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Slavery by Another Name: 'Voluntary' Immigrant Detainee Labor and the Thirteenth Amendment

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SLAVERY BY ANOTHER NAME: “VOLUNTARY” IMMIGRANT DETAINEE LABOR AND THE THIRTEENTH AMENDMENT

Anita Sinha*

During the McCarthy era, Congress passed an obscure law authorizing detained immigrants to work for a payment of one dollar a day. The government justified the provision, which was modeled after the 1949 Geneva Convention’s protections for prisoners of war, in the context of the period’s relative heightened detentions of noncitizens. Soon afterwards, the enactment of the Immigration and Nationality Act of 1952 diminished the use of detention drastically, and the practice of detainee labor lay dormant for decades.

Modern changes to immigration law and its systems have rendered immigration detention today the largest mass incarceration movement in U.S. history. The use, and in some cases abuse, of detainee labor is one of the symptoms of an epidemic involving the growing influence of the criminal justice system and prison industry on immigration enforcement. This Article uncovers the historic origins of paid detainee labor, and then situates the practice within a contemporary immigration system that includes for-profit corporations and increasingly punitive characteristics. It examines the legal and policy distinctions between criminal incarceration and immigration detention. In doing so, it describes how detainee labor, particularly in cases when the work is forced, is a violation of the Thirteenth Amendment’s prohibition of slavery and involuntary servitude. The Article concludes by offering additional specific and systemic

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recommendations, with the overarching objective of scaling back on the immigration detention system's trend of operating more like a penal than civil institution.

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INTRODUCTION

During the spring of 2014, Hassall Moses was detained at the Northwest Detention Center, a 1575-bed immigration detention facility owned by The GEO Group, Inc. (GEO),¹ a for-profit prison company. A sprawling campus-like structure built in Tacoma, Washington “on a badly contaminated Superfund site,”² the Northwest Detention Center is one of the largest immigration detention facilities in the country. During Moses’s detention, the facility made headlines when about 700 of the detainees engaged in a hunger

1. *Northwest Detention Center*, GEO GRP., INC., <http://www.geogroup.com/maps/locationdetails/52> (last visited Aug. 16, 2014). GEO was established in 1983 as a division of the Wackenhut Corporation, and changed its name in 2003 from the Wackenhut Corrections Corporation to The GEO Group, Inc. *History*, GEO GRP., INC., <http://geogroup.com/history> (last visited Oct. 8, 2014).

2. Max Blumenthal, *Why Immigrant Detainees Are Turning to Civil Disobedience*, NATION (May 23, 2014), <http://www.thenation.com/article/179987/why-immigrant-detainees-are-turning-civil-disobedience#>.

strike protesting the conditions of their confinement.³ The detainees’ demands included adequate medical care, an end to indefinite waits for their court hearings, and better-quality food.⁴

The Northwest Detention Center personnel allegedly retaliated by placing a number of the hunger-striker detainees in solitary confinement, among other ways.⁵ One of these detainees was Moses, who claimed that he was put in solitary for “encouraging others to participate” in the strike, including by calling for a “no working strike.”⁶ The latter implicated the work conducted by detainees inside the facility—labor under the U.S. Department of Homeland Security’s (DHS) “Voluntary Work Program” (VWP) that, as Moses described, rendered detainees “the backbone of [the] detention center.”⁷ The demand associated with the work strike was an increase in pay because, in Moses’s words, it “is a modern-day slavery that we [detainees] are working for a dollar a day.”⁸

The Northwest Detention Center strike is part of a broader context involving a bloated detention system within an immigration structure that is in crisis. Detaining immigrants is now the “largest mass incarceration movement in U.S. history.”⁹ Since 2009, Congress has ensured that more than 33,000 noncitizens are detained on average each day,¹⁰ resulting in approximately 400,000 immigrants in the detention system a year. Those who are detained are

3. Dan Berger & Angélica Cházaro, *Guest: What’s Behind the Hunger Strike at Northwest Detention Center*, SEATTLE TIMES, (Mar. 19, 2014, 5:08 PM), http://seattletimes.com/html/opinion/2023173231_danbergerangelicachazaropedprisonhungerstrike20.xml.html.

4. Berger & Cházaro, *supra* note 3; Blumenthal, *supra* note 2.

5. *See* Berger & Cházaro, *supra* note 3.

6. Interview with Hassall Moses (audio transcript on file with the author).

7. *Id.*

8. *Id.*; *see also* Berger & Cházaro, *supra* note 3.

9. *Melissa Harris Perry: Working in America for \$1 a Day* (MSNBC television broadcast June 1, 2014), *available at* <http://www.msnbc.com/melissa-harris-perry/watch/working-in-america-for-1-a-day-271647299870>; *see also* DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 1, 2 (2009), *available at* <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (finding that “ICE operates the largest detention and supervised release program in the country”). In Fiscal Year 2014, Congress allocated nearly \$3 billion in funding for immigration detention programs. Complaint at 14, *Det. Watch Network v. U.S. Immigration & Customs Enforcement*, No. 14-CV-00583 (S.D.N.Y. Jan. 30, 2014).

10. This per-day detention average is the result of a Congressional mandate first passed in 2008 subjecting DHS to what has been referred to as a “bed quota.” *See infra* Part I.B. Some question, however, whether this funding allocation constitutes a mandate. For example, the Freedom of Information Act lawsuit on the subject filed by Detention Watch Network seeks, *inter alia*, DHS’s reasoning for interpreting the mandate as a law enforcement quota and not a funding earmark. Complaint, *supra* note 9, at 11. On July 3, 2014, the Southern District of New York ordered DHS to produce the requested documents on a monthly basis. *Detention Watch Network (DWN) v. Immigration Customs & Enforcement (ICE)*, CTR. FOR CONST. RTS., <http://www.ccrjustice.org/bed-quota-foia>.

amongst the noncitizens the government has placed in removal proceedings, including lawful permanent residents, asylum seekers, and those with “status violations”—individuals who are undocumented because they entered without inspection or overstayed their visa.¹¹ Many who are detained are subject to mandatory detention,¹² which means there is little to no discretionary determination of whether they should be locked up.¹³ Unlike prison sentences in the criminal context, immigration detention is inherently indeterminate, and due in part to the extensive backlogs in the immigration court system,¹⁴ the

11. Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 13 (2009) (“The people in our immigration detention are not just the newly arrived or the ‘criminal offender.’ In fact, a large number of the detained are either long term permanent residents or those who are pursuing a claim for protection from persecution or torture.”); see PEW HISPANIC CTR., *MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION* (May 22, 2006), available at <http://pewhispanic.org/files/factsheets/19.pdf> (“Nearly half of all the unauthorized migrants now living in the United States entered the country legally through a port of entry such as an airport or a border crossing point where they were subject to inspection by immigration officials.”); *The Ones They Leave Behind: Deportation of Lawful Permanent Residents Harms U.S. Citizen Children*, IMMIGRATION POLICY CTR. (Apr. 26, 2010), <http://www.immigrationpolicy.org/just-facts/ones-they-leave-behind-deportation-lawful-permanent-residents-harm-us-citizen-children>. Ten percent of noncitizens deported by the government each year are Legal Permanent Residents. Keegan Hamilton, *Asylum Insanity: Welcome to the Land of the Free*, VILLAGE VOICE (Apr. 8, 2014), http://blogs.villagevoice.com/runninscared/2014/04/asylum_insanity_welcome_to_the_land_of_the_free.php?page=all.

12. See 8 U.S.C. § 1226(c) (2013) (requiring certain categories of immigrants to be detained during removal proceedings). According to a report issued by ICE in 2009, sixty-six percent of detainees are considered subject to mandatory detention. SCHRIRO, *supra* note 9, at 6.

13. Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL’Y REV. 429, 438 (2011) (“Unlike many prisoners, non-U.S. citizens detained by ICE are practically denied the chance at judicial review of their detention.”). Individuals subject to mandatory detention may request a *Joseph* hearing, but this option is riddled with procedural defects. See *infra* Part I.B. Congress over the past several decades has vastly broadened what renders an immigrant subject to mandatory detention, predominantly by expanding the definition of what constitutes an “aggravated felony.” Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. TIMES (Mar. 30, 2010), http://www.nytimes.com/2010/03/31/nyregion/31drug.html?pagewanted=all&_r=0; Steve Patrick Ercolani, *Why Are Immigrants Being Deported for Minor Crimes?*, ATLANTIC (Nov. 20, 2013), <http://www.theatlantic.com/national/archive/2013/11/why-are-immigrants-being-deported-for-minor-crimes/281622/>.

14. Ana Campoy, *Clogged Immigration Courts Slow Hearings*, WALL ST. J. (Aug. 11, 2014), <http://online.wsj.com/articles/clogged-immigration-courts-slow-hearings-1407800048>; Suzy Khimm, *Many Immigrants Facing Deportation Must Wait 550 Days for Their Day in Court*, WASH. POST (Feb. 22, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/22/many-immigrants-facing-deportation-must-wait-550-days-for-their-day-in-court/>; Dara Lind, *How the Government Became the Single Biggest Employer of Unauthorized Immigrants*, VOX (May 26, 2014), <http://www.vox.com/2014/5/26/5752392/how-the-government-became-the-single-biggest-employer-of-unauthorized>.

average time some noncitizens remain in detention has gotten longer.¹⁵

A key difference from criminal incarceration is that immigration detention was not conceived to be punitive, and despite its present scope and institutional design,¹⁶ immigration detention remains a civil, regulatory scheme. The justification for detention is to ensure that noncitizens do not abscond prior to their hearings, or in cases when they have been ordered to be deported, prior to their removal from the United States.¹⁷ The fact that immigration detention is not punishment exempts the system from many rights afforded in the criminal context, including the right to counsel.¹⁸ It also raises the question of whether immigration detainee labor is a violation of the Thirteenth Amendment’s prohibition of slavery and involuntary servitude, particularly in cases when detainees allege that the work is forced.

Congress authorized the use of voluntary paid detainee labor over six decades ago, two years before federal immigration law was first codified in the Immigration and Nationality Act (INA).¹⁹ The law merits scrutiny in today’s context of mass incarceration of immigrants, where the voluntary nature of the work detainees perform is dubious, both in certain specific incidents of alleged forced labor and also, arguably, because of the for-profit motive behind today’s VWP. The number of individuals who have gone through the immigration detention system within a given year has more than doubled, from 204,459 in 2001 to 478,000 in 2012.²⁰ With this expansion, immigration detention has become a very lucrative business—almost half of the facilities are owned or operated by for-profit corporations,²¹ with the Corrections Corporation of

15. There are considerable differences in lengths of detainees’ incarceration based on factors ranging from in which state they are detained, to whether they are contesting their removal. *Legal Noncitizens Receive Longest ICE Detention*, TRACIMMIGRATION (June 3, 2013), <http://trac.syr.edu/immigration/reports/321>.

16. See generally Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137 (2013) (describing how the legal institutions and administrative rules governing immigration detention, including an overreliance on mandatory detention and burden-shifting schemes, frustrate the purpose of detention as a tool for immigration enforcement).

17. But see BILL ONG HING, *DEPORTING OUR SOULS* 104-15 (2006) (detailing how detention is largely unnecessary to achieve these goals, and that alternatives to detention such as ankle bracelet monitoring essentially accomplish the same results).

18. See *infra* Part I.A.

19. See *infra* Part III.A. This provision was codified separately under Title 8 of the U.S. Code after the creation of the INA as 8 U.S.C. §1555(d).

