1312 (exploring the significant positive effect of the Cure violence program, which has demonstrated a decrease in shootings by “up to twenty-four percent” and saw a “drop in retaliatory homicides in four of eight communities”).

81. “Restorative justice requires, at minimum, that we address victims’ harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and communities in this process.” HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 25 (2002); *see also* Alexander Afnan, *An Abolitionist Vision: Reclaiming Public Safety from a Culture of Violence*, 28 VA. J. SOC. POL’Y & L. 1, 48 (2021) (“[R]estorative justice [is] a process which views the community as both an important stakeholder and key actor within the process.” (citing ZEHR, *supra*, at 23)).

82. Indeed, the process of restorative and transformative justice, “more fundamentally confront[s] the dynamics that drive particular young people in communities to engage in violence.” Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 552 (2022). Some organizations seek to extend the practices of restorative justice beyond singular incidents of interpersonal violence by “conven[ing] peace circles in communities impacted by violence, bringing high-risk young men and women together to make connections to one another and address the root causes of violence in their communities.” *Id.* at 552, 552 n.121 (citing CIRCLES & CIPHERS, <https://www.circlesandciphers.org/> [<https://perma.cc/Z9FR-V48Z>] (youth-led Chicago-based organization)).

forgiveness within a community—acknowledging the commission of harm and seeking readmission to their neighborhood, school, or community without the ostracization that comes from participation in the penal system.⁸³ The goal of restorative justice is to provide repair between parties and to reduce recidivism, resulting in safety for both individuals and the larger community.⁸⁴

This development of solutions is integral to the abolitionist movement. Offering positive ideas urges the movement forward, providing a unifying vision.⁸⁵ It can also allay fears about institutional absence which provoke discomfort among those new to the concept.⁸⁶ These visions in the carceral space demonstrate how transformational change might be possible, and they can serve to model how one might advocate for shifting away from a harmful system and toward one that is conceptually different.⁸⁷

II. MAPPING ABOLITION THEORY ONTO IMMIGRATION ENFORCEMENT

Even before calls to Defund the Police became widespread, activists had already rallied in favor of abolishing ICE,⁸⁸ which conducts much of the interior

83. See Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y. L. SCH. L. REV. 69, 88–91 (2019–20) (discussing the success of a restorative justice project administered by the District of Columbia's Office of the Attorney General).

84. It is worth noting that the data on restorative justice is still limited and subject to critiques. See Demas, *supra* note 59. Some concerns arise over how these programs are typically administered—requiring participation with the threat of prosecution frequently looming. *Id.* Others raise concerns about requiring the victims or survivors of violence, particularly in the case of domestic violence or sexual violence, to participate in the process. *Id.* Still others note that deciding how to evaluate these programs is itself notoriously difficult. *Id.* Some note the high level of victims' satisfaction rates, but others point to the fact that self-selecting participation could artificially inflate those numbers. *Id.* If recidivism is the ultimate measure, then the numbers are promising, if for no other reason than they remain at or below the recidivism rates that accompany participation in the juvenile justice system, which produces more harm and is more expensive. *Id.* For a comprehensive overview of these concerns, and responses to them, see *id.*

85. See Pow, *supra* note 49, at 86 n.19. Using the term “prefigurativism,” Professor Pow described this vision as “a commitment to using processes in organizing and building a social change movement that are themselves already constructing the world they want to see.” *Id.* (quoting Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 295, 323–24 (2016)); see also Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 855–57 (2021) (identifying the role of lawyers in “movement lawyering” and highlighting the use of prefiguration in establishing a common outlook and goal).

86. See Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1202 (2022).

87. See Silky Shah, *The Immigrant Justice Movement Should Embrace Abolition*, FORGE (Mar. 4, 2021), <https://forgeorganizing.org/article/immigrant-justice-movement-should-embrace-abolition> [<https://perma.cc/CK5W-LV3Y>].

88. In fact, politicians have also taken up this mantle, including New York's United States Senator Kirsten Gillibrand, New York's United States Representative Alexandria Ocasio-Cortez, New Mexico's United States Representative Deb Haaland (who later became the Secretary of the Interior under

immigration policing in the United States. Clever proposals have been submitted that seek to reduce the violence that has come to be associated with immigration policing.⁸⁹ Most of these calls have been grounded in concern for how immigration enforcement, designed to address one's civil status, has come to mirror and interact with criminal policing.⁹⁰ This stands in contrast to other administrative compliance efforts, such as how the Internal Revenue Service ("IRS") works to collect unpaid taxes.⁹¹

Scholars have suggested, for example, proportional responses or enforcement efforts that distinguish between long-term residents with status

President Biden), and several candidates in Florida, Massachusetts, and Hawaii. See Sydney Ember & Astead W. Herndon, *How 'Abolish ICE' Went from Social Media to Progressive Candidates' Rallying Cry*, N.Y. TIMES (June 29, 2018), <https://www.nytimes.com/2018/06/29/us/politics/abolish-ice-midterms-immigration.html> [<https://perma.cc/QJ4S-WUNH> (staff-uploaded, dark archive)]. There was similar success with a campaign entitled "Defund Hate," which sought to defund ICE and U.S. Customs and Border Protection ("CBP"). It was led by a nonprofit organization known as Detention Watch Network ("DWN"). DWN is

committed to divestment from [ICE] and [CBP], agencies that tear apart loved ones and harm our communities. Instead, we want our tax dollars used to strengthen our families and communities. We are committed to investment in education, housing, green infrastructure and health care programs that create thriving communities.

See #DefundHate, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/defundhate> [<https://perma.cc/5TSP-27BL>]. The Executive Director of DWN, Silky Shah, has authored her own guide for why and how abolition might be incorporated into the realm of immigration enforcement. See generally SILKY SHAH, UNBUILD WALLS: WHY IMMIGRANT JUSTICE NEEDS ABOLITION (2024) (providing "an anatomy of the last forty years of immigrant incarceration, an analysis of the successes and failures of the immigrant rights movement to come to grips with increasing criminalization, and strategies for dismantling both systems").

89. See, e.g., Kari Hong, *10 Reasons Why Congress Should Defund ICE's Deportation Force*, 43 HARBINGER 40, 41 (2019) (outlining the ways in which defunding "the arrests, detentions, and deportations . . . of people just for being without status" component of ICE while continuing to fund Homeland Security investigations, a separate part of the Department of Homeland Security's policing force, would retain ICE's ability to address public safety while reducing the harm of the agency); Peter L. Markowitz, *After ICE: A New Humane & Effective Immigration Enforcement Paradigm*, 55 WAKE FOREST L. REV. 89, 90 (2020) (offering an affirmative vision of immigration enforcement that "does not rely on detention, mass deportation, or a dedicated immigration police force at all").

90. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 380–81 (2006) [hereinafter Stumpf, *The Crimmigration Crisis*] (describing the overlap in perceptions of criminal and immigration law as well as the similarity in procedural structures); see also César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1459 [hereinafter Hernández, *Creating Crimmigration*] ("Crime control and migration control have become so intertwined that they have ceased to be distinct processes or to target distinct acts, for both noncitizens and individuals suspected of being noncitizens.").

91. See, e.g., Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J.F. 130, 138–39 (2019) [hereinafter Markowitz, *Abolish ICE*] (pointing to the IRS as a comparable administrative enforcement agency tasked with punitive enforcement). Professor Markowitz traces the evolution from universal enforcement for nonpayment of taxes, a task with which the IRS had originally been charged, to a current praxis which audits fewer than one percent of returns and prosecutes "only a couple hundred people" per year, while still enjoying "one of the world's highest tax compliance rates." *Id.*

and recent arrivals without status.⁹² These proposals offer immense utility by pushing back on the unjust system that currently exists, while also producing generative ideas that promote radical reimagination of that system. However, methodologically, it seems that immigration scholars and activists have skipped over an important step: trying to identify the underlying normative justification for why immigration restrictions and enforcement might exist in the first place.

To be clear, this analysis differs from the question of what the United States immigration system currently privileges.⁹³ Rather, this Article aligns with scholarship that questions the presumption of state sovereignty.⁹⁴ Here, as a thought exercise, one might consider the absence of immigration restrictions, and then determine what would justify their implementation.

92. Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 1 (2017); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 629 (2015); Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 465–66 (2015) [hereinafter Kanstroom, *Smart(er) Enforcement*]; Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651, 1651–52 (2009).

93. Current preferences for entry and long-term status include a combination of family unity, opportunities for very skilled workers, and humanitarian efforts. The immigration legal system is vast and complex. This explanation is reductionist but is being used as a formulaic placeholder, as opposed to a deep substantive analysis on this issue. See, e.g., Julia Gelatt, *Explainer: How the U.S. Legal Migration System Works*, MIGRATION POL'Y INST. (Apr. 2019), <https://www.migrationpolicy.org/content/explainer-how-us-legal-immigration-system-works> [<https://perma.cc/KE3R-RL7C> (staff-uploaded archive)]; *How the United States Immigration System Works*, AM. IMMIGR. COUNCIL (June 24, 2024), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works> [<https://perma.cc/379B-AJZS>] (both providing recent comprehensive overviews of the allocation of visas and other forms of relief which grant admission and provided status, either temporary or permanent, and on what bases).

94. See, e.g., Cházaro, *The End of Deportation*, *supra* note 2, at 1099–1100 nn.284–85, 1101 n.291 (2021) (supporting Linda Bosniak's concept of “inverting the burden” to prove sovereignty, and supporting the call from other scholars to extend the question of sovereignty to the historical period that predates settler colonialism in the United States, and urging scholars to reconsider the interconnectedness of questions of sovereignty, and the complexity of “attempting to resolve the status of immigrants with calls for membership on lands wrested from Indigenous people”); Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUM. 51, 78 (2016) (finding that the nation-state is rendered “a relative constant through history, permanent and immovable, resistant to the creative actions and political agency of individuals and collectivities”); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 63–90 (2007) (describing the Trail of Tears as well as fugitive slave laws as the “[a]ntecedents” of American deportation policy); Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 289 (2015) (“Immigration law, as it is taught, studied, and researched in the United States, imagines away the fact of preexisting [I]ndigenous peoples.”). See generally E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019) (critiquing the exception to border sovereignty that is afforded to refugees and asylum seekers but denied to economic migrants, proposing that such a distinction blurs quickly through a decolonial lens, and supporting international migration as a “political act”); HARSHA WALIA, *BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM* (2021) (interrogating the formation and function of borders as a spatial and material power structure).

By modeling this approach on that of the carceral abolition theorists, one will be able to determine if a proposed alternative satisfies that underlying goal in a more humane, equally or more effective, and less expensive way.⁹⁵ However, whereas carceral abolition is primarily focused on eliminating prisons, “immigration enforcement” has a much more expansive meaning, encompassing three distinct, though related, areas in which abolitionists may be directing their attention: (1) immigration detention, (2) deportation, and (3) exclusion via borders. Those who consider themselves abolitionists might focus on one or more of these areas, but each area of immigration enforcement is subject to its own vicissitudes that are worthy of exploration. This distinction makes the question of abolitionist thinking in the context of immigration enforcement more complex than the singular narrative framework of seeking prison abolition.

Last, clarity regarding these normative justifications is necessary so that the circle of support for abolition might be expanded. While enthusiasm for the abolition of immigration enforcement and exclusion remains marginal,⁹⁶ there have been major positive developments in efforts to one component of immigration enforcement—detention.⁹⁷ For that to happen, the interests of less

95. Regarding the issue of sovereignty, overlaps with the carceral system are clear. For example, Professor Dylan Rodríguez criticizes the episodic nature with which police brutality is viewed—an aberration as opposed to being part of a “*general historical continuity* of power relations that structure United States state institutions and the social-economic formations within which they perform their sovereignty.” Rodríguez, *supra* note 10, at 1604.

96. Approximately one-fifth of respondents in a recent poll supported completely eliminating ICE. Elaine Godfrey, *What ‘Abolish ICE’ Actually Means*, ATLANTIC (July 11, 2018), <https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/> [<https://perma.cc/S4QN-99DQ> (dark archive)] (citing Kevin Robillard & Daniel Marans, *Abolishing ICE Isn’t Very Popular (Yet)*, HUFFPOST, https://www.huffpost.com/entry/abolishing-ice-not-popular-yet_n_5b3a3916e4b08c3a8f6c803d [<https://perma.cc/8YSY-KJX7> (staff-uploaded archive)] (last updated July 3, 2018)). A survey of prominent Democratic candidates prior to the 2018 midterms also found only two willing to support the abolition of ICE. See *Would You Redistribute the Responsibilities of Immigrations and Customs Enforcement (ICE) to Other Agencies? If So, Would ICE Be Abolished?*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/policy-2020/immigration/abolish-ice/> [<https://perma.cc/R929-2YWD> (staff-uploaded, dark archive)]; see also Daniella Diaz, *These Democrats Want to Abolish ICE*, CNN (July 3, 2018, 10:57 AM), <https://www.cnn.com/2018/07/02/politics/abolish-ice-democrats-list/index.html> [<https://perma.cc/AEG8-9ULG>].

97. The Biden administration worked feverishly to create a strong Alternatives to Detention (“ATD”) program. Adam Shaw, *Nonprofit That Backs Defunding ICE to Oversee DHS Pilot Program Aiding Illegal Immigrants*, FOX NEWS (Oct. 20, 2022, 2:56 PM), <https://www.foxnews.com/politics/nonprofit-backs-defunding-ice-oversee-dhs-pilot-program-aiding-illegal-immigrants> [<https://perma.cc/GS6K-EDEY>]. However, while such a program should theoretically reduce the number of individuals being held in immigration detention, that is not currently the case, as there are nearly 40,000 individuals being held in facilities across the United States as of September 8, 2024. See *Immigration Detention Quick Facts*, TRAC IMMIGR. (Sept. 8, 2024), <https://trac.syr.edu/immigration/quickfacts/> [<https://perma.cc/FB6L-E27E>]. In addition, the Biden administration considered re-implementing family detention, though it shied away from the idea after vociferous negative feedback from the public

radical individuals must be considered. Such an appeal has proved successful elsewhere in the carceral context. For example, the Right on Crime Movement, a conservative effort in support of decarceration, identifies “public safety” as the goal of the criminal justice system and advocates against what it views as significant overcriminalization in the United States. For instance, in Oklahoma, arguably one of the most conservative states in the country,⁹⁸ local politicians exerted significant effort to lower the prison population in order to reduce the fiscal costs of the carceral system in the state.⁹⁹ Whether such accord could be reached across the aisle remains to be seen in the context of immigration, but, by identifying these animating principles, this Article seeks to begin that conversation.

Scholars and advocates have made significant headway in conversations about prison abolition and the decarceration movement. Their focus is now primarily on reimagining what a just society might look like.¹⁰⁰ This view

and advocacy groups. See Eileen Sullivan & Zolan Kanno-Youngs, *U.S. Is Said to Consider Reinstating Detention of Migrant Families*, N.Y. TIMES (Mar. 6, 2023), <https://www.nytimes.com/2023/03/06/us/politics/biden-immigration-family-detention.html> [<https://perma.cc/Z2DN-63HB> (staff-uploaded, dark archive)]; see also Ted Hesson, *US Family Immigration Detention Won't Restart 'at This Time,' Official Says*, REUTERS (Apr. 18, 2023, 5:23 PM), <https://www.reuters.com/world/us/us-family-immigration-detention-wont-restart-at-this-time-official-says-2023-04-18/> [<https://perma.cc/K4TW-BXMG> (staff-uploaded archive)]. But perhaps more troubling is that the ATD program has resulted in a massive amplification in the number of people being monitored by ICE—nearing 200,000, as of August 3, 2023. See *Alternatives to Detention (ATD)*, TRAC IMMIGR., https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html [<https://perma.cc/Q3F6-VVG7>].

