

# NOT A MATTER OF IF, BUT “WHEN”: EXPANDING THE IMMIGRATION CAGING MACHINE REGARDLESS OF *NIELSEN*

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## I. INTRODUCTION

During the Trump Administration the immigrant community has been subject to seemingly endless arrests, detentions, and abuses by Immigration

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and Customs Enforcement (ICE) during daily activities that were once deemed safe spaces.<sup>1</sup> These stories rightly provoke outcries of injustice from the public, rallying calls to #AbolishICE<sup>2</sup>, and rhetorical promises of comprehensive immigration reform from political elites. To those in directly-impacted communities, the reality is that the deportation machine is constantly expanding and feeding-on more black, brown, Asian, and native bodies each day. This includes people who have been branded as criminals, due to a charge or conviction, and who live in constant fear that they will be caged<sup>3</sup> in *las hieleras* (“the freezers”) without bail.<sup>4</sup> These individuals are

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<sup>1</sup> See Jacey Fortin and Sarah Mervosh, *ICE Detained Man Who Was Driving His Pregnant Wife to a Hospital*, N.Y. TIMES, (Aug. 19, 2018), <https://www.nytimes.com/2018/08/19/us/ice-arrest-man-pregnant-wife.html>, archived at <https://perma.cc/T5J7-AV56> (A soon-to-be father on his way to the hospital); See also Liz Robbins, *He Delivered Pizza to an Army Base in Brooklyn. Now He Faces Deportation*, N.Y. TIMES, (June 6, 2018), <https://www.nytimes.com/2018/06/06/nyregion/pizza-delivery-ice-deportation.html?module=inline>, archived at <https://perma.cc/JT3R-D7PU> (a pizza delivery man arrested on a military base); see also Sarah Mervosh, *A Legal Resident, an Arrest by ICE and Father's Day in Jail*, N.Y. TIMES, (June 17, 2018), <https://www.nytimes.com/2018/06/17/us/legal-resident-arrested.html?module=inline>, archived at <https://perma.cc/QWV4-WYRC> (a grandfather who has been a legal permanent resident since 1980 arrested by ICE on Sunday morning while watering his lawn); see also Hannah Rapple, Stephanie Gosk, Brenda Breslauer and John Carlos Frey, *Immigration crackdown makes women afraid to testify against abusers, experts warn*, NBC NEWS (Sep. 22, 2018), <https://www.nbcnews.com/politics/immigration/immigration-crackdown-makes-women-afraid-testify-against-abusers-experts-warn-n908271>, archived at <https://perma.cc/VW76-6CTQ> (a survivor of domestic violence about to testify against her abuser); see also Tal Kopan, *ICE arrested undocumented adults who sought to take in immigrant children*, SF CHRONICLE, (Dec. 10, 2018), <https://www.sfchronicle.com/politics/article/ICE-arrested-undocumented-adults-who-sought-to-13455142.php>, archived at <https://perma.cc/2CAZ-TLWU> (170 caretakers of migrant children); see also Ana Suda, *Border Patrol Detained me for speaking Spanish in Montana. Then my town turned against me*, ACLU, (Feb. 14, 2019), [https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/border-patrol-detained-me-speaking-spanish?fbclid=IwAR273f7z3YotM6qtaKOnArzcJDTG3HOJSUisw9ACYT2ktCJefvcMjubz\\_AA](https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/border-patrol-detained-me-speaking-spanish?fbclid=IwAR273f7z3YotM6qtaKOnArzcJDTG3HOJSUisw9ACYT2ktCJefvcMjubz_AA), archived at <https://perma.cc/AAH7-XGKD> (arrested for speaking Spanish at a convenience store).

<sup>2</sup> See Sean McElwee, *It's Time to Abolish ICE*, THE NATION, (March 9, 2018), <https://www.thenation.com/article/its-time-to-abolish-ice/>, archived at <https://perma.cc/7Q69-2ZCP> (“The goal of abolishing the agency is to abolish the function. ICE has become a genuine threat to democracy, and it is destroying thousands of lives. Moreover, abolishing it would only take us back to 2003, when the agency was first formed.”)

<sup>3</sup> The article uses of the word “cage,” instead of detention, to describe the purposeful political, legal, and physical act by the State to deprive noncitizens of their liberty and humanity by confining human beings to spaces that average 3x3 meters (approximately the size of a large dog kennel) or in metrics—about 10 feet by 10 feet for 10 to 20 people at any one time. People, including children, held in these cages are subject to traumatic physical, emotional, psychological, and sexual abuses. This practice is rooted in the practices of humane bondage and enslavement. Calling caging “detention” seeks to absolve the State of responsibility, and rather shift the blame to the noncitizen, and erases the trauma and violence inflicted by the State on human beings; see also, *In the Freezer Abusive Conditions for Women and Children in US Immigration Holding Cells*, HUMAN RIGHTS WATCH, (Feb. 28, 2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>, archived at <https://perma.cc/XM5H-N3BL> (“Holding cells are small—many of the women we spoke with estimated the size of their cells as three meters by three meters, or about 10 feet by 10 feet—and may hold 10 to 20 people or more at any one time . . . . We also asked CBP for its response to the accounts we heard, in which women and children routinely described sleeping directly on the floor in uncomfortably cold cells, being unable to wash their

castigated as “criminals, rapist, drug dealers, and terrorists” who pose the greatest threat to the country and, thus, deserve to be caged.<sup>5</sup> Despite the fact that such political fear mongering has been found to be false, it is persuasive in convincing the public that the mythical “criminal alien” is inherently violent and unworthy of redemption.<sup>6</sup> Legal scholars have recognized that an expanding deportation machine requires more and more people to be branded as “criminal aliens” to sustain its growth, largely driven by corporate shareholders invested in prisons. In all, this results in funneling more poor communities of color, overwhelming Latinx and disproportionately black, in a system that is procedurally and substantively racist, dehumanizing, and xenophobic.<sup>7</sup>

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hands with soap after using the toilets, before and after eating, and before and after feeding or changing infants, and being separated from other family members while in holding cells, among other abusive practices.”)

<sup>4</sup> See Opheli Garcia Lawler, *The Iceboxes at the Border*, THE CUT, (Dec. 26, 2018), <https://www.thecut.com/2018/12/what-are-las-hieleras-iceboxes-used-by-cbp-at-the-border.html>, archived at <https://perma.cc/8K62-7GQP> (“Migrants, immigration activists, and even—allegedly—U.S. government officials have a nickname for the frigid, cramped holding cells in Customs and Border Protection facilities: las hieleras, or “the iceboxes.” Women and children detained at the border will routinely spend several nights crowded into these tiny rooms, according to reports, wrapped in foil blankets, shivering, and denied mattresses and medicine.”)

<sup>5</sup> See Michelle Ye Hee Lee, *Donald Trump’s False comments connecting Mexican immigrants and crime*, THE WASH. POST, (July 8, 2015), [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?noredirect=on&utm\\_term=.d8318bbde703](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?noredirect=on&utm_term=.d8318bbde703), archived at <https://perma.cc/R88X-YYX5> (Quoting President Trump, “[t]he Mexican Government is forcing their most unwanted people into the United States. They are, in many cases, criminals, drug dealers, rapists.”); see also Mark Hosenball and Jonathan Landay, *no evidence for Trump claim on ‘terrorist’: government sources*, REUTERS, (Dec. 11, 2018 8:31 PM), <https://www.reuters.com/article/us-usa-trump-border/no-evidence-for-trump-claim-on-terrorists-government-sources-idUSKBN1OB05Y>, archived at <https://perma.cc/R7M4-BJ9B> (“‘People are pouring into our country, including terrorists,’ [Trump said W]e have terrorists. We caught 10 terrorists over the last very short period of time. Ten. These are very serious people. Our border agents, all of our law enforcement has been incredible what they’ve done. . . . We need the wall.”)

<sup>6</sup> See Anna Flagg, *Myth of the Criminal Alien*, N.Y. TIMES, (March 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html>, archived at <https://perma.cc/MQC7-M9PQ> (“As of 2017, according to Gallup polls, almost half of Americans agreed that immigrants make crime worse. But is it true that immigration drives crime? Many studies have shown that it does not.”)

<sup>7</sup> See e.g., Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 614 (2013) (tracking major developments in immigration law and immigration enforcement that have led to criminalization of immigrants); see, Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1549 (2011) (arguing that the Supreme Court in *Terry v. Ohio* and *United States v. Brignoni Ponce* effectively enables procedural racial profiling); see also Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (analyzing the Plenary Power Doctrine and its application against Asian and African Americans), see also Yolanda Vásquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW.L.J.639, 666–67 (2011); see also Juliana Morgan-Trostle, Kexin Zheng, & Carl Lipscombe, *THE STATE OF BLACK IMMIGRANTS*, NYU LAW IMMIGRANT RIGHTS CLINIC AND BLACK ALLIANCE FOR JUST IMMIGRATION, (Jan. 22, 2018), <http://www.stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf> (Although black immigrants represent about 7 percent of the noncitizen population, they make up more than 10 percent of immigrants in

In 2015, an estimated 820,000 (7.45%) of the approximately 11 million people living in the country without documentation had some type of criminal conviction.<sup>8</sup> Today, approximately 66% of undocumented people arrested by ICE are those convicted of a crime, followed by 21% with only pending criminal charges.<sup>9</sup> The most common pending and convicted criminal offenses are DUIs (16% of the total), possession/selling of “dangerous drugs,” traffic violations, and obstruction of justice.<sup>10</sup> ICE also arrests anyone who has committed acts which could constitute a chargeable offense or have abused any program related to public benefits.<sup>11</sup> In all, notwithstanding the

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removal proceedings. Criminal convictions amplify the disparity: Twenty percent of immigrants facing deportation on criminal grounds are black and 35% are ultimately deported.

<sup>8</sup> See Muzaffar Chishti & Michelle Mittelstadt, *Unauthorized Immigrants with criminal convictions: Who might be a priority for removal?* MIGRATION POLICY INSTITUTE, (NOVEMBER 2016), <https://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal> (About 300,000 had a felony conviction and 390,000 had “significant misdemeanors” as defined by the Obama Administration.); see also, Memorandum from Jeh C. Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir. U.S. Immigration & Customs Enf’t, R Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., Leon Rodriguez, Dir. U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec’y for Poly 4 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf), archived at <https://perma.cc/ST6S-V7EA> (categorizing the second-highest priority individuals for deportation for ICE: “aliens convicted of a ‘significant misdemeanor,’ which for these purposes is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence).”).

<sup>9</sup> See *Fiscal Year 2018 ICE Enforcement and Removal Operations Report*, U.S. Immigration & Customs Enf’t, December 14, 2018, <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> (In FY2018, ICE arrested 138,117 immigrants with criminal histories, which includes people who were convicted with crimes as well as those with pending criminal charges, for an increase of 10,125 aliens over FY2017.)

<sup>10</sup> See Kristen Bialik, *Most immigrants arrested by ICE have prior criminal convictions, a big change from 2009*, PEW RESEARCH CENTER (Feb. 15, 2018), <http://www.pewresearch.org/fact-tank/2018/02/15/most-immigrants-arrested-by-ice-have-prior-criminal-convictions-a-big-change-from-2009/>, archived at <https://perma.cc/9D8K-MGFJ> (“Among ICE arrestees in 2017 with prior convictions, the most common criminal conviction category was driving under the influence of alcohol [59,985 convictions, or 16% of the total], followed by possessing or selling “dangerous drugs” such as opioids [57,438, or 15%]. Immigration offenses, which include illegal entry or false claim to U.S. citizenship, were the third-most common crime type [52,128 convictions, or 14%]”); See *id.* (“For ICE arrestees with pending criminal charges in 2017, general traffic offenses topped the list of most common charges [24,438, or 17% of all charges], followed by driving under the influence of alcohol [20,562, or 14%] and possession or selling of “dangerous drugs” [19,065, or 13%]. Pending immigration violations were the fifth-most common charge [10,389, or 7%].”)

<sup>11</sup> See, U.S. Immigration & Customs Enf’t, *supra* note 9, at 1 (“Together, the EO and implementation memorandum expanded ICE’s enforcement focus to include removable aliens who (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security. The Department continued to operate under the directive that classes or categories of removable aliens are not exempt from potential enforcement”)

need to question why the state is able to designate someone as “criminal” and “public risk”, about 85% of people in immigration prisons are designated by ICE as non-violent or low-level offenders meaning they do not pose a substantial violent risk to society.

The widening criminalization of immigrants is due to the immigration system wholly adopting the institutional arrangement, politics, and processes of the criminal legal system.<sup>12</sup> Hence, the crimmigration machine is made up of a similar sophisticated institutional triangle (legislators, executive enforcers, and prisons) which works to cage as many immigrants as possible. The cycle begins with legislators who widen the net of criminal liabilities to increase police and prosecutorial powers to feed more and more people, particularly from low-income communities of color, into the criminal legal system.<sup>13</sup> As more undocumented people are incarcerated, the for-profit prison industry, elected officials, and social elites reap massive profits and push for more tough-on-immigration policies (i.e. widening criminal liabilities that trigger mandatory detention and deportation). Accordingly, a tough-on-immigration toxic cycle emerges.<sup>14</sup> Given this infrastructure, it is unfortunately no surprise that the United States has the fastest growing and largest immigration prisons, including the largest number of for-profit immigration prisons in the world which cage 75% of the immigrants in prison.<sup>15</sup>

In *Nielsen v. Preap* (2018), the Supreme Court was asked whether, under 8 U.S.C Section 1226(c), a noncitizen released from criminal custody

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<sup>12</sup> See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 Wash. & Lee L. Rev. 469, 472 (2007) (arguing that the “theories, methods, perceptions, and priorities” of the criminal justice system have been incorporated into the immigration enforcement system.); See also, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 407–09 (2006) (describing the historical movement from crimes of “moral turpitude” to a wider variety of crimes that trigger deportation proceedings).

<sup>13</sup> See William J. Stuntz, “The Pathological Politics of Criminal Law,” 100 MICHIGAN LAW REVIEW 505, (2002)

<sup>14</sup> See Felipe Hernández, *Abolishing the Tough-On-Immigration Paradigm*, 31 HAR. HISPANIC J. OF PUBLIC POLICY at 46 (2019) (“The tough-on-immigration toxic cycle, a global phenomenon, begins with the false—but powerfully persuasive—dehumanizing narrative that ‘illegal (criminal) aliens,’ particularly from non-European ‘shithole’ countries, are invaders threatening the economic, social, moral, and political interests of the country’s citizens. Once designated as threats and undesired populations, immigrants are systematically linked to criminality to facilitate their permanent exploitation and marginalization, positioned against a struggling poor White class. This positioning then moves those with political power, i.e., poor White class, to legitimize the use of the police, prisons, and the criminal legal system to control or eliminate the ‘criminal alien.’ Throughout this entire process, corporate shareholders, politicians, and social elites reap massive benefits from investing in the law-and-order system that punishes and removes the ‘criminal alien’ as a means to regulate a stable global supply of labor to exploit from predominantly non-White people with little to no legal and political powers to resist, i.e., factory workers, farm laborers, and domestic workers.”)

<sup>15</sup> See *Immigration Detention 101*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101>, archived at <https://perma.cc/JJ42-GY64> (Feb. 14, 2019); see also Staff, *the private prison industry explained*, The Week (Aug. 6, 2018), <https://theweek.com/articles/788226/private-prison-industry-explained>, archived at <https://perma.cc/DH4Z-4973> (“About 75 percent of all immigrants detained by ICE are also in private prisons. Just two companies dominate the industry: CoreCivic has 42 percent of the market and GEO Group 37 percent.”)

can be subject to mandatory detention if, after they are released from criminal custody, DHS “does not immediately take the immigrant into custody.”<sup>16</sup> The case involves two lawful permanent residents who after serving their criminal sentences returned to their communities and, years later, immigration authorities detained them and denied them a bond hearing under Section 1226(c). The Government argued, and the Supreme Court agreed, that DHS is allowed to take the noncitizen into mandatory detention at any time after release from criminal custody. Conversely, Respondents, represented by the American Civil Liberties Union (ACLU), asked the Supreme Court to adopt the plain language holding from the U.S. Court of Appeals for the Ninth Circuit which held that DHS must take people into custody immediately “when [they are] released” [within 24 hours] from criminal custody.”<sup>17</sup> However, the Court rejected the Respondents’ argument and held that DHS can take the noncitizen into custody any time after they have been released from criminal custody, even decades after release. This decision means that long-time residents of the U.S could face indefinite detention without a bond hearing and further expand the sophisticated reach of the immigration caging machine.<sup>18</sup>

Much crimmigration<sup>19</sup> scholarship has examined how the crimmigration system functions,<sup>20</sup> criminalizes immigrants<sup>21</sup>, and targets immigrants on the basis of their race, gender, and sexuality.<sup>22</sup> Relatedly, other scholarship has suggested reforms within the carceral system to afford basic due process

<sup>16</sup> *Nielsen v. Preap*, No. 16-1363, 2019 WL 1245517 (U.S. Mar. 19, 2019)

<sup>17</sup> *Preap v. Johnson*, 831 F.3d 1193, at 1197 (9th Cir. 2016)

<sup>18</sup> See Garrett Epps, *a high-stakes immigration case hits the Supreme Court*, THE ATLANTIC (Oct. 8, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/nielsen-v-preap-could-affect-thousands-immigrants/572359/> (“But a victory for the plaintiffs would not deprive Homeland Security of the power to detain aliens it arrests after release; it would mean only that those aliens would have a chance to show that, since release, they have put down roots and will not flee. In that hearing, the burden of proof is on the alien, not the government. The statistics show that most aliens released on bond do appear for their hearings.”)

<sup>19</sup> Professor Juliet Stumpf coined the term “crimmigration” in 2006. See Stumpf, *supra* note 12, at 367.

<sup>20</sup> See Yolanda Vazquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. Rich. L. Rev. 1093, 1148 (2017); see Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. Sidebar 42, 58 (2010); see Stumpf, *supra* note 12, at 407–09; see also, Cesar Cuauhtémoc Garcia Hernandez, *Naturalizing Immigration Imprisonment*, 36 IMMIGR. & NAT'LITY L. REV. 445, 510 (2015).

<sup>21</sup> See Angelica Chazaro, *Challenging the Criminal Alien Paradigm*, 63 UCLA L. Rev. 594, 664 (2016); see also, Angelica Chazaro, *Beyond Respectability: Dismantling the Harms of Illegality*, 52 HARV. J. ON LEGIS. 355, 422 (2015); see also, Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a Post-Racial World*, 76 OHIO ST. L.J. 599, 658 (2015)

<sup>22</sup> See César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling The Rationality Of Imprisoning Immigrant Based On Markers Of Race And Class Otherness*, 1 Colum. J. Race & L., 353 (2012); see also Jennifer M. Chacon, *Immigration Detention: No Turning Black?*, 113 S. ATLANTIC Q. 621, 624 (2014); see also Austin Kocher, *Terrorizing Latino Immigrants: Race, Gender, and Immigration Policy Post-9/11*, 50 INT'L MIGRATION REV. e19, e20 (2016); see also Monica Boyd, *Gender and U.S. Immigration: Contemporary Trends*, 38 INT'L MIGRATION REV. 1572, 1573 (2004); see also Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 167 (1996); see also,

(e.g. right to counsel<sup>23</sup>) and equal protection<sup>24</sup>, expand alternatives to caging (e.g. ankle monitoring)<sup>25</sup>, implement holistic defense models<sup>26</sup>, create new conceptions of citizenship<sup>27</sup>, or better training and compliance of enforcement policies.<sup>28</sup> While both forms of scholarship have been critical in understanding the crimmigration system and in influencing reforms, as recently incorporated in DHS's 2019 funding bill,<sup>29</sup> this scholarship has arguably also

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Elvia Rosales Arriola, *Queer, Undocumented, And Sitting In An Immigration Detention Center: A Post-Obergefell Reflection*, 84 UMKC L. REV. 617 (2016).

<sup>23</sup> See *The Right to Be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 HARV. L. REV. 726, 747 (2018); see also *A Prison Is a Prison Is a Prison: Mandatory Immigration Detention and the Sixth Amendment Right to Counsel*, 129 HARV. L. REV. 522, 543 (2015).

<sup>24</sup> See Emma Kaufman, "Segregation by Citizenship," 132 HARV. L. REV. 1379 (2019); see, Thomas Carnes, *The Right To Exclude Immigrants Does Not Imply The Right To Exclude Newcomers By Birth*, 14 J. ETHICS & SOC. PHIL. 28 (2018); see, Nationwide Injunctions, Immigration, and Civil Rights Litigation, *Civil Rights Litigation*, Vol. 5, Issue 1 (Spring 2017), at 20-22; see, Luz E. Herrera; Pilar Margarita Hernandez Escontrias, *The Network for Justice: Pursuing a Latinx Civil Rights Agenda*, 21 HARV. LATINX L. REV. 165, 228 (2018).

<sup>25</sup> See Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2192 (2017); see also, Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of Custody*, 48 U. MICH. J.L. REFORM 879, 914 (2015).

<sup>26</sup> See *Andreas Dae Keun Kwon, Defending Criminal(ized) Aliens after Padilla: Toward a More Holistic Public Immigration Defense in the Era of Cimmigration*, 63 UCLA L. REV. 1034, 1109 (2016); see Rebecca Sharpless, *Immigrants are Not Criminals: Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 766 (2016); see Stephen Manning; Juliet Stumpf, *Big Immigration Law*, 52 U.C.D. L. REV. 407, 434 (2018) (Arguing that private big law firms need to take on more immigration cases.).

<sup>27</sup> See Kit Johnson, *A Citizenship Market*, 2018 U. ILL. L. REV. 969 (2018); see, Matthew Lindauer, *Immigration Policy and Identification Across Borders*, 12 JETHSP 280 (2017); see Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 304 (2017); see Angela M. Banks, *Respectability & the Quest for Citizenship*, 83 BROOK. L. REV. 1, 54 (2017); see Deborah M. Weissman; Jacqueline Hagan; Ricardo Martinez Schuldt; Alyssa Peavey, *The Politics of Immigrant Rights: Between Political Geography and Transnational Interventions*, 2018 MICH. ST. L. REV. 117, 188 (2018).

<sup>28</sup> See Kelsey E. Papst, *Protecting the Voiceless: Ensuring ICE's Compliance with Standards That Protect Immigration Detainees*, 40 MCGEORGE L. REV. 261, 290 (2009); see Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 724 (2015).

<sup>29</sup> See U.S. DEPT OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF 4 ("\$184.4 million for ICE's Alternatives to Detention (ATD) Program, to monitor 82,000 average daily participants within the program that may pose a flight risk, but who are not considered a threat to our communities. The ATD Program places low-risk individuals under various forms of non-detained, intensive supervision through a combination of home visits, office visits, alert response, court tracking, and/or technology, which may include electronic monitoring."); see also, *id.* at 33 ("In FY 2017, ICE removed 226,119 illegal aliens arrested 143,470 aliens, of which 105,736 were convicted criminals (a 12 percent increase over FY 2016), and housed a daily average of 38,106 illegal aliens. In addition, the Alternatives to Detention (ATD) program monitored an average daily participant level of 69,873 of the more than 2.4 million illegal aliens on ERO's nondetained docket. ERO responded to 1,524,385 immigration alien inquiries from other federal, state, and local law enforcement agencies through ICE's Law Enforcement Support Center."); but see, James Kilgore & Emmett Sanders, *Ankle Monitors Aren't Humane. They're Another Kind of Jail*, WIRED (Aug. 4, 2018, 8:00 AM) <https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail/>, archived at <https://perma.cc/6BUQ-HRYK> ("For many, electronic monitoring equals incarceration by another name. It is a shackle, rather than a bracelet. The rules for wearing a monitor are far more restrictive than most people realize. Most devices today have GPS tracking, recording every movement and potentially eroding rights in ways you can't imagine.").

helped refine and bolster the crimmigration system's sophisticated ability to marginalize noncitizen people. At its core, reformist scholarship supports the underlying premise that the State's practice of controlling the immigrant's body, through mandatory caging, will always be part and parcel of deportation procedures.<sup>30</sup>

To date there has been little legal scholarship, though plenty of community organizing, which challenges the State's moral and political right to criminalize, cage, and deport immigrants. While abolitionism as a core tenant to securing a true democracy stems back centuries,<sup>31</sup> it was not until 2017 that a legal scholar argued for abolishing immigration prisons.<sup>32</sup> This article adds to immigration prison abolition scholarship by arguing how *Nielsen*—the premiere immigration detention case before the Supreme Court with two Trump appointed Justices—complicates the aims of immigration liberation because it will significantly expand the immigration caging machine. This argument is based on the settler-colonial roots embedded in the institutional triangle of the immigration caging machine which is designed to criminalize, cage, and remove (i.e. eliminate via physical removal from U.S. society) more bodies for profit. The institutional triangle is made up of three axes (legislators, executive enforcers, and prisons), and actors within each axis, who operate the immigration caging machine. The political and financial incentives and actions of these actors contribute to the expansion and sophistication of the machine (i.e. criminalizing more immigrants for caging and removal). Each axis, as well as the interdependent relationship between actors within each axis, operate within its own set of complex incentives and actions but all contribute to expansion. Moreover, this argument is based on past and recent Congressional and Executive actions which have provided the resources for expansion. Most critically, at each step of the expansion the Supreme Court has refused to check the legislator axis and rather has actively contributed to the machine's growth. Accordingly, regardless of the decision in *Nielsen*, the Court will contribute to expansion by strengthening the institutional triangle in three ways. First, the decision will further politically and legally entrench Congressional Plenary powers to designate which immigrants are "threats" or "criminal aliens" and use that political designation to require indefinite caging to guarantee removal. Second, the decision will strengthen policing and prosecutorial powers and resources to capture and criminally charge more undocumented bodies for removal. Third, as more immigrants are criminalized and subject to caging, public and private

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<sup>30</sup> See Chacon, *supra* note 22, at 627 ("[A]ll viable reform proposals. . . assume the need for punitive detention for migrants. . .").