20. Complaint, *supra* note 9, at 9.

21. Chris Kirkham, *Private Prisons Profit from Immigration Crackdown, Federal and Local Law Enforcement Partnerships*, HUFFINGTON POST (Nov. 26, 2013), http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement_n_1569219.html. I will predominantly use “for-profit” instead of “private” to designate corporate involvement in immigration detention facilities because, as was pointed out to me by an advocate working on these issues, “private” is often mistaken for better conditions, e.g. a private school. “For-profit,” on the other hand, is more explicit as far as the structural and operational motivations for an entity’s control over a detention facility.

America (CCA)²² and GEO as the two largest companies in the immigration detention business.²³ Detainee labor plays a significant role in how these corporations maximize their profits:

[In 2013], at least 60,000 immigrants worked in the federal government’s nationwide patchwork of detention centers—more than worked for any other single employer in the country The cheap labor, 13 cents an hour, saves the government and the private companies \$40 million or more a year by allowing them to avoid paying outside contractors the \$7.25 federal minimum wage.²⁴

This Article questions the legality of paid detainee labor as it operates today. The use, and in some cases abuse, of detainee labor is one of the myriad symptoms of an epidemic involving the growing influence of the criminal justice system and prison industry on immigration enforcement. The immigration detention system is a civil system, although as this Article will discuss, it has taken a significant punitive turn. As such, immigrants are increasingly treated like criminals, even as the two statuses remain distinct. Prison labor in the criminal justice system has been deemed constitutional, specifically on account of the Exception Clause contained in the Thirteenth Amendment.²⁵ With the increasing overlap between the criminal justice and immigration systems, importing yet another element, this time custodial labor, from the criminal into the immigration context easily could go unnoticed. I argue that it should not.

The Article’s title is a reference to Douglas Blackmon’s Pulitzer Prize-winning book, *Slavery by Another Name*,²⁶ to emphasize how detainee labor fits into structural forces—in particular, American capitalism and the legal system—that drive the way in which exploitable labor is and has been constructed in the United States. In doing so, however, I recognize the significant difference in severity between the brutal discrimination, criminalization, and state-sponsored harm inflicted upon African Americans post-Emancipation, and the subject matter of detainee labor which is the focus

22. See Complaint, *supra* note 9, at 10 (“CCA earned \$752 million in federal contracts in 2012.”).

23. César Cuauhtémoc García Hernández, *Private Prison Companies Continue Thriving Off Immigration Imprisonment*, CRIMMIGRATION (Sept. 18, 2014 4:00 AM), <http://crimmigration.com/2014/09/18/private-prison-companies-continue-thriving-off-immigration-imprisonment-2>; see also William Selway and Margaret Newkirk, *Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit*, BLOOMBERG (Sept. 23, 2013 9:01 PM), <http://www.bloomberg.com/news/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants.html>.

24. Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor: Detainees Resist a U.S. Program that Puts Them to Work for \$1 a Day or Less*, N.Y. TIMES (May 25, 2014), http://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html?_r=1.

25. See *infra* Part III.A.

26. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

of this Article. Drawing the comparisons between the systematic treatment of African Americans and immigrant detainees, however, reveals critical themes surrounding fairness and justice today, including the tolerance of legal discrimination against certain communities of color, and what Michelle Alexander names as the racial dimension of mass incarceration and the reconfiguration of a racial caste in this country.²⁷ This Article will touch upon these themes implicitly and at times expressly, although exploring thoroughly the important intersectionalities between immigrants, poverty, people of color, prisoners, and low-wage work is beyond its scope.

Part I provides a historical, legal, and policy overview of the immigration detention system. It discusses the well-settled construction of immigration enforcement, including detention, as a civil system. Part I also examines how modern reforms to U.S. immigration law and infrastructure have created an almost unquestioning criminalization of noncitizens, including their mass incarceration, which has been a significant boon to for-profit companies. Part II focuses on the practice of voluntary paid detainee labor. It details its legislative history, outlines modern analyses and the operation of the Voluntary Work Program, and discusses the range of reported problems associated with the practice.

Part III presents how detainee labor, especially in cases when it is allegedly forced, is a violation of the Thirteenth Amendment’s protection against slavery and involuntary servitude. In doing so, this Part examines the difference between custodial labor in the criminal justice and immigration settings, specifically by discussing the exception clause of the Thirteenth Amendment and the treatment of prison labor in the pretrial context. Finally, the Conclusion offers an array of additional recommendations aimed at improving the practice of paid detainee labor, with a focus on both specific and systemic changes.

I. IMMIGRATION DETENTION, PUNISHMENT, AND PROFIT

The objectives and use of immigration detention in the United States have changed dramatically in the past three decades. The present-day scale and structure of the system is virtually unrecognizable when compared to the manner in which it operated from its inception until the 1990s. Modern legislative and policy reforms have rendered immigration detention today to appear and function more like the criminal justice system than one that is still civil in nature. This transformation puts into question the relationship between detention’s rationale and its function today. Modern reforms to the immigration system also have heralded an era of mass incarceration of noncitizens, with for-profit corporations making a lucrative business out of detaining immigrants.

27. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

A. The Legal and Policy Construction of Immigration Detention as a Civil Scheme

The first federal immigration law that applied generally to noncitizens was the Immigration Act of 1882.²⁸ The Act's intent echoed those of state immigration laws that governed migration up until this point,²⁹ namely to keep out those deemed to be undesirable, including prohibiting “the landing of paupers and criminals and provid[ing] for the deportation of criminals who escaped exclusion at the time of arrival.”³⁰

But the 1882 Immigration Act did not mention, let alone authorize, detention,³¹ and it was almost another decade before Congress created federal immigration detention power.³²

A legislative review body known as the Ford Committee, tasked to investigate the operation of the 1882 Act, first raised the issue of federal detention power.³³ Amongst its findings was the practical problem of inspecting thousands of immigrants per day without the ability to detain at least a portion of the incoming flow.³⁴ In response, Congress in 1891 passed the first statute authorizing immigration detention at the federal level—the same year it created the federal prison system.³⁵ The intent of creating a federal immigration detention power was not “to restrict immigration, but to sift it, to separate the desirable from the undesirable immigrants.”³⁶ In other words, the purpose of

28. Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, J. AM. HIST. 1092, 1093 (2013). The first Chinese Exclusion Act was enacted in the same year. Under the Immigration Act of 1882, immigration regulation and enforcement was a matter of state law. The exception was a set of federal statutes passed in 1798 that restricted the rights of citizens and non-citizens to criticize the government, or to take acts that might organize opposition to the federal government. Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1881 (1993) (“[T]he federal government briefly entered the alien regulation business in 1798. The package of legislation known to history as the Alien and Sedition Acts included three statutes directed specifically at aliens: the Naturalization Act of 1798, the Alien Enemies Act, and the Alien (or Alien Friends) Act.”).

29. The federal law was modeled after the immigration laws of New York and Massachusetts in particular. Hirota, *supra* note 28, at 1095.

30. Hirota, *supra* note 28, at 1093. The enactment of a general federal immigration law, however, did not signal exclusive federal control over migratory matters—the administration of immigration enforcement during the 1880s was carried out as a joint state-federal schema. *Id.* at 1094.

31. DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 11 (2011).

32. *Id.*

33. *Id.* at 12.

34. *Id.*

35. See James Houston, *Shifting the Paradigm: Classification and Programs in Prison*, 20 CRIM. JUST. REV. 66, 68 (1995); Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1023 (2009).

36. WILSHER, *supra* note 31, at 12 (quoting WILLIAM D. OWEN, REPORT OF THE SELECT COMMITTEE ON IMMIGRATION AND NATURALIZATION, H.R. REP. NO. 51-3472, at II-III (1891))

detention was to facilitate processing.³⁷ During this era, if the government initiated deportation proceedings after admission, it was “not as an exercise of social control over individuals long resident in the United States, but as an extension of the power to admit (or refuse admission to) arriving aliens.”³⁸

Soon after Congress created the federal immigration detention system, the Supreme Court established, in two seminal opinions, that both deportation and detention are civil in nature. In 1893, the Court in *Fong Yue Ting v. United States* held that “deportation is not a punishment for crime.”³⁹ A few years later, in *Wong Wing v. United States*, the Court characterized detention’s function as linked to the government’s immigration enforcement power, and in doing so rejected the imposition of immigration detention as punishment.⁴⁰ The Court in *Wong Wing* examined the constitutionality of the Chinese Exclusion Act of 1892,⁴¹ which enhanced the ban against most Chinese citizens and descendants from entering the United States by imposing a sentence of hard labor for violating the prohibition.⁴² The Court upheld Congress’s power to

(internal quotation marks omitted). Detention was also acknowledged as a mechanism that could be beneficial from the vantage of immigrants, namely by providing “a period for migrants to send for financial or other help from relatives or community groups.” *Id.* at 13.

37. Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 39 QUEENS L.J. (forthcoming 2014) (manuscript at 51) (on file with author) (“Originally, the United States put the onus to detain and deport rejected noncitizens on the shipping companies that transported them, resulting in a brief detention that closely related to deportation. The shipping companies and immigration officials had little incentive to prolong the process.”).

38. Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement’s Failed Experiment with Penal Severity*, 38 FORDHAM URB. L.J. 217, 220 (2010). Between 1892 and 1907, only a few hundred non-citizens were deported.

Between 1908 and 1920, an average of two or three thousand non-citizens were removed each year, most of those people were removed from “asylums, hospitals and jails.” Those who entered unlawfully but managed to avoid early detection soon found safe harbor, since the law included a one-year statute of limitations on deportation.

Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1836 (2007) (quoting MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 59 (2004)). This varies greatly from the practice today, where the government can deport any noncitizen, including long-term lawful permanent residents. *See Ercolani, supra* note 13.

39. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

40. *Wong Wing v. United States*, 163 U.S. 228, 235-37 (1896).

41. The Chinese Exclusion Act, first enacted in 1882, imposed a ten-year ban on the migration of Chinese laborers into the United States, placed restrictions on Chinese workers already in the country, and denied Chinese migrants the ability to apply for citizenship. Ernesto Hernández-López, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and when Questioning Birthright Citizenship*, 14 TEX. WESLEYAN L. REV. 255, 267, 269 (2008). Congress renewed the Act in 1892 with the passage of the Geary Act, see James W. Gordon, “Was the First Justice Harlan Anti-Chinese?”, 36 W. NEW ENG. L. REV. 287, 292-93 (2014), which included the provision at issue before the Supreme Court in *Wong Wing*, 163 U.S. at 235-37.

42. Section 4 of the Act provided that “any such Chinese person or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter

exclude and expel aliens and characterized detention “as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens.”⁴³ But it held that the imposition of hard labor constitutes a criminal penalty that goes beyond the government’s immigration power,⁴⁴ and thus held that the Act violated the Constitution’s Fifth, Sixth, and Fourteenth Amendments.⁴⁵

Since this early era in American immigration law history, deportation, and by extension detention, has been consistently characterized as a civil, regulatory matter.⁴⁶ In fact, as Stephen Legomsky has put it, “[i]f there has been any constant in U.S. immigration law, it is the insistence of the courts that deportation is not punishment.”⁴⁷ That being said, immigration law is unique in its enforcement of a civil system through physical confinement.⁴⁸ Its function is essentially preventive,⁴⁹ namely to prevent noncitizens in removal proceedings

removed from the United States.” *Wong Wing*, 163 U.S. at 233-34 (internal quotation marks omitted).

43. *Id.* at 235; *see also* *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (characterizing detention as “necessarily a part” of the deportation process).

44. *See* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1464.

45. *Wong Wing*, 163 U.S. at 238.

No limits can be put by the courts upon the power of [C]ongress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial.

Id. at 237.

46. *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 511-12 (2007).