98. See David Wasserman, Sophie Andrews, Leo Saenger, Lev Cohen, Ally Flinn & Griff Tatarsky, *2020 National Popular Vote Tracker*, COOK POL. REP., <https://www.cookpolitical.com/vote-tracker/2020/electoral-college> [<https://perma.cc/H7P3-MCN3> (staff-uploaded archive)] (indicating a split in favor of the Republican candidate behind only Wyoming, North Dakota, and West Virginia).

99. See Taylor Miller Thomas & Megan McCrink, *How Oklahoma Popped Its Prison Bubble, in Charts*, POLITICO MAG. (Apr. 23, 2020, 5:00 AM), <https://www.politico.com/interactives/2020/justice-reform-decarceration-in-oklahoma/> [<https://perma.cc/ADH7-RECB>]. However, those efforts have proved to be more challenging to maintain in the long term because of other punitive policies that mar the reentry process for many who are released from prisons. See Adam Kemp, *Oklahoma Has Tried to Lower Its Incarceration Rate. But Many Obstacles Face the Newly Released*, PBS NEWS (Dec. 27, 2022, 2:02 PM), <https://www.pbs.org/newshour/nation/oklahoma-has-tried-to-lower-its-incarceration-rate-but-many-obstacles-face-the-newly-released> [<https://perma.cc/A78D-98RP>]. There are local progressive efforts that are seeking to remedy these issues and were recently supported and signed into law by a conservative majority. See Ray Carter, *Expungement Reform Signed into Law*, OKLA. COUNCIL PUB. AFFS. (May 5, 2022), <https://www.ocpathink.org/post/independent-journalism/expungement-reform-signed-into-law> [<https://perma.cc/YF73-MPR6>]. Such “[e]xpungement reform” measures were supported by a larger national effort called Right on Crime, whose director in Oklahoma noted, “allows individuals to move on from their past while reducing costly recidivism.” Marilyn Davidson, *Right on Crime Applauds the Passage of Oklahoma’s HB 3316 Expungement Reform*, RIGHT ON CRIME (Apr. 28, 2022), <https://rightoncrime.com/right-on-crime-applauds-the-passage-of-oklahomas-hb-3316-expungement-reform/> [<https://perma.cc/3DK7-9NLD>].

100. See Lola Olufemi, *We Can Enact the Future We Want Now: A Black Feminist History of Abolition*, GUARDIAN (Aug. 3, 2020, 12:30 PM), <https://www.theguardian.com/books/2020/aug/03/we-can-enact-the-future-we-want-now-a-black-feminist-history-of-abolition> [<https://perma.cc/>

beyond the abolitionist horizon has produced generative answers to what might replace the prison system. Indeed, if there is one misconception about abolition that is worth clarifying, it is the idea that abolition seeks only to tear down existing institutions. Rather, “abolition is about presence, not absence. It is about building life-affirming institutions” in place of prior harmful ones.¹⁰¹ Abolitionists have primarily focused on promoting new systems that address safety concerns while diminishing the associated harms that we have come to associate with the prison industrial complex.¹⁰²

The abolitionist scholarship in the immigration sphere is approaching the horizon, much like the abolitionist scholarship in the criminal sphere did before it. Indeed, an analogous line of reasoning is helpful in considering how to frame and construct an abolitionist vision of the immigration legal system in the United States.¹⁰³ Many scholars have already begun pursuing the first step in this analysis, identifying the connection between the struggles to address the harms of the carceral system and those of the immigration enforcement system.¹⁰⁴ This Article seeks to extend and expand upon the current scholarship by reiterating the call for abolitionist thinking in the immigration space.¹⁰⁵ However, this Article makes plain that part of the methodology utilized in the prison abolition scholarship has been overlooked in the immigration space: identifying the normative justifications for the immigration enforcement regime.

W5BA-26W2] (identifying the international effort that is long grounded in the positive aspect of building).

101. Karis Clark, *Abolition Is*, MICH. DAILY (Apr. 19, 2021), <https://www.michigandaily.com/michigan-in-color/abolition-is/> [https://perma.cc/8WCX-MSPC] (quoting Ruth Wilson Gilmore: “[A]bolition is about presence, not absence. It’s about building life-affirming institutions.”).

102. The Vera Institute has gathered a repository of many of these ideas. See *Investing in Evidence-Based Alternatives to Policing*, VERA INST. JUST. (Aug. 2021), <https://www.vera.org/publications/investing-in-evidence-based-alternatives-to-policing> [https://perma.cc/ZCF3-L3L4].

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

104. See Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 711 (2015) (“The susceptibility of certain noncitizens to banishment in the form of deportation is mirrored by the exposure of other liminal populations to banishment in the form of spatial exclusion and susceptibility to incarceration.”).

105. In doing so, this Article echoes Angélica Cházaro’s invitation for “scholarship and advocacy that move in a new direction, one which reorganizes responses to deportation toward the goal of its downfall.” Cházaro, *The End of Deportation*, *supra* note 2, at 1051.

Much agreement exists about the harms inherent in the current immigration system—the harsh detention features,¹⁰⁶ the removal process that is extensively punitive,¹⁰⁷ and the arbitrary (and vacillating) ways in which people are precluded from entering the United States.¹⁰⁸ But there exists little consensus about the purpose of the immigration system. This question is not whether immigration detention, expulsion, or exclusion are permitted to exist, or who gets to make those decisions, or even who gets to review those decisions. Interpretations of permissibility are largely settled.¹⁰⁹ Instead, this Article argues that there is a need to invert the presumption of sovereignty.¹¹⁰ There should be no insistence of immigration regulation as inherent or required. Instead, we should presume that migration is “natural” in that it occurs historically, with regularity, and frequently because of state action.¹¹¹ To interrupt this process requires some justification.¹¹²

A challenge in mapping abolition theory onto immigration enforcement is that there is a distinction between the type of activity that the government seeks

106. See, e.g., Marouf, *supra* note 3, at 2143; César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1382–92 (2014) [hereinafter Hernández, *Immigration Detention*]; Boaz, *Practical Abolition*, *supra* note 3, at 205–12.

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

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

109. Professor Adam Cox, for example, finds this to be an important clarification to make, stating that the canonical early Supreme Court cases, including *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), and other cases from the Chinese Exclusion Act era, “were not about open borders arguments, and as a result they have little or nothing to say about what might justify restrictions on migration.” Adam B. Cox, *Three Mistakes in Open Borders Debates*, in IMMIGRATION, EMIGRATION, AND MIGRATION 51 (Jack Knight ed., 2017).

110. See, e.g., Cházaro, *The End of Deportation*, *supra* note 2, at 1097–98 (supporting the effort to “force sovereignty to justify itself, both on its own terms and as an excuse for the practice of deportation”); Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 453 (2000).

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

112. See Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 343–44 (2008). Professor Cox interrogates the distinction between “selection rules” and “regulatory rules,” indicating that both are implicated in institutional design with regard to immigration policy. *Id.*

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

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

A. *The Harm of Immigration Enforcement*

Immigration enforcement, detention, and exclusion collectively manifest an extraordinary amount of harm directed at those seeking to migrate to the United States,¹¹³ noncitizens present in the United States,¹¹⁴ their family members,¹¹⁵ and the communities in which they live and work. As the role of the Department of Homeland Security (“DHS”) has expanded, so too have its subagencies: ICE and CBP, among others.¹¹⁶ The result has been exorbitant

113. See, e.g., Abel Rodriguez, *Lethal Immigration Enforcement*, 109 CORNELL L. REV. 465, 465 (2024) (noting that 853 border crossers died in the attempt, while many also perish in immigration detention).

114. See Michael D. Shear, *Biden Said He'd Veer from Trump on Immigration. The Reality Is More Complicated*, N.Y. TIMES (May 8, 2023), <https://www.nytimes.com/2023/05/08/us/politics/biden-trump-immigration-title-42.html> [<https://perma.cc/8XUL-J9J7>] (staff-uploaded, dark archive)] (identifying the ways in which policies of the first Trump administration that were criticized by President Biden as a candidate have been embraced and furthered by the Biden administration).

115. See Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2319–26 (2019) (describing the way that “family separation,” while most egregious when it occurs at the border as a form of deterrence, is, in fact, woven into the entire system of immigration enforcement in the United States and that this pervasive separation is infrequently acknowledged because it is a “slow death” or “slow violence” as opposed to the “spectacular violence” that occurs in border separations).

116. In 2013, during the Obama administration, the United States spent more money on immigration enforcement (approximately \$18 billion) than all other forms of federal law enforcement combined (about \$14 billion). Julia Preston, *Huge Amounts Spent on Immigration, Study Finds*, N.Y. TIMES (Jan. 7, 2013), <https://www.nytimes.com/2013/01/08/us/huge-amounts-spent-on-immigration-study-finds.html> [<https://perma.cc/R6JC-QSF7>] (staff-uploaded, dark archive)] (citing DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, *MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* (2013)). Relatedly, the Fiscal Year 2024 budget for the Department of Homeland Security (“DHS”) is \$103.2 billion, of which \$1.3 billion alone is dedicated to maintaining

spending,¹¹⁷ increased surveillance targeting both citizens and noncitizens,¹¹⁸ and the regular execution of a singular, draconian punishment—exclusion or expulsion from the United States for years, decades, or even permanently.¹¹⁹ The compounded harms—family separation, outlandish spending, and the perpetuation of xenophobia and racism via the belief that immigrants are somehow tangibly different from native-born or naturalized citizens—are unsustainable, unnecessary, and due for a reckoning. As a result, many scholars, activists, affected communities, and even some politicians have issued calls for the conversation around abolition to be incorporated into the sphere of immigration enforcement.¹²⁰

the system of immigration detention. U.S. DEP'T HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2024 at 3 (2023). The Biden administration sought \$25 billion for immigration enforcement, a more than 150% increase from a decade ago. See Mark Akkerman, *Global Spending on Immigration Enforcement Higher than Ever and Rising*, MIGRATION POL'Y INST. (May 31, 2023), <https://www.migrationpolicy.org/article/immigration-enforcement-spending-rising> [<https://perma.cc/Z3Y6-EDYL> (staff-uploaded archive)]. For a thorough account of spending on immigration enforcement from 2003 to 2019, see *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (Aug. 14, 2024), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> [<https://perma.cc/LP2W-9KNB>].

117. *The Cost of Immigration Enforcement and Border Security*, *supra* note 116 (“Since the creation of the Department of Homeland Security (DHS) in 2003, the federal government has spent an estimated \$409 billion on the agencies that carry out immigration enforcement.”). A 2023 overview of the budget for Immigration and Customs Enforcement (“ICE”), one of the agencies responsible for immigration enforcement, tallies in at over \$8 billion dollars. DEP'T HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW: FISCAL YEAR 2023 CONGRESSIONAL JUSTIFICATION 5 (2022).

118. See Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 1–2 (2014) (“At virtually every stage of the process of migrating or traveling to, from, and within the United States, both noncitizens and U.S. citizens are now subject to collection and analysis of extensive quantities of personal information for immigration control and other purposes.”).

119. See Kanstroom, *Smart(er) Enforcement*, *supra* note 92, at 465–66. See generally Banks, *supra* note 92 (explaining the origins of deportation as a singular solution, its decoupling from criminal sanctions, and the various reasons why other options should exist, particularly for long-established residents in the United States).

120. See Jennifer J. Lee, *Immigration Disobedience*, 111 CALIF. L. REV. 71, 116 (2023) [hereinafter Lee, *Disobedience*]. Professor Lee provides background on the ways in which the immigration rights landscape has changed:

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

Id.

The effort to incorporate abolitionist thinking into the conversations about immigration enforcement is burgeoning, but still at an emerging stage.¹²¹ Part of refining and clarifying the end goals of immigration enforcement abolition is to identify what exactly might be abolished. There are three distinct but interrelated areas in which abolition theory might apply: (1) immigration detention, (2) deportation, and (3) exclusion. This part addresses the harms of each.

1. Detention

Considering the harm of immigration detention makes for the smoothest application of abolitionist thinking.¹²² Immigration detention centers are, essentially, jails.¹²³ Many of them are operated by private prison companies and are designed to be interchangeable—eligible for contracts from both ICE and from county, state, and federal criminal prison contracts.¹²⁴ As such, immigration detention results in many of the same harms that are present in prisons: violence, death, psychological trauma, stigma, and harms to family

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

122. See Hernández, *Abolishing Prisons*, *supra* note 3, at 246 (identifying imprisonment as a “central feature of immigration law enforcement,” and issuing “the first . . . call for the abolition of immigration imprisonment in the United States”).

123. See Boaz, *Practical Abolition*, *supra* note 3, at 205–15 (describing the dehumanization that occurs in immigration detention, the speed with which contagious disease spreads, and the abuse that occurs in immigration detention facilities, whose standards of care are even less rigorous than many prisons); see also Hernández, *Immigration Detention*, *supra* note 106, at 1350–51 (critiquing the distinction that courts have drawn between “civil” and “criminal confinement,” and decrying the artificiality and blurred boundaries between these two systems as both ephemeral and causing additional harm).

124. This “flexibility” is a business strategy embraced after the Obama administration ended all federal prison contracts with private companies. See Clyde Haberman, *For Private Prisons, Detaining Immigrants Is Big Business*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html> [<https://perma.cc/2FM9-NYX7> (staff-uploaded, dark archive)]. The first Trump administration reinstated those contracts, but the Biden administration again terminated them. See Carrie Johnson, *Biden Ended Contracts with Private Prisons. So One May Turn to House Immigrants*, NPR (Sept. 15, 2021, 4:49 PM), <https://www.npr.org/2021/09/13/1036576308/biden-ended-contracts-with-private-prisons-so-one-may-turn-to-house-immigrants> [<https://perma.cc/LH9X-Z3JS>]; see also Jamiles Lartey, *Think Private Prison Companies Are Going Away Under Biden? They Have Other Plans*, MARSHALL PROJECT (Nov. 17, 2020), <https://www.themarshallproject.org/2020/11/17/think-private-prison-companies-are-going-away-under-biden-they-have-other-plans> [<https://perma.cc/SGR5-QSPZ>] (providing a more extensive report about the business strategies of CoreCivic and GEO Group and describing this “diversification”).

members.¹²⁵ Many of the same techniques for compliance used in prisons are also used in immigration detention centers: solitary confinement,¹²⁶ low-wage work,¹²⁷ uniforms, numbers instead of names, barred cells, and the constant threat of sexual assault.¹²⁸ Efforts to speak out about these harms are also under threat of suppression.¹²⁹ While a central feature of immigration enforcement

125. See KRISTINA SHULL, *DETENTION EMPIRE: REAGAN'S WAR ON IMMIGRANTS AND THE SEEDS OF RESISTANCE* 14–28 (2022) (describing the rise of immigration detention centers during the Reagan administration and the immense harms associated with its continued use); see also MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 7–11 (2004) (providing an earlier account of many of these same horrors).

126. Rebeka Wolf, *New Complaint Shows ICE's Use of Solitary Confinement Is Excessive*, IMMIGR. IMPACT (July 14, 2023), <https://immigrationimpact.com/2023/07/14/complaint-aurora-ice-solitary-confinement> [<https://perma.cc/VX4Z-QYY3>] (discussing a recent complaint filed in the U.S. District Court for the District of Colorado that cites the regular and punitive use of solitary confinement, as well as using the threat of solitary confinement as a form of promoting compliance from detainees); see also ALEXIS PERLMUTTER & MIKE CORRADINI, NAT'L IMMIGRANT JUST. CTR., *INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION* 8–9 (2012) (providing a lengthy report from a decade ago detailing how widespread and regular this practice has been in immigration detention facilities, even with official ICE policy discouraging its use).