<sup>31</sup> ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 39 (Greg Ruggiero ed., Seven Stories Press 2003) ("In the nineteenth century, anti-slavery activist insisted that as long as slavery continued, the future of democracy was bleak indeed. In the twenty-first century, anti-prison activists insist that fundamental requirement for the revitalization of democracy is the long-overdue abolition of the prison system.").

<sup>32</sup> See César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 300 (2017); at 246 ("This article is the first to argue that immigration imprisonment is inherently indefensible and should be abolished.").



actors will be incentivized to bolster their investment for more immigration prisons, notably for-profit prisons. In doing so, this article seeks to show that since the system is designed to expand its oppression against noncitizens, any reformist tactic through the Court will only limit immigrant liberation.

Part II.A uncovers the centuries-old roots of caging embedded in the modern immigration detention machine which demonstrates just how pervasive and persistent the expansion of the machine has been. This is a first step to understand how *Nielsen* is a logical next step in centuries of expansion. Part II.B describes the institutional triangle of actors involved in expanding the immigration caging machine with a particular focus on Congress. Part III examines how past Supreme Court decisions related to immigration detention has given wide deference to the institutional triangle in expanding the deportation caging machine. Specifically, the Court has consistently supported Congress's power to designate certain people as undesirable, threats, and/or criminal aliens as well as has supported Congress's ability to use that political construct to authorize mandatory caging and removal with limited due processes. Part IV examines the arguments offered in *Nielsen v. Preap* to demonstrate that regardless of which holding the Court could have adopted, each decision, in context of recent Executive and Congressional action on immigration, would have expanded the immigration caging regime. Part V describes how the *Nielsen* decision will impact the U.S. immigrant diaspora and points to next steps for future abolitionist crimmigration scholarship.

## II. THE EVOLUTION OF THE MODERN IMMIGRATION DEPORTATION MACHINE

Today, nearly 90% of people held in immigration prisons are from Latin American and Caribbean countries including Mexico (38%), El Salvador (18.5%), Honduras (16%), Guatemala (13%), and Haiti (1.6%).<sup>33</sup> In terms of removals, in FY 2018, over 90% of people were from Mexico (55%), Guatemala (19.6%), Honduras (11.28%), and El Salvador (6%). It is important to note that nationality does not necessarily mean that they are same race and/or ethnicity. The deportation caging machine impacts *all* communities and disproportionately impacts a diaspora of black folx and indigenous people.<sup>34</sup> On an average day, ICE holds over 41,100 people

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<sup>33</sup> See U.S. DEPT. HOMELAND SEC., *Annual Report: Immigration Enforcement Actions* (December 2017), at 6, [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2016.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf), archived at <https://perma.cc/98LX-CTLG>

<sup>34</sup> Morgan-Trostle, Zheng, & Lipscombe, *supra* note 7, at 21 (Although black immigrants represent about 7 percent of the noncitizen population, they make up more than 10 percent of immigrants in removal proceedings. Criminal convictions amplify the disparity: Twenty percent of immigrants facing deportation on criminal grounds are black and 35% are ultimately deported.); see, *Language Access Plan*, U.S. Immigration & Customs Enf't, (June 14, 2015), at 10 <https://www.ice.gov/sites/default/files/documents/Document/2015/LanguageAccessPlan.pdf>, archived at <https://perma.cc/DL22-B4FH> (As of March 2015, the following Mayan dia-

(FY2018) and about 400,000 per year at a cost of \$181 per person.<sup>35</sup> While caged, immigrants are subject to abuses by prison staff and forced to work for as little as a \$1/day, which some argue is a new form of enslaved labor and subject to numerous lawsuits.<sup>36</sup> Historically, ICE has categorized over 70% of detainees as not posing any danger.<sup>37</sup> Yet, in 2010, Congress, for the first time, required that the U.S. Department of Homeland Security (DHS) “maintain a level of not less than 33,400 detention beds” per year to prioritize deporting “criminal aliens” who posed a threat.<sup>38</sup> During the Trump Administration, ICE has caged more immigrants than ever before (45,890 in FY2018) and used this as a rationale to request increasing the detention bed quota to 52,000.<sup>39</sup> In 2019, Congress passed a budget bill which expanded

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lects are represented within the ICE family residential facilities: Quiche (K’iche), Mam, Achi, Ixil, Awakatek, Jakalteq (Popti), and Qanjobal (K’anjob’al).).

<sup>35</sup> See generally Walter Ewing et. al., *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL (July 15, 2015), <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states>, archived at <https://perma.cc/38RG-YNUJ>; see Sarah N. Lynch, Kristina Cooke, *Exclusive: sending 1,600 immigration detainees to federal prison*, REUTERS (June 7, 2018, 5:10 PM) <https://www.reuters.com/article/us-usa-immigration-prisons-exclusive/exclusive-u-s-sending-1600-immigration-detainees-to-federal-prisons-idUSKCN1J32W1>, archived at <https://perma.cc/N6NR-H3B9> (“According to ICE data, the average daily population of detainees in its facilities as of May 26 was 41,134, up from the 2017 daily average of 38,106.”)

<sup>36</sup> See *Barrientos v. CoreCivic, Inc.*, 332 F. Supp. 3d 1305 (M.D. Ga. 2018) (“Allegations of current and former detainees at immigration detention facility, that operator of the facility forced them to provide labor in facility’s voluntary work program, that operator benefited from that labor, and that operator should compensate detainees for the benefit they conferred on operator because allowing operator to keep that benefit would be unjust, were sufficient to state a claim against operator for unjust enrichment under Georgia law.”); see *id.* at 1308 (M.D. Ga. 2018) (“Responsibilities include scrubbing bathrooms, cleaning the medical center, preparing meals, washing detainees’ laundry, and cleaning floors. CoreCivic generally pays detainees in the program between \$1 and \$4 per day.”); see also Victoria Law, *End Forced labor in Immigration Detention*, THE NEW YORK TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/opinion/forced-labor-immigrants.html>, archived at <https://perma.cc/5GY9-GZMA> (“Prison labor is nearly as old as the American prison system itself, and it is protected by the 13th Amendment, which abolished slavery and indentured servitude except as punishment for a crime. . . . But immigrant detention is civil confinement, not criminal. People held in these facilities are not charged with any crime; they are being detained while awaiting asylum or deportation hearings. Under Immigration and Customs Enforcement’s Voluntary Work Program, however, immigrant detention centers need not pay workers more than one dollar a day, a rate set by Congress in 1950 and codified in the 1978 Appropriations Act. It has never been increased or adjusted for inflation.”)

<sup>37</sup> See generally Tara Cullen, *ICE released its most comprehensive immigration detention data yet*, NAT’L IMMIGR. JUSTICE CENTER (March 13, 2018), <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet>

<sup>38</sup> See National Immigrant Justice Center, *Immigration Detention Bed Quota Timeline*, NAT’L IMMIGR. JUSTICE CENTER (Jan. 2017), [https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2017-01/Immigration%20Detention%20Bed%20Quota%20Timeline%202017\\_01\\_05.pdf](https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2017-01/Immigration%20Detention%20Bed%20Quota%20Timeline%202017_01_05.pdf), archived at <https://perma.cc/Y4TD-RMBS> (2010 Congress enacted a bed quota that required the DHS to “maintain a level of not less than 33,400 detention beds” per year, despite opposition from the immigrant community.)

<sup>39</sup> See Caitlin Dickerson, *The Behind-the-scenes debate over immigration was about much more than a border wall*, THE NEW YORK TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/immigration-detention.html>, archived at <https://perma.cc/U9AW-TVBM> (“Mr. Trump’s strict enforcement agenda has pushed the population of detained immigrants to the highest levels in history, with the authorities sweeping into immigrant-heavy locales to arrest

the bed quota to 45,274 (a 12% increase), increased ICE/ CBP funding by 7%, and increased the use of ankle monitors and surveillance to 100,000 migrants (up from 82,000).<sup>40</sup> Consequently, the U.S. is building more cages to meet this manufactured demand.

While it seems that the expansion of the immigration detention machine is recent, the components of the modern deportation machine (i.e. institutional triangle) are deeply rooted in the settler-colonial practices of human bondage and caging as a form of social control.<sup>41</sup> We must first grapple with these roots to understand why the machine is fundamentally designed to expand and why it must be abolished.

### A. *The Settler-Colonial Roots of Caging in the Modern Deportation Machine*

The immigration liberation struggle is deeply connected to the liberation struggles of other oppressed people in America and across the world.<sup>42</sup>

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vast numbers of the undocumented, as well as immigrants who have violated the terms of their visas (usually through criminal convictions), making them deportable.)

<sup>40</sup> See U.S. DEPT OF HOMELAND SEC., *supra* note 24, at 4 (“\$184.4 million for ICE’s Alternatives to Detention (ATD) Program, to monitor 82,000 average daily participants within the program that may pose a flight risk, but who are not considered a threat to our communities. The ATD Program places low-risk individuals under various forms of non-detained, intensive supervision through a combination of home visits, office visits, alert response, court tracking, and/or technology, which may include electronic monitoring.”);

<sup>41</sup> Garcia Hernández, *supra* note 22, at 360 (“Enter the convergence of criminal law and immigration law. An immigration law regime that requires sorting, widespread public desensitization to and accommodation of mass penal imprisonment, and the constitutional sanctioning of raced and classed policing of people suspected of immigration law violations did not alone produce mass incarceration of people suspected of immigration law violations. These three trends meandered through the years with minimal overlap until immigration law entered its newest phase—the feverish use of immigration law as an extension of criminal law.”); See also, Kelly Lytle Hernández, Khalil Gibran Muhammad, & Heather Ann Thompson, 102 *Introduction: Constructing the Carceral State*, JOURNAL OF AMERICAN HISTORY, 18-24, at 21 (June 2015) (“Prisons and slavery defined the boundaries of citizenship and, in this sense were two sides of the same coin. Through the antebellum period the color line largely governed the use of prisons, primarily for poor men from European ancestry. Enslaved black and Native American populations remained outside the prison gates, subject to brutal and capricious physical punishments. By the mid-nineteenth century, the end of slavery collapsed the boundaries of citizenship and race. The Thirteenth Amendment’s slavery loophole created the legal preconditions for mass imprisonment of the formerly enslaved and of indigenous populations and non-European immigrants on an unprecedented scale. By region and at different rates, prisons gradually became blacker and browner.”)

<sup>42</sup> See generally Rashid, I Khalidi, *Israel: A Carceral State*, 42 Institute for Palestine Studies 4, <https://www.palestine-studies.org/jps/fulltext/165582> (The parallels with the Palestinian struggle against the Israeli settler-occupation is stark). see *id.* at 5 (“Fencing off lands to prevent access by their indigenous owners, or walling in, confining, and otherwise restricting the native people of the land to ‘reservations’ in order to allow the settler population freedom of movement and action, all the while imprisoning (or killing) those who actively contest the legitimacy of the colonial project, are typical characteristics of settler-colonial endeavors. Needless to say, those murdered and imprisoned in the process are dismissively described as ‘bandits,’ ‘fanatics,’ or ‘terrorists.’”); see also REECE JONES, BORDER WALLS: SECURITY AND THE WAR ON TERROR IN THE UNITED STATES, INDIA, AND ISRAEL: 1-4 (Zed Books Ltd 2012), (“Although there are context-specific differences in the American, Indian, and Israeli barriers. . . there are also broad similarities in how the projects were justified, what they mean for

The evolution of mandatory caging as a State tool to control racial minorities, designated as threats or undesirable, has been well documented.<sup>43</sup> Yet, little has been written about where the use of caging, as the primary tool of control in immigration prisons, evolved from. The practice of captivity and caging was embedded in the conquest model that white-European settler-colonizers used throughout the 16th-18th centuries against Native Americans—deemed the greatest threat to white settlers—as a method to eliminate them, occupy and take their lands/property, and expand westward through a manufactured legal system.<sup>44</sup> The logic of settler-colonialism is to replace the native population and exploit the lands for the profit of an elite few. Accordingly, the institution of slavery relegated people of African descent to the legal status of property and created institutions and processes (e.g. slave patrols, lynching) to physically, politically, and socially cage black folk to preserve a white-supremacist capitalist empire for as long as possible.<sup>45</sup> Af-

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the political identity, sovereignty, and territory of each state, and how they affect the lives of borderland residents.)

<sup>43</sup> See Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of Custody*, 48 U. MICH. J.L. REFORM 879 (2015) at 886-887 (“Unlike the European arrivals in New York, the arrival of Asian migrants on the West Coast during the mid to late 19th century triggered racist immigration detention practices. A rising anti-Chinese movement caused the same detention policies to be enforced disproportionately on Asian entrants on the West Coast. Officials subjected Asian immigrants to lengthy detention simply because of their race; many immigrants challenged their detention in federal courts.”); see also, Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 56 (2010) at 12 (“Let us abandon the mask of euphemism and admit that immigration law is fundamentally law about controlling people. We use detention to control people directly and because we hope that the use of detention will deter others from attempting to breach the border. Detention is people control.”).

<sup>44</sup> See KELLY LYTLE HERNANDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965*: 12-13 (Heather Ann Thompson & Rhonda Y. Williams eds., The University of North Carolina Press 2017), (“Facing constant and enormous resistance, Anglo-American settlers pushed into the contested territories of the new U.S. West. Determined to build a homeland in a conquered land, they funded massive and diverse programs of Native elimination, ranging from waging wars of removal to operating schools of cultural extinction. The goal was to replace Indigenous societies on the land. They also rapaciously consumed racialized labor while building structures of racial erasure, outlawing interracial marriages, adopting racially restrictive residency codes, and passing new immigration laws. And they invested in imprisonment, spurring a phenomenal carceral boom by broadly caging a diverse case of Native landholders and racialized outsiders variously criminalized, policed, and caged as vagrants, drunks, hobos, rebels, illegal immigrants, and illegitimize residents trespassing in their white settler society. Anglo-American invaders first eviscerate Native land rights with sweeping acts of Indian criminalization and caging, then, as Native elimination continued by other means, the emerging Anglo-American settler elite nimbly reshaped the project of human caging to include a range of communities defined as outsiders and deviants in the new U.S. West.”); see also PATRICK WOLFE, *TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE*: 145-146 (New York: Verso Books 2016) (“‘Discovery thus supported the assertion of American hegemony over the continent, a diplomatic stance reiterated during Marshall’s time in the 1823 Monroe Doctrine.’ President Monroe announced his bedrock foreign-policy doctrine in the same year as Marshall’s *Johnson v. McIntosh* decision formally incorporated the monarchial distinction between occupancy and dominion into republican jurisprudence.”)

<sup>45</sup> DAVIS, *supra* note 31, at 24 (“Slavery, lynching and segregation are certainly compelling examples of social institutions that, like the prison, were once considered to be as everlasting as the sun.”), see also ALEX S. VITALE, *THE END OF POLICING*: 47 (Verso Books 2017),

ter slavery was legally abolished, the State's overtly racist tactics evolved to using Black Codes (i.e. vagrancy laws) and transformed slave patrols into local/State police to "regulate the behavior of free black folx in ways similar to those that had existed during slavery" by criminalizing black people merely for being poor, unemployed, drinking, loitering, and/or allegedly neglecting their family or job.<sup>46</sup> When Black folx were merely alleged to have committed these acts they were often tortured to "confess" to crimes they did not commit and forced to decide between going to prison (where they would be forced to work) or face a public lynching, often carried out by the same court officers, prosecutors, and police.<sup>47</sup> These legal and extra-legal systems of subordination would steadily evolve to become the modern U.S. criminal legal system, including prisons, as well as the modern deportation regime, causing the social death and global apartheid of indigenous, black, Asian, and brown communities.<sup>48</sup>

Before the Civil War, immigration laws were regulated by states and there were no formal federal immigration laws authorizing deportation until

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("When slavery was abolished, the slave patrol system was too; small towns and rural areas developed new and more professional forms of policing to deal with the newly freed black population. The main concern of this period was not so much preventing rebellion as forcing newly freed blacks into subservient economic and political roles. New laws outlawing vagrancy were used extensively to force blacks to accept employment mostly in sharecropping system. . . . local police were the essential front door of the twin evils of convict leasing and prison farms. Local Sheriffs would arrest free blacks on flimsy to nonexistent evidence, then drive them into a cruel and inhuman criminal justice system whose punishments often resulted in death. These same sheriffs and judges also received kickbacks and in some cases generated list of fit and hardworking blacks to be incarcerated on behalf of employers, who would then lease them out to perform forced labor for profit.")

<sup>46</sup> DAVIS, *supra* note 31, at 28–29 ("The Mississippi Black Codes, for example, declared vagrant 'anyone/who was guilty of theft, had run away [from a job apparently], was drunk, was wanton in conduct or speech, had neglected job or family, handled money carelessly, and. . . all other idle and disorderly persons.'")

<sup>47</sup> See *Brown v. Mississippi*, 297 U.S. 278, at 279 (1936) ("A state may not permit an accused to be hurried to conviction under mob domination, where the whole proceeding is but a mask, without supplying corrective process. A state may not deny to the accused the aid of counsel. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.")

<sup>48</sup> See generally LISA MARIE CACHO, *SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED* (New York: New York University Press, 2012) (Traces the criminalization of bodies of color, particularly African American, Southeast Asian, and Latinx, by labeling them as suspected terrorists and enemies of the state while decriminalizing Whiteness to demonstrate the political, legal, and social strategies used to bring about a social death of these marginalized groups in an effort to protect Whiteness.); See also, TANYA GOLASH-BOZA, *DEPORTED: POLICING IMMIGRANTS, DISPOSABLE LABOR, AND GLOBAL CAPITALISM: 167-198* (New York: New York University Press, 2015), ("At least since the early 1990s, Latino and Caribbean men have been the primary targets of deportation policy. Today, about 90 percent of deportees are men, and nearly all (97 percent) are from the Americas, even though about half of all noncitizens are women and only 60 percent of noncitizens are from the Americas."), See also, *id.* at 256 ("Every area of the world has been incorporated into the global system of capitalist production, and mass deportation reflects global capitalism's demand for the free flow of goods across borders and the controlled flow of labor.")

the Chinese Exclusion Acts which, specifically barred Chinese women.<sup>49</sup> In the late 19th century, as the Court was grappling with the persistence of white supremacy in Jim Crow segregation<sup>50</sup>, the same Justices (including J. Harlan) upheld the segregation, caging, and deportation of Chinese, Filipinx, and Japanese immigrants, who were deemed by white nativist as the greatest economic, cultural, and security threat to white workers.<sup>51</sup> When these practices were challenged in *Chae Chan Ping v. United States* (1889), the Supreme Court set the touchstone precedent that those in immigration cages were not afforded Constitutional protections.<sup>52</sup> In a series of landmark cases the Supreme Court affirmed Congress's unqualified power to cage and remove *any* immigrant as it desired as well as its power to bestow immigrants with as few social, political, and legal rights and obligations as it desires.<sup>53</sup> Concurrently, to meet this demand, the U.S. began constructing Federal prisons to cage black folx with vagrancy offenses and force them to work for the

<sup>49</sup> See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–44 (1993); see also, Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1357 (2009); see also, Page Act of 1875, Ch. 141, 18 Stat. 477 (repealed 1974), (Specifically barred entry of sex workers who were Chinese women.).

<sup>50</sup> See *Plessy v. Ferguson*, 163 U.S. 537, at 540 (1896) (“Statute requiring railroads carrying passengers to provide equal but separate accommodations for white or colored races was not unconstitutional.”); See *id.* at 559 (Harlan dissenting “The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.

<sup>51</sup> See generally ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (University of California Press 1971); SUCHENG CHAN, *ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943* (Sucheng Chan ed., Temple University Press 1990); LUCY SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (The University of North Carolina Press 1993). See also YUJI ICHIOKA, *THE ISSEI: THE WORLD OF FIRST GENERATION JAPANESE IMMIGRANTS, 1880-1924* (New York University Press 1988); ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* (University of California Press 1977).

<sup>52</sup> See generally *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (holding that the provisions of the Constitution, securing the right of trial by jury and prohibiting unreasonable searches and seizures, and cruel and unusual punishment, have no application to immigration control.). See also Gabriel Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in *IMMIGRATION STORIES*, 7–30 (David A. Martin and Peter H. Schuck eds., New York University Press 2005); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, 853–86(1987); Gerald L. Neuman, *Anamalous Zones*, 48 Stan. L. Rev. 1197, 1197–1234 (1996).

<sup>53</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (holding that “[t]he right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation.”); see, *Nishimura Ekiu v. United States*, 142 U.S. 651, 662 (1892). (stating that “[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”); see, *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (The Supreme Court rejected a challenge to the authority of the federal government to detain or arrest a noncitizen.).

profit of landowners which included judges, police, and prison staff.<sup>54</sup> At the same time, this same carceral system began to target noncitizen people for removal as a form of elimination.<sup>55</sup>

Congress, fueled by national immigration anxiety and white nativism, exercised its power to further criminalize, arrest, cage, and remove (i.e. eliminate) more immigrants and lay the foundation for the modern deportation machine enshrined in the Immigration Act of 1917.<sup>56</sup> As more immigrants were criminalized, the U.S. needed a large enforcement force. Building from the use of slave patrols, in 1924, Congress created the Customs and Border Patrol (CBP), whose first recruits came from a variety of racist vigilante paramilitary groups (e.g. Texas Rangers) who used brutal tactics, like lynchings, to arrest, cage, and deport immigrants.<sup>57</sup> Then, in 1929 Congress passed the Immigration Act, as an agreement between agribusiness and an openly white supremacist anti-immigrant wing of Congress that further criminalized immigrants for entering the U.S. .<sup>58</sup> Immedi-

<sup>54</sup> See generally Fletcher M. Green, *Some Aspects of the Convict Lease System in the Southern States*, 31 *ESSAYS IN SOUTHERN HISTORY*: 166–120, (Durham: University of North Carolina Press 1949); see generally, Christopher R. Adamson, *Punishment after Slavery: Southern State Penal Systems, 1865-1890*. 30 *SOCIAL PROBLEMS* 5 (1983) at 555–569.

<sup>55</sup> See Kauffman, *supra* note 24, at 1390 (“By the early 1900s, there were three federal prisons, and the newly created Bureau of Immigration and Naturalization had started to ‘canvass . . . all penal institutions in the United States for the purpose of discovering the number of alien prisoners detained therein.’”).

<sup>56</sup> See generally JOHN HINGAM, *STRANGER IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1865–1925*: 160 (2002); See Act of Feb. 5, 1917, Ch. 29, 39 Stat. 874 (repealed 1952); see also, DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY*: 133-134 (2007) (“It radically changed prior law by requiring deportation after entry for a wide variety of reasons and in permitting deportation without without time limitation for certain types of cases. The act used three mechanisms to link the criminal justice system to deportation: the seriousness of the deportable crime was determined by the length of sentence and by multiple offenses; the nature of the deportable crime was determined by a rather vague standard, ‘a crime involving moral turpitude’; and a time limit of commission of the crime ‘within five years after entry’ was included in the interest of fairness, in the case of a single offense.”).