47. *Id.* at 511 (stating further that “no court has ever deviated from this principle,” but noting which held that deportation could be punishment in certain instances (citing *Lieggi v. INS*, 389 F. Supp. 12, 21 (N.D. Ill. 1975))); *see also* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L.L. REV. 289, 290 (2008) (“Before *Fong Yue Ting*, this civil designation [of removal proceedings], now taken for granted, was the subject of considerable debate. Since its initial pronouncement in these early cases, the Supreme Court has, despite frequent criticism, relied on the principle of *stare decisis* and repeatedly refused to revisit the issue of whether removal proceedings are civil or criminal in nature.”).

48. Stumpf, *supra* note 37 (manuscript at 3); *see also* Benson, *supra* note 11, at 17 (“Why is detention permissible in immigration law, as opposed to other important areas of civil law enforcement, whether it be tax collection or environmental protection? In a nation that abolished federal debtor’s prisons in 1835, why does the status of an individual’s citizenship allow a civil detention and restriction of individual liberty without individualized decision making?”). Some have compared immigration detention to civil commitment generally to argue that immigration detention should have higher substantive standards and procedural safeguards. *See, e.g.*, Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 377-79 (2014).

49. Stumpf, *supra* note 37 (manuscript at 17).

or with a final order of removal from absconding.⁵⁰ Noncitizens may be placed in immigration detention after the government charges them with an immigration violation through a document known as a Notice to Appear.⁵¹ But, it is important to note that if the alleged violation is based on criminal conduct, the noncitizen first goes through the criminal justice system, including, if appropriate, serving time in prison or jail.⁵²

The next Subpart details modern legal and policy changes that have led to a significantly heightened punitive immigration system. It is important to emphasize that despite these changes, the immigration system, including detention, remains distinct from the criminal justice system. This difference, established from virtually the beginning of federal immigration power, is why there are still “important reasons to consider [the rights of] those held purely under immigration powers separately from those convicted of criminal offenses.”⁵³ In many important ways, the immigration system is built on this distinction. For example, noncitizens facing charges of an immigration violation, even the most vulnerable, such as children and those with mental disabilities, do not have a right to an attorney.⁵⁴ The health care provided in

50. *See id.* Studies have found, however, that the government can achieve the same objective with comparable success and much less cost through alternatives to detention. *See, e.g.,* OREN ROOT, VERA INST., THE APPEARANCE ASSISTANCE PROGRAM: AN ALTERNATIVE TO DETENTION FOR NONCITIZENS IN U.S. IMMIGRATION REMOVAL PROCEEDINGS 5 (2000) (finding, inter alia, that ninety-one percent of immigrants not detained attended all their immigration hearings).

51. *New Practice Advisory Regarding Notices to Appear*, AM. IMMIGRATION COUNCIL (June 30, 2014), <http://www.americanimmigrationcouncil.org/newsroom/release/new-practice-advisory-regarding-notices-appear>. There have been incidents where the government mistakenly has placed U.S. citizens in deportation proceedings and detention as well. *See, e.g.,* William Finnegan, *The Deportation Machine: A Citizen Trapped in the System*, NEW YORKER, Apr. 29, 2013, available at <http://www.newyorker.com/magazine/2013/04/29/the-deportation-machine>; Ted Robbins, *In the Rush to Deport, Expelling U.S. Citizens*, NPR (Oct. 24, 2011), <http://www.npr.org/2011/10/24/141500145/in-the-rush-to-deport-expelling-u-s-citizens>; Jacqueline Stevens, *Deporting American Citizens: ICE’s Mexican-izing of Mark Lyttle*, HUFFINGTON POST (Sept. 21, 2009), http://www.huffingtonpost.com/jacqueline-stevens-phd/deporting-american-citize_b_265187.html.

52. Bosworth & Kaufman, *supra* note 13, at 438 (“Those who have already served a criminal sentence arguably experience an inverted double jeopardy—tried once but punished twice—when they are detained again prior to their removal rather than being deported immediately following the completion of their criminal sentence.”); *see also* Stumpf, *supra* note 37 (manuscript at 6) (“Immigration detention, however, relies upon a critical distinction to remain within the doctrinal borders of administrative law rather than criminal law. The central function of criminal law is to sort out who to punish and how. The central function of immigration law is to sort out who can enter and remain in the United States and for how long.”).

53. Bosworth & Kaufman, *supra* note 13, at 438.

54. *See* Alyssa Campbell, *Due Process, Not Deportation, for the Immigration System’s Hidden Population: Did the American Bar Association’s Civil Immigration Standard Fall Short of Its Mission?*, 26 GEO. J. LEGAL ETHICS 581, 588 (2013) (focusing specifically on the lack of representation for detainees with mental disabilities). A mere sixteen percent of

immigration detention facilities is another stark example of the distinction.⁵⁵ Nonetheless, there is now a growing tension with a legal construct of immigration enforcement as civil in theory but increasingly punitive in practice.

B. Immigration Detention's Questionable Rationale Today

As discussed above, the conception and function of immigration detention have been intrinsically tied to facilitating the deportation process. As such, the initial rationale of immigration detention was that it constituted a “constitutionally permissible liberty deprivation only to the extent necessary to enforce compliance with immigration proceedings.”⁵⁶ As discussed below, in the modern historical context of the Cold War and post-9/11, immigration detention has also been rationalized vis-à-vis times of national security threats. The present-day mass incarceration of immigrants, however, does not appear to be tied to either rationale.

Juliet Stumpf posits that the detention system exists today is decoupled from the long-standing justification as being intrinsically related to the government's immigration enforcement powers, and instead operates as “the mirror image of criminal detention.”⁵⁷ The transformation of immigration detention is largely a product of the blurred lines between immigration and criminal law generally, a phenomenon that Stumpf has coined “crimmigration law.”⁵⁸ In the process, as former director of Immigration and Customs

detainees have legal representation. Seth Freed Wessler, *Dispatch from Detention: A Rare Look Inside Our 'Humane' Immigration Jails*, COLORLINES (Jan. 4, 2012), http://colorlines.com/archives/2012/01/dispatch_from_detention_this_is_what_humane_deportation_looks_like.html. Spurred by the rise in unaccompanied minors entering the United States, groups have filed a lawsuit to force the government to provide legal representations for children in removal proceedings. Mario Trujillo, *Immigrant Groups File Suit to Represent Unaccompanied Children Crossing Border*, HILL (July 9, 2014), <http://thehill.com/blogs/blog-briefing-room/211695-lawsuit-filed-over-legal-representation-for-child-immigrants>.

55. In the context of medical care, it has been noted that “[t]here are fundamental problems with holding individuals in long-term custody under conditions designed for the short term.” Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 602 (2010).

56. Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1488 (2012).

57. Stumpf, *supra* note 37 (manuscript at 4-5); *see also* Miller, *supra* note 38, at 235 (“Detention has been used as a means of managing non-U.S. citizens for over a hundred years, dating back to 1892 However, it is only within the past twenty years that immigration detention has expanded beyond a few distinct facilities, into an expansive network of custodial facilities varying dramatically in size, staffing, and supervision.”).

58. Stumpf coined the term “crimmigration law” to describe the phenomenon of the line between criminal and immigration law becoming increasingly indistinct. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006); *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L.

Enforcement’s Office of Detention Policy and Planning Dora Schriro acknowledges, detention has strayed from its administrative purpose of facilitating the immigration process, and become a functionally punitive system.⁵⁹ One consequence of this shift is that “[d]etention facilities play a key role in creating incentives for longer and more restrictive deprivations of liberty.”⁶⁰ This Subpart will summarize the considerable scholarship on modern immigration legislative and policy reforms, focusing on the reforms that have brought about what arguably is a transformation to the fundamental character of immigration detention.⁶¹

The trend of criminalizing immigration, while historically rooted, is a relatively recent phenomenon.⁶² The recent history began with the mass arrival of Haitians, Cubans, and Central Americans seeking refuge in the United States in the 1980s, which prompted en masse and prolonged detention practices⁶³ that first existed, albeit briefly, during the height of the Cold War.⁶⁴ The legislative changes that ensued created the bedrock for immigration enforcement and detention practices in place today.⁶⁵

The first pair of legislative changes during this period that specifically impacted the detention of noncitizens was in 1986, with the passage of the

REV. SIDEBAR 42, 43 (describing the immigration detention system as “*immcarceration*”); Miller, *supra* note 38, at 223-24 (“The immigration system has not simply imitated the techniques of criminal punishment, it has become a hybrid system of ‘cimmigration’ as criminal and immigration law enforcement procedures have converged . . .”).

59. SCHRIRO, *supra* note 9, at 4.

60. Stumpf, *supra* note 37 (manuscript at 52).

61. See generally Hernández, *supra* note 44 (arguing that since the 1980s, immigration policy has “increasingly adopted the securitized approach of criminal law enforcement,” while criminal law has borrowed “the more lax procedures traditionally used in the civil immigration law system” when investigating crimes associated with immigration).

62. See David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 164-65 (2012) (describing the criminalization of immigration enforcement as “[g]radual[] and then sudden[]” (internal quotation marks omitted)). Congress blurred the boundary between criminal and immigration law as early as 1929, when “Congress made illegal entry into the United States a misdemeanor and illegal entry following deportation a felony.” *Id.* at 164.

63. See, e.g., Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 935-36 (1995); see also Evangeline G. Abriel, *Ending the Welcome: Changes in the United States’ Treatment of Undocumented Aliens (1986 to 1996)*, 1 RUTGERS RACE & L. REV. 1, 13-14 (1998); Mark D. Kemple, *Legal Fictions Mask Human Suffering: The Detention of the Mariel Cubans Constitutional, Statutory, International Law, and Human Considerations*, 62 S. CAL. L. REV. 1733, 1735-36 (1989) (describing how most of the 125,000 Mariel Cubans who fled to the U.S. during the spring of 1980 were denied admission and detained at Guantanamo Bay and in “camps in Florida, Arkansas, Pennsylvania, and the Atlanta Penitentiary in Georgia for varying lengths of time”); Harold Hongju Koh, *The “Haiti Paradigm” in the United States Human Rights Policy*, 103 YALE L.J. 2391, 2394 (1994).

64. See *infra* Part II.A.1.

65. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1360 (2014).

Anti-Drug Abuse Act (ADAA) and the Immigration Reform and Control Act (IRCA).⁶⁶ Known for igniting the “War on Drugs,”⁶⁷ the ADAA significantly expanded which drug offenses could lead to a noncitizen’s deportation.⁶⁸ The ADAA also amended the INA to introduce the practice of detainers,⁶⁹ which request that law enforcement officials hold an individual in criminal custody for federal immigration officials.⁷⁰ IRCA, best known for its legalization program⁷¹ and its regulation⁷² and criminalization⁷³ of unauthorized work, also

66. The Immigration Marriage Fraud Amendments were also passed in 1986, which rendered marrying for the purpose of immigration benefits a felony. Sklansky, *supra* note 62, at 165.

67. Hernández contends that the U.S. government tapped into the country’s concerns about drugs to expand immigration detention powers, stating, “Congress in effect envisioned immigration detention as a central tool in the nation’s burgeoning war on drugs.” Hernández, *supra* note 65, at 1349; *see also* Kevin R. Johnson, *It’s the Economy Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, etc.)*, 13 CHAP. L. REV. 583 (2010) (arguing that immigration actually does not have anything to do with constructed phenomena such as the war on drugs).

68. Hernández, *supra* note 65, at 1363 (noting that the ADAA replaced “a reference to convictions involving an ‘addiction-sustaining opiate’ with much broader language encompassing any conviction involving a state, federal, or foreign country’s controlled substance”).

69. Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, 690 (2013).