127. Eduardo Medina, *Immigration Detainees Are Owed \$17 Million in Back Pay, Jury Says*, N.Y. TIMES (Oct. 31, 2021), <https://www.nytimes.com/2021/10/31/us/immigrant-detainee-minimum-wage.html> [<https://perma.cc/CYU9-QFGA> (staff-uploaded, dark archive)] (reporting that a jury found that GEO Group was liable for \$17.3 million “in back pay to immigration detainees who were denied minimum wage” while detained at a Tacoma, WA facility, having been paid only \$1 a day); see also Farida Jhabvala Romero, *ICE Detainees Making \$1 a Day Sue over Alleged Wage Theft*, KQED (July 16, 2022), <https://www.kqed.org/news/11919749/ice-detainees-making-1-a-day-sue-over-alleged-wage-theft> [<https://perma.cc/HD6Z-APYT>]; Lautaro Grinspan, *ICE Detainees Say They Were Forced into Labor in Ga., File Lawsuit*, ATLANTA J.-CONST. (Aug. 26, 2022), <https://www.ajc.com/news/georgia-news/ice-detainees-say-they-were-forced-into-labor-in-ga-file-lawsuit/ECLTIVQNMVE6LKOFKXQBWCCVUA/> [<https://perma.cc/WA6F-4X6Q>] (examining a similar lawsuit that has been filed by detainees at the Bakersfield, CA facility also owned by GEO Group, wherein those who refuse to participate in work are frequently threatened with being placed in solitary confinement).

128. Habitual sexual misconduct by officials employed by immigration detention centers has occurred in Georgia and Texas. See José Olivares & John Washington, “*The Worst Day of My Life*”: ICE Jail Nurse Sexually Assaulted Migrant Women, *Complaint Letter Says*, INTERCEPT (July 13, 2022), <https://theintercept.com/2022/07/13/ice-stewart-detention-sexual-misconduct/> [<https://perma.cc/E2AT-Y67Z> (staff-uploaded archive)]; Lomi Kriel, *ICE Guards “Systematically” Sexually Assaulted Detainees in an El Paso Detention Center, Lawyers Say*, PROPUBLICA (Aug. 14, 2020), <https://www.propublica.org/article/ice-guards-systematically-sexually-assault-detainees-in-an-el-paso-detention-center-lawyers-say> [<https://perma.cc/TDD7-C9D6>]; see also Nicole Lue, Joseph Nwadiuko, Parveen Parmer & Amy Zeidan, *Trends in Sexual Assault Against Detainees in US Immigration Detention Centers, 2018–2022*, 329 JAMA 338, 339 (2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10408271/> [<https://perma.cc/3ZAE-EELD>] (detailing a recent study that found that over seventy percent of ICE facilities had sexual assault allegations reported, including allegations against other detainees and detention facility officials, although the study itself acknowledges that this data may be underinclusive because it is supplied by ICE).

129. See Alina Das, *Immigration Detention and Dissent: The Role of the First Amendment on the Road to Abolition*, 56 GA. L. REV. 1433, 1439–40 (2022) (identifying the necessity of preserving the First Amendment right to identify, and voice complaints about, the harms that occur, for example, in immigration detention centers).

today, detention is a relatively new phenomenon, one that has not existed for much of United States history.¹³⁰ Such a return seems possible.

2. Deportation

Deportation occurs in myriad ways. It can be perfunctory, drawn out and painful, or ultimately, deadly. A series of articles have pointed out the recent deaths of individuals who were deported after losing their cases in immigration court.¹³¹ They include: a trans woman,¹³² a man who had “[s]everal uncles and cousins . . . assassinated,”¹³³ another who could not stand to remain in immigration detention after seven months,¹³⁴ and countless others.¹³⁵ Frankly, as Angélica Cházaro announced, “[d]eportation is [v]iolence.”¹³⁶ As Stella Burch

130. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 55–74 (2019).

131. See Austin Kocher, *Asylum Seeker Killed in Guatemala After Omaha Immigration Judge Ordered Him Deported*, SUBSTACK (July 14, 2023), <https://austinkocher.substack.com/p/asylum-seeker-killed-in-guatemala> [<https://perma.cc/8KPG-HWMB>]. Professor Kocher, a legal geographer at Syracuse University, compiled these reports. *Id.*

132. See Muri Assunção, *Trans Woman Killed in Honduras Months After Deportation from U.S.*: Reports, N.Y. DAILY NEWS (Oct. 21, 2022), <https://www.nydailynews.com/news/world/ny-transgender-honduras-killed-months-after-deportation-us-miami-20221021-xzk2cbmzjhsdexmyjbfkfk-hee-story.html> [<https://perma.cc/99P3-V8RE> (staff-uploaded, dark archive)]. Her death was the thirty-fourth killing of a member of the LGBTQ+ community in Honduras in 2022, though more than 434 LGBTQ+ individuals have been killed there since 2009. *Id.*

133. See Jeremy Turley, *America’s Toughest Road to Asylum Runs Through the Omaha Immigration Court*, FLATWATER FREE PRESS (July 6, 2023), <https://flatwaterfreepress.org/americas-toughest-road-to-asylum-runs-through-the-omaha-immigration-court/> [<https://perma.cc/5XLB-A3SX>] (discussing the case of a man who came with his family to the United States from Guatemala in the early 1990s and was returned there, despite barely speaking Spanish). His case is one of the many denied in Omaha, Nebraska, where the immigration court denies ninety-six percent of the cases it hears. *Id.*

134. See Kevin Sieff, *When Death Awaits Deported Asylum Seekers*, WASH. POST (Dec. 26, 2018), <https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/> [<https://perma.cc/65ZK-6EVB> (staff-uploaded, dark archive)] (“Ronald Acevedo waited eight months for asylum in Arizona. Days after he was deported, he was found dead in the trunk of a car.”).

135. Much of the recent coverage around this issue has focused on the harms that occurred during the first Trump administration, but reporting on the Obama administration found that at least eighty-three United States deportees were murdered upon their return to El Salvador, Guatemala, and Honduras between January 2014 and October 2015. See, e.g., Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> [<https://perma.cc/6RHE-KTYC> (staff-uploaded, dark archive)] (highlighting primarily the harms in immigration policy following the first election of Donald Trump). But see, e.g., Sibylla Brodzinky & Ed Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, GUARDIAN (Oct. 12, 2015), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> [<https://perma.cc/L5QY-BM7M> (staff-uploaded archive)] (“Guardian investigation into consequences of Obama’s migration crackdown reveals US deportees have been murdered shortly after return to El Salvador, Guatemala and Honduras, with study saying as many as 83 killed since 2014.”).

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

Elias noted, immigration laws and policies of the United States have been transformed, reifying DHS as an organization that has “inspired terror in immigrant communities, particularly among immigrants of color.”¹³⁷

Most individuals are expelled from the United States discretionarily—meaning that the federal government is not obligated to remove them from its territory, though it has the authority to do so.¹³⁸ Currently, the undocumented population hovers around approximately ten million people,¹³⁹ though even more are subject to precarity because of temporary statuses.¹⁴⁰ The question, then, is to what extent the federal government should deport people who are not legally required to be deported. Past administrations have taken different tacks—the Obama administration abided by a slogan of “felons not families,”¹⁴¹

137. See Stella Burch Elias, *Law as a Tool of Terror*, 107 IOWA L. REV. 1, 1 (2021) (“The Department of Homeland Security was transformed from an organization dedicated to combatting terrorism to an organization that instead inspired terror in immigrant communities, particularly among immigrants of color.”). But see Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. TIMES (Feb. 21, 2023), <https://www.nytimes.com/2023/02/21/us/biden-asylum-rules.html> [<https://perma.cc/8P3R-L3ZZ> (staff-uploaded, dark archive)] (explaining that hopes in the Biden administration have proved less fruitful than desired, given Biden’s implementation of an asylum policy that would expel individuals seeking asylum at the border without following a particularized, difficult path involving a glitchy app, and identifying ways that the policy might violate international law).

138. This discretionary authority has been much debated and subject to significant scrutiny. The authority of the executive has been questioned in a partisan way and on a regular basis for much of the past fifteen years. See, e.g., *Deferred Action for Childhood Arrivals*, 86 Fed. Reg. 53736 (proposed Sept. 28, 2021) (to be codified at 8 C.F.R. pts. 106, 236, and 274a); Memorandum from Jeh Charles Johnson, Sec’y, Dept. of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf’t, and R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. (Nov. 20, 2014); 42 U.S.C. § 265; Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017); *Biden v. Texas*, 142 S. Ct. 2528, 2534–35 (2022).

139. See Miriam Jordan, *Many Undocumented Immigrants Are Departing After Decades in the U.S.*, N.Y. TIMES (Mar. 13, 2023), <https://www.nytimes.com/2023/03/01/us/undocumented-immigrants-exodus-us.html> [<https://perma.cc/R54X-58F6> (staff-uploaded, dark archive)] (“The current undocumented population has stayed relatively constant at about 10.2 million over the past several years after peaking at nearly 12 million in 2008, even with the large number of new arrivals at the border.”).

140. For example, Afghans and Ukrainians who entered the United States with parole, recipients of Deferred Action for Childhood Arrivals (who have been subject to threats and attempts to revoke their lawful status), recipients of Temporary Protected Status (who were also subject to threats and successful efforts to revoke their status during the Trump administration), and others are all subject to precarity because of their temporary statuses. See Mohamad Molsimani, *How Temporary Protected Status Has Expanded Under the Biden Administration*, PEW RSCH. CTR., <https://www.pewresearch.org/short-reads/2024/03/29/how-temporary-protected-status-has-expanded-under-the-biden-administration/> [<https://perma.cc/59DM-49H8>]. It also remains worth mentioning that any Legal Permanent Resident can quickly find themselves in danger of removal from even minor offenses, such as shoplifting or drug possession. See 8 U.S.C. § 1227(a)(2).

141. This distinction was roundly criticized, though it did introduce a more concrete form of prosecutorial discretion, which has been embraced by the Biden administration. The foresight of this approach was to focus limited resources in a way that might appeal to a broader audience—though partisans on both sides were ultimately unsatisfied. See *Biden Administration Announces New Prosecutorial*

while the Trump administration embraced a less disciplined and coherent plan, with the then-director of ICE stating plainly that undocumented immigrants broadly “should be afraid.”¹⁴² The constant threat of deportation promotes existential harm. As a federal policing agency, ICE is limited almost exclusively by executive authority under the plenary power.¹⁴³ Because of this, the threat of deportation hangs like a pendulum swinging wildly between realms of enforcement and relief.¹⁴⁴

Discretion Policy, CATH. LEGAL IMMIGR. NETWORK (June 28, 2021), <https://www.cliniclegal.org/resources/removal-proceedings/biden-administration-announces-new-prosecutorial-discretion-policy> [<https://perma.cc/E3YM-UVAR>] (“ICE Principal Legal Advisor John D. Trasviña issued a memo to ICE Office of the Principal Legal Advisor . . . Generally, the memo encourages OPLA attorneys to focus agency resources on cases that fall within one of the three priority categories, and to exercise prosecutorial discretion in non-priority cases.”); *Obama Has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016), <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> [<https://perma.cc/6S6Q-QVKC>] (“President Obama has often been referred to by immigration groups as the ‘Deporter in Chief’ . . . ‘Felons, not families’ . . . , Obama said in November 2014 when announcing his executive action on immigration.”).

142. Tal Kopan, *ICE Director Undocumented Immigrants ‘Should Be Afraid,’* CNN POLITICS, <https://www.cnn.com/2017/06/16/politics/ice-immigrants-should-be-afraid-homan/index.html> [<https://perma.cc/SE8X-5GQH>] (last updated June 16, 2017, 6:52 PM).

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

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

3. Exclusion

Borders throughout the world,¹⁴⁵ but especially in the United States,¹⁴⁶ are the genesis of frequent death and despair.¹⁴⁷ The United States has not always clung so tightly to these ideas of immigration restrictions.¹⁴⁸ But violence is now omnipresent at the border.¹⁴⁹

The lethality of borders is uncontested. In his seminal work, *The Land of Open Graves*, anthropologist Jason De León catalogues the sites of migrant deaths in the Sonoran Desert that have resulted from the United States' policy in the late 1990s of "Prevention Through Deterrence," wherein it made border crossing along known routes more difficult.¹⁵⁰ The result has been over eight thousand deaths in the desert since 1998.¹⁵¹ This lethality is on view everywhere in the immigration enforcement regime, but especially in the "hardening" of the

145. See Imogen Piper, Joyce Sohyun Lee, Claire Parker & Elinda Labropoulou, *Tracing a Tragedy: How Hundreds of Migrants Drowned on Greece's Watch*, WASH. POST (July 5, 2023, 10:00 AM), <https://www.washingtonpost.com/world/interactive/2023/greece-migrant-boat-coast-guard/> [<https://perma.cc/5JBQ-MD7U> (staff-uploaded, dark archive)] (tracing the capricious inaction that led to the drowning of hundreds of migrants). In June of 2023, a boat overloaded with individuals seeking refuge in Italy capsized in the Mediterranean Sea. *Id.* Perhaps as many as 750 people drowned. *Id.* While this incident occurred halfway around the world, the policies that led to it emanate directly from the United States. *See id.*

146. See Gloria Oladipo, *Texas Trooper Says They Were Told to Push Children into Rio Grande and Deny Migrants Water*, GUARDIAN (July 18, 2023, 8:38 PM), <https://www.theguardian.com/us-news/2023/jul/18/texas-troopers-inhumane-migrants-greg-abbott-border-initiative> [<https://perma.cc/CA7P-9LNK>] (showing how state governments are directly participating in this).

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

148. See Charles D. Weisselberg, *Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 942 n.23 (1995) (noting that there was a time when the United States government "cordially recognize[d] the inherent and inalienable right of man to change his home and allegiance"). Special thanks to Aaron Reichlin-Melnick for bringing this quotation to my attention.

149. See Ruth Wilson Gilmore, *Fatal Couplings of Power and Difference: Notes on Racism and Geography*, 54 PRO. GEOGRAPHER 15, 16 (2002) (calling for a movement to see deportation as violence, using Ruth Wilson Gilmore's description of violence as "the cause of premature deaths").

150. JASON DE LEÓN, *THE LAND OF OPEN GRAVES* 43 (2015).

151. James Verini, *How U.S. Policy Turned the Sonoran Desert into a Graveyard for Migrants*, N.Y. TIMES MAG., <https://www.nytimes.com/2020/08/18/magazine/border-crossing.html> [<https://perma.cc/S95U-3SFG> (staff-uploaded, dark archive)] (last updated Nov. 22, 2020); cf. *How Policy Turned the Sonoran Desert into a Weapon*, KINO BORDER INITIATIVE (June 10, 2021), <https://www.kinoborderinitiative.org/policy-weaponized-desert/> [<https://perma.cc/2E6B-CV2B>] (noting that the total number of migrant deaths investigated by Pima County, Arizona, in 1994 was eleven).

border.¹⁵² The border patrol has been subject to significant critique because of the way in which it operates to militarize the United States border.¹⁵³

While the first Trump administration elevated public awareness of the violence of the border through its separation of families,¹⁵⁴ the Biden administration rivaled it with incidents such as its almost caricature-like abusive treatment of Haitian migrants.¹⁵⁵ Indeed, both administrations relied on Title 42 and other measures to deny entry to and rapidly expel migrants during the COVID-19 pandemic.¹⁵⁶ The mythos of the border has long been used to justify the litany of deaths, injuries, and other violence that accompany it.¹⁵⁷ This reality and mythos makes working towards abolition in the immigration context all the more significant, as the next section discusses.