<sup>57</sup> See generally Carrigan, William D., and Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 *JOURNAL OF SOCIAL HISTORY* 2, 411 (2003) (From 1848 to 1928, mobs murdered thousands of Mexicans, but there are only records to show that there are 547 cases. These lynchings occurred not only in the southwestern states of Arizona, California, New Mexico and Texas, but also in states far from the border, like Nebraska and Wyoming.); see generally KELLY LYTTLE HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL*: 103-124 (Berkeley, CA: University of California Press, 2010); see also <https://theintercept.com/2019/01/12/border-patrol-history/>, archived at <https://perma.cc/XVK5-38PS>; MONICA MUÑOZ MARTINEZ, *THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS*: 7-8 (Harvard University Press, 2018), (“The violent on the Texas-Mexico border took many forms. Ethnic Mexicans were intimidated, tortured, and killed by hanging, shooting, burning, and beating.”).

<sup>58</sup> See Immigration Act of 1929. Ch. 690, 1151–1152 Stat. 1018 (1929) (repealed 1952), (The Act made ‘unlawfully entering the country a misdemeanor punishable by a \$1,000 fine and/or up to two years in prison for immigrants’ and unlawfully returning to the United States after deportation a felony punishable by a \$1,000 fine and/or up to two years in prison); See also, LYTTLE HERNANDEZ, *supra* note 44, at 137-38 (The bill was an agreement between Western agribusinesses, who wanted a steady supply of cheap Mexican labor only during peak season and then deport them back, and a Nativist wing of Congress led by Senator Blease, an

ately overnight, millions of immigrants were criminalized for an act of crossing a settler-colonial border—as the immigrant resistance saying goes “the border crossed us.”<sup>59</sup> This bill dramatically spiked the number of people detained for “unlawful” entry to about 44,000 cases per year by 1939 (over 70% of whom were agricultural Mexican laborers). This prompted the mass construction of some of the first immigration prisons on the border where over 90% in those incarcerated were Mexicans convicted on “unlawful crossing” charges and forced to work, often on the lands that judges themselves owned.<sup>60</sup> Previously, these same Mexican laborers were free to cross the border. These Congressional actions set the foundational institutional architecture of using arbitrary criminalization, police violence, and caging as the means to control non-white immigrants, politically designated as threats to white free personhood. For example, during the Great Depression, immigration prisons and border patrol became the tool of the U.S to control the immigrant laboring class to protect white laborers.<sup>61</sup>

As many scholars have noted, each subsequent Congress and Executive Administration have further entrenched each component of the immigration caging machine as a tool to meet their political agenda influenced by elite capitalist seeking to control labor.<sup>62</sup> During the 1980s and 1990s, amidst a

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openly staunch segregationist and white supremacist who campaigned on an anti-immigrant platform.).

<sup>59</sup> Sandro Mezzadra, *Proliferación de fronteras y derecho de fuga. Migraciones Forzadas. Papeles de Relaciones Ecosociales y Cambio Global*, 132 PAPELES DE RELACIONES ECOSOCIALES Y CAMBIO GLOBAL (2016), at 13-26 (“Nosotros no cruzamos la frontera, la frontera nos cruzó a nosotros” [We didn’t cross the border, the border crossed us”]; see also LOS TIGRES DEL NORTE, SOMOS MÁS AMERICANOS (Regional Mexican 2001), (“Quiero recordarle al gringo: Yo no crucé la frontera, la frontera me cruzó. América nació libre, el hombre la dividió.”)

<sup>60</sup> See generally, LYTLE HERNANDEZ, supra note 44, at 139–140

<sup>61</sup> Garcia Hernández, supra note 22, at 353 (2012) (“White workers are positioned against non-white workers, the multi-axis category in which most immigrants are initially placed even if they later “become” white, in a battle for pieces of the figurative, and sometimes literal, pie.”); see also Terry Gross, *A ‘Forgotten History’ Of How The U.S. Government Segregated America*, NPR (May 3, 2017), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>; see also, Alex Wagner, *America’s Forgotten History of Illegal Deportations*, THE ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/>, archived at <https://perma.cc/HC33-FDGD> (Throughout the 1920s and 30s, the U.S. carried out a series of mass removals in the interest of protecting employment of white Americans. In 1955, President Eisenhower ordered Operation Wetback, which forcefully removed 1.3 million Mexicans, most of whom were laborers who came through the 1942 Bracero Program. The Walter-McCarren Act of 1952 made it a felony to import or harbor, but not to employ, “illegal aliens” which allowed agribusinesses to deport any immigrant at its will.).

<sup>62</sup> See generally, Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, at 578-79 (1998) (For a more detailed discussion on how prisons were increasingly used as a tool to control immigrants.); see also, JUSTIN ANKERS CHACON AND MIKE DAVIS, *NO ONE IS ILLEGAL: 174* (Chicago, IL: Haymarket Books, 2006), (“In a capitalist economy, the most wealthy and powerful interest exert the most influence and control over the official institutions of the state, and can therefore use the state as a labor supplied and regulator. Since the primary desire of capitalist is to make maximum profit, they seek the cheapest and most controllable human material to do their labor. Initially, immigration proposal derives from economic imperative. . .[but] they take further



desire to sustain hyper-capitalist growth and push tough-on-crime politics, Congress, States, and localities passed more anti-immigrant laws. These laws essentially authorized local segregation and denied civil rights and basic public services to facilitate labor exploitation meanwhile increasing policing, caging, and removals. Such State repression is similar to the marginalization of other people fighting settler-colonialism across the globe.<sup>63</sup> Most notably, anti-immigrant laws combined with anti-black tough-on-crime politics strengthened and refined State repression against Black, Caribbean, and Afro-Latinx immigrants.<sup>64</sup> For example, the Reagan Administration through the Immigration Reform and Control Act (IRCA) strengthened border security, expanded border patrol powers, made it illegal to hire undocumented laborers, and expanded the “illegal” category to all those who entered after 1986—over 6 million people.<sup>65</sup> IRCA was followed by the Anti-Drug Abuse Act which made it easier to criminalize and deport immigrants by creating the “aggravated felonies” category and prison-based enforcement requiring caging before removal. These policies and politics cemented a modern sophisticated version of the settler-colonial tough-on-immigration paradigm which at its core is about social control, removal (i.e. elimination), and oppression.<sup>66</sup> Building on Reagan’s legacy, Bill Clinton

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political shape on the basis of *how* imported labor can be separated, controlled, or used as a wedge against existing labor organization.).

<sup>63</sup> See Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 31 IMMIGR. & NAT'LITY L. REV. 777, at 824 (2010) (“This paper theorizes that state and local anti-immigrant laws lead to the segregation, exclusion, and degradation of Latinos from American society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second-class citizenship.”); see also Deena Isom Scott, *The New Juan Crow?: Unpacking the Links Between Discrimination and Crime for Latinxs*, RACE AND JUSTICE 1-23; see also WOLFE, *supra* note 44, at 203 (“In the annals of settler colonialism, Zionism presents an unparalleled example of deliberate, explicit planning. No campaign of territorial dispossession was ever waged more thoughtfully.”); see also *Discriminatory Laws in Israel*, Adallah, <https://www.adallah.org/en/law/index>, archived at <https://perma.cc/Y6W2-WXJV> (Database of the more than 65 Israeli laws which systematically discriminate against Palestinians to advance the settler-colonial project including “The “Counter-Terrorism” bill which broadly define who is a security threat to the Israeli State and expands policing powers to arrest, cage, and remove Palestinian people.);

<sup>64</sup> See generally Irene Browne & Mary Odem, *Juan Crow in the Nuevo South? Racialization of Guatemalan and Dominican Immigrants in the Atlanta Metro Area*, 9 DU BOIS REVIEW: SOCIAL SCIENCE RESEARCH ON RACE, 321 (2012).

<sup>65</sup> See Marcel Paret, *Legality and exploitation: Immigration Enforcement and the US Migrant Labor System*, 12 LATINO STUDIES 503 (2014), at 503 (“The day-to-day experience of ‘illegality’ consists of a number of exclusions, from denied access to public spaces and services to the absence of various legal protections. But perhaps the most important effect is the perpetual possibility of deportation. Though in practice the vast majority of migrants are never deported, they must live and work under the surveillance of immigration officials and the threat of removal. Illegalization refers to the sum of these various effects, which constitute migrants as vulnerable outsiders within the space of the US nation-state.”).

<sup>66</sup> See Hernández *supra* note 14, at 49 (“The paradigm is sustained by two major forces: (1) a nihilistic capitalist system that influences the political process to provide a steady stream of vulnerable noncitizen people to exploit for profit and (2) a two-party system that amasses political power by appealing to the “forgotten” free White person by promising that they will achieve the fabled American Dream—built by the ‘deserving’ immigrant’ [while punishing the criminal alien.”).

campaigned on a tough-on-crime platform<sup>67</sup> and signed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996 which created expedited removal proceedings, expanded mandatory detention for more offenses (including non-violent drug offenses), increased border patrol, reduced welfare benefits available to immigrants, restricted asylum procedures, and established procedures to verify an employee's immigration status.<sup>68</sup> As the mass incarceration system funneled more black, southeast Asian, brown bodies into cages, IIRIRA also enacted Section 1226(c) which mandated that those designated as "criminal aliens" were subject to mandatory caging when they were released from criminal custody for flight and security risks and to ensure their removal. After 9/11, a bipartisan Congress and President Bush expanded the racialization of the criminal alien to include Arab and Muslim communities. Congress ratcheted up State surveillance including a mandatory registration tracking system. Bush also ramped up border militarization, expanded immigration detention to black sites, and created the largest Federal police force: ICE.<sup>69</sup> When President Obama entered office he had virtually unchecked powers to further expand the "criminal alien" category and bolster the deportation caging regime. As more displaced people (including children) migrated to the U.S., particularly from Central America, Obama declared a crisis, instituted an ICE prison bed quota, priorities deportation program, widened who qualified as a "criminal alien," and technology for the border wall.<sup>70</sup> Specifically, Obama expanded

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<sup>67</sup> Mary Pilon, *How Bill Clinton's Welfare Reform Changed America*, HISTORY STORIES (April 26, 2018), <https://www.history.com/news/clinton-1990s-welfare-reform-facts>, archived at <https://perma.cc/R59H-BWQP>, See e.g., BILL CLINTON, BETWEEN HOPE AND HISTORY: MEETING AMERICA'S CHALLENGES FOR THE 21ST CENTURY: 134 (Random House 1996), (In Clinton's State of the Union "We must not tolerate illegal immigration. Since 1992, we have increased our Border Patrol by over 35%; deployed underground sensors, infrared night scopes and encrypted radios; built miles of new fences; and installed massive amounts of new lighting."), see e.g., President George W. Bush, State of the Union Address (Jan. 28, 2008), ("America needs to secure our borders—and with your help, my administration is taking steps to do so. We're increasing worksite enforcement, deploying fences and advanced technologies to stop illegal crossings. . . . Yet we also need to acknowledge that we will never fully secure our border until we create a lawful way for foreign workers to come here and support our economy. This will take pressure off the border and allow law enforcement to concentrate on those who mean us harm.").

<sup>68</sup> Migration Policy Institute, "Major U.S. Immigration Laws, 1790 – Present," MIGRATION POLICY INSTITUTE (Mar. 2013), <https://www.migrationpolicy.org/research/timeline-1790>, archived at <https://perma.cc/V83B-CJ98>.

<sup>69</sup> See generally LOUISE A. CAINKAR, HOMELAND INSECURITY: THE ARAB AMERICAN AND MUSLIM AMERICAN EXPERIENCE AFTER 9/11 (Russell Sage Foundation, 2009); See also 67 Fed. Reg. 52584 (Aug. 12, 2002) (The National Security Entry-Exit Registration System [NSEERS] operated as a tracking program that set forth registration requirements for non-citizen males 16 years and older—specifically, those who were nonimmigrants, such as visitors, students, green card holders, and asylum/refugee status seekers. This only applied to individuals from: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.).

<sup>70</sup> See Melissa Franco and Carlos Garcia, *The Deportation Machine Obama Built for President Trump*, IMMIGRATION POLICY (June 27, 2016), <https://www.thenation.com/article/the-deportation-machine-obama-built-for-president-trump/>, archived at <https://perma.cc/DP82-6DT2> ("As record numbers of people were being deported, an increasing number were also charged

the criminal alien category which made more people deportable for petty offenses, or “significant misdemeanors,” which previously would not trigger deportations.<sup>71</sup> When Trump entered office he had a wide array of punitive and policing tools, built across centuries, to control and/or remove immigrants and carry out his racist and xenophobic agenda.<sup>72</sup>

### B. *The Institutional Triangle<sup>73</sup> of the Deportation Caging Machine*

Now that we better understand the historical settler-colonial roots and logic of the immigration caging machine and how it was designed to criminalize, cage, and eliminate people designated as threats and undesirable to the U.S. white supremacist imperialist project, we can better examine how the institutional actors help expand the machine and inflict institutional violence on noncitizens. The institutional arrangement of the deportation caging machine consists of three primary axes: legislators, executive enforcers (ICE police/prosecutors and Immigration Courts), and (for-profit) prisons. Each actor within the three axis act interdependently with complex sets of incen-

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and channeled into federal prison before their expulsion. Within two years of coming into office, President Obama doubled the number of people being prosecuted for reentry by expanding Bush’s border-court system, Operation Streamline, which tries up to 70 people per day in a cattle line of sentences. The experiment went from three jurisdictions in 2008 to every single border sector except California by 2010. From the time of its invention in 2005 to just four years later in 2009, Streamline sent over 209,000 individuals to serve federal prison sentences for no reason other than crossing the border.”); *See also* National Immigrant Justice Center, *supra* note 38, at 2.

<sup>71</sup> Jeh C. Johnson, Secretary, U.S. Department of Homeland Security, Memorandum to Thomas S. Winkowski, R. Gil Kerlikowske, Leon Rodriguez, Alan D. Bersin, November 20, 2014, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf), archived at <https://perma.cc/ST6S-V7EA> (categorizing the second-highest priority individuals for deportation for ICE: “aliens convicted of a ‘significant misdemeanor,’ which for these purposes is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence).”)

<sup>72</sup> German Lopez, *Donald Trump’s long history of racism, from the 1970s to 2019*, Vox (Feb. 14, 2019 12:35 PM), <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history>, archived at <https://perma.cc/P9DR-J6GD>, (“This long history is important. It would be one thing if Trump simply misspoke one or two times. But when you take all of Trump’s actions and comments together, a clear pattern emerges—one that suggests that bigotry is not just political opportunism on Trump’s part but a real element of Trump’s personality, character, and career.”)

<sup>73</sup> I theorize the Institutional Triangle based on similarities with the institutional arrangement, including the actors, processes, and political incentivizes imported from the criminal legal system into the immigration system. The triangle consists of three primary actors (as well as the interaction between the three actors): legislators, executive (ICE and Immigration Courts), and (for-profit) prisons. Legislators, made up of the federal, state, and local elected officials, create policies which impact the existence and criminalization of immigrants. The executive is made up of those who enforcement the immigration regulations which includes ICE (police and prosecutors), local/State police and prosecutors, and immigration courts. Finally, prisons, specifically for-profit prisons are the final piece of the triangle which is financially invested in caging immigrants.

tives, politics, and processes that converge toward criminalizing, caging, and removing (i.e. eliminating) more noncitizens. The institutional triangle of the deportation caging machine is made up of similar actors, processes, and political incentivizes as those in the criminal legal system because both systems are not only intertwined but also work in concert toward the same goal: control, cage, and eliminate as many non-white undocumented bodies from U.S. white society as possible.<sup>74</sup> Therefore, the settler-colonial logic is deeply embedded in the incentives, politics, and processes of the crimmigration system.

As William Stuntz famously argued, the institutional arrangements in the criminal legal system is a “deeper politics which are politics of institutional competition and cooperation, [which] *always* pushes toward broader liability rules, and towards harsher sentences as well [and which]. . . shows no signs of changing.”<sup>75</sup> As Stuntz notes, legislators, police, and prosecutors collaborate to widen criminal liabilities, streamline conviction adjudications, and cage more people. The widening effect is particularly triggered by reformist efforts which seek to preserve the system as a whole by making minor changes which, in all, only further refines and widens the nets to capture more people.<sup>76</sup> The following section will primarily focus on how the institutional triangle influences legislators and Congressional plenary power over immigration but recognizes the need for more scholarship<sup>77</sup> to completely examine each axis in detail to better understand how they are incentivized and operationalized to expand the deportation machine.

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<sup>74</sup> Legomsky, *supra* note 12, at 496 (Increasingly, many of the government personnel who implement the criminal justice system are simultaneously charged with enforcing the nation’s system of immigration control.”); *see id.* at 380 (2006) (“Both criminal and immigration law are, at their core, systems of inclusion and exclusion. They are similarly designed to determine whether and how to include individuals as members of society or exclude them from it. Both create insiders and outsiders. Both are designed to create distinct categories of people—innocent versus guilty, admitted versus excluded or, as some say, “legal” versus “illegal.” Viewed in that light, perhaps it is not surprising that these two areas of law have become entwined. When policymakers seek to raise the barriers for noncitizens to attain membership in this society, it is unremarkable that they would turn to an area of the law that similarly functions to exclude. Crimes committed by immigrants have influenced the direction of immigration law since its inception.”)

<sup>75</sup> *See* Stuntz, *supra* note 13, at 510.

<sup>76</sup> Chazaro, *supra* note 21, at 645 (citing Austin & Krisberg—the author notes how these reforms strengthen the machine. “As explained by James Austin and Barry Krisberg in their formative article on the topic, (i) reforms that increase the number of subgroups in society whose behavior is regulated and controlled by the state create wider nets; (ii) reforms that increase the state’s capacity to control individuals through intensifying state intervention create stronger nets; and (iii) reforms that transfer intervention authority from one agency or control system to another create new nets.”); *See* James Austin & Barry Krisberg, *Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform*, 18 J.RES. CRIME & DELINQ. 165, at 169 (1981) (“The criminal justice system can be conceptualized as a net or series of nets functioning to regulate and control personal behavior. Each component of the justice system . . . is authorized by the state to intervene in our personal lives.”).

<sup>77</sup> *See* Kauffman, *supra* note 24, at 1390 (This article provides an analysis on the federal prisons within the prisons axis of the institutional triangle. It details the history and modern use of all-foreign prisons in the federal prison system and demonstrates how this portion of the triangle contributes to the expansion of criminalizing and caging more noncitizens.)

## 1. Legislators

Legislators are primarily motivated to stay in office, or move to higher office, so they fight to appease their voting base by passing legislation with tangible outcomes in the form of more caged immigrant bodies.<sup>78</sup> As noted in Part I.A, elected officials have largely operated within the tough-on-immigration paradigm to build political power which has resulted in strengthening, refining, and widening the immigration caging machine to capture more people. While today most Americans do not believe that undocumented immigrants are here to take their jobs nor more likely to commit crimes,<sup>79</sup> most Americans do believe that those designated as “criminal aliens” or as threats should face punishment.<sup>80</sup> As demonstrated in Part I.A, the tough-on-immigration paradigm has created a false binary where it is politically beneficial to narrowly<sup>81</sup> support deserving immigrants (i.e. those without criminal records) while further punishing and deporting “criminal aliens.”<sup>82</sup> Thus, legislators are incentivized to criminalize as many immigrants as possible. The “deserving” v. “criminal alien” political binary continues to be entrenched despite pushback from community organizers who fully defend

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<sup>78</sup> See Clinton, *supra* note 67, at 134; see also Bush, *supra* note 67; <http://www.people-press.org/2018/06/28/shifting-public-views-on-legal-immigration-into-the-u-s/>, archived at <https://perma.cc/8MCT-N6CL>

<sup>79</sup> *Shifting Public Views on Immigration into the U.S.*, PEW RESEARCH CENTER, (June 28, 2018) <https://www.people-press.org/2018/06/28/shifting-public-views-on-legal-immigration-into-the-u-s/>, archived at <https://perma.cc/J4LB-YMHD>, at 3 (“Large majorities of Americans say that undocumented immigrants living in the U.S. are not more likely than U.S. citizens to commit serious crimes (65% say this) and that undocumented immigrants mostly fill jobs citizens don’t want (71% say this). These opinions, which also are divided along partisan lines, are virtually unchanged since 2016.”)

<sup>80</sup> See Lattimore, Lillie L., *Immigration, Crime, And Punishment: Minorities’ Perception Of Immigrants And Attitudes Towards Punitive Policies*, (Dec. 14 2017) (unpublished MA dissertation, Georgia State University) (on file with the Georgia State University Library, University of Georgia State), (“Analysis of both the 2012 National Election Survey and 2001 Los Angeles Social Survey data is used to explain how the relationship between economic threat and negative perceptions of immigrants lead to respondents becoming more punitive.”)

<sup>81</sup> See e.g., Stephen W. Bender, *Compassionate Immigration Reform*, 38 FORDHAM URB.L.J. 107, at 122 (2010) (“Conditions such as learning English should be replaced by an unfettered pathway to citizenship that aims to successfully and respectfully integrate undocumented immigrants into the political, economic, and social fabric of our communities.”); see also, Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, at 310 (2013) (“If DACA serves as a stepping stone to passage of the DREAM Act and comprehensive immigration reform, then this bold assertion of Executive authority will have lasting impact.”); see also Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNEL.REV. 1599, at 1621 (2009). (“For reasons of fairness, the legalization, or regularization of the immigration status, of undocumented immigrants has long been a priority of the advocates of immigrants.”).

<sup>82</sup> See, e.g., Daysi Diaz-Strong, Christina Gómez, María E. Luna-Duarte, Erica R. Meiners, & Luvia Valentin, *Commentary: Organizing Tensions—From the Prison to the Military-Industrial Complex*, 36 SOC. JUST. 73, at 74 (2010) (“Strategies for legalization offered by the state and embraced by many vulnerable communities, such as the DREAM Act, trade on tropes of ‘innocence’ and ‘merit,’ thus reinforcing the idea that there are ‘real’ criminals and undeserving or guilty immigrants who should legitimately be denied access to pathways for legalization.”).

those labeled as “criminals” or “threats” and seek to abolish immigration prisons, ICE, and borders.<sup>83</sup> Yet, political elites remain disconnected from the community. For example, even in rebuke to Trump, the Democratic Party (including 2020 Presidential candidates) has maintained the Obama era style of tough-immigration enforcement that includes prioritizing caging and deporting “criminal aliens” with limited relief to “deserving” immigrants.<sup>84</sup> In all, as crimmigration scholars have argued, the expanding overlap between immigration and criminal institutional can only be sustained by criminalizing more and more noncitizens, overwhelming people of color, by constructing them as threats and, thus, subject to mandatory caging.<sup>85</sup> This is best exemplified by legislators who overwhelmingly agree that “gang members” (e.g. MS-13) are the worst immigrants akin to “animals”<sup>86</sup> and should be targeted for mandatory caging and removal under administrative violations.<sup>87</sup> To achieve this political goal, legislators pass broad anti-gang ordi-

<sup>83</sup> See generally Kevin R. Johnson, *Open Borders?* 51 UCLA L. Rev. 193 (2003); see Los Angeles Immigrant Youth Coalition #DefendTheCriminalized campaign; see also, *To: Immigration and Customs Enforcement Release Immigrant Rights Activist Alejandra Pablos from Detention*, MIENTE, <https://action.mijente.net/petitions/release-immigrant-rights-activist-alejandra-pablos-from-detention>; see also, Rihan Yeh, *On The Possibility Of Imagining An Open Border*, 40 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 295 (2017); see also Ronald J. Krotoszynski, Jr., *Transborder Speech*, 94 NOTRE DAME L. REV. 473 (2018); see also Ray Ybarra, *Thinking and Acting beyond Borders: An Evaluation of Diverse Strategies to Challenge Vigilante Violence on the U.S.-Mexico Border*, 3 STAN. J. C.R. & C.L. 377, 424 (2007)

<sup>84</sup> See *immigration reform*, DEMOCRAT NATIONAL COMMITTEE, (March 25 2019) <https://democrats.org/issues/immigration-reform/>, archived at <https://perma.cc/T7LR-XVD9> (“Democrats will continue to work toward comprehensive immigration reform that fixes our nation’s broken immigration system, improves border security, prioritizes enforcement so we are targeting criminals – not families, keeps families together, and strengthens our economy.”)

<sup>85</sup> See Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 991 (2016) (“because ‘the immigrant’ in the United States occupies the most marginalized of identities—that of perceived criminals, non-citizens, and persons of color. This intersectionality of identity [that] allows monied interests to benefit off the imprisonment of the oppressed and to help perpetuate their continued incarceration.”) See also *id.* at 1027 (“The social and political subordination of immigrants, who embody the marginalized identities of criminals, noncitizens, and persons of color, feed the profit-seeking carceral machine.”); see also RUBÉN G. RUMBAUT, KATIE DINGEMAN, ANTHONY ROBLES, *IMMIGRATION AND CRIME AND THE CRIMINALIZATION OF IMMIGRATION* (The Routledge International Handbook of Migration Studies, edited by Steven J. Gold and Stephanie J. Nawyn 2018, forthcoming).