70. *See generally* Alia Al-Khatib, Comment, *Putting A Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 AM. U. L. REV. 109 (2014). There has been considerable discussion as to whether the detainer provision requires or merely requests that noncitizens be held for the purposes of transfer to ICE custody. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 12-15 (2014); Lasch, *supra* note 69, at 629, 695 (arguing that a detainer is only a request and “does not bind the receiving agency in any way”); *Third Circuit Appeals Court Rules that Immigration Detainers Are Non-Binding Requests in Ground-Breaking Case*, ACLU (Mar. 4, 2014), <https://www.aclu.org/immigrants-rights/third-circuit-appeals-court-rules-immigration-detainers-are-non-binding-requests>; Gosia Wozniacka, *Oregon Ruling Spurs Halt on Immigration Detainers*, ASSOCIATED PRESS (Apr. 17, 2014) <http://bigstory.ap.org/article/oregon-ruling-spurs-halt-immigration-detainers>.

71. “IRCA had an immediate and dramatic effect on the lives of millions of unauthorized immigrants who legalized their status,” and ultimately around 2.7 million individuals were able to legalize their status. Muzaffar Chishti, Doris Meissner & Claire Bergeron, *At Its 25th Anniversary, IRCA’s Legacy Lives on*, MIGRATION INFO. SOURCE (Nov. 16, 2011), <http://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives>.

72. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 987 (“Prior to IRCA, the relationship between employer and undocumented employee was not a direct object of immigration regulation.”).

73. *See* Sklansky, *supra* note 62, at 165 (describing how the IRCA criminalized working without authorization, including the use of false documents). *See generally* DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* (2008) (documenting the effect of increased work criminalization on immigrant communities). The criminalization of workers also directly caused increased enforcement, including detention of noncitizens, especially during the George W. Bush Administration,

“blurred the boundary between civil detention and penal detention by encouraging the confinement of excludable and deportable individuals in prisons operated by the Federal Bureau of Prisons.”⁷⁴ Additionally, IRCA encouraged the former Immigration and Naturalization Service (INS) to use detention as part of its investigative process, especially for noncitizens convicted of a felony.⁷⁵ Lastly, amendments in 1988 to the ADAA further impacted the function of immigration detention by creating the category of “aggravated felonies.”⁷⁶ Initially a classification that covered only murder, drug trafficking, and weapon trafficking,⁷⁷ Congress in subsequent years drastically expanded what qualifies as an aggravated felony so that it has become, as Nancy Morawetz puts it, an “Alice-in-Wonderland-like definition . . . [where the] crime need not be either aggravated or a felony.”⁷⁸

The other major set of legislative reforms that propelled the present-day mass incarceration of immigrants was in 1996,⁷⁹ with the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). These laws came on the heels of the Oklahoma City bombing, and so “images of migrant criminality became an important justification for the [1996] legislation,”⁸⁰ even

which emphasized workplace raids. See David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 *FORDHAM URB. L.J.* 77, 79-80 (2010); Bosniak, *supra* note 72, at 988 (“In recent years . . . the single most significant site of INS law enforcement, after the immediate border area itself, has been the workplace.”). Bacon and Hing also point out that the notion of employer sanctions was not created by the 1986 law, but instead dates back to 1952. Bacon & Hing, *supra* at 85.

74. Hernández, *supra* note 65, at 1364.

75. *Id.* at 1363.

76. *Id.* at 1366.

77. Gerald Seipp, *The Aggravated Felony Concept in Immigration Law: Traps for the Unwary and Opportunities for the Knowledgeable*, 02-01 *IMMIGR. BRIEFINGS* 1, 1 (Jan. 2002).

78. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 *HARV. L. REV.* 1936, 1939 (2000) (“For example, a conviction for simple battery or for shoplifting with a one-year suspended sentence—either of which would be a misdemeanor or a violation in most states—can be deemed an aggravated felony.”).

79. There were laws enacted throughout the 1990s and before 1996 that steadily widened the breadth of criminalizing immigrants, including: the Immigration Act of 1990; the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991; the Immigration and Nationality Technical Corrections Act of 1994; and the Violent Crime Control and Law Enforcement Act of 1994. For example, the Immigration Act of 1990 expanded what constitutes aggravated felonies to include “crimes of violence” for which there were at least a five-year sentence of imprisonment and in 1994, Congress added additional crimes, including certain fraud and money laundering offenses. Seipp, *supra* note 77, at 1-2.

80. Chacón, *supra* note 38, at 1843; see also MICHAEL WELCH, *Panic, Risk, Control: Conceptualizing Threats in a Post-9/11 Society*, in *PUNISHING IMMIGRANTS: POLICY, POLITICS, AND INJUSTICE* 17, 18-19 (Charis E. Kubrin et al. eds., 2012).

though the perpetrator was American-born Timothy McVeigh.⁸¹

AEDPA also “requires mandatory detention of noncitizens convicted on a broad array of offenses, including minor drug offenses,” and IIRIRA further expanded the list of offenses triggering detention.⁸² For example, asylum seekers, regardless of their criminal history, became subject to mandatory detention.⁸³ By imposing mandatory detention on a wide swath of noncitizens, AEDPA and IIRIRA marked an about-face from the status quo of parole alternatives to detention that was in place since the INA was enacted in 1952.⁸⁴

The other significant provision of IIRIRA that impacted the scope of detention was the creation of INA section 287(g), which allowed for the deputization of local law enforcement officers to enforce immigration laws.⁸⁵ AEDPA was an anti-immigration law veiled as an antiterrorism measure—a tactic that became virtually ubiquitous in the post-9/11 era—and IIRIRA, marketed as attacking “illegal immigration,” in fact significantly impacted lawful permanent residents by “convert[ing] many . . . into criminal aliens.”⁸⁶ The 1996 legislation capped a decade of overhauling an immigration system that now “codif[ied] a zero tolerance enforcement strategy against

81. Ella Dlin, *The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments?*, 38 CATH. LAW. 49, 50-51 (1998); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289, 300 (2000).

82. ROBERT KOULISH, IMMIGRATION AND AMERICAN DEMOCRACY: SUBVERTING THE RULE OF LAW 49 (2010); *see also* Morawetz, *supra* note 78 at 1936, 1946.

83. *See* Whitney Chelgren, Note, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1484 (2011); Kristen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 ADMIN. L. REV. 589, 590 (2007).

84. *See* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 11-12 (2012). Noncitizens subject to mandatory detention may request a *Joseph* hearing, which is a hearing before an immigration judge to determine whether the classification is proper. These hearings are tainted, however, by procedural problems. *See* Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process than “Enemy Combatants” and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1849 (2011).

85. Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 121 (2012). Intended as a public safety program targeting “criminal aliens and terrorists,” about half of the arrests made under the program have led to the detention of noncitizens with misdemeanors, including traffic violations. RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 2 (2011), *available at* <http://www.migrationpolicy.org/research/delegation-and-divergence-287g-state-and-local-immigration-enforcement>. In some jurisdictions, misdemeanor arrests account for as high as eighty percent of the arrests. *Id.*

86. Chacón, *supra* note 38, at 1846. It is important to note that these legislative changes were applied retroactively, which meant that long-time legal permanent residents with old convictions suddenly found themselves in the immigration system. *See, e.g.*, Bernstein, *supra* note 13.

immigrants.”⁸⁷

The terrorist attacks of September 11, 2001, solidified the rhetorical and operational association between immigration and criminal law, although the legislative changes merging the two systems had already largely occurred.⁸⁸ One of the most significant impacts of 9/11 on the immigration system is what Allegra McLeod calls “institutional repurposing”: the reorganization of institutions involved in immigration enforcement with the purported goal of focusing on “criminal aliens.”⁸⁹

The most drastic reorganization was the dismantling of the INS and creation of the U.S. Department of Homeland Security (DHS) in 2003.⁹⁰ The other significant shift was increased collaboration with the criminal justice system, from its technology to personnel, for immigration enforcement.⁹¹ One example was the piloting in 2008 of the Secure Communities program, which expanded the 287(g) program by allowing local law enforcement to share arrestees’ fingerprints with immigration officials.⁹² Post-9/11 also drew the for-profit prison industry squarely into the immigration detention business: “Many [prison] companies struggled in the late 1990s amid a glut of private prison construction, with more facilities built than could be filled, but a spike in immigrant detention after Sept. 11 helped revitalize the industry.”⁹³

87. KOULISH, *supra* note 82, at 41; *see also* Hernández, *supra* note 65, at 1369 (“By the mid-1990s prisons had become a fact of life and a go-to tactic for legislators engaged in drug war legislating, and immigrants were not exempted.”).

88. McLeod, *supra* note 85, at 121 (“It is worth noting that the significant changes in U.S. criminal-immigration law occurred during the 1990s, well before September 11, 2001. In the aftermath of that day, however, criminal-immigration enforcement became an increasingly central component of the U.S. immigration regulatory regime, even though the pivotal moment of expansion of criminal-immigration enforcement powers happened several years earlier.”).

89. *Id.* at 121-22.

90. DHS was created by the Homeland Security Act of 2002. *Creation of the Department of Homeland Security*, DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/creation-department-homeland-security> (last visited Oct. 29, 2014). It is made up of twenty-two sub-agencies, including a handful encompassing the constellation of immigration agencies such as the U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP). *Who Joined DHS*, DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/who-joined-dhs> (last visited Oct. 10, 2014).

91. The post-9/11 collaboration between the criminal justice and immigration system was a two-way street, insofar as the immigration system was used to charge and hold suspected terrorists against whom the government did not have enough evidence to charge and hold criminally. *See* David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 6 (2006).

92. MICHELLE MITTELSTADT ET AL., MIGRATION POLICY INST., THROUGH THE PRISM OF NATIONAL SECURITY: MAJOR IMMIGRATION POLICY AND PROGRAM CHANGES IN THE DECADE SINCE 9/11 11 (2011), *available at* http://www.migrationpolicy.org/pubs/FS23_Post-9-11policy.pdf; *see also* Lasch, *supra* note 69, at 677.

93. Urbina, *supra* note 24. Although there has been growth in immigration detention

One year after DHS was in operation, the Intelligence Reform and Terrorism Prevention Act required DHS to add 8000 detention beds, contingent upon funding from Congress.⁹⁴ Congress provided the funds, committing support in 2005 for 18,500 beds in the detention system.⁹⁵ But this was only the beginning of the immigration detention boom. The number of beds increased by eighty-four percent after 2005.⁹⁶ By 2009, the number of immigrants detained by the government was at 33,400 per day, a number reflecting a new Congressional quota, or “bed mandate,” added to DHS’s annual spending budget.⁹⁷ This “bed mandate” requires ICE to detain a minimum number of individuals on average per day,⁹⁸ and today the mandate stands at 34,000.⁹⁹ The quota is emblematic of today’s runaway immigration detention system—as Stumpf has put it, “[t]he ‘bed mandate’ is the most visible manifestation of detention driving deportation.”¹⁰⁰

The drastic changes to the immigration system have indicated a broader shift in immigration policy from pursuing a largely administrative function to having a retributive agenda, the latter of which “is rooted in mythologies of

after 9/11 in response to the legislative changes highlighted above, this growth started before 9/11. In 1985, the daily number of detained immigrants was about 2200; in 1995, this number tripled to 6600 per day. WILSHER, *supra* note 31, at 70.

94. William Selway & Margaret Newkirk, *Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit*, BLOOMBERG (Sept. 24, 2013), <http://www.bloomberg.com/news/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants.html>.

95. *Id.*

96. *Id.*

97. JENNIFER E. LAKE & BLAS NUÑEZ-NETO, CONG. RESEARCH SERV., RL34482, HOMELAND SECURITY DEPARTMENT: FY2009 APPROPRIATIONS 35, 36, 40 (2009).

98. Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 13, 2013), http://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html.

99. This past year Congress voted on the mandate (as opposed to passing it via appropriations), and DHS testified that the quota is at least 2000 more than necessary. Andy Sullivan, *Insight: Congress Keeps Detention Quota Despite Immigration Debate*, REUTERS (July 8, 2013, 5:32 PM), <http://www.reuters.com/article/2013/07/08/us-usa-immigration-detention-insight-idUSBRE96711920130708>. The mandate nonetheless passed. Miroff, *supra* note 98. For a breakdown on how much it costs to keep this number of immigrants detained see NAT’L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES (2013), available at <http://immigrationforum.org/blog/the-math-of-immigration-detention-2>.