B. *Arenas for Abolition*

These harms make clear the need for at least considering an abolitionist approach. Instructive terminology from scholarship identifies abolitionist reforms as “improvements that win real, material changes and get us closer to systemic change rather than incrementally improving and thereby reifying existing structures.”¹⁵⁸ Alternative terms include “transformative reforms, non-

152. Rodriguez, *supra* note 113, at 495–96 (identifying the ways in which lethality is reified and legitimized through political posturing and inhumane immigration policy).

153. See REECE JONES, *NOBODY IS PROTECTED: HOW THE BORDER PATROL BECAME THE MOST DANGEROUS POLICE FORCE IN THE UNITED STATES* 16 (2022).

154. See Elliot Spagat, *US Identifies 3,900 Children Separated at Border Under Trump*, AP NEWS (June 8, 2021, 1:17 PM), <https://apnews.com/article/az-state-wire-donald-trump-immigration-lifestyle-government-and-politics-54e2e5bbff270019d8bda3c81161c7c7> [<https://perma.cc/WJ3V-TQ3M>] (reporting that between 3,900 and 5,500 children were separated from their parents during the first Trump presidency).

155. Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrol's Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES, <https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html> [<https://perma.cc/Y7EL-DGMR> (staff-uploaded, dark archive)] (last updated Oct. 19, 2021) (“Images of Border Patrol agents on horses, pushing back Haitian migrants crossing the Rio Grande to try to reach U.S. soil, have prompted outrage among Democrats and called into question President Biden’s decision to swiftly deport thousands who had been arriving en masse at a small Texas border town.”).

156. See Justo Robles, *Title 42 Migration Restrictions Have Ended, but Biden's New Policy Is Tougher*, GUARDIAN (May 13, 2023, 9:05 AM), <https://www.theguardian.com/us-news/2023/may/13/title-42-migration-biden-new-policy-tougher> [<https://perma.cc/E6ZP-3GWK>] (describing how, even when the Title 42 restrictions ended, the Biden administration put into place equally restrictive rules for asylum seekers that seem to violate the rules of international law).

157. See, e.g., Nick Miroff, *The Border Wall Trump Called Unclimbable Is Taking a Grim Toll*, WASH. POST (Apr. 29, 2022, 11:00 AM), <https://www.washingtonpost.com/national-security/2022/04/29/trump-border-wall-injuries-deaths/> [<https://perma.cc/6WA6-PHG3> (staff-uploaded, dark archive)] (highlighting new research that notes a massive five-fold increase in serious injuries from border wall falls after the height of border walls was raised, as well as sixteen deaths, where there had previously been none).

158. Cheer, *supra* note 53, at 71.

reformist reforms, and revolutionary reforms.”¹⁵⁹ This is where the distinction between regular reforms and non-reformist reforms is important to delineate.¹⁶⁰ An example is instructive, and here I will not shy away from the most contentious one. Among immigration scholars and advocates, there have been prolonged calls for both universal representation¹⁶¹ and for the creation of independent immigration courts.¹⁶²

While the dismantling of one system is necessary to make space for another, viewing this dismantling in tandem with the construction of its replacement can help provide a unifying form around which some consensus and unification can coalesce. It is a challenging mental feat to grip onto the unknown. Prefiguration is necessary.¹⁶³ Abolitionist thinking requires radical imagination about what *will* exist in the future in addition to what will not exist. This abolitionist horizon has gained favor among criminal legal theorists in the abolition space, and it is helpful to incorporate that thinking here.¹⁶⁴ Below, this Article groups together and provides a brief overview of the abolition efforts directed at immigration detention, deportation, and exclusion.

Currently, there is some concern about how abolitionist ideas in the context of one area of enforcement may further retrench the mechanisms of

159. *Id.*

160. For an in-depth and practical analysis of drawing the line and the challenge of determining whether a reform is non-reformist, see Hlass, *supra* note 1, at 1631–36; *see also* Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. 407, 407 (2023) (raising the alarm that advocating for more representation of immigrants in removal proceedings may result in the same disappointing outcomes that have occurred decades after *Gideon v. Wainwright* guaranteed the right to counsel in criminal proceedings); Michael Kagan, *In Defense of Deportation Defense*, 56 U.C. DAVIS L. REV. ONLINE 1, 1 (2022) (grappling with the critique that providing counsel is not abolitionist and proposing what do we do in the meantime).

161. *See* Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503, 503 (2018) (discussing universal representation as a progressive project for noncitizens in removal proceedings).

162. *See America Needs a Fair and Independent Immigration Court*, AM. IMMIGR. LAWS. ASS’N (Oct. 20, 2023), <https://www.aila.org/featured-issues/immigration-courts> [<https://perma.cc/7WEB-5FAK>]; *Time for an Independent Immigration Court*, AM. BAR ASS’N (Feb. 27, 2022), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/feb-22-wl/article-i-courts-0222wl/ [<https://perma.cc/XV23-9BYQ>].

163. *See generally* Ashar, *supra* note 49 (discussing prefigurative thinking and asking how lawyers and law students can “work with social-movement organizations on projects that prefigure utopian social arrangements”).

164. Aiken & Silverman, *supra* note 121, at 150. Professors Aiken and Silverman describe the abolition space as follows,

[Nandita] Sharma argues that analyzing the links between slavery and immigration controls, on the one hand, and the links between the incarceration of subordinated citizens and those classified by States as ‘migrants,’ on the other, strengthens contemporary social justice struggles for No Borders. Indeed, in view of this history, Sharma makes a compelling case that prison abolition and No Borders spring from the same well of undoing and ultimately ending state controls on human mobility.

Id. at 150.

enforcement in other contexts. For example, efforts to end immigration detention via alternatives to detention may further strengthen the immigration surveillance system and do little to offer safety from removal.¹⁶⁵ Others note that attempts to provide representation to individuals in removal proceedings,¹⁶⁶ even as a way of mitigating removal in some cases and potentially diminishing the number of individuals detained,¹⁶⁷ could itself be subject to critique. Concerned advocates note namely that these efforts amount to little more than an argument “that deportation is being maldistributed—that there is a contradiction between with the rule of law requires, what due process requires, and the way that deportation is currently being meted out.”¹⁶⁸ Others

165. See generally Sarah Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages*, 95 COLO. L. REV. 219 (2024) (arguing that electronic monitoring of immigrants creates a widespread surveillance scheme that amplifies harm to migrants by increasing the number who are being monitored in “digital cages”).

166. See Boaz, *Practical Abolition*, *supra* note 3, at 233–34 (providing an overview of the scholarship on the due process right to counsel, generally and for specifically delimited classes); see also The Fairness to Freedom Act, S.1187, 118th Cong. (2023) (introducing The Fairness to Freedom Act, introduced to the Senate Judiciary Committee in April 2023 by Senator Kirsten Gillibrand); KIRSTEN GILLIBRAND, THE FAIRNESS TO FREEDOM ACT 1–2 (2023), <https://www.gillibrand.senate.gov/wp-content/uploads/2023/04/SUMMARY-Fairness-to-Freedom-Act-of-2023-1.pdf> [<https://perma.cc/D2YD-T94L>] (providing an overview of the Act and the troubles it may face passing in the current Congress).

167. See Boaz, *Practical Abolition*, *supra* note 3, at 257 (articulating a possible avenue for the abolition of immigration detention by diverting federal funding away from detention and toward the provision of counsel, an intervention which corresponds with both nearly perfect attendance rates at hearings and a significantly higher likelihood of success in the outcomes of the substantive case).

168. Cházaro, *The End of Deportation*, *supra* note 2, at 1113. This same critique applies to the effort to introduce independent immigration courts not situated within the Department of Justice or other part of the administrative state, and therefore not subject to shifts in the political winds that occur with changes in the executive branch. See ALISON PECK, THE ACCIDENTAL HISTORY OF THE U.S. IMMIGRATION COURTS: WAR, FEAR, AND THE ROOTS OF DYSFUNCTION xiv (2021) (providing an engrossing history of how the immigration courts ended up in the Department of Justice after having originated in the Department of Labor). Professor Peck also shares past proposals that have been offered to remove the immigration courts from beneath the direct authority of the Attorney General, who is under the direct authority of the President; these proposals range from the creation of a new subagency, to a new agency, to an Article I court. See *id.* at 160–66 (providing also Professor Peck’s strongest support for an Article I court). Critics have identified the capture of immigration courts as a major impediment to independent decision making. See Mimi Tsankov, *The Immigration Court: Zigzagging on the Road to Judicial Independence*, 93 U. COLO. L. REV. 303, 308–14 (2022) (summarizing a report by the American Bar Association which detailed these concerns). Others have proposed both Article I and Article III courts, each of which would provide different levels of autonomy, with a rationale focused on consistency, predictability, and insulation from the political branches. See *Courts in Name Only: Repairing America’s Immigration Adjudication System*, 136 HARV. L. REV. 908, 917–22 (January 2023). There is also political support for this reform, with legislation also pending in Congress; for example, a recent bill made it out of the House Judiciary Committee in 2022, seeking to establish an Article I court, similar to the United States Tax Court system. Press Release, U.S. Congresswoman Zoe Lofgren, House Judiciary Committee Passes Lofgren’s Legislation to Reform the U.S. Immigration Court System (May 12, 2022), <https://lofgren.house.gov/media/press-releases/house-judiciary-committee-passes-lofgren-s-legislation-reform-us-immigration> [<https://perma.cc/4Y56-2Y9S>] (detailing this legislation introduced by Congresswoman Zoe Lofgren).

argue that support for removal defense is a necessary precursor to advancing and strengthening the immigrant rights movement.¹⁶⁹ In the hierarchy of abolition efforts, immigration detention is a foundational place to initiate these conversations.

1. Detention

Immigration detention has been the primary target for abolitionists writing and working in the immigrant rights space.¹⁷⁰ It is easiest to conceptualize the absence of immigration detention because there are lengthy periods of time in United States history when such detention simply did not exist.¹⁷¹ The rise in the usage of immigration detention mirrors the United States' efforts to be 'tough on crime' by launching a 'War on Drugs' and implementing policies that led to a massive increase in the number of individuals being held in prison.¹⁷² This shift is historically observable and fits most neatly into the narrative of decarceral efforts—much in the same way that prisons should be abolished (or vastly diminished), so, too, do immigration detention centers no longer need to exist.¹⁷³

Immigration detention is supposed to function solely to ensure that individuals appear at their proceedings.¹⁷⁴ However, over the last several decades, it has also served as a form of punishment.¹⁷⁵ Scholars writing in this

169. See Kagan, *supra* note 160, at 1 (arguing that “[l]egal defense is the most feasible means available right now to stop many deportations” and that abandoning due support for it as a strategy would be a misstep).

170. Lee, *Disobedience*, *supra* note 120, at 117 (“Today, the movement for immigrant rights demand reforms that go beyond earned legalization. While they still seek pathways to citizenship, their policy demands now include defunding ICE and Customs and Border Enforcement (CBP), repealing laws that criminalize immigration, ending immigration detention, and ending contracts with private companies that participate in immigration enforcement.”).

171. See Ana Raquel Minian, *America Didn't Always Lock Up Immigrants*, N.Y. TIMES (Dec. 1, 2018), <https://www.nytimes.com/2018/12/01/opinion/sunday/border-detention-tear-gas-migrants.html> [<https://perma.cc/DSM8-YRAM> (staff-uploaded, dark archive)] (explaining that, historically, immigration detention has not been a consistent practice in the United States). For a more extensive accounting where Professor Ana Raquel Minian explores how immigration detention was pushed to the margins in the 1950s under the Eisenhower administration because it was “unpopular, expensive, and ineffective,” see ANA RAQUEL MINIAN, *IN THE SHADOW OF LIBERTY: THE INVISIBLE HISTORY OF IMMIGRANT DETENTION IN THE UNITED STATES* 117–19 (2024).

172. See ALEXANDER, *supra* note 13, at 1–19.

173. Aiken & Silverman, *supra* note 121, at 145 (“There is no evidence that detention centres promote safety and security in local communities or lead to lower numbers of newcomers. Despite popular rhetoric about detention’s deterrent effects, demographic evidence finds that restrictive immigration measures like detention do not stop inflows, decrease permanent settlement, or increase ‘voluntary’ deportations.”).

174. Hernández, *Immigration Detention*, *supra* note 106, at 1357 (exploring a critique of the way that immigration detention centers actually function).

175. See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 49 (2010) (“Immigration detention has embraced the ‘aesthetic’ and ‘technique’ of incarceration, evolving

area agree that immigration detention causes harm, is inordinately expensive, and its policy objectives can be satisfied elsewhere—via community-supported compliance efforts, alternatives-to-detention (including monitoring), or simply via the provision of counsel.¹⁷⁶ While there is agreement about the need for detention to end, how to go about implementing its end has less of a consensus. For example, some note that the programs that have led to a decrease in the detained population have incorporated other, new harms—such as the creation of a vast surveillance network, reifying the state with the power to continue to conduct enforcement.¹⁷⁷

2. Deportation

Abolishing deportation has received less scholarly attention, though interest in the idea is rising. Scholars have primarily focused on the concept of deportation as a form of banishment, a state response that has historically been viewed as punishment.¹⁷⁸ Yet, the Supreme Court has consistently held, for nearly a century and a half, that deportation is not punishment and therefore those subject to deportation cannot access the same rights that would be afforded to individuals subject to state punishment.¹⁷⁹ The result is that the executive retains significant power to remove any noncitizen for nearly any reason, even if such conduct would result in relatively minor sanctions for a United States citizen. Professor Eisha Jain explains that this approach has “paved the way for people who fit a racial stereotype to be treated as foreign, regardless of their actual immigration status.”¹⁸⁰ As a result, some scholars have

for many detainees into a quasi-punitive regime far out of alignment with immigration custody’s permissible purposes.”).

176. See Marouf, *supra* note 3, at 2164–65 (discussing community-based alternatives to detention); Boaz, *Practical Abolition*, *supra* note 3, at 258.

177. See Sherman-Stokes, *supra* note 165, at 230–31 (highlighting the harms that come from “digital cages” in the form of surveillance that supplants immigration detention).

178. Despite repeated affirmation from the Supreme Court that “deportation . . . is not punishment,” *Mahler v. Eby*, 264 U.S. 32, 39 (1924), scholars have long criticized this interpretation, Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 213 (1958–59). The Supreme Court, itself, has intimated that there may be some undefined contours to this understanding, finding that deportation is a consequence that frequently merits more consideration than criminal penalties for individuals being prosecuted in the United States. *Padilla v. Kentucky*, 559 U.S. 356, 387–86 (2010) (Alito, J., concurring). See generally Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011) [hereinafter Markowitz, *Different*] (discussing an analysis of this evolving jurisprudence); Javier Bleichmar, *Deportation as Punishment*, 14 GEO. IMMIGR. L.J. 115 (1999) (articulating an originalist argument for interpreting deportation as punishment, rooted in both English and common law historical legal understandings of banishment).