<sup>86</sup> President Donald Trump, Address at MAGA Rally in Evansville Indiana (Aug. 30, 2018), at 00:32:23–00:33:02 (39 sec) (“But these are people that go into a nest of MS-13. They call it a nest. That’s where it is. It’s a nest. These are evil people in there. These—this is a group of gang members—I can’t say ‘animals’ anymore because Nancy Pelosi got very angry when I called them animals. I called them animals. She went crazy. I can’t do it.”)

<sup>87</sup> See Rebecca A. Hufstader, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. L. REV. 671, 709, at 681 (2015) (“While unsupported by evidence, popular rhetoric linking immigration to crime has led to essentially unquestioned political support for the deportation of immigrants labeled as “criminals,” and thus to increased federal reliance on state and local criminal justice systems. On numerous occasions over the last twenty-five years, Congress has expanded the criminal grounds of deportation, which make authorized as well as unauthorized immigrants subject to removal from the country on the basis of criminal convictions. Meanwhile, enforcement efforts such as Operation Community Shield, the Criminal Alien Program, and Secure Communities have targeted noncitizens that come into contact with the criminal justice system.”); see also, Bryon

nances, akin to vagrancy laws targeting black folk, to expand the net of who qualifies as a gang member by criminalizing the behaviors and existence of people of color including our clothing, social media activity, language, public movement, and social circles.<sup>88</sup> The Courts have generally upheld these laws.<sup>89</sup>

Legislators from both parties built the immigration caging machine under the common political incentive of political power. This was recently demonstrated by the Democratic Funding bill passed on February 15, 2019. After shutting down the government and even in rebuke to Trump, Democrats authorized legislation which expanded the number of ICE detention beds, increased ICE and CBP, increased the use of ankle monitors and surveillance to 100,000 migrants, up from 82,000 (i.e. expanding incarceration and policing power through technology), allowed DHS to physically restrain pregnant women if they are “flight risks and people who could harm themselves or others,” and provided in \$1.4B for a border wall. All this tough-on-immigration politicking has amounted to bolstering policing and prosecutorial powers to capture more “criminal aliens” into the deportation machine.

## 2. Executive Enforcers: ICE, Prosecutors, and Immigration Courts

Prosecutors, police, and ICE, the natural allies of the legislator,<sup>90</sup> are incentivized to obtain the maximum number of convictions of the people the public wants to see punished (i.e. the criminal alien) with the fewest resources possible.<sup>91</sup> Since legislators want to appear to be tough-on-immigra-

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Okada, *Illegal immigrants arrested in ‘Operation Return to Sender*, FORT WORTH STAR-TELEGRAM (June 14, 2006) (quoting Immigration and Customs Enforcement head Julie L. Myers describing Operation Return to Sender, Operation Predator and Operation Community Shield as “focused on the worst of the worst”).

<sup>88</sup> See Jennifer M. Chacon, *Whose Community Shield: Examining the Removal of the Criminal Street Gang Member*, 2007 U. CHI. LEGAL F. 317, 358 (2007) (Examines the history of “consequences of U.S. laws and policies designed to effectuate the removal of noncitizen criminal street gang members and their associates.” The article points to anti-gang ordinances across the country which criminalized the clothing colors and public life of people of color to designate them as criminal aliens.”)

<sup>89</sup> See *Gallo v. Acuna*, 929 P2d 596, at 608 (Cal 1997) (holding an injunction banning members from gathering is not a first amendment violation. Justice Mosk’s dissenting opinion in that case warned that: The majority would permit our cities to close off entire neighborhoods to Latino youths who have done nothing more than dress in blue or black clothing or associate with others who do so; they would authorize criminal penalties for ordinary, nondisruptive acts of walking or driving through a residential neighborhood with a relative or a friend.)

<sup>90</sup> Stuntz, *supra* note 13, at 509 (“As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys’ offices and police departments.”)

<sup>91</sup> Stuntz, *supra* note 13, at 534, (“... elected legislators and elected prosecutors are natural allies. Both need to please voters in order to survive, and for both, pleasing voters means essentially the same thing: punishing people voters want to see punished. That natural alliance should make prosecutors [along with police] a very powerful lobby on criminal law issues. If

tion (and crime) via more caged bodies, legislators purposefully divest from the criminal legal system that can help defendants, while making the job of police and prosecutors as easy as possible.

Police (including ICE police) are arguably the most important institution because they are in direct daily contact with the immigrant community as immigrants are increasingly confined into segregated communities.<sup>92</sup> Under the 287(g) program, local police are increasingly working in partnership with the over 200,000 ICE officials to surveil, arrest, and cage as many immigrants as possible.<sup>93</sup> Accordingly, with wider criminal liabilities that trigger deportation (e.g. not having a license, traffic violations,<sup>94</sup> drug related charges<sup>95</sup>, looking like a gang member<sup>96</sup>), police can capture more immigrant bodies to funnel into the system. Moreover, without a clear doctrinal definition Fourth Amendment's probable cause prong of searches, police

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police and prosecutors want some new criminal prohibition, they likely want it because it would advance their goals. Advancing police and prosecutors' goals usually means advancing legislators' goals as well. Thus, legislators have good reason to listen when prosecutors urge some statutory change.)

<sup>92</sup> Stephanie L. Kent & Jason T. Carmichael, *Municipal Law Enforcement Policy on Illegal Immigration Stops: Do Social Factors Determine How Aggressively Local Police Respond to Unauthorized Immigrants?*, 87 *SOCIOLOGICAL INQUIRY* 3, 421–448 (August 2017) (Researchers found that in cities which were highly segregated in terms of where Latino populations lived, the police were most likely to voluntarily cooperate with federal immigration authorities.)

<sup>93</sup> See *National Map of 287(g) Agreements*, IMMIGR. LEGAL RESOURCES CENTER <https://www.ilrc.org/national-map-287g-agreements>, archived at <https://perma.cc/JH7T-LXEL>; see also Christie Thompson, *How ICE Uses Secret Police Databases to Arrest Immigrants*, THE MARSHALL PROJECT (Aug. 28, 2017), <https://www.themarshallproject.org/2017/08/28/how-ice-uses-secret-police-databases-to-arrest-immigrants>. (“Local police departments have long shared their gang intelligence with federal immigration authorities. But the feds may be using that information more now as Immigration and Customs Enforcement arrests have increased nearly 40 percent from last year. Critics of gang databases say that because of the loose criteria used to identify potential members, people with no gang affiliation are likely to be swept up in raids meant for serious criminals. Several recent lawsuits have been filed by immigrants who say they were wrongly identified as gang members and detained by ICE as a result.”); see also Michael Smolens, *Most police agencies didn't work much with ICE before sanctuary law*, SAN DIEGO UNION-TRIB. (April 15, 2015), <https://www.sandiegouniontribune.com/news/columnists/michael-smolens/sd-me-smolens-immigration-20180412-story.html>, archived at <https://perma.cc/9APT-2C7G>

<sup>94</sup> Liz Robbins, *Driving While Undocumented and Facing the Risks*, THE NEW YORK TIMES (July 18, 2017) <https://www.nytimes.com/2017/07/18/nyregion/driving-illegal-immigration-trump-administration.html>, archived at <https://perma.cc/H5B8-SG34> (“Under a Trump administration that has taken an aggressive stance on illegal immigration, the moving car has become an easy target. A broken headlight, a seatbelt not worn, a child not in a car seat may be minor traffic violations, but for unauthorized immigrants, they can have life-altering consequences. Routine traffic stops have always carried the threat of deportation, but during the last years of the Obama administration, when serious crimes were prioritized, the stops that simply revealed unlawful status often resulted in deferment. No longer.”)

<sup>95</sup> See Kauffman *supra* note 24, at 1404 (“According to BOP’s internal statistics, 53% of CAR [Criminal Alien Requirement] prisoners were convicted of a drug crime, 32% committed an immigration offense, and 8% were sentenced for a violent offense”)

<sup>96</sup> Hannah Dreier, *He drew his school mascot- and ICE labeled him a gang member*, PROPUBLICA (Dec. 27, 2018) <https://features.propublica.org/ms-13-immigrant-students/huntington-school-deportations-ice-honduras/>, archived at <https://perma.cc/Z2JB-62JY> (Tells the story of Alex who was labeled a MS-13 gang member for drawing his school’s mascot who was blue devil. ICE arrested and caged Alex.)



have nearly vast powers to search anyone suspected as a threat with little to no probable cause.<sup>97</sup> Unsurprisingly, there has been a rapid increase in the number of daily arrests by ICE to 436 in FY2018, up from 300 daily arrests before Trump.<sup>98</sup>

Once in the system, prosecutors have a large menu of criminal charges to choose from. Since prosecutors are paid on salary, not per conviction, they are heavily incentivized to give the most number of charges in each case to increase their odds of securing a conviction. Prosecutors wield their increased powers to use trial-avoidance mechanisms, such as plea bargaining, as the primary adjudicatory system to efficiently cycle more people through the criminal legal system, often also as a method to secure court funding from fees.<sup>99</sup> This includes using the cash bail system to their advantage to cage poor black and brown immigrants simply for their inability to pay, until they plea guilty.<sup>100</sup> Consequently, police, prosecutors, and investigative agencies have the structural incentives to use coercive and profiling tactics to decide who gets convicted for which crime, and what their punishment and/or fee will be.<sup>101</sup> In fact, over 97% of criminal convictions are

<sup>97</sup> See generally Andrew Crespo, *Probable Cause Pluralism*, 129 Yale Law Journal (Forthcoming 2019)

<sup>98</sup> Dara Lind & Javier Zarracina, *By the numbers: how 2 year of Trump's policies have affected immigrants*, Vox (Feb. 5, 2019 4:38 PM) <https://www.vox.com/policy-and-politics/2019/1/19/18123891/state-of-the-union-2019-immigration-facts>, archived at <https://perma.cc/8NVY-EE89> (“The average number of daily immigration arrests under Trump between February 2017 and September 2018, including immigrants with and without criminal records, up from 300 in 2016, according to ICE statistics. Of that 436, an average of 139 arrests were of immigrants without criminal records, up from 47 in 2016.”)

<sup>99</sup> See ANGELA J. DAVIS, *The Prosecution of Black Men*, in *Policing the Black Man Eds.*, (2017), at 182 (“Prosecutors need only meet the low standard of probable cause [more likely than not] to bring charges against the defendant. The standard is much lower and much easier to meet than the proof beyond a reasonable doubt that the prosecutor must establish to get a conviction at a trial. So frequently prosecutors will bring charges that they know they cannot prove beyond a reasonable doubt, just to give themselves leverage in a plea-bargaining process. Frightened by a long list of serious charges, defendants represented by overworked court-appointed attorneys with few or no resources to investigate cases may plead guilty in cases where they may very well have prevailed at trial, simply because their lawyers do not have the time or resources to mount either an investigation that might reveal the weaknesses in the government’s case and/or a viable defense. And prosecutors often increase the pressure by putting deadlines on plea bargains, requiring the defendant to accept or reject the plea by a certain time or the offer ‘expires.’ This puts defense attorneys in the untenable (and unethical) position of advising their clients about whether to accept an offer before they have had the opportunity to investigate the case and establish whether there is a viable defense.”); See generally also, Elizabeth Jones, *Racism, fines and fees and the US carceral state*. 59 RACE & CLASS 3, 38–50 (2018)

<sup>100</sup> See Nick Pinto, *The Bail Trap*, THE NEW YORK TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>, archived at <https://perma.cc/VFT2-DBB4> (“By comparison, defendants held on bail for the duration of their cases were convicted 92 percent of the time. The numbers showed what everyone familiar with the system already knew anecdotally: Bail makes poor people who would otherwise win their cases plead guilty.”)

<sup>101</sup> See Máximo Langer, *Plea Bargaining and the Global Administratization of Criminal Convictions: A research Agenda*, 3 ANNUAL REVIEW OF CRIMINOLOGY (forthcoming 2020); see also H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, at 96 (2011)

obtained by plea bargain even in cases where prosecutors mislead the defendant about the evidence they have.<sup>102</sup> For purposes of mandatory detention and deportation, a conviction in immigration law is more broadly defined than in criminal proceedings which vastly increases the number of people eligible for deportation.<sup>103</sup> In all, since noncitizens are highly likely to come into contact with police due to widening criminal liabilities, once a noncitizen is *merely charged* with a crime they are nearly certain to get a conviction, which triggers mandatory caging and removal. Over the past few decades there has been a rapid but steady increase in criminal convictions, as well as the scope of the crimes being charged, secured by prosecutors against noncitizens.<sup>104</sup> This is evidenced by the yearly sharp increases in the pending immigration cases which rose to 809,041 in FY2018 a 49.1% increase from FY2017.<sup>105</sup>

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<sup>102</sup> See Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, The New York Times (Aug. 7, 2017), (“According to the State Division of Criminal Justice Services, more than 98 percent of felony arrests that end in convictions occur through a guilty plea, not a trial, a slightly higher number than national figures.”); see also, Emily Yoffe, *Innocence is Irrelevant, September 2017 Issue* (“Because of plea bargains, the system can quickly handle the criminal cases of millions of Americans each year, involving everything from petty violations to violent crimes. But plea bargains make it easy for prosecutors to convict defendants who may not be guilty, who don’t present a danger to society, or whose ‘crime’ may primarily be a matter of suffering from poverty, mental illness, or addiction. And plea bargains are intrinsically tied up with race, of course, especially in our era of mass incarceration.”)

<sup>103</sup> See Phillip Torrey, *Challenging Immigration Law’s Conviction Definition*, HARV. C.R.-C.L. L. REV. AMICUS BLOG, (Nov. 20, 2018) (“The INA’s “conviction” definition includes two distinct prongs. If either prong is satisfied, then the state criminal disposition at issue is rendered a conviction for immigration purposes regardless of how the state categorizes the disposition. The definition’s first prong is straightforward. It simply requires a final judgment of guilt entered by a court. The second prong, however, turns any guilty plea, no contest plea, or admission to “sufficient facts to warrant a guilty finding” plea into a conviction for immigration as long as some punishment, penalty or restraint on liberty is imposed—even if that plea is held in abeyance or later vacated. The second prong, as currently interpreted, morphs many deferred adjudications and expungements into convictions for immigration purposes even though most states would not consider dispositions from those types of ameliorative programs convictions for state law purposes.”)

<sup>104</sup> See *Convictions for December 2018*, SYRACUSE U. TRAC IMMIGR, <https://trac.syr.edu/tracreports/bulletins/overall/monthlydec18/gui/>, archived at <https://perma.cc/H8JQ-LUDD> (“When monthly 2018 convictions of this type are compared with those of the same period in the previous year, the number of convictions was up (64.6%). Convictions over the past year are still much higher than they were five years ago. Overall, the data show that convictions of this type are up 26.3 percent from levels reported in 2013. The largest number of convictions of these matters in December 2018 was for ‘Immigration,’ accounting for 71.9 percent of convictions. Convictions were also filed for ‘Drugs-Drug Trafficking’ (7%), ‘Weapons-Operation Trigger lock Major’ (5.5%), ‘Drugs-Organized Crime Task Force’ (3%), ‘Withheld by Govt from TRAC’ (FOIA challenged (2.1%).”); see also, *ICE Deportations Only Half Levels of Five Years Ago*, SYRACUSE U. TRAC IMMIGR, <https://trac.syr.edu/immigration/reports/513/>, archived at <https://perma.cc/C73J-GNGD> (“In 2017, 33% of noncitizens were detained and deported for being charged/convicted with a State crime.”)

<sup>105</sup> See *Immigration Court Backlog Tool*, SYRACUSE U. TRAC IMMIGR, [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/) <https://perma.cc/VZA8-Y6A8>; see also, *Growth in the Immigration Court Backlog Continues in FY2019*, SYRACUSE U. TRAC IMMIGR, <https://trac.syr.edu/immigration/reports/542/>, archived at <https://perma.cc/SW4Q-6VQU>

Once, the “criminal alien,” goes before an Immigration Judge (IJ), the legal architecture is set up to almost guarantee caging and removal. At this stage, less than 37% of defendants are able to secure legal counsel.<sup>106</sup> This institutional arrangement is set up to maximize deportations as evidenced by the fact that in FY2018 over 92% of immigrants were ordered to deportation in immigration court nationally.<sup>107</sup>

### 3. (For-Profit) Prisons

The third axis are prisons, with for-profit prisons as the primary actor. The long-held business of human bondage, caging, and forced labor is deeply embedded in our country’s politics and immigration policies. The State’s power to imprison noncitizens has been vigorously preserved by interests who are financially and politically invested in maintaining and expanding the prison industrial complex to preserve their profits, power, and social position.<sup>108</sup>

In FY2018, ICE reported that it held 850 contracts (known as Intergovernmental Service Agreements) with 669 counties to cage immigrants. Counties then subcontract with private companies to cage this population. About 71% (more than 15,000 people) of the daily population are detained in privately owned prisons.<sup>109</sup> In addition to traditional prisons, people have been confined in warehouses, tent-cities, hotel rooms, offices, basements, nonprofit children centers, and shelters transformed to serve as prisons.<sup>110</sup>

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<sup>106</sup> See generally, Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sep. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>

<sup>107</sup> See, *Immigration, Outcomes of Deportation Proceedings in Immigration Court*, SYRACUSE U. TRAC IMMIGR, [https://trac.syr.edu/phptools/immigration/court\\_backlog/deport\\_outcome\\_charge.php](https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php), archived at <https://perma.cc/Q7BA-A2JY> (92% ordered to deportation)

<sup>108</sup> See García Hernández, *supra* note 32, at 285 (2017); (“Immigration prisons convert migrants, who have been exploited in their home countries and pushed to migrate, into commodities that are capitalized and quantified.”)

<sup>109</sup> Cullen *supra* note 37

<sup>110</sup> Pete Certo, *Never mind the wall—they’re building warehouses for immigrant children*, IN THESE TIMES (June 6, 2018), <http://inthesetimes.com/article/21194/donald-trump-immigration-border-children-families-wall-detention-centers>, archived at <https://perma.cc/L5RU-MAQE> (“Already the warehouses are filling up, leaving authorities to prepare holding pens on military bases for the inevitable overflow.”); see also, Shannon Najmadi, *Across the country, basements, offices and hotels, play short-term host to people in ICE custody*, THE TEXAS TRIBUNE (Aug. 29, 2018 12:00 AM) <https://www.texastribune.org/2018/08/29/heres-ice-network-basements-offices-and-hotels-hold-immigrants/>, archived at <https://perma.cc/XS8J-CKPE> (All told, at least 80 hospitals and 150 holding locations—scattered across the country—have played host to people in ICE custody over the last decade, records show.); see also Camila Domonoske, *A Latino Nonprofit Is Holding Separated Kids. Is That Care Or Complicity Or Both?*, NPR (June 22, 2018 2:25 PM) <https://www.npr.org/2018/06/22/622186779/a-latino-nonprofit-is-holding-separated-kids-is-that-care-or-complicity-or-both>, archived at <https://perma.cc/WTZ8-LDUW> (“Southwest Key has 26 shelters in Texas, Arizona and California, housing more than 5,100 immigrant minors. That’s about half of the total population in the custody of Health and Human Services. Its federal contracts now tally more than \$400 million annually.”); see also, Micheal E. Miller, *Immigrant kids held in shelters: ‘They told us to behave, or we’d be there forever.’* THE WASHINGTON POST (July 15, 2018), <https://www>

Since 1994, the daily immigrant prisoner population has skyrocketed in correlation with more laws that criminalize immigrants as well as more executive enforcement. This trend shows no signs of stopping.<sup>111</sup> Moreover, since the 1990s, noncitizens have been increasingly held in all-foreign federal prisons. Today, there are ten all-foreigner only federal prisons (all operated by for-profit companies) which account for approximately 10% of the total federal prison population and 53% of the noncitizen prisoner population.<sup>112</sup> While these all-foreign prisons were in decline under the Obama Administration, the Trump Administration is increasing their use.

Human bondage has always been a lucrative and profitable business—foundational to the American model of capitalism.<sup>113</sup> Those who profit from human caging wield their financial power to not only preserve the institutional triangle but use it to expand the deportation machine. GEO Group and Corrections Corporation of America/CoreCivic together detain over 75% of all immigrant detainees, with annual revenues of over \$2 billion dollars.<sup>114</sup> In 2017, GEO Group generated \$541 million, or 24% of its total revenue from ICE contracts in representing 105% growth over three years. Similarly, CoreCivic experienced a 107% growth in its ICE-related revenues, earning

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.washingtonpost.com/local/immigrant-children-held-in-shelters-they-told-us-to-behave-or-weld-be-here-forever/2018/07/14/635f4cee-86b4-11e8-8f6c-46cb43e3f306\_story.html?utm\_term=.67ac2ca8f19c, archived at <https://perma.cc/9BZU-TF7Z> (A report that documents the abuses that children were subjected to in ICE detention.).

<sup>111</sup> See Lind & Zarracina, *supra* note 94 (In 1994, the average daily immigrant population in prison was less than 10,000. When ICE was created in 2003 that jumped to about 20,000. During the Obama Administration, these numbers rose to a daily average of about 35,000. During the Trump Administration, the average has increased to 45,000.).

<sup>112</sup> See Kaufman *supra* note 24, at 1403–04

<sup>113</sup> See CEDRIC J. ROBINSON, *BLACK MARKISM: THE MAKING OF THE BLACK RADICAL TRADITION* 113 (The University of North Carolina Press 1983) (“For Marx, slavery had been ‘the chief momenta of primitive accumulation,’ ”an economic category of the highest importance.’ First, African workers had been transmuted by the perverted canons of mercantile capitalism into property. Then, African labor power as slave labor was integrated into the organic composition of nineteenth-century manufacturing and industrial capitalism, thus sustaining the emergence of an extra-European world market within which the accumulation of capital was garnered for the further development of industrial production.”); see also *id.* at 186 (“The formation of the American state provided no exception. The American Constitution, the Declaration of Independence, the considerations raised in the Federalist Papers were all expressions of the interests and creed of the American bourgeoisie. Soon they were to be augmented by the myths of Frontier, the paternal Plantation, the competitive capitalism of the Yankee, the courage of the Plainsman, and later supplemented by the tragedy of the War between the States, the Rugged Individual, the excitement of the American Industrial Revolution, the generosity of the Melting Pot. Such were the romantic fictions that came to constitute the social ideology of the nation’s bourgeoisie.”)

<sup>114</sup> Business Wire, *The GEO Group Reports First Quarter 2018 Results*, BUSINESS WIRE (April 26, 2018 06:55 AM) <https://www.businesswire.com/news/home/20180426005582/en/GEO-Group-Reports-Quarter-2018-Results>, archived at <https://perma.cc/8EHV-7VN6> (In its first quarter report of 2018, GEO Group reported a net income of \$35 million.); see also Marcia Heroux Pounds, Boca-based prison operator Geo’s 2017 revenues up 4 percent, earnings dip, SOUTH FLORIDA SUN SENTINEL, (Feb. 14, 2018 8:05 AM) <https://www.sun-sentinel.com/business/fl-bz-geo-2017-earnings-20180214-story.html>, archived at <https://perma.cc/XF88-4EPG> (GEO Group annual revenues in 2017 were \$2.26 billion.).

\$444 million, or 25% of its total revenue, from these contracts.<sup>115</sup> Other shareholders and private beneficiaries include JPMorgan Chase and Bank of America (provide debt financing), Universities like Harvard<sup>116</sup> (own shares in for-profit prisons), and private companies which provide medical, technological, infrastructure, transportation, and food services.<sup>117</sup> This has prompted organizers to call for the divestment of all funds in for-profit prisons.

Private prisons (and other private actors tied to the carceral state) use their profits to support both Democratic and Republican candidates for office who they believe are favorable to their shareholders' interests (i.e. funneling more bodies into cages). For example, in 2010, the year when Congress authorized the first bed detention quota, 43% of contributions from CoreCivic went to Democrats. This practice has not stopped. According to GEO Group, their political lobbying is meant to promote "the use of public-private partnerships in the delivery of correctional services."<sup>118</sup> In 2018, GEO Group spent \$1.15M in campaign contributions and \$1.17M in lobbying efforts.<sup>119</sup> In the 2016 Presidential election, GEO group spent \$3.1M in political contributions and \$3.3M in lobbying while CoreCivic spent \$1M in political contributions and \$1.8M in lobbying. During the 2018 midterm elections, Henry Cuellar (D-TX) received \$32,400, Vicente Gonzalez (D-

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<sup>115</sup> Worth Rises, *Immigration Detention: An American Business*, WORTH RISES CORRECTIONS ACCOUNTABILITY PROJECT, URBAN JUSTICE CENTER (ND) <https://correctionsaccountability.org/immigration>, archived at <https://perma.cc/QS7K-XFUT> ("With a 19% increase in the detained immigrant population since the 2016 election and the administration projecting a another increase of more than a quarter over the next year, the financial forecasts for The GEO Group and CoreCivic appear positive. The market is responding accordingly. Not only did The GEO Group and CoreCivic enjoy some of the largest single-day gains in the market on November 9, 2016, the day after the presidential election, but after a brief decline due to the delay in promised immigration policy change, their stock prices are back on the rise.")