100. Stumpf, *supra* note 37 (manuscript at 60). Immigration detention has not only changed in scope, but also in duration. In 1981, the average detention length was four days. By 1994, that number increased to 26.5 days; from 2001 to today, the average duration of detention is about 29.5 days. There is a significant variation on this average, depending on a noncitizen’s immigration status and nationality. The number of detainees “held for more than 180 days following an order of removal increased from 1,847 in 1994 to 5,266 in 2001.” WILSHER, *supra* note 31, at 70. Mexicans were “swiftly removed . . . [n]on-Mexicans . . . were detained for sixty-three days. For one-quarter of the countries to which aliens were removed detention periods averaged over 120 days.” *Id.*

migrant criminality”¹⁰¹ This trend is part of the broader pattern of criminalizing communities of color in the United States.¹⁰² The United States currently “has the highest rate of [criminal] incarceration in the world, dwarfing the rates of nearly every developed country No other country in the world imprisons so many of its racial or ethnic minorities.”¹⁰³ It therefore, perhaps, should not come as a surprise that the detention of noncitizens is now the new wave of mass incarceration in our country.

C. Mass Incarceration of Noncitizens and the For-Profit Prison Industry

While detaining individuals the government sought to deport was atypical in the not-so-distant past, today it has become virtually “commonplace.”¹⁰⁴ In Schriro’s 2009 report, ICE acknowledges the nexus between recent policy changes, such as those mentioned in the previous Subpart, and the population explosion in immigration detention facilities.¹⁰⁵ One of the ramifications of the spike in demand for detention facilities over a relatively short period of time is that the immigration detention system has heavily borrowed, if not mimicked completely, the prison system.¹⁰⁶ With a record-breaking number of

101. Chacón, *supra* note 38, at 1890-91; *see also* Hernández, *supra* note 44, at 1458 (“[T]he procedural and substantive law that comprises crimmigration law has reimagined noncitizens as criminal deviants and security risks.”). Although outside the scope of this Article, it is important to note that the legislative changes described in this Subpart also caused a spike in immigration-related criminal prosecutions, which is distinct from detention and removal based on immigration violations. Ingrid V. Eagly, *Gideon’s Migration*, 122 *YALE L.J.* 2282, 2286-87 (2013) (“Today, immigration crime is the largest single category of crime prosecuted by the federal government and noncitizens are over one-fourth of federal prisoners.”); Legomsky, *supra* note 46, at 476; McLeod, *supra* note 85, at 107 (“Between 1990 and 2010, immigration offenses became the most common federally prosecuted crimes in the United States.” (footnote omitted)); Sklansky, *supra* note 62, at 166 (“Over a twelve-year period, from 1997 to 2009, immigration prosecutions per year grew more than tenfold, from less than 9,000 to 90,000.”).

102. *See generally* ALEXANDER, *supra* note 27; Angela Davis, *Race and Criminalization: Black Americans and the Punishment Industry*, in *RACE, ETHNICITY, AND GENDER: SELECTED READINGS* 204 (Joseph F. Healey & Eileen O’Brien eds., 2d ed. 2007).

103. ALEXANDER, *supra* note 27, at 6; *see also* Adam Gopnik, *The Caging of America: Why Do We Lock up So Many People?*, *NEW YORKER* (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america> (“Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today—perhaps the fundamental fact, as slavery was the fundamental fact of 1850. In truth, there are more black men in the grip of the criminal-justice system . . . than were in slavery then. Over all, there are now more people under ‘correctional supervision’ in America—more than six million—than were in the Gulag Archipelago under Stalin at its height.”).

104. Sklansky, *supra* note 62, at 182.

105. SCHRIRO, *supra* note 9, at 11-12.

106. *But see* Stumpf, *supra* note 58, at 402 (“[T]he rapid importation of criminal grounds into immigration law is consistent with a shift in criminal penology from rehabilitation to harsher motivations: retribution, deterrence, incapacitation, and the

deportations, “a vast network of immigration detention facilities has emerged— a kind of parallel prison system, operating alongside and in conjunction with the network of facilities for criminal detention and punishment.”¹⁰⁷ In fact, immigration detention facilities often use the same physical spaces and personnel as prisons and jails.¹⁰⁸

The immigration detention system today “is a sprawling and varied system”¹⁰⁹ comprised of approximately 250 facilities.¹¹⁰ Some are processing centers where, as the name suggests, individuals charged with removable immigration offenses are detained pending processing, and often are moved to another facility. The second type of detention structures is dedicated facilities, where all of the beds in the facility are used to hold immigration detainees. The last type is shared-use jails, where individuals held on criminal and immigration charges are incarcerated in the same facility.¹¹¹

Despite the fact that DHS oversees the largest detention system in the country,¹¹² its operations are not bound by regulation.¹¹³ Instead, immigration detention facilities are governed by “standards,” which are adopted from the criminal justice system: “The national detention standards that the [former] Immigration and Naturalization Service (INS) introduced in 2000 . . . which were then updated by ICE in 2008, are based upon the American Correctional Association (ACA) jail detention standards for pretrial felons.”¹¹⁴ In 2010, in response to a slew of detainee deaths and reports of misconduct within the facilities, “DHS replaced the National Detention Standards with the Performance Based National Detention Standards (PBNDS),” but substantively “the two are strikingly similar.”¹¹⁵ Despite advocacy efforts to make them fully enforceable,¹¹⁶ they “remain mere guidelines.”¹¹⁷

expressive power of the state.”).

107. Sklansky, *supra* note 62, at 182.

108. See Stumpf, *supra* note 37 (manuscript at 46) (“When the immigration detention system uses the same facilities, procedures, and personnel as the criminal detention system, the detention experience becomes indistinguishable from that of criminal punishment.”).

109. Sklansky, *supra* note 62, at 183.

110. Urbina, *supra* note 24.

111. Miller, *supra* note 38, at 235-36.

112. SCHRIRO, *supra* note 9, at 2.

113. See, e.g., Maunica Sthanki, *Reconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 450 (2013) (noting that the ICE “standards are unenforceable”); Noah Nehemiah Gillespie, Note, *Positive Law: Providing Adequate Medical Care for HIV-Positive Immigration Detainees*, 81 GEO. WASH. L. REV. 1329, 1339 (2013) (stating that ICE standards are “policies” that “are not legally binding”).

114. SCHRIRO, *supra* note 9, at 16.

115. Chelgren, *supra* note 83, at 1487-88.

116. ACLU, HOLIDAY ON ICE: THE U.S. DEPARTMENT OF HOMELAND SECURITY’S NEW IMMIGRATION DETENTION STANDARDS 2 (2012), available at http://www.aclu.org/files/assets/aclu_detention_standards_hearing_statement_final_2.pdf (stating that the PBNDS “are only the first step” in improving detention facilities, and while significant and necessary, more action is needed).

Immigration detention facilities, therefore, operate like jails and prisons,¹¹⁸ only worse. Unlike their criminal counterparts, there is no “automatic judicial oversight of immigration detention centers”¹¹⁹ While the programs and services in detention are required and regulated by statute and case law, effective compliance is difficult to achieve.¹²⁰ Moreover, detainees are often held outside the jurisdiction in which they were arrested, far away from their families and resources.¹²¹ Given this context, many practices within immigration detention facilities, including “voluntary” paid detainee labor, are troublesome.

1. The Role of For-Profit Corporations and the Historical Use of Custodial Labor

Each of the three types of immigration detention facilities mentioned above are “owned or operated, to varying degrees, by private companies.”¹²² For-profit corporations began to get into the prison business in the early 1980s, “when the criminal justice policies in the United States underwent a period of intense politicization and harsh transformation,” including “[d]raconian sentencing laws and get-tough correctional policies.”¹²³ During this era, the

117. *Conditions in Immigration Detention*, DET. WATCH NETWORK, <http://www.detentionwatchnetwork.org/node/2383> (last visited Oct. 21, 2014).

118. SCHRIRO, *supra* note 9, at 4.

119. Bosworth & Kaufman, *supra* note 13, at 437.

120. SCHRIRO, *supra* note 9, at 23, 25; *see also* ACLU, PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA 14-17 (May 2012), *available at* http://www.acluga.org/download_file/view_inline/42/244/ (outlining problems in several Georgia immigration detention facilities, including access to phone services, religious services, and recreational time); DET. WATCH NETWORK, EXPOSE AND CLOSE, ONE YEAR LATER: THE ABSENCE OF ACCOUNTABILITY IN IMMIGRATION DETENTION (2013), *available at* <http://www.detentionwatchnetwork.org/ExposeAndClose> (describing complaints about lack of access to healthcare, restrictions on fresh air, sanitation, and solitary confinement, in select detention facilities across the country).

121. *See* Kirk Semple & Tim Eaton, *Detention for Immigrants That Looks Less Like Prison*, N.Y. TIMES (Mar. 13, 2012), http://www.nytimes.com/2012/03/14/us/model-immigration-detention-center-unveiled-in-texas.html?_r=0 (“Critics accused immigration officials of impinging on detainees’ civil rights by frequently transferring them from jail to jail, often far away from their families and lawyers.”).

122. Chelgren, *supra* note 83, at 1486.

123. Judith Greene, *Banking on the Prison Boom*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 3, 3-4 (Tara Herivel & Paul Wright eds., 2007); *see also* Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 232-33 (2009); Ari Melber, *Presumed Guilty: How Prisons Profit off the ‘War on Drugs’* (MSNBC television broadcast Aug. 14, 2013), *available at* <http://www.msnbc.com/msnbc/presumed-guilty-how-prisons-profit-the>; Vicky Pelaez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOBAL RESEARCH (Mar. 31, 2014), *available at* <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289>.

Corrections Corporation of America (CCA) and Geo Group Inc. (GEO) grew to be the two largest prison corporations in the United States,¹²⁴ and at U.S. taxpayers' expense.¹²⁵ Private corporations not only made profits running facilities, they also have scored lucrative contracts for services related to incarceration,¹²⁶ including providing meals,¹²⁷ telephone services,¹²⁸ money transfers,¹²⁹ prisoner transportation,¹³⁰ and even medical care.¹³¹

The parallel legislative and policy changes during the 1980s and 1990s related to the increased criminalization of immigration discussed in Part I.B also opened the door for companies to enter the detention business.¹³² The post-9/11 era saw the "outsourcing [of] immigration control,"¹³³ including immigration detention facilities, helping CCA's revenue to grow more than

124. See *supra* note 23.

125. See Ray Downs, *Who's Getting Rich off the Prison-Industrial Complex?*, VICE (May 2013), <http://www.vice.com/read/whos-getting-rich-off-the-prison-industrial-complex>. Both the CCA and the GEO have restructured internally so that they can be classified as Real Estate Investment Trusts (REITs), which are exempt from paying federal taxes. Nathaniel Popper, *Restyled as Real Estate Trusts, Varied Businesses Avoid Taxes*, N.Y. TIMES (Apr. 21, 2013), http://www.nytimes.com/2013/04/22/business/restyled-as-real-estate-trusts-varied-businesses-avoid-taxes.html?_r=0.

126. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005). Hedge funds and banks invest heavily in prison corporations and thus are also significant profiteers of the industry. Vanguard and Fidelity Investments are two more investment management companies that own large stakes in CCA and GEO Group. Downs, *supra* note 125.