179. An exploration of this history is offered by Peter L. Markowitz’s article *Deportation Is Different*. See Markowitz, *Different*, *supra* note 178, at 1308–13. A comparison of civil and criminal treatment is observed and critiqued in Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 313–18 (2000).

180. Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794, 1804 (2022) (detailing the history of race-based immigration policing in the United States).

called for the abolition of deportation, calling it a form of violence and attacking the arbitrary nature in which it is implemented.¹⁸¹

The push here has largely centered around the harm that is directed at individuals who have resided in the United States for a significant period and who would be subject to separation from their communities and families if deported.¹⁸² In addition, others have pointed out that the inadequate structure and interpretation of asylum law frequently lead to the removal of individuals back to a country where they will be subject to severe harm or even death.¹⁸³ Interestingly, there has also been an effort directed at solidarity—expanding protections against deportation for a broader swath of the population, as opposed to privileging one group over another.¹⁸⁴ Some scholars have sought to split the difference, offering up policy proposals that would offer different forms of enforcement, for example, by mimicking the actions of the IRS in collecting taxes,¹⁸⁵ and focusing on compliance.¹⁸⁶

This means that the work of the administrative state would shift toward moving the myriad people who are eligible for status into conformance with some available status, thus obviating the need for removal proceedings. This compliance focus would be more akin to the work already being done by U.S. Citizenship and Immigration Services, which adjudicates affirmative

181. See Cházaro, *The End of Deportation*, *supra* note 2, at 1040.

182. See, e.g., Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 290–93 (2008) (distinguishing between “exclusion” and “expulsion” proceedings and arguing for additional protections for those subject to the latter).

183. Professor Austin Kocher, a legal geographer at Syracuse University, has collected many of these articles. Kocher, *supra* note 131; see also Stillman, *supra* note 135 (providing a lengthier exploration of this reality); Shibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, GUARDIAN (Oct. 12, 2015, 8:57 AM), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> [https://perma.cc/XTX9-9L9T (staff-uploaded archive)]; Alison Parker, *The US Deported Them, Ignoring Their Pleas. Then They Were Killed.*, HUM. RTS. WATCH (Feb. 10, 2020, 2:23 PM), <https://www.hrw.org/news/2020/02/10/us-deported-them-ignoring-their-pleas-then-they-were-killed> [https://perma.cc/2F56-DCQJ]. Professor Abel Rodríguez recounts the “spectacular deaths” that result from coming to or being expelled from the United States. Rodríguez, *supra* note 113, at 474.

184. “Rather than throw segments of their community under the bus, activists reimagine an altogether different immigration system. In this way, immigration disobedience connects to BLM and other social movements that demand radical reconfiguration of the prevailing systems because of systemic racial and economic inequality.” Lee, *Disobedience*, *supra* note 120.

185. See Peter Markowitz, *Rethinking Immigration Enforcement*, 73 FLA. L. REV. 1033, 1055 (2021); Markowitz, *Abolish ICE*, *supra* note 91.

186. See Frost, *supra* note 92, at 3 (“The immigration bureaucracy could adopt a cooperative enforcement model similar to that used by other federal agencies, under which government officials would proactively assist a subset of unauthorized immigrants come into compliance with the law.”); see also Ryo, *supra* note 92, at 630 (discussing an approach to immigration law that would “broaden our base of empirical knowledge about the individuals whose behavior the law seeks to regulate, in order to develop more principled, sustainable, and effective policies that engender greater voluntary compliance”).

applications. A change could be slight to incorporate some structured incentives to ensure that those who could gain status do in fact do so. But this carrot also comes with a stick. Failure to obtain status could still result in removal, though some have proposed gradations in responses, such as civil fines.¹⁸⁷ Whether these proposals satisfy the abolitionist ethic is challenging to say. They certainly promote the regularization of status for people who may currently be undocumented, but they also indicate that some subsection of individuals would likely still be subjected to removal from the United States. This outcome does not sit well with other scholars who note that many will simply not have a pathway to regularize and thus will be left out of such a compliance scheme, while still suffering the same harms of marginalization that existed before.¹⁸⁸

3. Exclusion

The final area of abolition concerns the state's efforts to exclude individuals from the United States. Here, scholars advocate for open, or at least more permeable, borders. More than two decades ago, Professor Kevin Johnson attempted to bring this discussion into the mainstream.¹⁸⁹ More contemporary scholars have continued to build upon these deep critiques of sovereignty and the philosophy of borders.¹⁹⁰

187. See Kanstroom, *Smart(er) Enforcement*, *supra* note 92, at 491 (“Two things should be immediately apparent about graduated sanctions: First, they seek to implement goals not only of retribution and deterrence, but also rehabilitation, with due recognition for proportionality. Second, they tend to be *post-hoc* guidelines for judges who exercise discretion.”); see also Banks, *supra* note 92, at 1656 (examining deportation in the context of existing jurisprudence that governs other excessive civil penalties, such as excessive fines).

188. Professor Lisa Washington highlights the convergence of various enforcement systems—criminal, family, and immigration—arguing that “system convergence produces feedback effects that bolster punitive interventions and outcomes in both systems, ultimately creating [what she calls] a [fammigration] web,” which “exacerbate[s] the risk of family separation for noncitizen and mixed-status families by marking and subordinating them.” S. Lisa Washington, *Fammigration Web*, 103 B.U. L. REV. 117, 117 (2023); see also Nermeen Arastu & Qudsiya Naqui, *Standing on Our Own Two Feet: Disability Justice as a Frame for Reimagining Our Ableist Immigration System*, 71 UCLA L. REV. 236, 236 (2024) (articulating that “decoupling migration from ableism and advancing access as a pathway to power and self-determination for immigrant communities must become a part of the abolitionist vision”).

189. Johnson, *Open Borders*, *supra* note 3, at 196 (“In making a case for open borders, this Article calls for consideration of no less than a revolutionary change in immigration law.”); see JOHNSON, *OPENING THE FLOODGATES*, *supra* note 3, at 169 (stating that “[t]he presence of undocumented immigrants in the United States is a plain reality” and “[b]order controls, as currently configured in the United States, simply waste billions of dollars, and result in thousands of deaths. They have not ended, and cannot end, unlawful immigration”).

190. There is a growing list of advocates for open or less restrictive borders. See, e.g., Achiume, *supra* note 94, at 1509; PETER SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* 3–8 (2008) (critiquing traditional citizenship law’s role in the age of globalization); Steven Sacco, *Abolishing Citizenship: Resolving the Irreconcilability Between “Soil” and “Blood” Political Membership and Anti-Racist Democracy*, 36 GEO. IMMIGR. L.J. 693, 694–98 (2022); Reece Jones,

Abolishing exclusion, also known as pursuing “open borders,” or variations on that theme, might be considered the most radical in the progression of abolition efforts. Yet, it also receives praise from a group of strange bedfellows, who would typically not align on other areas of policymaking.¹⁹¹ Libertarian scholars, for example, have focused on the economic benefits of opening borders and the inadequacy of political theory in justifying the exclusion of people when goods and money freely cross borders every day.¹⁹² Still others cite the moral harm that comes from excluding individuals who might benefit from relocating to a wealthier and safer part of the world.¹⁹³ Finally, many point to the gruesome history of United States immigration policy and the racism¹⁹⁴ that has contributed to colonialism, xenophobia, and the perpetual subjugation of nonwhite people in the United States¹⁹⁵ and throughout the world.

C. *A Key Omission*

What is distinct about immigration enforcement abolition is that whereas society often views certain “criminal” behavior as a per se harm to the

Introduction, in OPEN BORDERS: IN DEFENSE OF FREE MOVEMENT 13–17 (Reece Jones ed., 2019) (challenging the nationalistic case against open borders); RUTGER BREGMAN, UTOPIA FOR REALISTS: HOW WE CAN BUILD THE IDEAL WORLD 203–31 (Elizabeth Manton trans., Little, Brown & Co. 2017) (2014) (rebutting common arguments against open borders); BRYAN CAPLAN & ZACH WEINERSMITH, OPEN BORDERS: THE SCIENCE AND ETHICS OF IMMIGRATION 163–90 (2019) (same); ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM 1–9 (2020) (providing a strong critique of the origins of theories of sovereignty, denouncing any historical universal understanding, and providing practical reasons for why nation states might abandon the current immigration regime to permit freer international migration).

191. See SARAH SONG, IMMIGRATION AND DEMOCRACY 189 (2019) (describing how “[l]abor-market protectionists might find themselves on the same side as restrictive nationalists in supporting immigration restrictions. On the other side, immigrant rights advocates are joined by proponents of the free market in their commitment to open borders”).

192. Even scholars who acknowledge that states may have a right to sovereignty or an obligation to consider the desires of their internal political communities may decide not to exercise sovereignty to exclude the flow of migrants. See, e.g., DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 201–30 (2007).

193. Professor Joseph Carens is perhaps most well-known for this critique, stating that “[t]he exclusion of so many poor and desperate people seems hard to justify from a perspective that takes seriously the claims of all individuals as free and equal moral persons.” JOSEPH CARENS, THE ETHICS OF IMMIGRATION 228 (2013).

194. See Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 NW. U. L. REV. ONLINE 1, 21 (2021) (“Differences among immigrant rights advocates exist on the necessary and essential law and policy changes. Nonetheless, building a racial justice coalition backing a set of positive immigration reforms will be an essential prerequisite for meaningful change.”); see also Aiken & Silverman, *supra* note 121, at 148–50 (quoting Nandita Sharma: “[F]rom the start, [immigration and carceral controls] have been racist [and] have organized and enforced the immobility of those who are hegemonically regarded as ‘not belonging’ to the ‘nation.’” (second and third alterations in original)).

195. See Jain, *supra* note 180, at 1814 (describing the Supreme Court’s jurisprudence in *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976), which permitted the perception of “Mexican appearance” as a proxy for illegality and critiquing this widespread concept of racial appearance as a proxy for belonging in the United States).

community, migration is not a per se harm. Consider Mariame Kaba's observation that criminal law regulates some behavior that need not be criminalized and does not regulate other behavior that perhaps should be.¹⁹⁶ The lines drawn are mostly policy oriented as opposed to innate. The same artificiality extends to immigration regulation. But whereas real violence might need to be prevented in the wake of prison/policing abolition, the abolition of immigration enforcement has a much more tangential connection to these alleged harms. While it is true that some individuals and groups share the concern that the absence of immigration detention, deportation, and/or exclusion could lead to societal harms, such perceptions are due to caustic narratives and not data.¹⁹⁷ "Immigration" is simply not a harm in the same way that "criminal activity" might be considered a harm.¹⁹⁸

III. NORMATIVE JUSTIFICATIONS FOR IMMIGRATION ENFORCEMENT

This part addresses the question of why the United States has immigration laws. Interestingly, the answer to this question has been quite difficult to pin down.¹⁹⁹ Frequently, this scholarly analysis veers into the realm of political theory, philosophical query, and international law. This Article seeks to draw upon the scholarship from these various fields in identifying normative reasons that are relied upon to justify immigration enforcement. While this premise is

196. See generally MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021) (recounting the history of abolitionist movements in the United States).

197. Consider, for example, the jurisprudence that has developed around states' standing to sue the federal government for its immigration policies, which permits states to identify the costs of immigration to a state without accounting for the fiscal contributions that those individuals make. See Jennifer Lee Koh, *The Rise of the 'Immigrant as Injury' Theory of State Standing*, 72 AM. U. L. REV. 885, 935–39 (2023). A study conducted by psychologists in 2021 puts it more plainly: "Though claims of relatively greater criminality among some immigrant groups are statistically unfounded, . . . these claims may nevertheless alter the structure of the cognitive representation of immigrants as a whole—for example, cleaving immigrants into 'good' and 'bad' subgroups, or more specifically, 'White' and 'non-White' subgroups." Joel E. Martinez, Lauren A. Feldman, Mallory J. Feldman & Mina Cikara, *Narratives Shape Cognitive Representations of Immigrants and Immigration-Policy Preferences*, 32 PSYCH. SCI. 135, 135–36 (2021).

198. Some may note that there are certain aspects of migration that have been criminalized in the United States, namely illegal entry and illegal re-entry, both of which are prosecuted under federal law at high rates. One scholar has compiled an exploration of the racist origins of these laws alongside an argument in support of disaggregating criminality from one's immigration status. See generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, WELCOME THE WRETCHED: IN DEFENSE OF THE "CRIMINAL ALIEN" (2024) (proposing an immigration system that does not consider criminal background).

199. Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1211–12 (2014) [hereinafter Johnson, *Theories of Immigration Law*] ("Legal scholarship lacks a comprehensive account of the theoretical underpinnings of immigration law.").

often presumed,²⁰⁰ it is worth interrogating. Again, presupposing that the baseline is a world in which no immigration limits exist, let us reconsider how each of these norms would be reframed. If we imagine immigration policy as a question of why people should be detained, expelled, or excluded, as opposed to a question of why they should be let into the United States, this presumption shifts our thinking.

A. *The Trouble with Transference*

Even the politically correct terminology “irregular migration” belies the idea that migration itself is not the problem. The desire to relocate is driven by numerous factors: violence, market structure, family, and plenty of other incentives to leave and disincentives to stay in one’s homeland.²⁰¹ To divorce these push/pull factors²⁰² from the inability of the current regulatory system to adequately address them is not the fault of the people seeking to move themselves and their families.²⁰³ The fact of people wanting or needing to relocate from one place to another remains fixed.²⁰⁴ The intended destinations, the quantity of individuals, and the reasons may have evolved, but the fundamental fact of human movement is a constant. International scholars have long been seeking to address this issue and have even proposed an International Migrants Bill of Rights.²⁰⁵ Efforts to recognize human movement as natural and worthy of protection are already underway, but the efforts to prohibit and limit

200. See, for example, Tom McClintock, *A Nation Without Borders Will Cease to Be a Nation*, U.S. CONGRESSMAN TOM MCCLINTOCK (Sept. 21, 2022), <https://mcclintock.house.gov/newsroom/columns/a-nation-without-borders-will-cess-to-be-a-nation> [<https://perma.cc/SS4X-T733>], for a claim from Representative Tom McClintock that the United States is “now a nation without borders,” resounding a statement from President Trump made in support of his effort to build a contiguous wall separating the United States from Mexico.

201. Professor Kit Johnson explains factors that influence relocation like this:

Consider the human context of these states’ exclusionary efforts. Refugees and asylees are individuals who, by definition, have been or would be persecuted in their home country because of politics, religion, nationality, race, or group membership. To put it more plainly, they have been chased from their homes and have nowhere else to go.

Kit Johnson, *Can We Act Globally While Thinking Locally?: Responding to Stella Burch Elias, the Perils and Possibilities of Refugee Federalism*, 67 AM. U. L. REV. 217, 225 (2017).

202. See, e.g., MARIO BRUZZONE, U.S. COMM. FOR REFUGEES & MIGRANTS, UNDERSTANDING MIGRATION: WHY “PUSH FACTORS” AND “PULL FACTORS” DO NOT EXPLAIN VERY MUCH 2 (2020) (noting that “push” factors have long mattered more than “pull” factors).

203. See Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 CALIF. L. REV. 63, 101–03 (2021) (describing the involvement of the United States in Central American states and how this involvement led to “push” factors developing in the region, for which the United States now refuses to claim responsibility).

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

205. *International Migrants Bill of Rights*, 28 GEO. IMMIGR. L.J. 9, 12 (2013).

movement are already in place. Yet, the history of these restrictions is relatively short.