<sup>116</sup> See *about us: Harvard's Investments*, HARVARD PRISON DIVESTMENT, <https://harvard-prisondivest.org/about/>, archived at <https://perma.cc/9JTB-QZLH> ("Harvard profits off of hundreds of holdings within the prison-industrial complex. Some of these companies like the private prison operators CoreCivic and the GEO Group, to which Harvard is connected through a related Mid-Cap ETF fund, profit from owning immigrant jails that serve as sites of detention for the many children separated from their parents and abuse, driving people to attempt suicide.")

<sup>117</sup> See David Dayen, *Surface of ICE: The Corporations Profiting From Immigrant Detention*, IN THESE TIMES (Sep. 17, 2018), <http://inthesetimes.com/features/ice-abolish-immigration-child-detention-private-prison-profiting.html>, archived at <https://perma.cc/T4HQ-VJXW> (Details all of the companies who are helping support the for-profit prison system which includes companies like Microsoft, Amazon, Aramark, Dell, Century Link, CSI Aviation, Trailboss, Western Union, Bank of America, JPMorgan Chase, BNP Paribas, and Wells Fargo).

<sup>118</sup> SECRETARY OF THE U.S. SENATE, OFFICE OF PUBLIC RECORDS, LOBBYING REPORT OF BRADLEY ARANT BOULT CUMMINGS LLP, (Oct. 22 2018) <https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=BCDA3337-2B39-4181-93C7-E90617D62BA7&filingTypeID=69>, archived at <https://perma.cc/N53Z-CME2>

<sup>119</sup> See *Profile for 2018 Election Cycle: GEO Group*, THE CENTER FOR RESPONSIVE POLITICS OPENSECRETS.ORG (March 25, 2019) <https://www.opensecrets.org/orgs/summary.php?id=D000022003&cycle=2018>, archived at <https://perma.cc/YL72-MJH9> (In 2018 GEO made the following contributions to candidates: \$469,442, to Leadership PACs: \$85,100, to parties: \$278,622, to 527 committees: \$80,000, to outside spending groups: \$377,250)

TX) received \$5,000, and Democratic Committee Chairmen Ben Lujan (D-NM) received \$5,000 from GEO Group.<sup>120</sup>

These campaign contributions and lobbying efforts are strongly correlated with broadening criminal liabilities and increasing immigrant populations in cages.<sup>121</sup> For example, in 2010, CoreCivic and GEO Group were instrumental in passing the Support Our Law Enforcement and Safe Neighborhoods Act (Senate Bill 1070) in Arizona, which drastically increased the number of caged immigrants bodies as well as generated a for-profit prison boom.<sup>122</sup> In 2018, GEO Group lobbied Congress on Commerce, Justice, and Science Appropriations Bills (H.R. 5952, S. 3072), Homeland Security Appropriations (H.R. 6776, S. 3109), and the Corrections Act (S.1994). Arguably, GEO Group targeted these bills to secure contracts to cage more people in partnership with the Federal government. The influence of dark money fundamentally undermines American democracy and is a driving force of caging more immigrant bodies.<sup>123</sup>

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<sup>120</sup> See *GEO Group Recipients: Among Federal Candidates, 2018 Cycle*, THE CENTER FOR RESPONSIVE POLITICS, (March 25, 2019) <https://www.opensecrets.org/orgs/recips.php?id=D000022003&chamber=H&party=D&cycle=2018&state=&sort=A>, archived at <https://perma.cc/4TUV-7XNJ>

<sup>121</sup> See Paul Ashton, *Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies*, *Justice Policy Initiative* (June 22, 2011), [http://www.justicepolicy.org/research/2614?utm\\_source=%2fGamingTheSystem&utm\\_medium=web&utm\\_campaign=redirect](http://www.justicepolicy.org/research/2614?utm_source=%2fGamingTheSystem&utm_medium=web&utm_campaign=redirect), archived at <https://perma.cc/XWX6-4DUD> (“While private prison companies may try to present themselves as just meeting existing demand for prison beds and responding to current market conditions, in fact they have worked hard over the past decade to create markets for their product. As revenues of private prison companies have grown over the past decade, the companies have had more resources with which to build political power, and they have used this power to promote policies that lead to higher rates of incarceration. For-profit private prison companies primarily use three strategies to influence policy: lobbying, direct campaign contributions, and building relationships, networks, and associations.”); See also In the Public Interest, *Buying Influence: How Private Prison Companies Expand Their Control of America’s Criminal Justice System*, IN THE PUBLIC INTEREST (October 2016), [https://www.inthepublicinterest.org/wp-content/uploads/ITPI\\_BuyingInfluence\\_Oct2016.pdf](https://www.inthepublicinterest.org/wp-content/uploads/ITPI_BuyingInfluence_Oct2016.pdf), archived at <https://perma.cc/7RT8-WVBD> (“During the 2013 and 2014 election years, the corrections industry contributed more than \$2.5 million dollars to 360 candidates running for state offices. In 2014, out of the 30 governors, lieutenant governors, controllers, attorney generals, and legislators that received individual contributions of \$5,000 or greater from the corrections industry, 27 won their races.”)

<sup>122</sup> See Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct 28, 2010), <https://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>, archived at <https://perma.cc/8PXR-GEX> (“The 50 or so people in the room included officials of the Corrections Corporation of America, according to two sources who were there. Pearce and the Corrections Corporation of America have been coming to these meetings for years. Both have seats on one of several of ALEC’s boards. And this bill was an important one for the company. According to Corrections Corporation of America reports reviewed by NPR, executives believe immigrant detention is their next big market. Last year, they wrote that they expect to bring in “a significant portion of our revenues” from Immigration and Customs Enforcement, the agency that detains illegal immigrants. In the conference room, the group decided they would turn the immigration idea into a model bill. They discussed and debated language. Then, they voted on it.”)

<sup>123</sup> See generally JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT*, (Doubleday 2016).

The continually expanding reach of the prison industrial complex, driven by profit, subjects people to not only a deprivation of life and liberty for merely existing without U.S. documentation but also creates tortious conditions that fester sexual, physical, and emotional abuse,<sup>124</sup> and even death, often at the hands of State officials, such as ICE and prison guards. For example, between 2009-2017 there have been 84 deaths in immigration detention centers.<sup>125</sup> The institutional triangle is fundamentally rotten but designed to expand via a toxic cycle of tough-on-immigration politics rooted in settler-colonialism logic of social control and elimination.

### III. SUPREME COURT EXPANDING CONGRESSIONAL AUTHORITY TO CAGE NONCITIZENS

Now that we understand the settler-colonial history of how the institutional triangle was constructed and how it operates to criminalize and cage as many immigrant bodies as possible, this article turns to the following question: how has the Supreme Court checked the deportation machine? The answer is rarely. While the Court was designed to serve as a check on Congressional and Executive power, when it comes to immigration, the Court has been overwhelmingly deferential to and supportive of the institutional triangle, namely legislators. Per the plenary power doctrine, Congress has almost absolute and unqualified power to determine the manner in which it admits and removes noncitizens or whether it does so at all and whether it does so through mandatory caging.<sup>126</sup> Congress also has the power to bestow

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<sup>124</sup> See Angelina Chalin, *Drinking Toilet Water, Widespread Abuse: Report Details 'Torture' For Child Detainees*, HUFFPOST (July 18, 2018) [https://www.huffpost.com/entry/migrant-children-detail-experiences-border-patrol-stations-detention-centers\\_us\\_5b4d13ffe4b0de86f485ade8](https://www.huffpost.com/entry/migrant-children-detail-experiences-border-patrol-stations-detention-centers_us_5b4d13ffe4b0de86f485ade8), archived at <https://perma.cc/DK3L-6GH8> (“Over the course of four days in June, Keylin says, U.S. Border Patrol guards would kick her body to keep her awake throughout the night. The 16-year-old, whose last name was redacted from court documents, told a lawyer that she would lie in fear on the cement floor of the Border Patrol station in Texas, surrounded by chain-link fence.”) see also Alyson Hobbs et. al., *A firsthand look at the horrors of immigration detention*, THE WASHINGTON POST (June 25, 2018) [https://www.washingtonpost.com/news/made-by-history/wp/2018/06/25/a-firsthand-look-at-the-horrors-of-immigration-detention/?utm\\_term=.88c252f0a91c](https://www.washingtonpost.com/news/made-by-history/wp/2018/06/25/a-firsthand-look-at-the-horrors-of-immigration-detention/?utm_term=.88c252f0a91c), archived at <https://perma.cc/7LGF-ZEB5>; see also Alice Speri, *Detained then violated*, THE INTERCEPT (April 11, 2018) <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhhs/>, archived at <https://perma.cc/EX3A-K2QZ> (“Most disturbing of all, though, is that the very practice of detention renders the men, women and children in the facilities as faceless and nameless as the drab buildings in which they are held.”).

<sup>125</sup> See *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigrant Detention*, IMMIGRANT JUSTICE, (2018) <http://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/Code%20Red-%20detention%20deaths%20report%20June%202018.pdf>, archived at <https://perma.cc/R6Y6-TEC7>

<sup>126</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (“The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation.”); see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 662 (1892). (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”); but see *The*

noncitizens with as many social, political, and legal rights, throughout the immigration process, as it desires or build an alternative immigration system. In essence, Congress can abolish the deportation caging machine (and institutional triangle) and instead build a humane and reparative immigration system.<sup>127</sup> However, as demonstrated above, Congress has exercised its plenary power to design a mass deportation machine that relies on caging as its core method for removal (i.e. elimination). The Supreme Court has contributed to expanding the immigration caging machine by further entrenching Congressional plenary power at the expense of substantially curtailing or outright denying due process rights for noncitizens.<sup>128</sup>

### A. Plenary Power to Determine Who Is Caged

Early on, the Supreme Court upheld Congress's power to deport noncitizens because of their political affiliation and maintained that immigration detention of noncitizens, per Congressional design, was constitutional.<sup>129</sup> Then the Court specified in *Carlson v. Landon*<sup>130</sup> that residing in the U.S. was a privilege bestowed by Congress, not a right. Moreover, the *Carlson* Court held that although noncitizens could petition for bail "detention is necessarily part of [ ] deportation procedure" otherwise the noncitizen could "hurt the United States."<sup>131</sup> The *Carlson* decision was monumental in establishing that Congress not only had the authority to deport noncitizens in any manner it desired but, most critically, that it could determine who was "dangerous" or a "threat" to the U.S. and use that political construct to justify their caging, without bail, and removal (i.e. elimination).<sup>132</sup> Most significantly, the Court placed the burden on noncitizens to prove that they were not a security risk, even though the government designated them as such. The *Carlson* Court also upheld Congressional authority to determine which class of people were threats (i.e. communist) and Congress's ability to target members from these groups for mandatory caging and removal.<sup>133</sup> The

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*Chinese Exclusion Case*, 130 U.S. 581, at 604, (1889) (holding that Congressional authority limited "by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations").

<sup>127</sup> See generally First We Abolish ICE: A manifesto for immigrant liberation, CALIFORNIA IMMIGRANT YOUTH JUSTICE ALLIANCE (July 2, 2018), <https://ciyja.org/first-we-abolish-ice/>, archived at <https://perma.cc/R4J3-ZFW> (Lays out what a reparative alternative to the immigration system would look like.).

<sup>128</sup> See *supra* note 35.

<sup>129</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

<sup>130</sup> *Carlson v. Landon* 342 U.S. 524 (1952)

<sup>131</sup> *Id.* at 538.

<sup>132</sup> See *Id.* at 541 ("As the purpose of the Internal Security Act to deport all alien Communists as a menace to the security of the United States is established by the Internal Security Act itself, Title I, s 2, we conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention to all these parties without bail as a menace to the public interest.).

<sup>133</sup> See *Id.* ("As all alien Communists are deportable, like Anarchists, because of Congress' understanding of their attitude toward the use of force and violence in such a constitutional democracy as ours to accomplish their political aims, evidence of membership plus



*Carlson* Court noted that Congress had chosen to make such aliens deportable based on its “understanding of [Communists’] attitude toward the use of force and violence. . .to accomplish their political aims.”<sup>134</sup> While the “aliens” in *Carlson* had not been found individually dangerous, their mere political affiliation, as members of class of people (i.e. Communist) and “. . .participation in Communist activities” were markers that legitimized their caging and removal (i.e. elimination of political threats). Here we see the Supreme Court’s circular two-step logic in maintaining the caging machine. First, Congress can designate any immigrant, or categories of people, as a threat, danger, or criminal. Second, Congress cage and remove people because they are designated are threats and/or dangerous. In other words, the Court still operates under the settler-colonial circular logic of control, oppression, and elimination. Thus, the Court affirmed the components, processes, and rationales of the institutional triangle whose actors are pursuing the settler-colonial agenda: to construct people from Latin America and the Caribbean, who are disproportionately black and indigenous, and poor, as dangerous alien invaders to warrant their control, punishment, and removal.<sup>135</sup>

In his dissent, Justice Douglas recognized the perverse discrimination embedded in the immigration caging machine and wrote that the *Carlson* majority set the dangerous precedent that, solely on the basis of the noncitizen’s social membership and supposed threat to the nation’s safety, Congress had the power to isolate noncitizens from their families and communities through caging.<sup>136</sup> The dissent further argued that the majority created the legal architecture allowing immigration police to detain any noncitizen who they have “reason to believe” is dangerous based only on the “rankest hearsay evidence.”<sup>137</sup>

After these cases, the Supreme Court consistently upheld Congressional plenary power, with some limitations,<sup>138</sup> to require mandatory caging without bail to noncitizens solely on the rationale that they labeled as a flight

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personal activity in supporting and extending the Party’s philosophy concerning violence gives adequate ground for detention. It cannot be expected that the Government should be required in addition to show specific acts of sabotage or incitement to subversive action.”)

<sup>134</sup> *Id.*

<sup>135</sup> See Chacon & Davis, *supra* note 62, at 195 (“Immigration policy, influenced by issues of race, class, and proximity to Mexico, ultimately reflects a two-track system by which Mexican workers become segregated and separated from the rest of the working class through the designation of some Mexicans as “illegal.” Couched in the language of legality, it remains a means of division of exclusion to better sustain the hegemony of capital over labor.”); see also, Garcia Hernández, *supra* note 22, at 358 (“Prisons, then, are immigration law’s necessary purgatory, the physical in-between space that must exist to facilitate the welcoming embrace of the “good immigrant” and DHS’s concerted efforts to remove unwanted immigrants.”).

<sup>136</sup> See *Carlson v. Landon*, 342 U.S. at 551 (“. . . they are kept in jail solely because a bureau agent thinks that is where Communists should be.”)

<sup>137</sup> See *Id.* at 540

<sup>138</sup> See *INS v. Chadha*, 462 U.S. 919, at 941-942 (1983) (Congress must choose “a constitutionally permissible means of implementing” that power)

and/or security risk, or simply “undesirable.”<sup>139</sup> Notably, in 1997, mandatory caging was expanded to include undocumented children. Despite arguing that the noncitizen juveniles (later applied to unaccompanied minors) should be immediately released from detention, the parties agreed to a “Flores Settlement” which affirmed that the U.S. had a right to cage children but it also had duty to provide minimum standards for caging children and a general policy favoring release on bond.<sup>140</sup> These minimum standards are regularly violated.

### B. Limited Check on Congressional Caging Powers

Following *Flores*, the caging machine expanded rapidly to capture record numbers of people and children. This was due to many factors including increased migration rates into the U.S. due to economic instability, civil wars, and human displacement across Latin America and Southeast Asia, largely due to U.S. foreign intervention. It was also due to expanding mass incarceration and policing systems and increased Congressional funding for immigration enforcement prompted by the emergence of white nativism. These circumstances converged toward caging more and more noncitizens of color who were being held in cages for longer periods of time awaiting removal. This prompted the Court to figure out how long noncitizens could be held in cages. In an attempt to limit the machine’s expansion, the *Zadvydas* Court<sup>141</sup> limited the executive’s authority to detain noncitizens with removal orders to 90-days. The Court held that instead noncitizens should be caged for a period “reasonably necessary” to deport them.<sup>142</sup> Yet, the Court did not

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<sup>139</sup> See *Leng May Ma v. Barber*, 357 U.S. 185, at 190 (1958), (“physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond.”); see, *Jackson v. Indiana*, 406 U.S. 715, at 731-739 (1972) (Dangerous defendants who become incompetent to stand trial.); see, *Addington v. Texas*, 441 U.S. 418 (1979) (Government may detain mentally unstable individuals who present a danger to the public); see *United States v. Witkovich*, 353 U.S. 194, at 194 (1957) (“The power of Congress with respect to aliens is exceedingly broad; Congress may expel any noncitizen it may determine is undesirable.”); see also, Douglas G. III Bonner, *Filling the Immigration Void: Rodriguez-Fernandez v. Wilkinson-An Excluded Alien’s Right to be Free from Indeterminate Detention*, 6 IMMIGR. & NAT’LITY L. REV. 400, 428 (1982-1983) at 338 (Later, “the United States Court of Appeals for the Tenth Circuit, in *Rodriguez-Fernandez v. Wilkinson* recently expanded the previously-limited due process protections afforded an excluded alien to include freedom from indefinite and arbitrary detention. By construing relevant provisions of the Immigration Act, the Constitution, and international law, the court attempted to remove the open-ended nature of detention from the exclusion process”)

<sup>140</sup> Stipulated Settlement Agreement at 14, *Jenny Lisette Flores, et al., v. Janet Reno*, CV 85-4544-RJK (Px) Jan. 7, 1997, [https://www.aclu.org/sites/default/files/field\\_document/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlementAug.12011797.pdf](https://www.aclu.org/sites/default/files/field_document/flores_settlement_final_plus_extension_of_settlementAug.12011797.pdf), archived at <https://perma.cc/XC6D-DUE6>; see also, *Flores v. Sessions*, 862 F.3d 863, at 866 (9th Cir. 2017) (“Providing unaccompanied noncitizen minors with the right to a bond hearing before an immigration judge pursuant to a settlement ensures that they are not held in secure detention without cause.”).

<sup>141</sup> See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>142</sup> *Id.* at 682 (“It is unlikely that Congress believed that all reasonably foreseeable removals could be accomplished in 90 days, but there is reason to believe that it doubted the constitutionality of more than six months’ detention. Thus, for the sake of uniform administration in

overturn *Carlson* as it was not concerned with answering the question of whether the Congressional power to designate noncitizens as threats in order to cage them was unconstitutional or should be limited in some way. Instead the Court held that while caging itself did not raise any issues, indefinite caging did “raise[s] serious constitutional concerns” in that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”<sup>143</sup> While it appeared that the Court was limiting Congressional plenary power to detain noncitizens, the Court’s *Zadvydas* reasoning did not hold on for more than two years (and returned in Justice Breyer’s dissent in *Nielsen*). Post-9/11, the Court expanded executive powers to criminalize and cage noncitizens. Accordingly, Justice Kennedy’s dissent in *Zadvydas* set the foundation for the line of arguments which would vastly expand Congressional and Executive powers to cage noncitizens. In his dissent, Justice Kennedy argued that “Congress’ power to detain aliens in connection with removal or exclusion. . . is part of the Legislature’s considerable authority over immigration matters.”<sup>144</sup>

### C. Expanding Congressional Caging Powers

In *Demore* (2003), the Court, influenced by war-on-terror politics, moved towards adopting Justice Kennedy’s argument by vastly expanding Congressional plenary power and Executive authority to cage any noncitizen, labeled as flight and/or security risks, for prolonged periods without bail hearings and without constitutional limits.<sup>145</sup> Specifically, the Court returned to the logic in *Carlson* in arguing that “detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.”<sup>146</sup> This was based on

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the federal courts, six months is the appropriate period. After the 6-month period, once an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must furnish evidence sufficient to rebut that showing.)

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 711.

<sup>145</sup> See *Demore v. Hyung Joon Kim*, 538 U.S. 510, at 513 (2003) (Held that mandatory detention of deportable alien under Immigration and Nationality Act provision [8 USC § 1226(c)] pending removal proceedings, without determination of danger to society or flight risk, held consistent with Fifth Amendment’s due process clause.”); see also, *Margaret H. Taylor, Demore v. Kim: Judicial Deference to Congressional Folly*, in *IMMIGRATION STORIES* (David A. Martin & Peter H. Schuck eds., 2005) (“Nevertheless, the sweeping detention mandate was not the product of careful deliberation, as depicted by the *Demore* majority, but rather was an overreaction, prompted by election year politics and inserted without study into omnibus legislation that Congress was in a hurry to pass. In addition to developing this legislative history, the chapter details the considerable costs that mandatory detention imposes on noncitizen offenders, who must relinquish their freedom as the price for contesting deportation, and on the government, which must devote scarce resources to detain individuals who do not present a risk of flight or danger to the community.”).

<sup>146</sup> *Demore* 538 U.S. 510 at 528.

evidence provided by the Government showing that “criminal aliens” made up an increasing share (25%) of the criminal population held in federal prisons and that “once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings.”<sup>147</sup> The Government also showed that in 85% of the cases in which people were caged, removal proceedings were completed in an average time of “47 days and a median of 30 days”.<sup>148</sup> It would not be until 2018 that the Government admitted this empirical analysis was wrong as later evidence proved the contrary by showing that 77% (and 86% in FY2015)<sup>149</sup> of people released on bond show up to all of their hearings and that immigrants commit far fewer crimes than U.S. citizens.<sup>150</sup> However, the *Demore* Court was convinced that noncitizens had to be held in cages in order to guarantee their removal. Thus, noncitizens became the fastest growing prisoner population. In all, the Court affirmed the circular logic in *Carlson* (1952) by holding that the Executive and Legislative Branches’ had the power to determine how, when, and why to cage and deport people in the manner they best see fit. In doing so the *Demore* Court moved drastically away from *Zadvydas* when it held that Congress’s power to require mandatory detention was itself not unconstitutional but rather core to Congressional plenary power.<sup>151</sup> In his concurrence, Justice Kennedy said that he would be open to limiting prolonged detention of legal permanent residents if it became evident that their detention was “unreasonable and unjustified” as well as unrelated to “protecting against flight risks and dangerousness.”<sup>152</sup>

By the time we arrive to *Jennings v. Rodriguez* (2018)<sup>153</sup>, the Court had reaffirmed that Congress has virtually unchecked power to designate particular groups of people as dangerous and, therefore, had the power to subject them to mandatory caging, without bond, to guarantee their removal as long as they were designated as flight and security risks. The Court also supported the Executive’s ability to ratchet up the deportation machine with few

<sup>147</sup> *Id.* at 518- 519.

<sup>148</sup> *Id.* at 529.

<sup>149</sup> See *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?* SYRACUSE U. TRAC IMMIGR, (Sep. 14, 2016) <http://trac.syr.edu/immigration/reports/438/> (“the bond request was frequently turned down—sometimes more, and sometimes a bit less than half the time. For those granted bond, about one in five remained detained until the end of their case, presumably because they were unable to post the bond amount set. . . for those who posted bond and were then released, relatively few individuals currently abscond. During FY 2015, for example, only 14 percent failed to turn up at their subsequent court hearing.”).

<sup>150</sup> See *Jennings v. Rodriguez*, 138 S. Ct. 830, 869 (2018) (“The Government now tells us that the statistics it gave to the Court in *Demore* were wrong. Detention normally lasts twice as long as the Government then said it did.”); See Robert Farley, *is illegal immigration linked to more or less crime?* THE WIRE (June 27, 2018), <https://www.factcheck.org/2018/06/is-illegal-immigration-linked-to-more-or-less-crime/>, archived at <https://perma.cc/4EPP-A8WP> (“the available research that estimates the relationship between illegal immigration and crime generally shows an association with lower crime rates.”).

<sup>151</sup> *Demore* 538 U.S. 510 at 521.

<sup>152</sup> *Id.* at 523.

<sup>153</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

Constitutional checks to meet its Congressional mandate. Thus, while *Jennings* presented an opportunity to limit Congressional plenary power in immigration<sup>154</sup>, the Court continued with the trajectory of moving further away from *Zadvydas* by further entrenching Congress's power to imprison immigrants without due process. Specifically, the Court held that 8 U.S.C. §1226(a), §1225(b), and §1226(c) "do not give detained aliens the right to periodic bond hearings during the course of their detention."<sup>155</sup>

In all, the Court has not only upheld the institutional triangle but has consistently upheld that the tough-on-immigration politics, processes (profiling and caging), and settler-colonial logic undergirding the triangle.