127. See Paul Egan, *Michigan Prison Food Vendor Fined \$98,000 for Worker Fraternalization, Menu Problems*, DETROIT FREE PRESS (Mar. 11, 2014, 8:15 PM), <http://www.freep.com/article/20140311/NEWS06/303110103/michigan-department-of-corrections-fines-prison-food-vendor>.

128. Steven J. Jackson, *Mapping the Prison Telephone Industry*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 235, 235 (Tara Herivel & Paul Wright eds., 2007).

129. Stephanie Clifford & Jessica Silver-Greenberg, *In Prisons, Sky-High Phone Rates and Money Transfer Fees*, N.Y. TIMES (June 26, 2014), http://www.nytimes.com/2014/06/27/business/in-prisons-sky-high-phone-rates-and-money-transfer-fees.html?_r=0.

130. Alex Friedmann, *For-Profit Transportation Companies: Taking Prisoners and the Public for a Ride*, in PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION 265, 265 (Tara Herivel & Paul Wright eds., 2007).

131. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 510–11 (2005).

132. For-profit prison companies also contracted with governments to operate half-way houses, juvenile facilities, and work-release programs. Rachel Christine Bailie Antonuccio, Note, *Prisons for Profit: Do the Social and Political Problems Have a Legal Solution?*, 33 J. CORP. L. 577, 582–83 (2008); see also Stumpf, *supra* note 58, at 403 ("From the 1950s through the 1970s, both criminal and immigration sanctions reflected a rehabilitation model . . . [which] fell into disfavor after the 1970s.").

133. Robert Koulish, *Privatization of Immigration Control*, in IMMIGRATION AND AMERICAN DEMOCRACY: SUBVERTING THE RULE OF LAW 75 (2010).

sixty percent over the past decade.¹³⁴ Today, CCA and GEO combined “hold[] almost two-thirds of all immigrants detained each day.”¹³⁵

In the Introduction, we heard Hassall Moses describe detainee labor as “modern-day slavery” that constitutes the “backbone” of the Northwest Detention Center facility in which he was detained. Another detainee, Pedro Guzman, who was held in the Stewart Detention Center in Georgia, reported that ninety percent of the jobs in the CCA-operated facility is done by detainees.¹³⁶ During his almost twenty-month detention, Guzman “cleaned the communal areas, cooked, painted walls, ran paperwork and buffed floors.”¹³⁷ Guzman earned a dollar a day for his work, except when he worked in the kitchen, where he earned three dollars a day.¹³⁸ Professor Jacqueline Stevens, who has investigated the issue of detainee labor extensively, states: “[T]he ICE jails are paying people \$1/day for work that minimum wage laws would require compensated at \$29-\$58/day.”¹³⁹ As a result, detainee labor adds up to save the entities that run immigration detention facilities “\$40 million or more a year.”¹⁴⁰

Immigrant detainee labor is a continuation of the American practice of exploiting labor through incarceration. Exploited custodial labor first emerged on the backs of African Americans in the infamous forms of convict leasing and chain gangs following the abolition of slavery—or in Douglas Blackmon’s words, convict forced labor became “slavery by another name.”¹⁴¹ Convict leasing “functioned with the Black Codes to reestablish and maintain the race relationships of slavery by returning the control over the lives of these African Americans to white plantation owners.”¹⁴² Southern states phased out the convict lease system by the turn of the nineteenth century, but at that same time “prisoners were increasingly being made to work in the most brutal form of convict forced labor in the United States, the chain gang.”¹⁴³ Today, cheap

134. Urbina, *supra* note 24.

135. Selway & Newkirk, *supra* note 94 (“[CCA] and Geo have each about doubled in value since mid-2010.”).

136. Yana Kunichoff, “Voluntary” Work Program Run in Private Detention Centers Pays Detained Immigrants \$1 a Day, TRUTHOUT (July 27, 2012), <http://truth-out.org/news/item/10548-voluntary-work-program-run-in-private-detention-centers-pays-detained-immigrants-1-a-day>.

137. *Id.*

138. *Id.*

139. *Id.*

140. Urbina, *supra* note 24.

141. BLACKMON, *supra* note 26.

142. Julie Browne, *The Labor of Doing Time*, in CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS 61, 63 (Elihu Rosenblatt ed., 1996); *see also* ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 19 (1996) (stating that “[c]onvict labor depended upon both the heritage of slavery and the allure of industrial capitalism”).

143. Browne, *supra* note 142, at 64 (noting that chain gangs were specifically created to labor for the expansion of public roads and highways at the time).

labor in the criminal context is a widespread practice both inside and outside penitentiary walls. While largely less physically brutal than its historical counterpart, the practice continues to be an economic boon for both the public and private sector.¹⁴⁴

The remainder of this Article focuses on the analog to prison labor in the immigration detention setting—detainee labor. In doing so, it will emphasize the legal, policy, and institutional differences between the criminal and immigration detention systems in which these forms of custodial labor operate. However, while a thorough examination of the subject is beyond the scope of this Article, it is important to at least note here that the trajectories of racism, criminalization, as well as structural forces such as law and capitalism, in many ways link prison labor specifically to the general systemic problems of immigrant work. Made in the context of opposition to federal immigration reform, Representative Dana Rohrabacher captured some of the complex connections between the two forms of exploited work when he declared, “Let the prisoners pick the fruits. We can do it without bringing in millions of foreigners.”¹⁴⁵

144. Beneficiaries of prison labor today include universities and the federal government. Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAL. U. L. REV. 857, 868 (2008) (“[O]ffice furniture, especially in state universities and the federal government, is a major prison labor product. Inmates also take hotel reservations at corporate call centers, make body armor for the U.S. military, and manufacture prison chic fashion accessories, in addition to the iconic task of stamping license plates.” (citations omitted)). Moreover, mega-corporations such as Starbucks, Boeing, BP, Victoria’s Secret, McDonalds, and Walmart all profit from prison labor. Nicole Goodkind, *Top 5 Secrets of the Private Prison Industry*, YAHOO FIN. (Aug. 6, 2013), <http://finance.yahoo.com/blogs/daily-ticker/top-5-secrets-private-prison-industry-163005314.html>; Sadhbh Walshe, *How US Prison Labour Pads Corporate Profits at Taxpayers’ Expense*, GUARDIAN (July 6, 2012) <http://www.theguardian.com/commentisfree/2012/jul/06/prison-labor-pads-corporate-profits-taxpayers-expense>; Abe Louise Young, *BP Hires Prison Labor to Clean up Spill While Coastal Residents Struggle*, NATION (July 21, 2010), <http://www.thenation.com/article/37828/bp-hires-prison-labor-clean-spill-while-coastal-residents-struggle>.

145. Zatz, *supra* note 144, at 859 (citing Carl Hulse & Rachel L. Swarns, *Conservatives Stand Firm on Immigration*, N.Y. TIMES, Mar. 31, 2006, at A12). Alabama lost a significant portion of its agricultural workforce after it passed an anti-immigration law in 2011, and the head of the state’s agricultural department suggested replacing these workers with prison laborers. *See, e.g.*, Amanda Peterson Beadle, *Alabama Official Suggests Using Prisoners As Farm Workers After Immigration Law Scares Away Laborers*, THINKPROGRESS (Oct. 7, 2011, 3:40 PM), <http://thinkprogress.org/justice/2011/10/07/338922/alabama-prisoners-immigrants-farm-labor/>.

II. VOLUNTARY PAID DETAINEE LABOR

A. Legislative History

In 1950, two years before the enactment of the Immigration and Nationality Act (INA), the comprehensive body of federal law governing immigration,¹⁴⁶ Congress passed what stands today as the legal authority for voluntary paid labor in immigration detention facilities.¹⁴⁷ The objective of the 1950 law generally was to authorize the Department of Justice (DOJ) to surpass the appropriations process¹⁴⁸ to incur what was characterized as recurring “administrative expenses.”¹⁴⁹ Providing for paid detainee labor was a subsection of a bill that covered many areas,¹⁵⁰ but it received considerable attention during congressional deliberations.

Section 6 of the DOJ expenditure bill contained the provision providing for the payment of noncitizens held in detention for work performed. Section 6 generally addressed a range of expenditures relating specifically to the INS, including paying interpreters and translators who are not citizens and distributing citizenship textbooks to detainees without cost.¹⁵¹ The provision authorizing paid detainee labor, Section 6(d), read as follows: “Appropriations

146. Prior to the INA, Congress passed piecemeal immigration legislation starting in 1882. *See supra* text accompanying note 28.

147. 8 U.S.C. §1555(d) (2013).

148. The letter from then DOJ Acting Assistant to the Attorney General, Peter Campbell Brown, included in the Congressional Report on the bill, stated: “In order to preclude the raising of points of order against the Department of Justice appropriation bills on the ground that certain expenditures provided for therein have not previously been authorized by law, it is recommended that legislation be enacted to supply substantive law for such recurring items.” S. REP. NO. 81-1258, at 2 (1950).

149. This intent was in line with what at the time was the policy of eliminating legislative language from appropriation bills. *See* 96 CONG. REC. 5315, 5326 (1950). The bill, entitled “Authorization of Certain Administrative Expenses for Department of Justice,” *id.*, had the stated purpose of “enact[ing] into substantive law authorization for certain items that frequently recur in the Appropriation Act dealing with administrative expenses incurred by the Department of Justice.” S. REP. NO. 81-1258, at 1 (1950).

150. The legislation has nine sections in total, each of which addresses a specific classification of expenses concerning operations within the DOJ: (1) Costs associated with trials, including payment of notarial fees and compensation to witnesses; (2) Expenses related to the transfer of drug-addicted prisoners; (3) Permission to purchase new books and periodicals by using the proceeds made by selling older ones; (4) Costs associated with internal investigations within the DOJ, as well as of officials of U.S. District Courts; (5) Expenditures related to the Federal Bureau of Investigation’s response to “unforeseen emergencies”; (6) Costs of certain functions carried out by the Commissioner of Immigration and Naturalization Service (INS); (7) Expenses related to the Bureau of Prison’s continued care of mentally ill inmates; (8) Permanent authority to the Attorney General to purchase land adjacent to federal penitentiaries; and (9) Correction of a bookkeeping problem so that funds related to charging prison personnel for meals, laundry service, etc., are credited to the DOJ’s, not Treasury’s, coffers. *Id.* at 2-3.

151. *Id.* at 2.

now or hereafter provided for the Immigration and Naturalization Service shall be available for . . . (d) payment of allowances (at such rate as may be specified from time to time in the appropriation act involved) to aliens, while held in custody under the immigration laws, for work performed.”¹⁵²

Section 6(d) was a late addition to the bill,¹⁵³ and the DOJ, in a letter to the Senate Judiciary Committee chair, Patrick McCarran, explained that it was “included at the urgent request of the Commissioner of Immigration and Naturalization to meet a practical problem encountered in the work of that Service.”¹⁵⁴ The DOJ elaborated further during a House Judiciary Committee hearing by testifying that the payment of allowances to immigrant detainees for work performed would help the INS maintain order in detention facilities, specifically that the “problem of maintaining these aliens in detention is greatly minimized if they can put an alien to some useful work and pay him a modest daily return for the work he does.”¹⁵⁵ The type of work contemplated was described as “[a]ny kind of work around the detention center or camp, such as policing the place, cooking, or, possibly, attending some small garden farm or plot.”¹⁵⁶

During the same House Judiciary Committee hearing, Representative Samuel Francis Hobbs raised the question of whether detainee labor constituted a form of punishment. The DOJ witness, George Miller, assured the Congressman that it was not:

Mr. Hobbs. Is it clear that it is voluntary? It was held in the Michigan case decided by the Supreme Court¹⁵⁷ that we had no authority to detain them, even in a case of deportation, at hard labor. Is this purely voluntary?