This part supports the proposed movement away from restrictions and toward free movement. This new foundation for initiating conversations requires the conception of a world without immigration regulations to serve as a starting point for justifying the implementation of immigration regulations in the first place.²⁰⁶ Put more simply, if immigration restrictions did not exist, what reasons would the United States (or other countries) have for putting restrictions in place? When viewed from this new perspective, the abolition movement can engage with the normative assumptions that serve as foundational pillars for immigration law in the United States.

B. *Four Possible Normative Pillars*

This Article offers four normative pillars that the United States can and does use to support both its establishment of immigration restrictions and its tailoring of those restrictions: (1) economic policy, (2) (national) security, (3) (national) identity, and (4) international power and influence. This part seeks to demonstrate why these four pillars stand together and what considerations are grouped within each category.²⁰⁷ Moreover, this part also offers initial critiques of each pillar—both as substantive categories and of the policy decisions that the United States has implemented as a way of satisfying each pillar. This part concludes by directing future abolitionist proposals to focus on these pillars as a central point of analysis in determining: whether these pillars are worthy of undergirding a system of immigration restrictions; and whether they might be satisfied in more humane, equally or more effective, and less costly ways.²⁰⁸

206. This assertion relies on the analysis presented by Angélica Cházaro of Linda Bosniak's scholarship, supporting the effort to "force sovereignty to justify itself, both on its own terms and as an excuse for the practice of deportation." Cházaro, *The End of Deportation*, *supra* note 2, at 1097–98, 1097 n.278 (citing Bosniak, *supra* note 110, at 453); *see also id.*, at 1096, 1096 n.271 ("[O]nce one accepts the basic legitimacy of the nation-state, then deportation of noncitizens as a tool of extended border control is both logically necessary and potentially legitimate so long as certain secondary questions are properly accounted for." (quoting Kanstroom, *Smart(er) Enforcement*, *supra* note 92, at 476)).

207. Other scholars have provided distinctive but related groupings. Consider, Professor Kit Johnson's "domestic interest theory," which would encompass both economic policy and national security, her "national values theory," which would correlate with national identity, and parts of her "global welfare theory," which overlap with international power and influence. Johnson, *Theories of Immigration Law*, *supra* note 199, at 1211–12.

208. Professor Johnson notes that her proposal of specific immigration theories can promote a coalition of "political actors with disparate practical and ideological interests," while also noting how reforms might "achieve greater traction by either engaging the dominant theoretical perspective or utilizing multiple theoretical underpinnings." *Id.* at 1211. A similar concept is at play here, though rather than having as a foundation the sovereign state beneficently granting membership, I offer the starting point of no immigration restrictions.

1. Economic Policy

The pillar of economic policy concerns decisions about employment, the distribution of government resources to noncitizens, and the overall economic health of the United States. Many political and legal theorists identify economic policy as a major driver of immigration policy decisions. Interestingly, economists primarily conclude that more immigration would result in greater economic growth not only in the United States, but also in other states.²⁰⁹ From an economic perspective, immigration restrictions hinder the goal of economic prosperity—both domestically and internationally.

While abolitionist immigration policies would have extreme net positive effects worldwide,²¹⁰ this Article is primarily concerned with domestic perceptions.²¹¹ Many legal scholars identify economics as a real concern for both United States citizens and policymakers.²¹² Issues of employment, government assistance, taxes, and economic growth loom large in the consciousness of many Americans. Indeed, many politicians strategize about how to leverage these concerns about a possible negative impact from an influx of immigration in

209. See generally ZEKE HERNANDEZ, *THE TRUTH ABOUT IMMIGRATION: WHY SUCCESSFUL SOCIETIES WELCOME NEWCOMERS* (2024) (concluding that at bottom, “immigrants are net positive contributors to everything that makes a society successful”).

210. See *Opening Borders Would Double World GDP, Economist Says*, WBUR (Aug. 6, 2018), <https://www.wbur.org/hereandnow/2018/08/06/open-borders-economy-workers> [<https://perma.cc/XNU6-K3PD>] (containing an interview wherein economist Michael Clemens claims that easing border restrictions would as much as double world gross domestic product).

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

212. See *The Effects of Immigration on the United States Economy*, PENN WHARTON BUDGET MODEL (June 27, 2016), <https://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy> [<https://perma.cc/A5FC-LFBB>] (providing a statistical analysis of immigration since 1970 and the relative economic effects, finding that “[i]mmigrants in general—whether documented or undocumented—are net positive contributors to the federal budget”); see also Catherine E. Shoichet, *Undocumented Immigrants Are Paying Their Taxes Today, Too*, CNN, <https://www.cnn.com/2023/04/18/us/undocumented-immigrants-taxes-cec/index.html> [<https://perma.cc/WAR4-VV8A>] (last updated Apr. 18, 2023, 2:29 PM) (reporting on the amount of taxes paid each year by undocumented immigrants, exceeding \$6 billion in federal taxes alone); Alex Nowrasteh, *The Fiscal Impact of Immigration in the United States*, CATO INST. BLOG (Mar. 21, 2023, 10:54 AM), <https://www.cato.org/blog/fiscal-impact-immigration-united-states> [<https://perma.cc/EHY6-R95K>] (“[I]mmigrants pay more in taxes than they consume in benefits, on average.”); Adi Gaskell, *The Economic Case for Open Borders*, FORBES (Jan. 19, 2021, 8:40 AM), <https://www.forbes.com/sites/adigaskell/2021/01/19/the-economic-case-for-open-borders/> [<https://perma.cc/7PK9-VZUX>] (staff-uploaded, dark archive)] (advocating for an open borders approach because of the potential positive economic effect in the United States and internationally).

favor of support for their candidacy.²¹³ Despite the falseness of this claim,²¹⁴ its resonance with some voters demonstrates its relevance.

Economic policy is a key pillar in constructing the narrative that there is a need for immigration enforcement. The strongest voice in favor of this concern is Professor George Borjas, an economist at Harvard, who claims that “[b]oth low- and high-skilled natives are affected by the influx of immigrants. But because a disproportionate percentage of immigrants have few skills, it is low-skilled American workers, including many [B]lacks and Hispanics, who have suffered most from this wage dip.”²¹⁵ This rhetoric was picked up by President Trump and others in his administration, especially Stephen Miller,²¹⁶ the hardline, anti-immigrant policy advisor²¹⁷ who was behind such efforts as

213. Consider, for example, President Trump’s efforts to court Black voters by vilifying immigrants as “tak[ing] jobs from hardworking African-Americans and Hispanic citizens.” *The Latest: Trump Says Immigrants Are Taking Minorities’ Jobs*, AP NEWS (Aug. 30, 2016), <https://apnews.com/article/09215cf7f37f4c6ea05f92f8c83e6125> [https://perma.cc/5UVU-F765]. He made this claim in 2014, 2015, 2016, and 2019. For Trump’s repeated invocation of this unsubstantiated claim, see Aaron Blake, *Trump Warns GOP on Immigration: ‘They’re Taking Your Jobs,’* WASH. POST (Mar. 6, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/03/06/trump-warns-gop-on-immigration-theyre-taking-your-jobs/> [https://perma.cc/XZ5C-4VMM (staff-uploaded, dark archive)]; Daniel Politi, *Donald Trump in Phoenix: Mexicans are “Taking our Jobs” and “Killing Us,”* SLATE (July 12, 2015, 8:40 AM), <https://slate.com/news-and-politics/2015/07/donald-trump-in-phoenix-mexicans-are-taking-our-jobs-and-killing-us.html> [https://perma.cc/P4YH-95RL]; Eugene Scott, *Trump’s Claim That Black Americans Are Hurt Most by Illegal Immigration Gets Pushback*, WASH. POST (Jan. 9, 2019), <https://www.washingtonpost.com/politics/2019/01/09/trumps-claim-that-black-americans-are-hurt-most-by-illegal-immigration-gets-pushback/> [https://perma.cc/6YTT-Z6NT (staff-uploaded, dark archive)]; Josh Boak, *AP Fact Check: Trump Plays on Immigration Myths*, PBS (Feb. 8, 2019), <https://www.pbs.org/newshour/politics/ap-fact-check-trump-plays-on-immigration-myths> [https://perma.cc/Q4P5-D5BP (staff-uploaded archive)].

214. See Brennan Hoban, *Do Immigrants “Steal” Jobs From American Workers?*, BROOKINGS (Aug. 24, 2017), <https://www.brookings.edu/blog/brookings-now/2017/08/24/do-immigrants-steal-jobs-from-american-workers/> [https://perma.cc/UCM4-5XH6] (identifying these claims as falsehoods).

215. George J. Borjas, *Yes, Immigration Hurts American Workers*, POLITICO (Sept./Oct. 2016), <https://www.politico.com/magazine/story/2016/09/trump-clinton-immigration-economy-unemployment-jobs-214216/> [https://perma.cc/EQR3-TMQV]. Of note, this rhetoric is similar to the political language used by Donald Trump in his most recent bid for reelection. See Associated Press, *Trump’s Debate References to ‘Black Jobs’ and ‘Hispanic Jobs’ Stir Democratic Anger*, POLITICO (June 29, 2024, 6:49 PM), <https://www.politico.com/news/2024/06/29/trumps-debate-black-jobs-democratic-anger-00165930> [https://perma.cc/JQC9-7CLL (staff-uploaded, dark archive)]. Such descriptions of racial or immigration categorization by employment are dehumanizing, oversimplified, and racist. But even Borjas rejects such a simplistic view, stating, “Trump might cite my work, but he overlooks my findings that the influx of immigrants can potentially be a net good for the nation, increasing the total wealth of the population.” Borjas, *supra*.

216. A fact check indicated that the data around this issue are contentious and that “the debate remains unsettled.” Amita Kelly, *FACT CHECK: Have Immigrants Lowered Wages for Blue-Collar American Workers?*, NPR (Aug. 4, 2017, 5:00 AM), <https://www.npr.org/2017/08/04/541321716/fact-check-have-low-skilled-immigrants-taken-american-jobs> [https://perma.cc/7NMH-367Q].

217. See generally Boaz, *Speculative Immigration Policy*, *supra* note 49, for an exploration of Miller’s ideological mindset, as well as other like-minded individuals in the Trump administration.

the Muslim Travel Ban,²¹⁸ the separation of children from their parents at the border,²¹⁹ and the massive decline in refugee admissions.²²⁰ But economics is a much broader question than just the impact of immigration on low-wage workers.

The economic pillar considers employment needs from an employer perspective, wages from a labor perspective, and the distribution of government resources to noncitizens. From an employer perspective, there is currently a labor shortage, which would benefit from increased migration.²²¹ However, employers also benefit from the ability to exploit undocumented workers²²²—meaning that immigration restrictions and the precarity in which those

218. See Sabrina Siddiqui, *Meet Stephen Miller, Architect of First Travel Ban, Whose Words May Haunt Him*, *GUARDIAN* (Mar. 15, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/mar/15/stephen-miller-new-trump-travel-ban> [<https://perma.cc/L8T6-CPPG>] (“Miller was the policy’s 31-year-old architect and was at the center of the troubled first attempt to introduce a travel ban on seven Muslim-majority countries in late January.”).

219. See McKay Coppins, *The Outrage over Family Separation Is Exactly What Stephen Miller Wants*, *ATLANTIC* (June 19, 2018), <https://www.theatlantic.com/politics/archive/2018/06/stephen-miller-family-separation/563132/> [<https://perma.cc/2GWG-M3NS> (staff-uploaded, dark archive)] (“[Miller] is, by all accounts, an avowed restrictionist, and he likely believes that separating children from their parents at the border will deter future illegal immigration.”).

220. See Jonathan Blitzer, *How Stephen Miller Single-Handedly Got the U.S. to Accept Fewer Refugees*, *NEW YORKER* (Oct. 13, 2017), <https://www.newyorker.com/news/news-desk/how-stephen-miller-single-handedly-got-the-us-to-accept-fewer-refugees> [<https://perma.cc/U92L-XYUR> (staff-uploaded, dark archive)] (describing how Miller’s influence led to a forty-five-thousand-person, record-low cap on refugees allowed in the United States).

221. See Lydia DePillis, *Immigration Rebound Eases Shortage of Workers, Up to a Point*, *N.Y. TIMES* (Feb. 6, 2023), <https://www.nytimes.com/2023/02/06/business/economy/immigration-labor.html> [<https://perma.cc/HN2C-UMLJ> (staff-uploaded, dark archive)] (describing the hope that a resurgence in the influx of foreign-born workers will ease the labor shortage and its economic effects); see also Julia Ainsley, Joel Seidman & Didi Martinez, *Canada and the U.S. Both Face Labor Shortages. One Country Is Increasing Immigration.*, *NBC NEWS* (Jan. 7, 2023, 6:00 AM), <https://www.nbcnews.com/politics/immigration/canada-us-increasing-immigration-labor-shortage-rcna64691> [<https://perma.cc/X2YV-CUKT> (staff-uploaded archive)] (comparing Canada’s strategy to increase immigration to address the persistent labor shortage).

222. See Daniel Costa, *Employers Increase Their Profits and Put Downward Pressure on Wages and Labor Standards by Exploiting Migrant Workers*, *ECON. POL’Y INST.* (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-immigration-policy/> [<https://perma.cc/BZ5W-LJ7Z>] (providing examples of direct exploitation, such as low wages and wage theft); Susan Ferriss & Joe Yerardi, *Wage Theft Hits Immigrants—Hard*, *PBS NEWS HOUR* (Oct. 14, 2021, 4:28 PM), <https://www.pbs.org/newshour/economy/wage-theft-hits-immigrants-hard> [<https://perma.cc/73RY-WDPY>] (describing the rampant labor violations and intimidation faced by noncitizen workers in the United States). *But see* Walter Ewing, *Corrupt US Employers and Smugglers Are Exploiting Migrant Teens for Profit*, *IMMIGR. IMPACT* (Feb. 9, 2022), <https://immigrationimpact.com/2022/02/09/us-employers-smugglers-exploiting-migrant-teens/> [<https://perma.cc/3YYS-KFGM>] (explaining how a “skyrocketing number of migrant teens from Central America” are being “exploit[ed] by unscrupulous employers”); Hannah Dreier, *As Migrant Children Were Put to Work, U.S. Ignored Warnings*, *N.Y. TIMES* (Apr. 17, 2023), <https://www.nytimes.com/2023/04/17/us/politics/migrant-child-labor-biden.html> [<https://perma.cc/34E2-N3PP> (staff-uploaded, dark archive)] (describing how this exploitation can also be indirect, for example, by creating a market for smuggling individuals across the border and subcontracting to companies that violate child labor laws).

restrictions place undocumented workers can actually benefit employers.²²³ Indeed, this is the source of wage drops that other economists bemoan.²²⁴ Removing immigration restrictions would eliminate this artificial hierarchy, and the potential harm to employees would disappear.²²⁵ Nonetheless, many companies still advocate for an increase in authorized migration, indicating that not all companies wish to align with support for maintaining a subordinated, undocumented workforce.²²⁶

Professor Eric Posner has proposed that immigration law functions to “maximize the well-being of Americans,”²²⁷ and promote investment.²²⁸ Professor Posner notes that immigration policy should be constructed around the concept of maximizing the national social welfare.²²⁹ If the normative purpose of immigration is to improve the lives of citizens residing within the United States, then some intriguing options become available. Arguments that demonstrate how abolition immigration enforcement might produce economic

223. Travis P. Hill, *Big Employers No Strangers to Benefits of Cheap, Illegal Labor*, TEX. TRIB. (Dec. 19, 2016, 12:00 AM), <https://www.texastribune.org/2016/12/19/big-name-businesses-exploit-immigrant-labor/> [<https://perma.cc/NG3K-9SPS>] (“We’ve realized that [employers] prefer us for being undocumented because we just keep our heads down to get jobs,” Chuncio said. “[We] can’t afford to complain. They take advantage of us being undocumented.”).