#### IV. EXPANDING OF THE IMMIGRATION CAGING REGIME REGARDLESS OF "WHEN"

By now this article has put forth three arguments. First, the white supremacist-capitalist-imperialist settler-colonial roots of profiting from human bondage, caging, and forced labor set the institutional, political, social, and legal foundations for the immigration caging machine. Second, the three axes of the institutional triangle of the immigration caging machine, which include legislators (i.e. Congress), executive enforcers (ICE, Police, and immigration courts), and (for-profit) prisons, operate with a complex set of incentives, politics and processes which converge toward expanding and refining the sophistication of the machine's ability to criminalize, cage, and remove more noncitizens. Third, the Supreme Court has refused to grapple with the settler-colonial roots of caging embedded in the machine and has also refused to substantively check the actors in the institutional triangle. Rather, the Court has contributed to expanding of the immigration caging machine by affirming Congressional and Executive powers in nearly every case regarding immigration detention.

Given these three arguments, this section examines *Nielsen* in three parts. Part IV.A summarizes the current deportation procedures under 8 U.S.C. §1226 [INA§236(c)] as background. Part IV.B provides the procedural posture and summary of the case. Part IV.C shows how *Nielsen's* "any time when" holding will contribute to the expansion the immigration caging regime in three ways that refines the institutional triangle. First, the decision will further entrench Congressional authority to broaden liabilities which criminalize noncitizens as a method to cage more noncitizens to guarantee

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<sup>154</sup> See Philip L. Torrey, *Jennings v. Rodriguez and the Future of Immigration Detention*, 20 HARV. LATINX L. REV. 171, 186 (2017) ("The fact that the Court seems to be seriously considering the respondents' constitutional arguments may signal its willingness to revisit the plenary power doctrine. For decades, scholars have examined the courts' reluctance to review immigration statutes because of the plenary power doctrine. The Jennings case gives new hope to those who think that immigration's constitutional exceptionalism is unwarranted."); see generally, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (Princeton University Press 1996).

<sup>155</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, at 834 (2018).

their removal. Second, the decision will expand policing and prosecutorial powers to arrest, cage, and remove more immigrant bodies. Third, as the demand for more cages rises, the decision will incentivize prisons and legislators to bolster their investment in immigration caging mechanisms (e.g. ankle monitoring) which will contribute to the circular logic of the institutional triangle. Part IV.C will also show that even if the Court had adopted an “reasonable when” or “immediate when” interpretation of 8 U.S.C. section 1226(c), the Court would have also expanded the immigration caging regime.

### A. *Current Deportation Procedures Under 8 U.S.C. §1226*

Under the original text of the Immigration and Naturalization Act, all deportable noncitizens were eligible for a bond hearing.<sup>156</sup> Later, Congress made it more difficult for noncitizens to receive a bond hearing via the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 §303, 8 U.S.C. §1226.<sup>157</sup> IIRIRA established a general rule that allows bond hearings for most noncitizens and an exception for some noncitizen who were charged and/or convicted of crimes—the former in subsection (a), the latter in subsection (c). Subsection (a) applies to most deportable noncitizens and allows immigration officials to cage a noncitizen “pending a decision on whether the alien is to be removed from the United States.”<sup>158</sup> This class of noncitizens are eligible for a bond hearing if an immigration judge decides that the noncitizen does not pose a danger to society and is not a flight risk.<sup>159</sup> However, the noncitizen is not eligible for a bond hearing if subsection (c) applies and, thus, their detention is mandatory.<sup>160</sup> Per 8 U.S.C. §1226(c) [INA §236(c)], a noncitizen is subject to mandatory detention without bond if they commit one of the crimes listed in subparagraphs (A) through (D), which Justice Breyer called “ABCD Aliens” in his *Nielsen* dissent.<sup>161</sup> These crimes include human trafficking, drug trafficking, crimes

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<sup>156</sup> See *Patel v. Zemski*, 275 F.3d 299, at 304 (3d Cir.2001), abrogated by *Demore v. Kim*, 538 U.S. 510, (2003).

<sup>157</sup> See *Demore* 538 U.S. 510.

<sup>158</sup> §1226(a) (“On a warrant issued by the Attorney General, an alien may be arrested and detained?”).

<sup>159</sup> See 8 C.F.R. § 236.1(c)(8). (this provision states: “(a) Arrest, detention, and release . . . . On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—(1) may continue to detain the arrested alien; and (2) may release the alien on—(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole; but (3) may not provide the alien with work authorization (including an ‘employment authorized’ endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.”)

<sup>160</sup> See 8 U.S.C. §1226(a) (“Except as provided in subsection (c)?”)

<sup>161</sup> See *Nielsen v. Preap*, No. 16–1363, 2019 WL 1245517, at 18 (March 19, 2019) (Justice Breyer dissenting “Paragraph (1), entitled ‘Custody,’ says that the Secretary ‘shall take into custody any alien who’ is ‘inadmissible’ or ‘deportable’ [by reason of having committed

of moral turpitude (e.g. downloading pirated music, possessing stolen bus transfers), drug conspiracies, prostitution, firearm offenses, treason, espionage, and the like.<sup>162</sup> If someone falls into this net of “ABCD Aliens,” then they are subject to mandatory caging without bond.

### B. *Nielsen v. Preap Background and Arguments*

This case is a consolidation of two cases from the Ninth Circuit, where the lead plaintiffs are Mony Preap and Bassam Yusuf Khoury, lawful permanent residents, along with a class of plaintiffs whom the government charged with removal for a criminal offense listed in §1226(c).<sup>163</sup> Mr. Preap, born in a refugee camp, fled Cambodia as an infant in 1981. In 2006, Mr. Preap was convicted of two misdemeanors for possessing cannabis.<sup>164</sup> Years later, after serving time in jail for a simple battery assault (an offense that did not trigger mandatory detention), Mr. Preap was arrested by ICE for his 2006 offense. Similarly, Mr. Khoury served his criminal sentence and upon release returned to his community and family only to be detained by ICE years later and held without bond under §1226(c).<sup>165</sup>

The question presented before the Supreme Court in *Nielsen v. Preap* was “whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. 1226(c) [INA §236(c)] if, after the alien is released from criminal custody, the Department of Homeland Security does not take [them] into immigration custody immediately.”<sup>166</sup> In *Preap v. Johnson*, 2016 WL 4136983 (9th Cir. 2016), the U.S. Court of Appeals for the Ninth Circuit affirmed the ruling by the U.S. District Court for the Northern District of California which held that under the plain language of INA §236(c), the government can only take into immigration custody without bond hearing only those people with criminal charges/convictions immediately upon being released from criminal custody. In doing so, the Ninth Circuit joined the First Circuit, which similarly ruled in *Casteneda v. Souza*, 810 F. 3d 15 (1st Cir. 2015) (en banc), that Congress intended for the Attorney General to take “criminal aliens” into custody “when [they were] released” from

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certain offenses or having ties to terrorism] ‘when the alien is released,’ presumably from local, state, or federal criminal custody. § 1226(c)(1) (emphasis added). Because the relevant offenses are listed in four subparagraphs headed by the letters ‘A,’ ‘B,’ ‘C,’ and ‘D,’ I shall refer to the relevant aliens as ‘ABCD’ aliens. Thus, for present purposes, paragraph (1) says that the Secretary ‘shall take into custody any’ ABCD alien ‘when the alien is released’ from criminal custody.”).

<sup>162</sup> See §1226(c)(1)(A)(D) (citing offenses listed in 8 U.S.C. §§ 1182, 1227); see *Khoury v. Asher*, 667 F. App’x 966 (9th Cir. 2016); see *Hashish v. Gonzales*, 442 F. 3d 572, 576 (CA7 2006) (illegally downloading music is a crime of “moral turpitude”); see *Michel v. INS*, 206 F. 3d 253, 261 (CA2 2000) (possessing stolen bus transfers is a crime of “moral turpitude”).

<sup>163</sup> See *Preap v. Johnson* 831 F. 3d 1193 (9th Cir. 2016).

<sup>164</sup> See Gerald Seipp, *Ninth Circuit Joins First in Holding that § 236(c) Mandatory Detention Applies Only Against Aliens Promptly Detained Following Criminal Custody, Thus Creating 4-2 Circuit Split*, 93 No. 32 Interpreter Releases Art. 2 (2016).

<sup>165</sup> *Id.*

<sup>166</sup> See Interpreter Releases. Supreme Court Hears Oral Argument in Mandatory Detention Case, Focusing on “When the Alien is Released” 95 No. 40 Interpreter Releases Art. 4

criminal custody which means immediately and not years after release from criminal custody. The Ninth Circuit reasoned that while §1226(a) gives DHS broad discretion whether to release a noncitizen on bond after they are detained by ICE, the “when released” language of §1226(c) limits this discretion by triggering mandatory detention for a list of certain crimes *but only if* DHS detains the individual immediately. The Ninth Circuit ruling benefited hundreds of noncitizens whom the government failed to detain immediately and who became eligible for bond hearings under §1226(a). However, other circuits in the Second, Third, Fourth, and Tenth held otherwise.<sup>167</sup>

At oral arguments in October 2018,<sup>168</sup> and in their brief,<sup>169</sup> Plaintiffs argued that §1226(c)(1)’s “when released” means that DHS must take them into custody immediately (within 24 hours) upon their release from criminal custody. Since DHS failed to take them into custody immediately, the Plaintiffs argue that they are not subject to mandatory detention without bond and therefore qualify for bond hearings to leave immigration caging by showing that they are not flight nor security risks. Moreover, the plaintiffs invoked the avoidance canon<sup>170</sup> by arguing that Justice Alito, in *Jennings v. Rodriguez* (2018), already held that the INA required mandatory detention for

<sup>167</sup> See *Lora v. Shanahan*, 804 F. 3d 601 (2d Cir. 2015) (“In order to avoid significant constitutional concerns surrounding the application of section 1226(c), it must be read to contain an implicit temporal limitation. In reaching this result, we join every other circuit to have considered this issue. Specifically, we join the Ninth Circuit in holding that mandatory detention for longer than six months without a bond hearing affronts due process.”); see also, *Sylvain v. Attorney General of U.S.*, 714 F. 3d 150, at 157 (3d Cir. 2013) (“the government’s authority to impose mandatory detention does not depend on its compliance with the “when . . . released” deadline. The text states that immigration officials “shall take into custody any alien who [has committed various crimes] when the alien is released.” 8 U.S.C. § 1226(c)(1). The text does not explicitly remove that authority if an alien has already left custody. We are loath to interpret a deadline as a bar on authority after the time has passed—even when the word “shall” appears in the text.”); see also *Hosh v. Lucero*, 680 F. 3d 375 (4th Cir. 2012); see also, *Olmos v. Holder*, 780 F. 3d 1313 (10th Cir. 2015)

<sup>168</sup> Kirstjen M. NIELSEN, Secretary of Homeland Security, et al., *Petitioners, v. Mony PREAP, et al.*, Respondents., 2018 WL 4922082 (U.S.), 3 (U.S.Oral.Arg.,2018)

<sup>169</sup> Brief for Respondent at 30, *Nielsen v. Preap, et al.*, (No. 16-1363), 2018 WL 3805987 (U.S.,2018) (“From its earliest iterations, the mandatory detention statute that culminated in Section 1226(c) required the immigration authorities to detain noncitizens with certain criminal histories when they are released from their sentences, eliminating any gap between criminal and immigration custody.”)

<sup>170</sup> Kirstjen M. NIELSEN, Secretary of Homeland Security, et al., *Petitioners, v. Mony PREAP, et al.*, Respondents., 2018 WL 4922082 (U.S.), 38 (U.S.Oral.Arg.,2018)

(“MS. WANG: My first response to you, Justice Ginsburg, would be that’s what the statute provides.

And the second response is that the Court decided in *Demore* in 2003 that applying the mandatory detention rule, at least, not considering the question before the Court now, is constitutional.

And that brings me, I think, to the—to answer the question about constitutional avoidance that you brought up, Justice Breyer, that when Congress—there are two reasons the government says better late than never. There are lots of reasons why this Congress did not want better late than never.

The first is the text and the structure of the statute, which indicate if the person is not taken into custody when they’re released from criminal custody by ICE, then they’re under 1226(a) and you get a hearing.”)



noncitizens only when the noncitizen taken into ICE custody *immediately* after they were released from criminal custody. Therefore, noncitizens who were not arrested *immediately* after being released from criminal custody would fall outside of §1226(c)(1) and would be eligible for bond.

On the other hand, the Government argued, and Justice Kavanaugh seemed to agree<sup>171</sup>, that the legislative text and purpose of §1226(c)(1) was clear. In drafting IIRIRA, Congress was concerned with noncitizens not showing up for their hearing and Congress was aware that requiring an immediate apprehension would be impractical for immigration officials to meet because the criminal legal system is not able to detain people with charges/convictions due to the plea deal structure which often results in no prison time. Also, the Government recognized that Congress was aware of the lack of resources for DHS to immediately detain “criminal aliens.” Therefore, arresting the noncitizen (since most are not detained in prison/jail) would place an onerous burden on DHS which Congress did not intend to do. Rather Congressional intent was to maximize the number of deportations for noncitizens who committed these specific crimes.

In March 2019, in a 5-4 decision, Justice Alito joined by the Chief Justice and Justice Kavanaugh overturned the Ninth Circuit. The Court held that DHS can arrest and cage noncitizens who fall under §1226(c)(1) and are subject to mandatory detention without bond at any time after the noncitizen is released from criminal custody as long as they have committed the prescribed sets of crimes in (A)-(D) which make them deportable. Moreover, the Court held that DHS’s discretionary judgement regarding the application of §1226(c) is subject to Court review.<sup>172</sup>

The Court had two main arguments for its holding. First, the plain text of §1226(c)(1) is clear those who qualifies for mandatory detention without bond is determined not by when they are “released” from criminal custody but rather by the predicate offenses identified in subparagraphs (A)-(D).<sup>173</sup> If a noncitizen committed those sets of crimes, then DHS has the discretion to

<sup>171</sup> Kirstjen M. NIELSEN, Secretary of Homeland Security, et al., *Petitioners, v. Mony PREAP, et al.*, Respondents., 2018 WL 4922082 (U.S.), 56 (U.S.Oral.Arg.,2018)

(“JUSTICE KAVANAUGH: But Congress would have known or thought that it wasn’t going to be immediate in many cases, correct?”)

MS. WANG: Yes, Justice Kavanaugh. And the consequence—

JUSTICE KAVANAUGH: And—and yet Congress did not put in a time limit, whether it’s reasonable time, as Justice Breyer says, or a year or two years or six months or 48 hours.

And so when you combine those two points, Congress knew it wouldn’t be immediate, and yet Congress did not put in a time limit. That raises a real question for me whether we should be superimposing a time limit into the statute when Congress, at least as I read it, did not itself do so.”)

<sup>172</sup> *Nielsen v. Preap*, No. 16-1363, 2019 WL 1245517, at 2 (U.S. Mar. 19, 2019) (“This Court has jurisdiction to hear these cases.”)

<sup>173</sup> *Id.* at 8 (“And here is the crucial point: The ‘when . . . released’ clause could not possibly describe aliens in that sense; it plays no role in identifying for the Secretary which aliens she must immediately arrest. If it did, the directive in §1226(c)(1) would be nonsense. It would be ridiculous to read paragraph (1) as saying: ‘The Secretary must arrest, upon their release from jail, a particular subset of criminal aliens. Which ones? Only those who are arrested upon their release from jail.’ Since it is the Secretary’s action that determines who is

cage them for removal at any time after release without bond. Furthermore, the Court held that in subsection (c)(1) and (c)(2) Congress limited the Attorney's Attorney General's discretion of releasing the noncitizens who were already arrested under subsection(a).<sup>174</sup> The Court reasoned that Congress was clear that DHS has the power to arrest "ABCD Aliens" at any time because Congress believed that "ABCD Aliens" were safety and flight risks.<sup>175</sup> Thus, if the Secretary does not detain "ABCD Aliens" when they are released from criminal custody, this does not deprive the power of DHS to detain the "ABCD aliens" because DHS always preserves caging power in subsection (a). Once subsection (a) is triggered (i.e. arrest and caging by ICE), then DHS may subject the noncitizen to mandatory caging without bail per section (c)(1) or (c)(2). Moreover, the Court reasoned that it would be illogical to require DHS to arrest noncitizens within 24 hours of release from criminal custody because of challenges with resources and localities refusing to work with ICE, under sanctuary city policies and some States requiring cooperation between local/State police and ICE.<sup>176</sup>

Second, the majority rejected the Respondent's argument that the "when . . . released" provision should be read to mean "immediate" because if they face mandatory detention after being arrested years after their release

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arrested upon release, 'being arrested upon release' cannot be one of her criteria in figuring out whom to arrest.").

<sup>174</sup> *Id.* at 9 ("subsection (c)(1) limits subsection (a)'s first sentence by curbing the discretion to arrest: The Secretary *must* arrest those aliens guilty of the predicate offense. And subsection (c)(2) limits subsection (a)'s second sentence by cutting back the Secretary's discretion over the decision to release: The Secretary may not release aliens 'described in' subsection (c)(1)—that is, those guilty of a predicate offense.").

<sup>175</sup> *Id.* at 10 ("Congress enacted mandatory detention precisely out of concern that such individualized hearings could not be trusted to reveal which 'deportable criminal aliens who are not detained' might 'continue to engage in crime [or] fail to appear for their removal hearings.' *Demore*, 538 U. S., at 513. And having thus required the Secretary to impose mandatory detention without bond hearings immediately, for safety's sake, Congress could not have meant for judges to "enforce" this duty in case of delay by—of all things—forbidding its execution.").

<sup>176</sup> *Id.* at 11 ("To give just one example, state and local officials sometimes rebuff the Government's request that they give notice when a criminal alien will be released. Indeed, over a span of less than three years (from January 2014 to September 2016), the Government recorded 'a total of 21,205 declined [requests] in 567 counties in 48 states including the District of Columbia.' ICE, Fiscal Year 2016 ICE Enf. and Removal Operations Rep. 9."); *see also*, S.B. 168 (FL. 2019) ("Prohibiting sanctuary policies; requiring state entities, local governmental entities, and law enforcement agencies to use best efforts to support the enforcement of federal immigration law; authorizing a law enforcement agency to transport an alien unlawfully present in the United States under certain circumstances; prohibiting discrimination on specified grounds."); *see also*, Ann Morse, *Immigrant Policy Project Report on State Immigration Laws, 2018*, NATIONAL CONFERENCE OF STATE LEGISLATURES, [http://www.ncsl.org/Portals/1/Documents/immig/ImmigPolicy\\_2018\\_v04.pdf](http://www.ncsl.org/Portals/1/Documents/immig/ImmigPolicy_2018_v04.pdf), archived at <https://perma.cc/MDF3-P2KG>, at 1 ("In 2018 at least 25 states considered 66 State Sanctuary bills, down from 100 2017. In 2018, three states—California, Iowa and Tennessee—enacted laws related to sanctuary policies. California prohibited law enforcement agencies from contracting with the federal government to house individuals as federal detainees for purposes of civil immigration custody. Iowa required state law enforcement to comply with federal immigration requests, and Tennessee barred state or local government entities or officials from adopting or enacting sanctuary policies. In Oregon, a ballot initiative to repeal the state's sanctuary laws failed 2 to 1.").

then “when. . . released” would be superfluous. The Court held that the “when . . . released” provision means that DHS cannot detain a noncitizen while they are serving time in criminal custody and that it prompts DHS to take action *only after* the noncitizen was released without placing a deadline.<sup>177</sup> Third, the majority rejected the Respondents’ argument that arresting noncitizens years after they are released from criminal custody raises constitutional due process issues that the Court should avoid. The Court rebuffed the Respondents’ constitutional avoidance argument by saying that the text of §1226 is clear and not subject to multiple interpretations.

### C. Expanding Mandatory Caging Through Nielsen Regardless of “When”

#### 1. “Any time When”

By fully adopting the Government’s position, the majority vastly expanded the caging machine in the following way: DHS can now cage “ABCD Aliens” at any time after they are released from criminal custody and deny them bond as long as they are “ABCD Aliens.”<sup>178</sup> Once the individual is branded as an “ABCD Alien,” the Government’s ability to deprive the immigrant of life and liberty at any point in their lives looms large. As Justice Breyer argued, such vast policing powers to cage threatens the very foundations of our Democratic system.<sup>179</sup> Under this holding, the immigration caging machine will expand greatly because of the four reasons articulated below.

First, the majority affirmed that Congress has virtually unqualified power to determine who is caged, why, and for how long.<sup>180</sup> Congress has

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<sup>177</sup> *Nielsen v. Preap*, No. 16-1363, 2019 WL 1245517, at 12.

<sup>178</sup> *See Nielsen v. Preap*, No. 16-1363, 2019 WL 1245517, at 17 (U.S. Mar. 19, 2019) (Justice Breyer dissenting “The majority concludes that paragraph (2) forbids bail hearings for aliens regardless of whether they are taken into custody ‘when . . . released’ from prison. Under the majority’s view, the statute forbids bail hearings even for aliens whom the Secretary has detained years or decades after their release from prison.”); *See Id.* at \*18 (U.S., 2019) (Justice Breyer dissenting “Paragraph (1), entitled ‘Custody,’ says that the Secretary ‘shall take into custody any alien who’ is ‘inadmissible’ or ‘deportable’ [by reason of having committed certain offenses or having ties to terrorism] ‘when the alien is released,’ presumably from local, state, or federal criminal custody. § 1226(c)(1) (emphasis added).”).

<sup>179</sup> *Id.* at 24 (Justice Breyer dissenting “In deciphering the intent of the Congress that wrote this statute, we must decide—in the face of what is, at worst, linguistic ambiguity—whether Congress intended that persons who have long since paid their debt to society would be deprived of their liberty for months or years without the possibility of bail. We cannot decide that question without bearing in mind basic American legal values: the Government’s duty not to deprive any “person” of “liberty” without “due process of law,” U.S. Const., Amdt. 5; the Nation’s original commitment to protect the “unalienable” right to “Liberty”; and, less abstractly and more directly, the longstanding right of virtually all persons to receive a bail hearing.”).

<sup>180</sup> *See Id.* at 1 (“Federal immigration law empowers the Secretary of Homeland Security to arrest and hold a deportable alien pending a removal decision, and generally gives the Secretary the discretion either to detain the alien or to release him on bond or parole. 8 U.S.C. § 1226(a).”).

the power to expand the “ABCD Alien” category to include more offenses and funnel more people into cages. The Court clarified that Congress exercised this plenary power to create a system of mandatory caging “precisely out of a concern that such individualized hearings [bond hearings] could not be trusted to reveal ‘which deportable criminal aliens who were not detained’ might ‘continue to engage in crime [or] fail to appear for their removal hearings.’”<sup>181</sup> Similarly, in his concurrence, Justice Kavanaugh clarified that the *Nielsen* case was not about whether a “noncitizen may be *detained* during removal proceedings or before removal.”<sup>182</sup> Justice Kavanaugh stated that the Court has long recognized that Congress has the power to cage and remove whomever it decides. Moreover, the Court, with the exception of Justice Breyer, did not question Congress’s ability to broaden criminal liabilities which would make individuals more susceptible to arrest and removal. As the dissent points out, the majority’s holding expanded Congressional power to widen criminal liabilities to allow the Executive to arrest more “criminal aliens” and trigger mandatory detention without bail.<sup>183</sup> This may mean broadening ABCD categories or creating other categories altogether to criminalize more acts specific to immigrants. For example, the U.S. could broaden 18 USC §371 “Conspiracy to commit offense or to defraud United States”, which is one of the most common deportable offenses, to include sharing messages/posts on Facebook that is considered a conspiracy to commit an offense against the U.S. This may seem fantastical but it is not. The U.S. already screens the Facebook media profiles of immigrants seeking admission into the U.S. and the Justice Department uses Facebook content to prosecute activist deemed threats to the Government.<sup>184</sup> For example, under

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<sup>181</sup> *Id.* at 10 (citing *Demore*, 538 U.S. at 513.).

<sup>182</sup> *Id.* at 14.

<sup>183</sup> *Id.* at 19 (J. Breyer Dissenting “Why would Congress have granted the Secretary such broad authority to deny bail hearings, especially when doing so would run contrary to basic American and common-law traditions? The answer is that Congress did not do so. Ordinary tools of statutory interpretation demonstrate that the authority Congress granted to the Secretary is far more limited.”).