Mr. Miller. I should say it is voluntary. Certainly there is no intention I have ever heard of that these people would be forced to labor.¹⁵⁸

When asked about the practice at the time related to detainees performing labor, Miller testified that they work, but do not get paid:

[Representative Clyde] Reed. How do they do it now, without this law?

Mr. Miller. They do not pay them.

152. *Hearing on H.R. 4645 and S. 2864 Before Subcomm. No. 2 of the H. Comm. on the Judiciary*, 81st Cong. 3 (1950) (language from H.R. 4645).

153. *See id.* at 4-5, 21 (statement of George M. Miller, Assistant Chief of the Accounts Branch, Department of Justice).

154. S. REP. NO. 81-1258, at 2 (1950); H.R. REP. NO. 81-2309, at 3 (1950).

155. *Hearing on H.R. 4645 and S. 2864 Before Subcomm. No. 2 of the H. Comm. on the Judiciary*, 81st Cong. 21 (1950) (statement of George M. Miller, Assistant Chief of the Accounts Branch, Department of Justice).

156. *Id.* at 22-30 (statement of George M. Miller, Assistant Chief of the Accounts Branch, Department of Justice).

157. Rep. Hobbs was referring to *Wong Wing v. United States*, 163 U.S. 228 (1896), which was decided by the Supreme Court on appeal from the Eastern District of Michigan. *See supra* text accompanying notes 40-45 for a discussion of *Wong Wing*.

158. *Hearing on H.R. 4645 and S. 2864 Before Subcomm. No. 2 of the H. Comm. on the Judiciary*, 81st Cong. 31 (1950).

Mr. Reed. They do not pay them anything, and they do work. It must be voluntary.

Mr. Miller. Yes.¹⁵⁹

The DOJ mentioned “eighty cents or a dollar a day” as a suggested rate of pay for detainee labor, but deferred to the appropriations process to fix the rate of pay.¹⁶⁰ Congress set the rate of pay in 1950 at one dollar a day, which today would be equivalent to about \$9.80.¹⁶¹

1. Political Context

There were two important events surrounding the enactment of the DOJ expenditure bill that help explain why the government sought to authorize the payment of voluntary detainee labor. The first involved the DOJ’s priorities in the era of McCarthyism. The subject matter of the legislation generally was of interest in a period of investigations and prosecutions of suspected communists, and the era brought a relative spike in immigration detentions specifically.¹⁶² The second was the ratification of the Geneva Convention’s protections for prisoners of war, which directly influenced the DOJ’s decision to add the provision authorizing payment for immigrant detainee labor into the expenditure bill.¹⁶³

The overall purpose of the DOJ expenditure bill was to give the agency greater leeway in its operations, by decoupling its expenditure decisions from the congressional appropriations process.¹⁶⁴ In the context of the McCarthy Era, this facially administrative purpose becomes more politically charged. Historically, the years immediately following World War I were marked by the Palmer Raids, named after then DOJ Attorney General Alexander Mitchell Palmer. These raids became the hallmark of the First Red Scare, leading to more than 10,000 arrests.¹⁶⁵ The 1950 expenditure bill was introduced when the DOJ was amid another wave of targeting suspected communists in the United States,¹⁶⁶ and although the legislative history is not explicit in this regard, the

159. *Id.* at 31-32.

160. In the discussions with me about this provision it was proposed to pay the alien eighty cents or a dollar a day for his work, but, as I say, whether it is 25 cents or \$1.50 a day would be determined by the rate to be fixed of this provision in the Appropriation Act.

Id. at 21 (statement of George M. Miller, Assistant Chief of the Accounts Branch, Department of Justice). Miller also suggested that the Appropriations Committee can specify the rate of payment “from time to time” so that “this [the amount paid] will not get out of hand.” *Id.*

161. Urbina, *supra* note 24.

162. *See infra* text accompanying note 170.

163. *See infra* text accompanying note 173.

164. *See supra* text accompanying notes 148-149.

165. Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 78 (2002).

166. *See generally* Irving Louis Horowitz, *Culture, Politics, and McCarthyism: A Retrospective from the Trenches*, 22 WM. MITCHELL L. REV. 357 (1996); Mari J. Matsuda,

subject of the DOJ bill—flexibility in agency expenditures—would facilitate expedient arrests and prosecutions. Therefore, it may not be surprising that the sponsor of the bill, Senator Patrick McCarran, was himself avidly anticommunist.¹⁶⁷

The zealous efforts of the Palmer Raids specifically targeted noncitizens.¹⁶⁸ Although the legislative history of the 1950 DOJ bill is not explicit on this particular issue, the arrests and prosecutions of accused noncitizen communists already underway were likely at least partly what the DOJ meant when it justified INS's expenditure authorization to be for "certain confidential expenditures for unforeseen emergencies."¹⁶⁹ In fact, Congress passed the DOJ legislation amidst a spike in the government's use of immigration detention: "Fears of Communist subversion between 1948 and 1952 saw 2,000 lawfully resident foreigners held [in detention] . . . pending expulsion on the basis of secret evidence."¹⁷⁰ Putting detainees to work and paying them a nominal fee for their labor was, as the DOJ testified, a way to maintain order, which would have been of particular concern in an unprecedented period of heightened

Foreword: McCarthyism, The Internment and the Contradictions of Power, 19 B.C. THIRD WORLD L.J. 9 (1998-1999).

167. Senator McCarran was also the Senate Judiciary Committee Chair at the time. Senator Harry Reid vividly described Senator McCarran as "one of the most anti-Semitic . . . one of the most anti-black, one of the most prejudiced people who has ever served in the Senate." Richard N. Velotta, *Harry Reid: Pat McCarran's Name Shouldn't Be On Anything*, LAS VEGAS SUN (Aug. 25, 2012), <http://www.lasvegassun.com/news/2012/aug/25/harry-reid-pat-mccarrans-name-shouldnt-be-anything>. The McCarran Act (also known as the Internal Security Act of 1950) "required all members of 'Communist-front' organizations to register with the . . . government." Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1077-78 (2002). Notably, McCarran co-sponsored the 1952 Immigration and Nationality Act (the McCarran-Walter Act), which imposed strict immigration entry quotas and allowed for the deportation of "dangerous" aliens." See ALICIA J. CAMPI, IMMIGRATION POLICY CTR., *THE MCCARRAN-WALTER ACT: A CONTRADICTIONARY LEGACY ON RACE, QUOTAS, AND IDEOLOGY* (2004) (noting that allowing for the deportation of dangerous aliens is part of the reason why President Truman vetoed the bill, although his veto was overridden by Congress and the bill became law), *available at* <http://www.immigrationpolicy.org/sites/default/files/docs/Brief21%20-%20McCarran-Walter.pdf>.

168. See Frank W. Dunham, Jr., *The Thirty-Second Kenneth J. Hodson Lecture on Criminal Law: Where Moussaoui Meets Hamdi*, 183 MIL. L. REV. 151, 159 (2005) (noting that during the Palmer Raids, over 1000 people were deported to Russia without due process); Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W. L. REV. 265, 317 n.382 (2004) ("The Palmer Raids were a series of mass arrests conducted under the direction of U.S. Attorney General A. Mitchell Palmer, leading to the deportation of alleged subversives By the early 1920s, the anti-radicalism and xenophobia that triggered the Palmer Raids helped give rise to the racially discriminatory national origins immigration quotas of the early 1920s.").

169. S. REP. NO. 81-1258, at 2; H.R. REP. NO. 81-2309, at 3.

170. WILSHER, *supra* note 31, at 59.

detentions.¹⁷¹

The other event that specifically influenced the government’s inclusion of Section 6(d) into the omnibus DOJ bill was the ratification of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.¹⁷² This time, the legislative history is explicit, as the DOJ testified during the House Judiciary Committee hearing that the provision providing allowances for immigrant detainee work was modeled after the Convention: “It [Section 6(d)] is along the lines of the prisoner of war provision under the Geneva Convention, whereby prisoners of war who come to prison camps may be used for useful purposes and paid some small amount. It is patterned after that.”¹⁷³ The 1949 Geneva Conventions generally are regarded as the core of international humanitarian law, and the prisoners of war protections are no exception. This is evident in the prison camp labor provisions, not only with regard to compensation for labor performed but in Article 49, which explicitly states that prisoners of war “may in no circumstances be compelled to work.”¹⁷⁴ As such, the political context that influenced the payment of detainee labor law appeared to be a combination of security and humanitarian concerns.¹⁷⁵

B. The Voluntary Work Program

Section 6(d) of the DOJ expenditure bill today is codified in the INA as 8

171. This period was short-lived, because soon after the INA was enacted in 1952, immigration law adopted a presumption that noncitizens in deportation proceedings would be paroled rather than detained. *See* Stumpf, *supra* note 37 (manuscript at 17) (citing WILSHER, *supra* note 31, at 64).

172. *Hearing on H.R. 4645 and S. 2864 Before Subcomm. No. 2 of the H. Comm. on the Judiciary*, 81st Cong. 31 (statement of George M. Miller, Assistant Chief of the Accounts Branch, Department of Justice). The Geneva Convention was ratified on August 12, 1949, but the United States did not sign on until 1955. *See e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 62, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention], available at <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=74214325D0325FE0C12563CD0051AF9E>.

173. *Id.* In particular, Article 62 of the Convention provided that: “Prisoners of war shall be paid a fair working rate of pay by the detaining authorities direct. The rate shall be fixed by the said authorities, but shall at no time be less than one-fourth of one Swiss franc for a full working day.” Geneva Convention, *supra* note 172.

174. Geneva Convention, *supra* note 172, art. 49, available at <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=517042012F4D959CC12563CD0051AE8A>.

175. *See generally* Chacón, *supra* note 38. Although beyond the scope of this Article, the payment of detainee labor provision also came about during a time of feared labor shortages. “In 1951, Congress passed Public Law 78, which gave the Bracero program [for Mexican guest workers] a permanent statutory basis for the next 13 years. This extension was enacted in response to political pressure from growers . . . [and to] growing fears of labor shortages during the Korean War.” KOULISH, *supra* note 82, at 62-63.

U.S.C. § 1555(d).¹⁷⁶ The rate of pay for detainee labor remains a matter for congressional action, and the last time Congress addressed the issue was in the Appropriations Act of 1979, when it kept it at one dollar a day.¹⁷⁷

1. Legal Analyses of Detainee Labor

The legality of immigrant detainee work came under scrutiny after the enactment of the 1986 Immigration Reform and Control Act (IRCA), which for the first time made it unlawful for undocumented immigrants to work.¹⁷⁸ This analysis came from the former INS, in the form of a legal opinion issued by the General Counsel's Office. The opinion addressed the following question: "Does work performed by alien detainees in a detention facility operated by or contracted through the Immigration and Naturalization Service . . . subject the Service to the employer sanctions provisions of the Immigration and Nationality Act . . . ?"¹⁷⁹

INS's answer to this question was, "No." To arrive at this answer, the General Counsel's Office placed immigrant detainee labor outside the scope of IRCA employer sanctions by finding that there was no employee/employer relationship between the detainee worker and INS or its contractors. The legal opinion proffered the following reasoning: "Inmates may be *required* to participate in an institutional work program, and for that participation receive remuneration. Work performed is for the purpose of rehabilitation and institutional maintenance, *not compensation*."¹⁸⁰

The INS General Counsel's Office reasoning circumventing IRCA, however, conflicts with the statute's legislative history. The first tension is in the opinion's reasoning that detainees may be required to work. The House Judiciary Committee hearing on the provision emphasized the voluntary nature of detainee work, explicitly distinguishing the practice from the forced labor law that was struck down in *Wong Wing*.¹⁸¹ The Geneva Convention upon which the provision was modeled similarly expressly prohibits involuntary labor.¹⁸² The other source of conflict between the INS's legal opinion and the statute's legislative history is in downplaying the remunerative aspect of detainee labor. Once again, the Committee hearing record makes clear that Section 6(d) was meant to change the status quo, which was not paying

176. S. REP. NO. 1258, at 2-3 (1950); *see also* 8 U.S.C. §1555(d).

177. Urbina, *supra* note 24; Kunichoff, *supra* note 136.

178. *See supra* note 73.