224. George J. Borjas & Hugh Cassidy, *The Wage Penalty to Undocumented Immigration*, 61 LABOUR ECON., Dec. 2019, at 101757 (finding that undocumented individuals earn less than those who have lawful status and that the wage penalty increases as restrictions are tightened).

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

226. See Nathaniel P. Flannery, *In Pictures: Where Do Major U.S. Corporations Stand in the Immigration Debate?*, FORBES, <https://www.forbes.com/sites/nathanielparishflannery/2013/09/17/in-pictures-where-do-major-u-s-corporations-stand-in-the-immigration-debate/> [<https://perma.cc/ZA48-NSEZ> (staff-uploaded archive)] (last updated Sept. 24, 2013, 1:10 PM) (identifying the complex calculus that companies consider when determining what policies to support, but indicating that many large companies rely on immigrant labor and do not support efforts that would result in large-scale removal).

227. Professor Posner notes that consideration for the well-being of “foreigners,” which he identifies as “cosmopolitanism,” has essentially “no support in American public policy.” Posner, *supra* note 211, at 291. Given that public policy is frequently believed to be the voice of the people, I will defer to him on this assertion. Next, he frames this assertion to mean a focus primarily on the economic well-being of Americans, as evaluated through a series of positive contributions (filling labor gaps and paying taxes) and negative detractions (increasing demand on goods and driving up prices, accessing public resources and increasing “congestion” with regard to these resources). *Id.* at 292. Professor Posner notes that the empirical net effect cannot be fully analyzed. *Id.* But see Jennifer M. Chacón, *Moving Forward*, 50 SW. L. REV. 208 (2021), for an example of an alternative argument that the majority of economic studies find migration to be a positive good and that we simply ascribe to a narrative that immigrants (and particularly, refugees) are a societal burden to bear.

228. Posner, *supra* note 211, at 293. Professor Posner indicates that this is verified through the types of visas available—particularly with a focus on the exceptional, providing the example of preferential treatment for Olympic athletes. *Id.*

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

benefits for United States citizens, for example, could gain traction. Other arguments that demonstrate how United States citizen families might suffer less because family members are not removed from or prohibited entry into the United States also begin to sound more appealing to a wider audience.

In sum, the economic pillar is a real concern, but likely insufficient on its own. As a pillar, however, its purpose remains unsatisfied by United States immigration policy. Despite the rhetoric of politicians raising the issue of economic harm in their conversations about increasing immigration restrictions,²³⁰ such correlations are not supported by the data. As demonstrated above, immigrants contribute to the financial welfare of the United States via payment of taxes, even when they cannot receive access to those same state-sanctioned supports.²³¹ Moreover, economists nearly universally conclude that increases in migration into the United States (and across the world more broadly) would result in amplified economic growth and prosperity. Moreover, a presumption of no immigration regulation would move the incentives that exist in the black market to traffic and smuggle individuals into the United States.²³² Therefore, while economic policy is a satisfactory goal, and thus worthy of being erected as a pillar, it appears that the implementation of immigration restrictions does little to satisfy that goal, and in fact may harm our aims.

2. (National) Security

The pillar of (national) security focuses on terrorism, criminality, and the existential threat to the “rule of law.” However, each of these sub-tenets dissolves under further scrutiny. Though the task of immigration enforcement was incorporated into the newly created DHS in the early 2000s, immigration policy has proved to be a poor proxy for predicting and preventing potential terrorist attacks.²³³ Indeed, the terminology of “terrorism” is itself open to

230. See Jasmine Garsd, *For Many Migrants Being Bused from New York City to Other Towns, Hostility Awaits*, NPR, <https://www.npr.org/2023/06/18/1181933592/for-many-migrants-being-bused-from-new-york-city-to-other-towns-hostility-awaits> [https://perma.cc/K5MM-398Z] (last updated June 20, 2023, 11:07 PM) (“At a nearby supermarket parking lot, Anthony Gerome says he’s concerned about the costs of taking people in. He points out that the U.S. economy is not great right now.”).

231. A recent study from the Institute for Tax and Economic Policy found that undocumented immigrants paid nearly \$100 billion in federal, state, and local taxes in 2022, the most recent year for which there is comprehensive data. CARL DAVIS, MARCO GUZMAN & EMMA SIFRE, INST. ON TAX’N & ECON. POL’Y, *TAX PAYMENTS BY UNDOCUMENTED IMMIGRANTS* 5 (2024).

232. See generally STEVEN DUDLEY, PARKER ASMANN & VICTORIA DITTMAR, *INSIGHT CRIME, UNINTENDED CONSEQUENCES: HOW US IMMIGRATION POLICY FOMENTS ORGANIZED CRIME ON THE US-MEXICO BORDER* (2023) (describing the ways that United States immigration policy impacts organized crime at the United States-Mexico border).

233. See, e.g., Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1520–21 (2010) [hereinafter Wadhia, *Business as Usual*].

criticism and perhaps lacks utility.²³⁴ Relatedly, one major goal of immigration policy has been to address and respond to criminal activity more generally.²³⁵ While the legal repercussions for violations of the criminal code in the United States have had an outsized negative effect on the ability of an individual to remain in or enter the United States, there is simply no correlation between one's immigration status and the likelihood that they might engage in criminalized activity.²³⁶ The last concern under security is that of the existential threat to the "rule of law." But, creating boundaries and then holding them up as justification for themselves presumes too much.

It is possible to infer some of the purpose of the immigration legal system from its architecture—composed largely of detention, deportation, and exclusion. This framework suggests a major normative focus for immigration policy, which aligns with that of the criminal legal system: safety. Here,

(explaining that the infamous National Security Entry-Exit Registration System program did not result in a single identification of an alleged terrorist, and likely decreased the willingness of immigrant communities to supply the government with intelligence).

234. Scholars across various methodologies have scrutinized proposed definitions for terrorism, frequently finding that the term "lacks a coherent definition and is too frequently used in propagandist terms." Heather Panter, *Defining Terrorism and Counterterrorism Methods*, 58 CRIME L. & SOC. CHANGE 579, 579 (2012) (reviewing ROBERT ENGLISH, *TERRORISM: HOW TO RESPOND* (2009)); see also Jacqueline S. Hodgson & Victor Tadros, *The Impossibility of Defining Terrorism*, 16 NEW CRIM. L. REV. 494, 495 (2013) (finding that the dilemmas in attempting to define terrorism "are fairly intractable; no definition in law will be ideal"). Finally, Professor Bruce Hoffman offers a historical account for the evolving understanding and nuance of the term terrorism. See generally BRUCE HOFFMAN, *INSIDE TERRORISM* 7 (1998) (describing the most salient and important trends in terrorism—both past and present).

235. This is perhaps best demonstrated through President Obama's prioritization of immigration enforcement glibly explained as targeting "felons not families." All Things Considered, *Immigration Advocates Challenge Obama's 'Felons Not Families' Policy*, NPR, at 00:34 (Nov. 1, 2016, 4:40 PM), <https://www.npr.org/2016/11/01/500264042/immigration-advocates-challenge-obamas-felons-not-families-policy> [<https://perma.cc/73JZ-A2MT>]. More broadly, the convergence and intersection of criminal law and immigration law has come to be known as "crimmigration." Scrutiny of this overlap has led to much productive scholarly analysis. See, e.g., Hernández, *Creating Crimmigration*, *supra* note 90, at 1458; Stumpf, *The Crimmigration Crisis*, *supra* note 90, at 376–77 (coining the term "crimmigration"); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 108–09 (2012). For a critique of the actual categorization of migration as a criminal act, see Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1260 (2014) ("[E]ngag[ing] criminal law theory, political theory, and federal sentencing norms and find[ing] that they all cut decidedly against criminalizing acts of migration.").

236. See Jasmine Garsd, *Immigrants Are Less Likely to Commit Crimes than U.S.-Born Americans, Studies Find*, NPR (Mar. 8, 2024, 7:00 PM), <https://www.npr.org/2024/03/08/1237103158/immigrants-are-less-likely-to-commit-crimes-than-us-born-americans-studies-find> [<https://perma.cc/98Y2-9WVW>] ("Beyond incarceration rates, research also shows that there is no correlation between undocumented people and a rise in crime.").

however, the concept of safety is a bit more nuanced, referring to both domestic criminality and national security.²³⁷

The conversation about national security has existed since the late nineteenth century and has carried forward to the present day.²³⁸ Primarily, this has been done through the allegory of invasion.²³⁹ The Supreme Court's jurisprudence continues to echo both the ideas of foreign threat, and the ability of the executive to respond accordingly.²⁴⁰ This idea of threat has grown even more elevated following the creation of the DHS²⁴¹ and its charge of immigration enforcement.²⁴² It is challenging now to have a conversation about immigration enforcement without implicating notions of foreign aggression, invasion, or terrorism, despite criticism that immigration status and potential threats to national security do not share sufficient overlap to be associated for the purpose of policymaking.²⁴³ Within this morass, many have argued that the

237. "Admittedly, the complexities of immigration have long touched on several facets of our democracy, from economic production and resources to 'internal security, relations with other states, and the national identity.'" Ali Shan Ali Bhai, Note, *A Border Deferred: Structural Safeguards Against Judicial Deference in Immigration National Security Cases*, 69 DUKE L.J. 1149, 1169 (2020) (citing CHRISTOPHER RUDOLPH, NATIONAL SECURITY AND IMMIGRATION: POLICY DEVELOPMENT IN THE UNITED STATES AND WESTERN EUROPE SINCE 1945, at 2 (2006)). A discussion of national identity and relations with other states follows in the sections below. See *infra* Sections III.B.3, III.B.4.

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

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

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

241. For a critique about the discourse surrounding "national security," and the special privileges that national security law and lawyers receive in various judicial systems, see Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 2, 6–11 (2021) (raising concerns about "[t]he absence of any real oversight [in national security law,] [which] means that those interpreting the law are almost exclusively the lawyers for the very same actors regulated by that law—members of the U.S. executive branch.").

242. As Professor Jonathan Hafetz describes it, "[t]he past two decades of immigration law . . . highlight[] the degree to which national security provides as a proxy for measures that restrict the rights of noncitizens without serving the ends of security." J. Hafetz, *Immigration and National Security Law: Converging Approaches to State Power, Individual Rights, and Judicial Review*, 18 ILSA J. INT'L & COMPAR. L. 625, 639 (2012).

243. See Anthony J. DeMattee, Matthew J. Lindsay & Hallie Ludsins, *An Unreasonable Presumption: The National Security/Foreign Affairs Nexus in Immigration Law*, 88 BROOK. L. REV. 747, 751 (2023) (finding that "99.987 percent of immigration cases . . . do not involve those exceptional governmental

policies are simply not defensible for the purposes cited.²⁴⁴ Moreover, because of interpretations of the plenary power, the executive has nearly unchecked authority to regulate immigration simply by claiming that there are national security implications.²⁴⁵ In short, this aspect of the (national) security pillar is divorced from the facts. While national security is regularly held out as an important component of immigration enforcement, such a response is incoherent with the policy tools that are available.

A secondary component of the (national) security pillar is the question of domestic crime. An entire field has arisen to address the confluence of criminal law with immigration law: “cimmigration.”²⁴⁶ The idea of linking the commission of crime with immigration is as historically pervasive as it is erroneous.²⁴⁷ Despite study after study that eschew any connection between noncitizens and the propensity to commit criminalized acts in a particular location,²⁴⁸ policy continues to be driven by some imagined connection between the two.²⁴⁹

In conclusion, the pillar of (national) security presents an unsatisfactory rationale for its own existence. Like the pillar of economic policy, the idea of

interests,” specifically national security or foreign affairs concerns, and concluding that it may be necessary to retain such “broad latitude in immigration cases involving bona fide national security and foreign affairs interests, but [that the government should] no longer enjoy the categorical judicial deference that it currently receives as a matter of course”).

244. See Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 160 (arguing that efforts to support national security might benefit from an improved and more broadly administered legalization and admission regime); see also Lindsay, *supra* note 238, at 5–6 (discussing the ways in which the Supreme Court invented the legal construct of immigrant as a way of elevating the nation’s defense against “foreign aggression”).

245. See, e.g., Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 732–33 (2017) (“This Article endeavors to define [the outer limits of plenary power] and offers a new judicial review paradigm for constitutional challenges to immigration actions implicating [heretofore unchecked] national security interests.”).

246. Juliet P. Stumpf, *Crimmigration and the Legitimacy of Immigration Law*, 65 ARIZ. L. REV. 113, 113 (2023) (“[E]xplor[ing] the significance of crimmigration for the procedural legitimacy of immigration law.”).

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

248. See, e.g., Michael T. Light, Jingying He & Jason P. Robey, *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas*, 117 PROC. NAT’L ACAD. SCI. 32340, 32340 (2020) (“We find that undocumented immigrants have substantially lower crime rates than native-born citizens and legal immigrants across a range of felony offenses.”).

249. Consider, for example, J.D. Vance’s continued perpetration of lies that connect migration status with criminality. Alexandra Hutzler, *Fact-Checking JD Vance’s Claims About Haitian Migrants in Springfield, Ohio*, ABC NEWS (Sept. 19, 2024, 6:58 PM), <https://abcnews.go.com/Politics/fact-checking-jd-vances-claims-haitian-migrants-springfield/story?id=113844705> [https://perma.cc/J8NT-GSQP].

national security is an important one, but its correlation with immigration policy ranges from miniscule to nonexistent. There are myriad ways in which to address this concern in more exacting ways that would not be overbroad and harmful. There is simply no data that presents a connection between criminality or national security and immigration status.

3. (National) Identity

Immigration law in the United States is inextricably bound up in questions of identity and assertions of belonging.²⁵⁰ Supreme Court decisions about race have historically been central to the definition of who can access the mantle of citizenship in the United States and who cannot.²⁵¹ What identity has boiled down to, in the annals of immigration law, is race.²⁵² Specifically, the main concern among policymakers has been who gets access to whiteness, and by proxy, uncontested access to citizenship.²⁵³

The idea of a comprehensive United States national identity is susceptible to both reductionism and overly complex analysis.²⁵⁴ American identity is not monolithic,²⁵⁵ and yet there are some who would prefer that it skew in that

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

251. See Joy Kanwar, *Stories from the Negative Spaces: United States v. Thind and the Narrative of (Non)Whiteness*, 74 *MERCER L. REV.* 801, 805–06 (2023) (describing the prevailing forces that “continue to work in the negative spaces to define who gets to become fully part of [the United States] and who does not”); see also Devon W. Carbado, *Yellow by Law*, 97 *CALIF. L. REV.* 633, 636–37 (2009) (discussing the history of race and skin color as a barometer of who can and cannot access citizenship). For a startlingly vibrant criticism of the racism in “naturalization law” from over a hundred years ago, see D.O. McGovney, *Race Discrimination in Naturalization*, 8 *IOWA L. REV.* 129, 129–31 (1922).

252. Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 *YALE L.J.* 1188, 1191–92 (2021) (reviewing DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE* (2019) (sketching the ways in which race has corresponded with citizenship, borders, and immigration in the history of the United States)). The United States is not alone in this idea of racialized borders. See generally E. Tendayi Achiume, *Racial Borders*, 110 *GEO. L.J.* 445 (2022) (arguing that across neocolonial nations, borders are enforced in a largely racial manner); John Reynolds, *Emergency and Migration, Race and the Nation*, 67 *UCLA L. REV.* 1768 (2021) (addressing the way that international border decisions are founded in fear based on race).