<sup>184</sup> See U.S. DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GENERAL, DHS’ PILOTS FOR SOCIAL MEDIA SCREENING NEED INCREASED RIGOR TO ENSURE SCALABILITY AND LONG-TERM SUCCESS, at 1 (<https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf>, archived at <https://perma.cc/ZP2F-DV9A> (DHS issued a notice that it is storing social media information on immigrants, including lawful permanent residents and naturalized U.S. citizens, apparently indefinitely, in a government database that contains “Alien Files” (A-Files). The purpose is to identify any suspected terrorist activity against the U.S. However, the inspector general’s report says that the program “lack criteria for measuring performance to ensure they meet their objectives.”); see also Simon Davis-Cohen, *Justice Department helped a county prosecutor target the Facebook records of anti-pipeline activists*, THE INTERCEPT (Jan. 14, 2018 1:35 PM), <https://theintercept.com/2018/01/14/facebook-warrant-pipeline-protest-what-com-county-justice-department/>, archived at <https://perma.cc/GBN4-ZUHG> (“The DOJ’s intervention in the case makes it the latest example of the Trump administration’s direct involvement in law enforcement actions against protesters who allege they are being targeted for protected First Amendment activity: On the other side of the country, the DOJ is pursuing decades of prison time for protesters, journalists, medics, and legal advocates arrested during the anti-Trump “J20” demonstrations on Inauguration Day. In that case, too, the prosecution secured warrants for the Facebook page and website used to organize the protests. Now, Stand-

the Trump administration, immigrant rights and anti-police brutality organizers are deliberately being criminalized as national security threats and targeted, partly based on their social media activity, as a method to stop their activism.<sup>185</sup> Trump is waging a deliberate campaign to further criminalize immigrants and subject them to mandatory caging and removal. *Nielsen* is the gift that Trump has been waiting for. For example, Trump has been lobbying States and cities to bolster anti-gang efforts by giving local police more authority to label young immigrants, mostly men, as gang members and threats, and, thus, warrant their caging (i.e. elimination).<sup>186</sup> At the same time, the immigration relief is becoming more limited. For example, immigration reform proposals by Democrats continue to offer limited temporary relief for DACA and TPS while further fueling the institutional triangle to criminalize, cage, and remove more “criminal aliens.”

Second, the majority’s holding in combination with increased Congressional resources for immigration enforcement will expand the caging machine. The Court affirmed that Congress has the power to determine mandatory executive enforcement of mandatory caging and removal. As Justice Kavanaugh clarified, the majority opinion was not about “whether Congress may *mandate* that the Executive Branch detain noncitizens during removal proceedings” because the Court had already decided this in *Zadvydas*, *Clark v. Martinez*,<sup>187</sup> and *Jennings*. Thus the question becomes whether Congress will provide the Executive with the funds to meet this increased mandate? The answer is yes. As the immigrant community has been witness to for decades, and as Parts I.A-B demonstrate, the institutional triangle has historically received the political and financial resources necessary for expansion. For example, DHS funding has nearly doubled since it

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ing Rock-inspired activists in Whatcom County find themselves on the front lines of the battle over Americans’ right to anonymously organize with political groups.”).

<sup>185</sup> See Michelle Chen, *Trump’s Crackdown on Immigrant Activists Is an Attack on Free Speech*, THE NATION (Oct. 10, 2018), (“[Ravi] Ragbir, who believes he was arrested in retaliation for his outspoken criticism of Trump, is arguing before an appeals court that he is a victim of a campaign of political terror against migrant communities.”).

<sup>186</sup> See *ACLU of Massachusetts v. Boston Police Department*, ACLU (Nov. 15, 2018), <https://www.aclum.org/en/cases/aclu-massachusetts-v-boston-police-department>, archived at <https://perma.cc/X6BZ-EZRL> (“Describes ACLU Of Massachusetts V. Boston Police Department (2018). Little is known about the BPD’s system of labeling, tracking, and sharing information about young people it alleges to be involved in gangs. Being labeled as a gang member can have catastrophic consequences for a young person’s life, including being targeted for surveillance and police stops, facing harsher outcomes in the criminal legal system, and – for noncitizen youth – being detained and deported by U.S. Immigration and Customs Enforcement (ICE).”); see also, U.S. Immigration & Customs En’t *supra* note 9, at 11 (“ICE removals of known or suspected gang members and known or suspected terrorists (KST) are instrumental to ICE’s national security and public safety missions, and the agency directs significant resources to identify, locate, arrest, and remove these aliens. ICE removals of known and suspected gang members increased by 162 percent in FY2017, more than doubling from the previous year. These critical removals increased again in FY2018, rising by 9 percent from FY2017. ICE’s KST removals also rose significantly between FY2016 and FY2017 (Figure 13), increasing by 67 percent, while removals of aliens in this group were relatively level in FY2018, with ICE conducting 42 removals compared to 45 in FY2017.”)

<sup>187</sup> See *Clark v. Martinez* 543 U.S. at 371 (2005)

was created in 2003 with substantive increases in the number of ICE officers.<sup>188</sup> Moreover, in February 2019, despite rhetorical rebuke of Trump's border wall, Congress's Democratic-led budget bill expanded the number of ICE detention bed quota to 45,274 (a 12% increase), increased ICE/ CBP funding by 7%, increased the use of ankle monitors and surveillance to 100,000 migrants (up from 82,000), and offered increased funding for other ICE services.<sup>189</sup> ICE has a documented practice of using the increased bed quota as a new "floor" to cage more people, get resources from other DHS sources to fund increased caging, and then use those increased caging numbers as the starting place for negotiations to demand more resources.<sup>190</sup> It is likely that DHS will get it even in a Democrat controlled Congress since historically Democrats have been the party which has increased funding for immigration enforcement the most. *Nielsen's* "any time" when decision will likely bolster the caging cycle with Congress as it has done before.

Now that we see that Congress is able to expand how immigrants are criminalized as well as provide more resources to expand the machine to funnel them into cages, the third question is: whether executive enforcers will actually arrest and prosecute more noncitizens after release (even years)

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<sup>188</sup> See William L. Painter, *Trends in the Timing and Size of DHS Appropriations: In Brief*, CONGRESSIONAL RESEARCH SERVICE (Aug. 7, 2018), at 5, <https://fas.org/sgp/crs/homsec/R44604.pdf>, archived at <https://perma.cc/DW8D-7X8B> (Funding for DHS in 2004 was \$29.8 billion in 2018 and \$55.74 billion in 2004); see also John Burnett, *Funding The Immigration Crackdown At An 'Unsustainable Rate.'* NPR (Sep. 26, 2018), <https://www.npr.org/2018/09/26/651524569/funding-the-immigration-crackdown-at-an-unsustainable-rate>, archived at <https://perma.cc/9JQ8-J6J2>; see also *The Growth of the U.S. Deportation Machine*, AM. IMMIGR. COUNCIL (March 1, 2014), <https://www.americanimmigrationcouncil.org/research/growth-us-deportation-machine>, archived at <https://perma.cc/EUF6-CD3A> ("As budgets have grown, so has staffing. The number of Border Patrol agents deployed between ports of entry roughly doubled from 10,717 in FY 2003 to 21,394 in FY 2012. At the same time, the number of CBP officers working at ports of entry grew from 17,279 to 21,423. And the number of ICE agents devoted to Enforcement and Removal Operations more than doubled from 2,710 to 6,338 (Figure 4). All told, the number of border and interior-enforcement personnel now stands at roughly 49,000.")

<sup>189</sup> See U.S. Dep't of Homeland Sec., *supra* note 24, at 5 ("\$184.4 million for ICE's Alternatives to Detention (ATD) Program, to monitor 82,000 average daily participants within the program that may pose a flight risk, but who are not considered a threat to our communities. The ATD Program places low-risk individuals under various forms of non-detained, intensive supervision through a combination of home visits, office visits, alert response, court tracking, and/or technology, which may include electronic monitoring.");

<sup>190</sup> See Heidi Altman, *DHS's Secret Detention Expansion Is Dangerous For Immigrants, And Democracy*, NAT'L IMMIGR. JUSTICE CENTER (Jan. 10, 2019), <https://www.immigrantjustice.org/staff/blog/dhss-secret-detention-expansion-dangerous-immigrants-and-democracy>, archived at <https://perma.cc/5YGJ-38ZK> ("The agency has a track record of bypassing congressional intent by manipulating the appropriations process. ICE has for three years running: 1) massively overspent its detention budget; 2) notified Congress of its intent to raise other DHS accounts to make its detention account whole before the end of the fiscal year; and 3) used its newly inflated detention budget as the starting place for negotiations on the next year's bill. This three-step strategy is particularly effective for the agency because of a provision of appropriations law that gives DHS significant discretion to move money between accounts without requiring congressional approval. This past summer, for example, advocates obtained the transfer document showing ICE had moved nearly \$10 million from FEMA to fill its detention coffers.")

from criminal custody? The answer is most likely yes. Now that police have no deadline for when to catch “ABCD Aliens” this makes their work easier as they are able to effectively use their resources to scale up enforcement operations. In 2018, ICE arrests increased by 13%, and that was with fewer resources than were allocated in FY 2019.<sup>191</sup> Additionally, when the Obama Administration created the Secure Communities Program, there was a rapid widening of criminal liabilities as a deliberate effort to arrest more people designated as “criminal aliens” across the country particularly through widening gang databases.<sup>192</sup> As Part I.B. demonstrated, there is also an increasing trend of cooperation between local law enforcement and ICE in a backlash wave against the Sanctuary City policies.

The fourth question is whether prisons can keep up with this expansion? The answer is yes. The prison industrial complex has significantly and consistently ramped up its ability to either physically or remotely cage immigrants as evidenced by its quick buildup of tent cities, non-profit shelters, and the rapid increase of ankle monitoring technology. Now that DHS has the power to arrest and cage noncitizens any time after they are released from criminal custody without bail, there will be a higher demand for cages. Trump is planning to build more immigration cages, particularly for children, to meet this demand.<sup>193</sup> Additionally, new State prisons are being built

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<sup>191</sup> See Kristen Bialik, *ICE arrests went up in 2017, with biggest increases in Florida, northern Texas, Oklahoma*, PEW RESEARCH CENTER (Feb. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/02/08/ice-arrests-went-up-in-2017-with-biggest-increases-in-florida-northern-texas-oklahoma/>, archived at <https://perma.cc/RR3Z-K3K8> (“ICE Enforcement and Removal Operations made a total of 143,470 arrests in fiscal 2017, a 30% rise from fiscal 2016. The surge began after President Donald Trump took office in late January: From his Jan. 20 inauguration to the end of the fiscal year on Sept. 30, ICE made 110,568 arrests, 42% more than in the same time period in 2016. The Miami area of responsibility, which covers all of Florida, Puerto Rico and the U.S. Virgin Islands, saw the largest percentage increase in ICE arrests between 2016 and 2017 (76%). Next were the Dallas and St. Paul regions [up 71% and 67%, respectively]. Arrests increased by more than 50% in the New Orleans, Atlanta, Boston and Detroit regions as well.”); see also Ron Nixon, *Immigration Arrests and Deportations are rising, I.C.E. data show*, THE NEW YORK TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/politics/illegal-immigrant-arrests-deportations-rise.html>, archived at <https://perma.cc/U77Q-BQNW> (“Officials said they also deported 256,085 people last year, a 13 percent increase from fiscal year 2017. That included 5,914 undocumented immigrants, 5,872 known or suspected gang members and 42 suspected terrorists, the agency’s data show. About 90 percent of the people arrested had criminal convictions, were facing pending criminal charges or had been previously issued a final deportation order by an immigration judge.”).

<sup>192</sup> See *Overview: Secure communities*, U.S. IMMIGR. AND CUSTOMS ENF’T, (Mar. 20, 2018), <https://www.ice.gov/secure-communities>, archived at <https://perma.cc/UF2Z-F7FK> (“Secure Communities is a simple and common sense way to carry out ICE’s enforcement priorities for those aliens detained in the custody of another law enforcement agency (LEA). It uses a federal information-sharing partnership between DHS and the Federal Bureau of Investigation (FBI) that helps to identify in-custody aliens without imposing new or additional requirements on state and local law enforcement.”); see generally also, Chacon, *supra* note 88

<sup>193</sup> See John Burnett, *Inside the largest and most controversial shelter for migrant children in the U.S.*, NPR (Feb. 13, 2019 10:13 AM), <https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u->, archived at <https://perma.cc/Y29D-RX6Y> (“Homestead is like no other federal children’s shelter in America. Not only is it the biggest—it has been contracted to receive up to 2,350 kids—it’s the only youth sanctuary operated for a profit. The operator is Comprehensive Health Ser-

across the country and virtual caging methods are increasingly being used. As Part II.C.3 demonstrated, the (for-profit) prison industrial complex has been profiting massively over the caging and abuse of immigrant bodies for centuries. For-profit prisons are thriving and using their large profit margins to lobby to Congress and State's to contract with them to cage more immigrants. Moreover, for-profit prisons are driven by their legal obligation to maximize shareholder's wealth holdings which means: criminalize and cage more immigrant bodies for profit.

These are only but a few examples of how the institutional triangle of the immigration caging machine will likely expand under *Nielsen's* "any time when" holding. The triangle will be triggered to widen criminal liabilities and expand policing and prosecutorial powers to criminalize, arrest, cage, and remove more immigrants—without any signs of stopping.

## 2. Immediate "When"

If the Respondents would have won, the Court would have adopted the plain language interpretation, as the U.S. Court of Appeals for the Ninth Circuit held. The statute would be read to impose mandatory detention without bond *only* if noncitizens are taken into immigration custody *immediately* when they are released from criminal custody.<sup>194</sup> While the Court explicitly<sup>195</sup> stated that it would not have held this, the Respondents would have won by opening the opportunity for more people to be considered for bond hearings.<sup>196</sup> However, it is difficult to discern how successful this strategy would have been given the low success rates of bond hearings (30% in FY

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vices. . . .The current Homestead contract with the Department of Health and Human Services is worth up to \$220 million.”); *see also* Michelle Mark, The government is set to build a massive, \$192 million facility in El Paso to process migrant families, in the wake of 2 children’s deaths in Border Patrol custody, *INSIDER NEWS*, (Feb. 15, 2019 1:31 PM) <https://www.thisisinsider.com/new-migrant-families-processing-center-el-paso-2019-2>, *archived at* <https://perma.cc/76EC-LXPE> (“The Customs and Border Protection agency will soon be authorized to build a huge processing facility in El Paso, Texas that would be better equipped to hold migrant families.”); *see also* John M. Eason, *Why prison building will continue booming in rural America*, *THE CONVERSATION*, (Mar. 13, 2017 11:33 AM), <https://theconversation.com/why-prison-building-will-continue-booming-in-rural-america-71920>, *archived at* <https://perma.cc/MD2H-M2Q9> (“It doesn’t look like the footprint of prisons will be shrinking any time soon. Given our current political climate, it’s more likely we will see more prisons built. Weaning rural communities off the prison economy will mean considering alternative investment strategies like green industries.”)

<sup>194</sup> *Preap v. Johnson*, 831 F.3d 1193, at 1195 (9th Cir. 2016) (“8 U.S.C.S. § 1226(c) unambiguously imposes mandatory detention without bond only on those aliens taken by the Attorney General into immigration custody when they are released from criminal custody. And because Congress’s use of the word when conveys immediacy, the immigration detention must occur promptly upon the aliens’ release from criminal custody.”)

<sup>195</sup> *See Nielsen v. Preap*, No. 16-1363, 2019 WL 1245517, at \*23 (U.S. Mar. 19, 2019) (Justices Breyer, Ginsburg, Kagan, and Sotomayor holding for the dissent, “I disagree with the Court of Appeals as to the meaning of the phrase “when the alien is released.”)

<sup>196</sup> *See Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015); *see also, Gordon v. Johnson And Castaneda v. Souza*, ACLU MASSACHUSETTS, <https://www.aclum.org/en/cases/gordon-v-johnson-and-castaneda-v-souza>, *archived at* <https://perma.cc/FH3J-6N6N> (“Since 2014, the case has allowed some 200 noncitizens to be reunited with their families after showing that they did



2018), dismal access to counsel, the wide disparity of success across districts, the incredibly long court dockets, and the high costs of bonds without any required consideration of the immigrant's inability to pay.<sup>197</sup> Of course, for people held in cages any slim chance of freedom is worth the fight and this article does not want to minimize the impact that successful bond hearings have on families. Also, it is important to acknowledge that the "immediate when" holding would have significantly limited who is subject to mandatory immigration caging without bail by excluding thousands of immigrants with criminal charges and/or convictions but who have lived in their communities for years and were not detained within 24 hours after release from criminal custody, like Preap. Although this would have been a major win, it is also important to consider how this holding could have also incentivized rapid expansion of the immigration caging machine.

First, this interpretation would further entrench Congressional power to cage criminal aliens without bond as long as DHS is able to do it within twenty-four hours. This argument was central in the Respondent's Brief because they clarified that they were not challenging Congressional authority to cage noncitizens but rather were seeking to demonstrate that Congressional intent has always been to cage as many "criminal aliens" as quickly as possible without any gaps in time.<sup>198</sup> While this argument aligns with the history of caging, expansion of the deportation machine (See Part I. A-B), as well as Supreme Court precedent, this reasoning is dangerous because it further legitimizes Congressional authority to criminalize and cage people as a means for removal.

Second, Respondents then went on to argue that while Congress intended to deport as many "criminal aliens" as quickly as possible, Congress also understood that it was not allocating sufficient resources for executive enforcers to do so.<sup>199</sup> Accordingly, an "immediate when" holding could have

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not pose a danger or flight risk that warranted detention during their immigration proceedings.")

<sup>197</sup> See *Three-fold Difference in Immigration Bond Amounts by Court Location*, SYRACUSE U. TRAC IMMIGR., (July 2, 2018), <https://trac.syr.edu/immigration/reports/519/>, archived at <https://perma.cc/JW8H-CSJ7> ("In recent years somewhat over one in four detained individuals were ultimately successful in obtaining an Immigration Court custody decision that allowed them to be released by posting a bond. So far this year, this success rate has been 30.5 percent, up from 18.4 percent during FY 2014."); See data on different success rates of bond hearings across Federal districts. See low rates of access to counsel in bond hearings; Padilla for no requirement to consider noncitizen's income to determine bond eligibility.

<sup>198</sup> See, Brief for Respondent *supra* note 169, at 30-31 ("Subsequent amendments maintained the focus on an immediate transfer to immigration custody upon release from criminal custody. When some noncitizens argued that the statute could not apply to individuals released from incarceration through parole or other forms of supervised release, because their 'sentence' had not yet been completed, Congress amended the statute to clarify that it required mandatory detention of individuals upon release from criminal.")

<sup>199</sup> *Id.* at 33 ("Concerned that "the Attorney General did not have sufficient resources" to implement mandatory detention, the TPCR were "designed to give the Attorney General a . . . grace period . . . during which mandatory detention of criminal aliens would not be the general rule." *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 675 (BIA 1997). The need for a "transition period" makes sense only if Congress understood Section 1226(c) to require immediate detention at the time of release. Had Congress intended "when" to authorize detention "at any

incentivized Congress and other actors, particularly groups tied to for-profit prisons, to lobby Congress to increase DHS's budget to provide substantially more resources. As the immigrant community has been witness to for decades, and as Parts I.B demonstrate, the institutional triangle has historically received the political and financial resources necessary for expansion. While the Respondents may have been hedging their bets that a divided Congress (or possibly a Democrat controlled one) would not increase more resources to meet the infrastructural demands of an "immediate when" holding, the overwhelming historical evidence shows otherwise. Even recent immigration reform Democrat proposals continue to offer limited temporary relief for DACA and TPS while further fueling the institutional triangle to criminalize, cage, and remove more "criminal aliens." *Nielsen's* "immediate when" decision risked bolstering such Congressional action as it has done before in previous generations when the immigration caging machine required a mass influx of resources to sustain its expansion.<sup>200</sup>

An "immediate when" would not result in a substantial or sustained win for the immigrant community. Rather it would be a win for all stakeholders who profit from the immigration caging regime as they would have a stronger mandate from the Supreme Court to bolster the immigration detention regime as soon as possible. Arguably, a quick ramp up of removals would have required a larger influx of funds. As President Trump has already demonstrated, he is willing to re-allocate funding for the border wall via a National Emergency declaration. While Congress vetoed Trump's National Emergency declaration it is less clear that Democrats and Republicans, who operate solely within the tough-on-immigration paradigm, would veto another National Emergency Declaration if DHS makes the case that there is a crisis as more "criminal aliens" are not in detention and allegedly causing harm in communities. Democrats may be inclined to support such a National Emergency declaration or may re-appropriate funds given their tough-on-immigration party platform.<sup>201</sup> This is exemplified by consistent Democrat support for tough-on-immigration policies that cage more immigrants (e.g. detention bed quota, increased DHS funding, more contracts to for-profit prisons) under the Clinton and Obama Administrations. Moreover,

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time after" release, there would have been no need to provide a two-year delay in its effective date to account for resource constraints. Immigration authorities could have simply taken their resource constraints into consideration in deciding when to detain individuals.")

<sup>200</sup> See e.g., Immigration Reform and Control Act of 1986, S. 1200, 99th Congress Title I, Part B. (1985-1986) (Congress immediately authorized "a \$35,000,000 immigration emergency fund to be established in the Treasury for necessary enforcement activities and related State and local reimbursements.")

<sup>201</sup> See *supra* note 84, ("Democrats will continue to work toward comprehensive immigration reform that fixes our nation's broken immigration system, improves border security, prioritizes enforcement so we are targeting criminals – not families, keeps families together, and strengthens our economy."); see also, Brian Naylor, *ICE Detention Beds new stumbling block in efforts to prevent another shutdown*, NPR (Feb. 11, 2019 1:03 PM), <https://www.npr.org/2019/02/11/693460861/ice-detention-beds-new-stumbling-block-in-efforts-to-prevent-another-shutdown>, archived at <https://perma.cc/PL8W-AEJH> ("Roybal-Allard chairs the House Appropriations subcommittee on homeland security and is a member of the House-Senate conference committee trying to reach an agreement on spending levels.);

leading up to the 2020 Presidential elections, all Democratic candidates have consistently promised to be tough-on-immigration by prioritizing deporting “criminal aliens.”

In all, the immediate “when” interpretation would have emboldened the institutional triangle to rapidly expand the machine because of the Supreme Court mandate. This could have the unintended effect of incentivizing the triangle to criminalize, cage, and remove people as fast as possible. It is difficult to accurately detail how the institutional triangle would have been evolved its sophistication to cage more people with an “immediate when” holding because no one on the Court discussed it. However, this section sought to argue that the components for how the expansion of the immigration caging machine are present and how the “immediate when” holding would expand the machine in a unique way.

### 3. Reasonable “When”

The dissent, composed of Justices Breyer, Ginsburg, Sotomayor, and Kagan, argued that Congress intended to only deny bail to “ABCD Aliens” *only if* they were detained reasonably when (e.g. 6-months to a year) they were released from criminal custody.<sup>202</sup> Here, the dissent returned to the *Zadvydas* majority. Notably, the dissent disagreed with the Respondent’s and Ninth Circuit’s “immediate when” holding. The dissent is important to examine because it signals where the liberal wing of the Court may be persuaded to move in terms of future of immigration detention jurisprudence. The dissent offers a textualism analysis to support this holding but also argues that the Majority’s holding creates a constitutional issue because it “would give the Secretary authority to arrest and detain aliens years after they have committed a minor crime and then hold them without a bail hearing for months of years” including those who only received a fine or proba-

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<sup>202</sup> Kirstjen M. NIELSEN, Secretary of Homeland Security, et al., Petitioners, v. Mony PREAP, et al., Respondents., 2018 WL 4922082 (U.S.), 26-27 (U.S.Oral.Arg., 2018) (“JUSTICE BREYER: What about saying a reasonable time, the word —the words that we know are there, “upon his release,” means a reasonable time within his release, you know, a reasonable time. Therefore, the people who have been hiding in the mountains for 10 years, we say, well, yeah, that’s a reasonable time. \*27 But the people who have families and have jobs and have lived as citizens of the community for 14 years, that was not a reasonable time when you went 14 years later. What about that typical legal term in order to satisfy what the government says, as you say, is its major interest?”); *see also*, Nielsen v. Preap, No. 16-1363, 2019 WL 1245517, at \*24 (U.S., 2019) (“I would interpret the word “when” in the same manner as we interpreted other parts of this statute in *Zadvydas v. Davis*, 533 U.S. 678, (2001). The words ‘when the alien is released’ require the Secretary to detain aliens under subsection (c) within a reasonable time after their release from criminal custody—presumptively no more than six months. If the Secretary does not do so, she must grant a bail hearing. This presumptive 6-month limit is consistent with how long the Government can detain certain aliens while they are awaiting removal from the country.”); *see id.* at \*22 (“From this it follows that Congress saw paragraph (2) as forbidding bail hearings only for aliens who have been “released.” That, however, can be true only if the “when . . . released” provision limits the class of aliens subject to paragraph (2)’s “no-bail-hearing” requirement.”).

tion.<sup>203</sup> Thus, the dissent argues that although Congress did intend to give DHS more time to cage “ABCD Aliens,” without bail, after they were released from criminal custody, Congress limited DHS non-bail caging powers to cases where DHS detained “ABCD Aliens” less than a year after they were released from criminal custody.<sup>204</sup> Finally, the dissent argues that the majority will split families long after those facing removal have established strong ties in their community.

Nevertheless, this holding would still expand the immigration caging machine but arguably along a similar form as the machine has expanded in recent years (see Part I.B). As the dissent argues, a “reasonable when” holding would be more consistent with both current Congressional intent and resources for DHS. For example, Congress is periodically funding the Government (including DHS) via short-term stop-gap funding bills and, so, a “reasonable when” holding would allow DHS to still cage “ABCD Aliens” in light of these funding fluctuations.<sup>205</sup> Moreover, this holding better matches how legislators, police, prosecutors, and prisons in the institutional triangle work to criminalize, arrest, and cage more “ABCD Aliens.”<sup>206</sup>

This holding is also consistent with current ramp-ups of policing and prosecutorial actions. For example, in FY 2018, the number of people held in immigration detention increased by 22.5 percent for a total of 396,448 individuals booked into ICE custody. These are the same numbers that ICE used to justify a budgetary increase for FY 2019. Here the question becomes whether a 22% annual increase in immigration caging and increased Congressional funding to support this increase would match a “reasonable when” scale-up. If not, then the immigrant community would likely face a quicker ramp-up in arrests, caging, and deportations. If yes, then the pain inflicted upon immigrant community would continue at the current pace. Perhaps the former is worse but neither is truly aligned with what the vision for immigration liberation advocated by community organizers.<sup>207</sup> Moreover,

<sup>203</sup> See *Id.*

<sup>204</sup> See *Id.* at \*23 (“Congress neither wished for nor expected the Secretary to detain aliens more than a year after their release from criminal custody. IIRIRA, §303(b)(2), 110 Stat. 3009–586.”)

<sup>205</sup> See U.S. Immigr. & Customs Enf’t, *supra* note 9, at 8; see also *Budget Overview Fiscal Year 2019 Congressional Justification*, U.S. Immigr. & Customs Enf’t, Dept. of Homeland Sec at 5; see also, Painter, *supra* note 188, at 2 (In 2018 Congress funded DHS in three separate occasions and in 2019 it has done so nearly every month DHS Stopgap Funding bills are becoming more common and occurring much more frequently, often weeks from each other.).

<sup>206</sup> *Nielsen v. Preap*, No. 16-1363, 2019 WL 1245517, at \*24 (U.S., 2019) (Justice Breyer dissenting “This presumptive 6-month limit is consistent with how long the Government can detain certain aliens while they are awaiting removal from the country. *Id.*, at 682, 701 (interpreting a different provision, §1231(a)(6)). To insist upon similar treatment in this context would give the Government sufficient time to detain aliens following their release from local, state, or federal criminal custody. It would also ensure that the Government does not fall outside the 1-year maximum dictated by the transition statute.”)

<sup>207</sup> See *our values*, FREEDOM FOR IMMIGRANTS (Mar. 26, 2019), <https://www.freedomforimmigrants.org/our-values>, archived at <https://perma.cc/JVL7-V35P> (“1. We are dedicated to abolishing immigration detention while supporting the organizing and power-building initia-

the current ramp-up of the for-profit prison industrial complex is expanding physical and virtual cages to confine immigrants, as well as lobbying Congress for more funds. This is highly indicative that the prison axis of the institutional triangle is heavily invested in expanding the machine. Finally, we can look to similar large-scale immigration deportations in the past to understand that the U.S. can arrest, cage, and remove millions of people in a matter of months. For example, in 1954 Operation Wetback to round up and remove 1.3 million, mostly Mexican, immigrants were in a matter of months.<sup>208</sup>

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Admittedly, the Respondent's litigation goals were not to dismantle the deportation machine. Their goal was to ensure immediate relief for the hundreds of thousands of people, with criminal charges and convictions, who are trapped in the deportation machine and whose only way out is by bond. For those trapped in *las hieleras*, as well as for those fighting to get them out, any increased opportunity to secure bond is a win no matter how marginal the win is at chipping away at the machine. However, this article argues that the strategy may have indeed generated more harm than good because the ultimate holding vastly expanded mandatory caging. But also, this article argued that regardless of how the Court would have defined "when," the immigration caging machine would have been expanded because of its settler-colonial roots and modern operation of the institutional triangle. In all, *Nielsen* will (1) further politically and legally entrench the authority of Congress to use prisons as necessary for deportation, (2) incentivize actors, in varying ways, to bolster their investment in immigration prisons, notably for-profit prisons, and (3) dramatically increase DHS's policing power, and its networks with local and State police, to capture more undocumented bodies for criminalization, caging, and removal.

#### V. IMPLICATIONS FOR THE IMMIGRANT DIASPORA AND STRATEGIES TO MOVE TO END THE DEPORTATION MACHINE

*Nielsen* will seriously impact those most affected by the deportation machine: black, Asian, native, and brown people from low/no-income communities overwhelmingly from the global south. These communities have

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tives of those of us who are most impacted. . . 3. We know that the immigration detention system is built upon a long history of white supremacy, capitalism, and imperialism. It intentionally functions to dispossess marginalized communities and peoples of their homes and their histories.”).

<sup>208</sup> See Erin Blakemore, *The Largest Mass Deportation in American History*, HISTORY, (Mar. 23, 2018), <https://www.history.com/news/operation-wetback-eisenhower-1954-deportation>, archived at <https://perma.cc/4TSW-5DYR> (“During Operation Wetback, tens of thousands of immigrants were shoved into buses, boats and planes and sent to often-unfamiliar parts of Mexico, where they struggled to rebuild their lives. In Chicago, three planes a week were filled with immigrants and flown to Mexico. In Texas, 25 percent of all of the immigrants deported were crammed onto boats later compared to slave ships, while others died of sunstroke, disease and other causes while in custody.”).

historically been targeted by the settler-colonial politics and infrastructure of caging as a tool to control, remove, and eliminate such communities. Following the decision, these communities will likely experience more policing, arrests, convictions, caging, and removals. However, not solely because of this decision. Rather, in spite of. As this article is being written, the number of refugees trying to cross the U.S.-Mexico border is at an eleven-year high and officials expect this number to keep increasing.<sup>209</sup> Yet, the U.S. continues to respond to this humanitarian crises with more caging and cramped confined areas with little to no access to basic services.<sup>210</sup> The machine is not designed to deal with humanitarian issues with humanity because the machine is not humane. As this article has demonstrated, the immigration caging machine (like the well-oiled monster that it is) is fundamentally designed to continually and dramatically criminalize, cage, and remove (i.e. eliminate) more and more displaced people, merely because they have been politically designated as “threats.” The Respondents in *Nielsen* agree that Congress intended to design a deportation machine which would maximize the number of removals through caging. The actors in the institutional triangle of the immigration caging machine are heavily invested in expanding the machine’s sophisticated architecture. As Supreme Court precedent shows, rather than check this system, the Court has affirmed Congress’s unqualified power to determine *who* should be designated as a “threat” or “risk” and how and when to cage them.

As Part II of this article demonstrated, the immigration caging machine is deeply rooted in settler-colonial practices human bondage, slavery, and forced-labor as forms of control and elimination, all underpinned by politics of white supremacy, xenophobia, and imperialism. Once these roots are uncovered, we see that any attempt to reform the machine ignores how pervasive these roots are at expanding and refining the immigration caging machine. Accordingly, we must question whether reformist litigation tactics which attempt to marginally chip away at the caging machine are most effective at securing liberation. That is not to say that reformist strategies have not generated some material wins. They have. This article does not seek to minimize what these wins mean to the individuals released on bond as well as their families. On the contrary, it is hard to find any immigration lawyer and immigrants who are satisfied with the current immigration system and its expansion. However, as *Nielsen* demonstrates, reformist strategies run the

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<sup>209</sup> See Dara Lind, *Why border crossings are at an 11-year high, explained in 500 words*, VOX (Mar. 6, 2019 4:05 PM), <https://www.vox.com/2019/3/6/18253444/border-statistics-illegal-immigration-trump>, archived at <https://perma.cc/72HE-RADD> (Over 66,450 people attempted to cross in February 2019. “Almost two-thirds of Border Patrol apprehensions are of parents and their children. While we don’t have complete historical data, it seems likely that more families are coming to the US without papers than ever before.”).

<sup>210</sup> See Eoin Higgins, *‘We are running concentration camps’: Images from El Paso stir outrage over migrant treatment*, COMMON DREAMS (Mar. 28, 2019) <https://www.common-dreams.org/news/2019/03/28/we-are-running-concentration-camps-images-el-paso-stir-outrage-over-migrant?fbclid=IwAR1mgRNiXaA71BjTvVJmez6Gra0nfzCMmpkFys5UJnKm50PBcAOXDjvHTA>, archived at <https://perma.cc/ZYK4-BYED>

high risk of blowback by further expanding the machine. This article sought to argue that, regardless of *Nielsen*, we must fight against the ever-expanding machine by abolishing it.<sup>211</sup>

As Derrick Bell famously argued with his interest convergence theory, “Racial justice - or its appearance - may, from time to time, be counted among the [white] interests deemed important by the courts and by society’s policymakers.”<sup>212</sup> That is, immigrant liberation, which is a part of black, brown, Asian, and native liberation, will always be limited as long as the machine benefits those whom the Court and legislators are designed to protect— i.e. the white citizen. Through this lens, we uncover that the Court’s continued rationales, of security and flight risks, for upholding mandatory caging without bond are inherently racialized and beholden to the settler-colonial logic. Whose security is being protected by mandatory caging without bail? Who are immigrants a “threat” to? Why is the mere existence of immigrants criminalized? Whose interests are advanced by expanding the immigration caging machine? These questions are rhetorical but must be answered as a step towards abolishing the machine because Bell’s interest convergence theory is salient in immigrants’ rights struggle in that substantial changes have historically come by appealing those with political power, who are largely white voters. However, as this article has demonstrated, this strategy has resulted in limited and temporary immigration relief while further expanding the immigration caging machine. Nevertheless, Bell’s interest convergence theory prompts immigrant rights organizers to consider how to strategically appeal to divergent views of other political and societal actors (i.e. documented whites with voting power) in effectuating an effective immigration reform agenda.<sup>213</sup> Yet this article has sought to argue that we must move beyond reform, towards abolition.

While some argue<sup>214</sup> that immigrant rights organizers do not have a cohesive vision for reform, some organizers and directly impacted communities have moved beyond the question of reform and instead are moving to abolish the immigration caging machine.<sup>215</sup> Accordingly, organizers are

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<sup>211</sup> See Critical Resistance, *What is Abolition?*, <http://criticalresistance.org/wp-content/uploads/2012/06/What-is-Abolition.pdf>, archived at <https://perma.cc/NZ79-ZFYF> (last visited Mar. 28, 2019) (states that the abolitionist goal, in context of the prison industrial complex, is to “shrink the system into nonexistence” and endorsing “small steps that move us toward abolition.”)

<sup>212</sup> Derrick A. Jr. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 533 (1980), at 523.

<sup>213</sup> Mariela Olivares, *Resistance Strategies in the Immigrant Justice Movement*, 39 N. Ill. U. L. Rev. 1, 47, at 6 (2018)

<sup>214</sup> *Id.*

<sup>215</sup> See, e.g., MIJENTE, *FREE OUR FUTURE: AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA*, [https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform\\_0628.pdf](https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf), archived at <https://perma.cc/2XQT-NJ52> (2018) (last visited Mar. 29, 2019) (Policy demands include abolishing ICE, repealing laws that criminalize migration, ending Operation Streamline, enacting non-cooperation policies at the State level that go beyond ‘Sanctuary’ laws, ending all forms of immigration detention, ending all contracts between private sector and governmental agencies involved in immigration enforcement, defunding border patrol, banning the use of military on the border, stop funding other governments to carry out

pushing towards a radical conception of law that abolishes the multiple intersecting systems of subordination.<sup>216</sup> This brings the question of whether abolishing the immigration caging machine can be achieved through impact litigation strategies? The *Nielsen* strategy complicates the use of impact litigation as a tool towards abolition because in this case, the impact litigation strategy might have contributed to the expansion and refinement of the immigration caging machine. Moreover, this raises questions about whether using limited resources on impact litigation strategies, which marginally chip away at the deportation machine, are worth it. This is a question that leaders of impact litigation firms must decide in conjunction with community organizers. Can resources be better use to get us close to abolishing the immigration caging machine? Perhaps. For example, funding direct action grass-roots strategies to physically shut-down immigration prison centers,<sup>217</sup> funding prison divestment campaigns, and adopting the radical secessionists models<sup>218</sup> to create safe harbor and power-building enclaves could be more powerful. Moreover, impact litigation resources could be used strategically to challenge Congressional plenary power over immigration in courts and to mobilize a national multi-ethnic coalition for large scale political action, like those that stopped the 2006 Sensenbrenner Immigration Bill (H.R. 4437).<sup>219</sup> However, for many movement lawyers, their work has evolved from traditional lawyering to instead lending their legal skills to support abolition campaigns of grassroots organizers. For example, organizations like ArchCity

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U.S. immigration policies; THE MOVEMENT FOR BLACK LIVES, A VISION FOR BLACK LIVES: POLICY DEMANDS FOR BLACK POWER, FREEDOM, & JUSTICE, <https://policy.m4bl.org/wp-content/uploads/2016/07/20160726-m4bl-Vision-Booklet-V3.pdf>, archived at <https://perma.cc/6NEH-9SPB> (last visited Mar. 29, 2019) (“An end to the war on Black immigrants including the repeal of the 1996 crime and immigration bills, an end to all deportations, immigrant detention, and Immigration and Custom Enforcement (ICE) raids, and mandated legal representation in immigration court.”)

<sup>216</sup> See Anna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 479 (2018), at 461 (“The abolitionist ethic permeates the Vision, which calls for an “end” to various punitive and exploitative practices. To take but a few examples, the Vision calls for an end to police in schools; mass surveillance by police; privatization of police; capital punishment; money bail, fines, and fees; the use of criminal history as relevant to determining access to housing, education, voting and other rights and benefits; immigration detention and deportation and ICE raids.”)

<sup>217</sup> See Jeremy Redmon, *Protestors: Shut down ICE detention centers in Georgia*, AJC (May 25, 2017) <https://www.ajc.com/news/breaking-news/protestors-shut-down-ice-detention-centers-georgia/udhTwSAw60c5XcmrpguNPP/>, archived at <https://perma.cc/2WYW-S3Z4>; see also Raices Launches ABOLISH ICE Box campaign at SXSW in Austin, Texas, RACIES (Mar. 8, 2019) <https://www.raicestexas.org/2019/03/08/raices-launches-abolish-ice-box-campaign-at-sxsw-in-austin-texas/>, archived at <https://perma.cc/4TWP-QQDS> (The re-created ice box is a 8 x 20 foot storage pod and it will be part of a campaign we’re launching calling on ICE and CBP to stop holding migrants in these inhumane conditions, and especially in these cold rooms [#AbolishICEBox, #NoMasHieleras].”).

<sup>218</sup> See RICHARD PRICE MAROON SOCIETIES: REBEL SLAVE COMMUNITIES IN THE AMERICAS: 2 (The John Hopkins University Press 1996), (“Throughout Afro-America, such communities stood out as a heroic challenge to white authority, and as the living proof of the existence of a slave consciousness that refused to be limited by the white’s conception or manipulation to it.”)

<sup>219</sup> See generally CHRIS ZEPEDA-MILLÁN, *LATINO MASS MOBILIZATION: IMMIGRATION, RACIALIZATION, AND ACTIVISM*. (Cambridge University Press, 2017).



Defenders' provide a model for how to work with community organizers, like St. Louis Action Council and Close the Workhouse, to abolish cash bail and jails via impact litigation, policy, and direct action.<sup>220</sup> Future legal scholarship can help answer these questions as well as develop strategic abolition interventions.

Aside from litigation strategies, organizers are adopting incrementalist abolitionist strategies to shrink the footprint of the immigration caging machine by boycotting investors and collaborators of for-profit prisons<sup>221</sup>, ending local government contracts with ICE<sup>222</sup>, and organizing around sanctuary state policies with some mixed results.<sup>223</sup> Moreover, organizers are connecting struggles against climate change<sup>224</sup>, gender and transphobic violence<sup>225</sup>,

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<sup>220</sup> See Thomas Harvey, *Cash Bail Ends in St. Ann: Archcity Defenders Enters into settlement with the city of St. Ann*, ARCHCITY DEFENDERS (Sep. 04, 2018), <https://www.archcitydefenders.org/cash-bail-ends-in-st-ann-archcity-defenders-enters-into-settlement-with-the-city-of-st-ann/>, archived at <https://perma.cc/7YHX-SK3A> (“ArchCity Defenders believes that no human being should be held in a cage, before or after trial, because of his poverty. This agreement builds on previous victories that set a precedent that should be applied nationally, ensuring that no arrested person remains in jail simply because they are too poor to pay bail. We’ve simply become too comfortable with locking up poor and Black people up in America. This agreement paves the way for transformational change to a justice system both regionally and nationally.”).

<sup>221</sup> Reuters, *JPMorgan to stop financing private prisons and detention centers are protests*, NBC NEWS (Mar. 5, 2019 4:24 PM) <https://www.nbcnews.com/news/us-news/jpmorgan-stop-financing-private-prisons-detention-centers-after-protests-n979491>, archived at <https://perma.cc/A4H7-56PY> (“[JPMorgan] will no longer bank the private prison industry.”)

<sup>222</sup> See Amy Taxin, *Orange County Ending Contract With ICE to Hold Immigrant Detainees*, KQED (Mar. 27, 2019), <https://www.kqed.org/news/11735974/orange-county-ending-contract-to-hold-immigrant-detainees>, archived at <https://perma.cc/N9MH-J3YE>; see also Sophie Kasakove, *Cities are saying ‘No’ to ICE by canceling their contracts with the agency*, THE NATION (July 2, 2018), <https://www.thenation.com/article/cities-saying-no-ice-canceling-contracts-agency/>, archived at <https://perma.cc/RTG9-9GXH> (Documents how the following cities/counties have canceled their contracts with ICE: Philadelphia, Seattle, Sacramento County, Springfield [Oregon], Alexandria [Virginia], Williamson County [Austin, TX]).

<sup>223</sup> See TURING THE GOLDEN STATE INTO A SANCTUARY STATE: A REPORT ON THE IMPACT AND IMPLEMENTATION OF THE CALIFORNIA VALUES ACT (SB 54), ASIAN AMERICANS ADVANCING JUSTICE- ASIAN LAW CAUCUS & UNIVERSITY OF OXFORD CENTRE FOR CRIMINOLOGY BORDER CRIMINOLOGIES, (March 2019) at 3 (“In its first five months from January 2018 to May 2018, SB 54 implementation led to a 41% decrease in ICE arrests at local jails compared to the immediately preceding five months from August 2017 to December 2017.”) But see *Id.* (“Twenty-four out of fifty-eight, or 41%, of Sheriff’s Departments have taken advantage of this latter exception by posting on their department websites release date information for individuals in their custody in advance of their release, upcoming court hearing dates and locations, and detainee personal information including city of residence and occupation. This practice provides ICE an opportunity to detain and deport people at the point of release from LEA custody even though the individual may not have the criminal conviction history that would allow LEAs to conduct an in-custody transfer to ICE or directly notify ICE of the individual’s release date.”)

<sup>224</sup> See Adam Wernick, *Climate change is contributing to the migration of Central American refugees*, PRI (July 15, 2018 10:00AM), <https://www.pri.org/stories/2018-07-15/climate-change-contributing-migration-central-american-refugees>, archived at <https://perma.cc/ABE6-YQUQ>; see also Michael Kimmelman, *Climate change is threatening to push a crowded capital toward a breaking point*, THE NEW YORK TIMES (Feb. 17, 2017), <https://www.nytimes.com/interactive/2017/02/17/world/americas/mexico-city-sinking.html>, archived at <https://perma.cc/6CWB-832F> (“One study predicts that 10 percent of Mexicans ages 15 to 65 could eventually

police abolition,<sup>226</sup> as well as racial capitalism and militarized imperialism<sup>227</sup>, to the immigrant liberation struggle. Indeed, the entire political and legal construction of “citizenship,” as a mechanism to allocate civil, social, legal, economic and political rights, is being questioned. Thus, abolishing the immigration caging machine is linked with global struggles for liberation against *all* systems of subordination. The machine is only one part of a much larger ecosystem of oppression which must all be abolished. For example, abolitionist organizers and movement lawyers can look to global struggles against apartheid and settler-colonialism, like those in South Africa and Palestine to draw transnational solidarity. Doing so illuminates the similar institutions and actors, like the G4S Security company,<sup>228</sup> participating in oppression in multiple contexts. Moreover, a global analysis demonstrates that criminalizing and caging people as a tool of control, oppression, and elimination is use by oppressive regimes worldwide because they learn from one another and employ similar tactics of oppression. Our oppressors are more united than ever and our oppressions are more intersectional than ever. Thus, globalized oppression necessitates globalized and intersectional struggles for liberation. Once these abolitionist movements and visions converge, liberation will be achieved. Future scholarship can continue to uncover these

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try to emigrate north as a result of rising temperatures, drought and floods, potentially scattering millions of people and heightening already extreme political tensions over immigration.”).

<sup>225</sup> See Duncan Tucker, Louise Tillotson, and Sergio Ortiz, ‘*It breaks my heart, but I have to keep going*’: the Honduran women forced to leave their homeland, AMNESTY INTERNATIONAL (Nov. 13, 2018 4:33 PM), <https://www.amnesty.org/en/latest/news/2018/11/it-breaks-my-heart-but-i-have-to-keep-going-the-honduran-women-forced-to-leave-their-homeland/>, archived at <https://perma.cc/8UNB-YQA9> (“women accounted for about 30 percent of the 4,700 people at the shelter as of November 6, with many of them accompanied by young children. . . . transgender women in Central America are at particularly high risk of violence and extortion by gangs and abuse by police.”).

<sup>226</sup> Derecka Purnell, *What Does Police Abolition Mean?*, BOSTON REV., Aug. 23, 2017 <http://bostonreview.net/law-justice/derecka-purnell-what-does-police-abolition-mean>, archived at <https://perma.cc/R99B-UKFY>

(“Oppressed people must give up the systems that harm them. Police are not public, nor good. Departments arrest for profit and sell vulnerable people to jails and prisons to fill beds. Cities incentivize and reward police officers for maximizing their ticket writing and traffic stops.”)

<sup>227</sup> See WILLIAM I. ROBINSON & XUAN SANTOS, *Global Capitalism, Immigrant Labor, and the Struggle for Justice*, 2 CLASS, RACE AND CORPORATE POWER 3, (2014) at 6–7 (“State controls over immigrant labor and the denial of civil, political, and other citizenship rights to immigrant workers are intended not to prevent but to control the transnational movement of labor and to lock that labor into a situation of permanent insecurity and vulnerability. The global working class thus becomes divided between ‘citizen’ and ‘immigrant’ labor. The creation of these distinct categories [‘immigrant labor’] replaces earlier direct colonial and racial caste controls over labor worldwide. The struggle of immigrant workers is therefore at the cutting edge of popular struggles worldwide against the depredations of global capitalism.”).

<sup>228</sup> ANGELA DAVIS, *Freedom is a Constant Struggle* (Haymarket Books 2016): 55–56 (“G4S is the third-largest private corporation in the world. . . . G4S has insinuated itself into our lives under the guise of security and the security state- from the Palestinian experience of political incarceration and torture to racist technologies of separation and apartheid; from the wall in Israel to prison-like schools in the US and the wall along the US-Mexico border. G4S Israel has brought sophisticated technologies of control to HaSharon prison, which includes children among its detainees, and Damum prison, which incarcerates women.”)

intersections of oppression and point to pressure points to focus abolitionist efforts.

This article ends with the call, as many other scholars and activists have argued, that abolition is not only possible but it is our moral imperative. Much like the call to end slavery was carried out through generations, so must the call to abolish the immigration caging machine as well as all systems tied to it. As this article has demonstrated, the roots of the deportation machine are rotten at the core. There are no possible reformist strategies that can make these rotten roots better. The only logical step is to abolish the immigration caging machine entirely through a large-scale global, multi-ethnic, and intersectional movement.