253. See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th ed. 2006) (discussing the racial restrictions in the laws of citizenship, as well as the various ways in which race-consciousness and colorblindness have, in different eras, worked to bolster white supremacy); AMANDA FROST, *YOU ARE NOT AMERICAN: CITIZENSHIP STRIPPING FROM DRED SCOTT TO THE DREAMERS* (2021) (observing the way in which the citizenship of certain individuals remains suspect, primarily due to racial categorization or solidarity with marginalized groups).

254. See MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 9–11 (2004) (discussing both the powerful influence of nationalism, but also referring to Benedict Anderson’s description of nations as “imagined communities”).

255. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall

direction. Centuries of racism and xenophobia (including into the present) are the main culprits here²⁵⁶—a preference for one’s own being the central principle to this pillar that would permit or necessitate exclusion or deportation.²⁵⁷ The presumption of a national identity develops only by defining who does not belong.²⁵⁸ The idea of an interloper taking advantage of the beneficence of the United States also rings true to certain members of the population who in return feel entitled to decry such oversteps and seek retribution through more restrictive policies.²⁵⁹

The historic narrative implicates national identity quite frequently.²⁶⁰ The way in which immigration detention, deportation, and exclusion are utilized in the United States demonstrates that it has both always been this way and that it has never been this exact way before. For example, the desire to subordinate some groups remains as present as it did in the nineteenth century,²⁶¹ while the

be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”)

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

257. Even references to other policy goals—such as linking crime to immigration prove illusory in the face of more deep-seated desires. See Das, *Inclusive Immigrant Justice*, *supra* note 247, at 176 (“[d]rawing on the early history of crime-based deportation” to argue that “criminal records have never been a neutral means for prioritizing immigrants for detention and deportation from the United States” . . . but, rather, “racial animus has driven the creation and development of crime-based deportation from the beginning”).

258. See Johnson, *Theories of Immigration Law*, *supra* note 199, at 1217 n.16 (“Racism, along with nativism, economic, and other social forces, has unquestionably influenced the evolution of immigration law and policy in the United States.” (quoting Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1119 (1998))); see also Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 761 (2000) (arguing that “implicit and explicit racial biases [that] still pervade all four major avenues of legal immigration” are embodied in country caps).

259. Consider, for example, Jeff Sessions’s claim that false asylum seekers were simply saying “the magic words” to gain entry into the United States and his further call to “close [the] loopholes [in the system],” a cry that has been echoed by other politicians. Jeff Sessions, Att’y Gen., Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [<https://perma.cc/KH2T-2G9X>]. See also TESS WILKINSON-RYAN, FOOL PROOF (2023), for an analysis of why people are afraid of playing the fool, but also critiquing this natural inclination for its propensity to promote bad public policy.

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

261. Jain, *supra* note 180, at 1794 (stating “[t]he era of Chinese Exclusion left a legacy of race-based deportation. Yet it also had an impact that reached well beyond removal,” in arguing that the requirement that people of “Chinese descent” retain a certificate of residence to avoid arrest, detention, and deportation, led to race-based subordination); see also Gabriel J. Chin, *Slave Law, Race Law*, 94 U. COLO. L. REV. 551, 552 (2023) (noting that “the Fugitive Slave Acts blessed by the Constitution are said to be antecedents of the Chinese Exclusion laws, which required Chinese people to carry

subordination of other groups is relatively new.²⁶² What remains consistent is the violence with which these distinctions are created and enforced.²⁶³

It is difficult to reckon with this pillar. It does not offer utility for an analysis of what immigration policy should look like in the United States, but it does resonate with some groups.²⁶⁴ Certainly the composition of a nation's identity does not require racial, ethnic, or religious divisions, but the history of United States nationalism does seem to gravitate toward and embrace those ideals.²⁶⁵ If national identity is to provide some utility, it must be re-evaluated. For example, Eisha Jain has argued that utilizing a “polity-centric” framework, “which treats immigration status as necessarily fluid rather than fixed” could

identification”); David B. Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 22 (2016) (“The language of the Chinese Exclusion Acts—as well as the willingness of the federal judiciary to look the other way while state and federal governments restricted or forced the movement of racially designated groups—also drew from the Fugitive Slave Act of 1793 and from antebellum state laws that had regulated the migration of slaves.”).

262. See, e.g., Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 20 (2014) (discussing the infiltration and monitoring of Muslim communities by the Federal Bureau of Investigation, ICE, and other law enforcement agencies in the aftermath of the September 11, 2001, attacks, resulting in immigration enforcement efforts that clearly targeted Arabs and other mosque-attending communities).

263. Describing this, Professor Angélica Cházaro, states:

Thinking outside of deportation—thinking beyond anyone's banishment—requires letting go of an investment in the paradigm of membership through proximity to U.S. citizenship. Membership and belonging are premised on exclusion (and policing the exclusion) of those who do not make it into the inner circle, and such an exclusion, in the United States, has always been distributed with violence, along racial lines.

Cházaro, *The End of Deportation*, *supra* note 2, at 1087.

264. For example, a racist conspiracy theory known as The Great Replacement has gained traction with political groups in the United States, France, Italy, and other countries grappling with the rise of right-wing nationalistic populist groups. See Nicholas Confessore & Karen Yourish, *A Fringe Conspiracy Theory, Fostered Online, Is Refashioned by the G.O.P.*, N.Y. TIMES (May 15, 2022), <https://www.nytimes.com/2022/05/15/us/replacement-theory-shooting-tucker-carlson.html> [<https://perma.cc/2TSU-JLY3> (staff-uploaded, dark archive)] (“[R]eplacement theory, once confined to the digital fever swamps of Reddit message boards and semi-obscure white nationalist sites, has gone mainstream [in the United States].”); see also Norimitsu Onishi, *In France, a Racist Conspiracy Theory Edges into the Mainstream*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/world/europe/france-elections-pecresse-great-replacement.html> [<https://perma.cc/DX56-3TZF> (staff-uploaded, dark archive)] (describing The Great Replacement theory's rise in French political discourse in recent years); Anchal Vohra, *Italy Now Has Conspiracy Theory as National Policy*, FOREIGN POL'Y (May 8, 2023, 6:40 AM), <https://foreignpolicy.com/2023/05/08/italy-meloni-great-replacement-conspiracy-theory-immigration/> [<https://perma.cc/SC2N-HVL8>] (“[Italian Prime Minister] Meloni is the first Western European leader to espouse the great replacement [sic] theory, which claims that, instead of an organic movement driven by poverty and war, immigration to the West has been engineered.”).

265. See generally Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019) (discussing how white nationalism motivated the Trump administration's immigration policy decisions).

help to shift conceptions of who is a natural participant in the membership community.²⁶⁶

Conformance with national ideals can be difficult in less “homogenous” states, but I argue that an effort should be made to resist the flattening of cultural ideas.²⁶⁷ By acquiescing to this idea of the necessity of homogeneity as a requirement for a successful democratic society, we are missing an opportunity to demonstrate what is possible in a multi-racial, pluralistic society. Instead, by embracing an abolitionist goal, one can reject the notion that the racial, religious, and ideological diversity of the United States somehow weakens or destabilizes it. Such conclusions lack imagination. By being too rooted in this conclusion, an important opportunity is missed—the possibility that success is on the horizon—that identity can be multi-faceted, and that the strength of the United States is due to its ability to incorporate varied perspectives and promote communities within.²⁶⁸ National identity does not require a national perspective. The idea of unity on every opinion or doctrine should frighten rather than invigorate. The ability to connect in a single way with someone with whom you differ on almost everything else is immensely powerful. Importantly, that point of connection need not be the same for every person.

4. International Power and Influence

The final pillar, international power and influence, stands ominously over the other pillars. It, alone, may be capable of providing singular support for the implementation of immigration restrictions.²⁶⁹ Through this lens, immigration policy becomes a way to exercise discretion in support of other nations to which the United States wishes to demonstrate favor. At the same time, the United States can display considerable disfavor by limiting the entry of individuals from particular countries.²⁷⁰ In this way, immigration policy becomes a valuable

266. Jain, *supra* note 180, at 1833–34.

267. See, e.g., Norimitsu Onishi & Aida Alami, *The Quiet Flight of Muslims from France*, N.Y. TIMES, <https://www.nytimes.com/2022/02/13/world/europe/france-election-muslims-islam-macron-zemmour-le-pen-pecesse.html> [<https://perma.cc/HKV9-JKWT> (staff-uploaded, dark archive)] (last updated Apr. 8, 2022) (providing an example of France’s struggles with this flattening).

268. PAULINA OCHOA ESPEJO, ON BORDERS: TERRITORIES, LEGITIMACY, AND THE RIGHTS OF PLACE ix (2020) (“The best way to challenge the xenophobia of borders . . . is to undo their conceptual entanglement with collective identity. Borders are not fundamentally about collective identity, but rather about place.”).

269. Indeed, this is where the Supreme Court has situated its defense of sovereignty—“under the rubric of state relations,” with migrants viewed as “proxies for foreign troops,” despite the fact that “immigrants have historically pursued not the political interests of states but individual and family improvement.” NGAI, *supra* note 254, at 11.

270. Here, the United States has vacillated between providing refuge to individuals seeking refuge from Cold War communist states such as the Soviet Union and its proxy states, to a current policy of barring entire populations based on one’s nationality regardless of the ideological beliefs of those seeking to immigrate. See, e.g., Michael S. Teitelbaum, *Immigration, Refugees, and Foreign Policy*, 38

good in itself, almost a bargaining chip through which the state can shape international policy in its favor.²⁷¹

While the other pillars are subject to scrutiny regarding the mismatch between the purported rationales and the failure to satisfy those goals, at first glance, it appears that international power is clearly and effectively asserted through United States immigration policy. This is evident in the way that Biden and past administrations have collaborated with Mexico, Honduras, Guatemala, and El Salvador to affect their desired immigration policies.²⁷² It is also clear in the way that the United States favors and facilitates entry from specific states via the Visa Waiver Program. This program permits individuals from forty countries to freely travel into and out of the United States, staying for up to six months at a time.²⁷³ For permanent access to the United States, a class-based distinction exists—the wealthy are permitted to use their investment to produce a return of United States legal permanent residence and eventually citizenship.²⁷⁴

While it is easier to identify the ways in which abolitionist policies could satisfy concerns about economic policy and national security, it is much more challenging to ask that international power and influence be yielded to satisfy an abolitionist goal.²⁷⁵ However, yielding in some way would not remove the lever of international influence but could perhaps promote more collaborative relations with neighboring countries, among others. Put more simply, the success of the Visa Waiver Program and other favorable immigration policies could more widely and generously be extended.

INT'L ORG. 429, 430 (1984); cf. Wadhia, *Business as Usual*, *supra* note 233, at 1497–1507 (decrying the indiscriminate ways in which race, ethnicity, and nationality are used in immigration enforcement under the guise of national security, to ineffective ends).

271. For example, the United States has used additional border restrictions as a way of coercing Mexico, Honduras, Guatemala, and El Salvador into amplifying their own migration policing systems. See Stef W. Kight, *Mexico Agrees to Accept Non-Mexican Migrants Rejected by U.S.*, AXIOS (May 3, 2023), <https://www.axios.com/2023/05/03/biden-mexico-migration-border-deportation-title-42> [<https://perma.cc/22RS-XJMH>].

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

273. *Visa Waiver Program*, U.S. DEP'T STATE—BUREAU CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html> [<https://perma.cc/GZH3-E7S8>].

274. *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program> [<https://perma.cc/YBK3-7DC2>] (last updated Mar. 1, 2023).

275. Though, it is worth noting that using foreign policy in an effort to limit or control migration is frequently ineffectual and at the very least frequently produces unintended results. Teitelbaum, *supra* note 270, at 433 (“Foreign policies have frequently served (often unintentionally) to stimulate international migrations. In particular, foreign military or political interventions, or internal or external responses to intervention, often result in mass migrations. Foreign-policy makers rarely evaluate such effects seriously when considering intervention.”).

This pillar, in the abstract, represents perhaps the strongest argument for immigration enforcement, though not without critics. When other scholars have asked for sovereignty to be justified, this may be the singular answer—a way for a country to imbue itself with power. However, there is a weakness—this power is not inviolable. Crafting a policy of immigration restrictions is much different from enforcing them. Here, there is a mismatch between what would be necessary for this to be an effective pillar (complete prevention of unauthorized migration) and what is possible (something decidedly less than complete enforcement). What is curious is how a border, even when pierced, somehow remains figuratively intact via posturing and signaling. Access can be doled out to many, as long as it is not doled out to all. Still, this argument is subject to additional criticism. It seems possible that a territory or country could maintain its identity and influence even with permeable borders—indeed the United States has done just that, despite a massive undocumented population.²⁷⁶

C. *The Sum of the Pillars*

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

Collectively, these four normative pillars are worthy of additional analysis. I have categorized other concerns under the umbrella of each of these pillars,

276. Ironically, the majority of the undocumented population is composed of people who are visa overstays. See Richard Gonzales, *For 7th Consecutive Year, Visa Overstays Exceeded Illegal Border Crossings*, NPR (Jan. 16, 2019, 7:02 PM), <https://www.npr.org/2019/01/16/686056668/for-seventh-consecutive-year-visa-overstays-exceeded-illegal-border-crossings> [<https://perma.cc/PNR6-9AXG>] (“[F]rom 2016–2017, people who overstayed their visas accounted for 62 percent of the newly undocumented, while 38 percent had crossed a border illegally.”).

but others may find those areas ripe for their own, more extensive analyses. Subjecting these pillars to scrutiny and critique is a worthy goal of its own, and even more so when it connects to the project of abolition.

CONCLUSION

The process of incorporating abolition theory into the realm of immigration law and policy is at an important nexus. Scholars and advocates have engaged deeply in the process of critique—identifying the harms associated with immigration detention, amplifying and reframing the violence that accompanies deportation, and questioning the way exclusion from the United States occurs. Activists and researchers have also begun to offer creative and imaginative solutions that would mitigate the harms associated with detention, deportation, and exclusion, while also promoting structural societal benefits and reducing federal fiscal expenses. However, before it is possible to engage with meaningful proposals, the methodology of abolition theory in other fields—particularly criminal legal theory—requires the identification of an underlying rationale for the current immigration enforcement system. In submitting my own proposed normative pillars of immigration law—economic policy, (national) security, (national) identity, and international power and influence—I hope to propel these future conversations that might offer a vision beyond the abolitionist horizon. In crafting these visions, I also caution the need to identify onto which structure of immigration enforcement the abolitionist lens is being mapped (detention, deportation, or exclusion), and I urge attention to the downstream effects of such a proposal. In sum, I find that abolition theory is an important exercise in identifying the policy goals of the United States' current regime of immigration enforcement. It appears eminently possible²⁷⁷ that abolitionist thinking can provide a way to both interrogate and satisfy these normative pillars in a way that is more humane, equally effective, and less expensive. This thinking provides an opportunity to introduce creative ideas that might appeal more broadly across the political spectrum.

277. See generally Berkeley Talks, *Paul Butler on How Prison Abolition Would Make Us All Safer*, BERKELEY NEWS (Jan. 17, 2020), <https://news.berkeley.edu/2020/01/17/berkeley-talks-paul-butler/> [<https://perma.cc/6HRM-NTPP>] (“Butler advocates abolishing prisons and finding alternative ways to deal with those who cause harm—something that he says would create a safer, more just society.”).