179. INS GEN. COUNSEL, THE APPLICABILITY OF EMPLOYER SANCTIONS TO ALIEN DETAINEES PERFORMING WORK IN INS DETENTION FACILITIES, Op. No. 92-8 (1992).

180. *Id.* (emphasis added) ("Therefore, an inmate who participates in a work program in a state or federal facility is not doing so 'for wages or other remuneration' and is not therefore an 'employee' as defined by [the corresponding regulation to IRCA].").

181. *See supra* text accompanying note 45.

182. *See supra* text accompanying note 174.

detainees for work performed.¹⁸³ Moreover, the fact that the provision was lifted from the language of the Geneva Convention demonstrates the importance of the compensatory aspect of the legislation.¹⁸⁴

The other standing analysis of the detainee labor statute is from the Fifth Circuit Court of Appeals, which specifically addressed the rate of pay. In this case, *Guevara v. INS*, the plaintiffs were former and current detainees who conducted institutional work such as grounds maintenance, cooking, and laundry.¹⁸⁵ They alleged that the rate of one dollar a day at which they were paid violated the Fair Labor Standards Act (FLSA).¹⁸⁶ In rejecting plaintiffs’ claim, the Fifth Circuit characterized detainees as outside the group of workers Congress intended to protect under the FLSA: “The congressional motive for enacting the FLSA . . . was to protect the ‘standard of living’ and ‘general well-being’ of the worker in American industry. Because they are detainees removed from American industry, Plaintiffs are not within the group that Congress sought to protect in enacting the FLSA.”¹⁸⁷

The court further held that detainees do not fall under the definition of government “employees” by finding that detainees are the same as inmates in the criminal justice system, the latter of which courts have held are outside the protection of the FLSA.¹⁸⁸ As discussed in Part III.B, however, there are dispositive differences between detainees and criminal inmates that put into question the Fifth Circuit’s reasoning in *Guevara*.

2. DHS Oversight of Detainee Labor

Within the DHS, ICE’s Office of Detention and Removal Operations

183. See *supra* text accompanying note 159.

184. In an article in which ICE defended detainee paid labor, it failed to acknowledge that there are both statutory and administrative guidelines underlying the practice, saying in a statement that “there is no specific statute, regulation, or executive order authorizing the program.” Susan Carroll, *\$1 a Day for Immigrants Illegal on Outside, Just Fine in Jail*, HOUS. CHRON., Mar. 26, 2009, at B1, available at <http://www.chron.com/news/houston-texas/article/1-a-day-for-immigrants-illegal-on-outside-just-1661907.php>.

185. *Guevara v. INS*, 902 F.2d 394, 395 (5th Cir. 1990).

186. *Id.* Plaintiffs also alleged that 8 U.S.C § 1555(d) makes an impermissible distinction based on alienage without a compelling governmental purpose to justify this classification. The court, however, found that because the statute is part of the government’s overall power to regulate immigration, it is constitutional as “a valid exercise of the congressional power to regulate the conduct of aliens.” *Id.* at 396-97.

187. *Id.* at 396 (citations omitted).

188. *Id.* (“These prior decisions . . . have recognized imprisoned individuals are not covered under the FLSA because they do not fit the statutory definition of employee and because the congressional intent of the FLSA was to protect the standard of living and general well-being of the worker in American industry.”) The court looked to prison inmate cases because it recognized that there were no other cases addressing specifically labor in the context of immigration detention. *Id.*

(DRO) oversees immigration detention operations.¹⁸⁹ It is governed by detention standards, which were first issued in November of 2000.¹⁹⁰ The detention standards address detainee labor by its institutional name—the “Voluntary Work Program” (VWP).¹⁹¹ According to the standards, the VWP is made available to detainees in all three types of detention facilities.¹⁹² Information provided through a Freedom of Information Act (FOIA) request filed by Professor Stevens shows that the majority of the facilities that engage in paid immigrant labor are facilities contracted by ICE to for-profit corporations.¹⁹³

Categorized as “detainee services,” the VWP is described as giving “detainees opportunities to work and earn money while confined.”¹⁹⁴ The standards specifically provide that while detainees can volunteer for work assignments, they cannot be required to work, except to do “personal housekeeping.”¹⁹⁵ The standards also specify the limited rights afforded to detainees under the VWP. As a general rule, detainees are not permitted to work in excess of eight hours a day, forty hours a week.¹⁹⁶ There are antidiscrimination prohibitions and a grievance process¹⁹⁷ and, “while not legally required,” basic health and safety protections afforded to detainees who work under the VWP.¹⁹⁸ Information obtained by Professor Stevens’s FOIA, however, suggests that there has been considerable leeway in the enforcement of the limited rights laid out by the standards pertaining to the VWP.¹⁹⁹

189. Interior enforcement is distinct from Customs and Border Patrol, which is responsible for enforcement at ports of entry and within 100 miles of the border. *Authority of U.S. Customs and Border Protection Agents: An Overview*, IMMIGRATION POLICY CTR. (Feb. 23, 2012), <http://www.immigrationpolicy.org/just-facts/authority-us-customs-and-border-protection-agents-overview>.

190. Sayed, *supra* note 84, at 1854 n.115.

191. INS, *Voluntary Work Program*, in DETENTION OPERATION MANUAL 1 (2000), available at <http://www.ice.gov/doclib/dro/detention-standards/pdf/work.pdf>.

192. INS, *Voluntary Work Program*, in 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 382 [hereinafter WORK PROGRAM STANDARDS], available at https://www.ice.gov/doclib/detention-standards/2011/voluntary_work_program.pdf.

193. Letter from Catrina M. Pavlik-Keenan, FOIA officer at ICE, to Jacqueline Stevens, Professor of Political Science, Northwestern University (Sept. 11, 2011) [hereinafter Stevens FOIA], available at <http://www.governmentilllegals.org/2011FOIA13921SlaveLabor.pdf>.

194. WORK PROGRAM STANDARDS, *supra* note 192. Note that this seems to be in conflict with the agency’s earlier legal opinion concerning IRCA. See *supra* text accompanying note 180.

195. Personal housekeeping includes tasks relating to the upkeep of their immediate living area such as “making their bunk beds daily, stacking loose papers, keeping the floor free of debris and dividers free of clutter.” *Id.* at 383-84.

196. *Id.* at 385.

197. *Id.*

198. *Id.* at 382.

199. Stevens FOIA, *supra* note 193.

C. Problems Associated with the Voluntary Work Program

“Zamora” was a lawful permanent resident when ICE detained him after a shoplifting conviction.²⁰⁰ He was being held at a contracted, privately run immigration detention facility while awaiting his immigration court hearing, and was happy to have a job assembling arrival packages for new detainees to help him pass the time. Zamora considered this job to be better than others available to detainees, because it allowed him to be in close proximity to the facility’s administrators with whom he was able to develop good relationships. Moreover, he reported that the pay of ninety cents a day was better than what he was paid in his last assignment of doing laundry. While he was grateful for the work, the pay did not go very far, especially in relation to the cost of items in the prison’s commissary: the envelope he purchased to mail a letter to the law clinic representing him cost him one dollar—ten cents more than his one-day earnings. Also, about one month before his immigration court hearing, Zamora was suddenly pulled from his job based on a vague assertion of “security changes” made in the facility. Zamora told his student attorneys that the loss of work made him more desperate than ever to be released from detention.

Zamora’s experience highlights both the complexities and problems with paid detainee work. The complexities include the fact that many detainees such as Zamora welcome the opportunity to work as a way to endure the stress and boredom of incarceration. Zamora’s story also demonstrates that performing work can position detainees favorably vis-à-vis guards and other personnel in the facility. The first problem is clearly the rate of pay, especially in relation to the hyperinflated prices in prison and detention commissaries. The other set of problems involve potential abuses related to work opportunities and in some cases, work requirements. These and other reported issues will be addressed below.

As discussed, the statutory minimum pay for detainee labor is one dollar a day, and has been since 1950 when the law was enacted. Zamora does not know why he was paid less than the one-dollar wage, but he is not alone: about five percent of detainees in the aggregate are not paid for their labor at all, which is how a county in Ohio “saved at least \$200,000 to \$300,000 a year by relying on about 40 detainees each month for janitorial work.”²⁰¹ In such cases, detainee workers sometimes are referred to as “volunteers,” as the ACLU of Georgia reported regarding the VWP at the Irwin County Detention Center:

The work program at Irwin is not compensated. The “volunteers,” as the detainees are called, have duties that range from cleaning and kitchen duty to

200. This narrative involves a case that is part of the Washington College of Law Immigrant Justice Clinic’s active docket. The facts relayed were obtained during the course of representation. “Zamora” is not the detainee’s actual name; the detainee’s name has been altered to protect his identity given that the detainee’s case is pending.

201. Urbina, *supra* note 24.

distributing clothing to new arrivals. Detainee interviews revealed that the work of the volunteers is poorly monitored at times, which has resulted in reports of abuse and discrimination dealt out to other detainees.²⁰²

Some detainees describe being paid in junk food in lieu of the dollar-a-day wage. Karina Tamayo from the Northwest Detention Center received a chocolate bar and chips for cleaning other cells and folding blankets for incoming detainees.²⁰³ Tamayo said that while detainees would receive the dollar wage for laundry shifts, other jobs were compensated with snack food.²⁰⁴ Other detainees who are given the dollar-a-day rate of pay report being paid in “credits toward food, toiletries and phone calls.”²⁰⁵ Such items often are necessities that are not provided by the facility—for example, detainees in Arizona’s Eloy Detention Center are only provided soap and must buy their own shampoo.²⁰⁶ Often goods sold by prisons and detention facilities are offered at exorbitant prices,²⁰⁷ which is why Professor Stevens posits that detainees often participate in the VWP primarily “so that they can buy food and hygiene products. If they don’t have relatives on the outside to pump up their commissary accounts then they’ll buff floors.”²⁰⁸

In other reported cases, detainee labor is an alternative to punishment or harsher treatment. For Marian Martins, a detainee held in Alabama’s Etowah County Detention Center, “work had been her only ticket out of lockdown, where she was placed when she arrived without ever being told why.”²⁰⁹ Martins was compensated for her work, which included cooking and scrubbing

202. ACLU, *supra* note 120, at 87.

203. Audio tape: Interview of Karina Tamayo at Northwest Detention Center (Apr. 2013) (on file with author).

204. *Id.*

205. Urbina, *supra* note 24. Detainees with relatives out of state have reported having to pay higher charges for phone calls. See ACLU, *supra* note 120, at 52. Moreover, the ICE Detention Standards include providing reasonable telephone rates, but jails holding detainees are not required to follow these standards. Leticia Miranda, *Dialing with Dollars: How County Jails Profit from Immigrant Detainees*, NATION (May 15, 2014), <http://www.thenation.com/article/179775/dialing-dollars-how-county-jails-profit-immigrant-detainees#> (“About 50 percent of all immigrant detainees are held in county jails, according to ICE, and many of these cash-strapped jails, like Plymouth County Detention Center, have sought to raise revenue through contracts with phone companies that charge excessive rates and kick back part of the profits. Immigrant detainees end up paying the same inflated telephone rates charged to their citizen inmate counterparts . . .”).

206. Nina Rabin, *Unseen Prisoners: Women in Immigration Detention Facilities in Arizona*, 23 GEO. IMMIGR. L.J. 695, 732 (2009).

207. See Stephanie Clifford & Jessica Silver-Greenberg, *In Prisons, Sky-High Phone Rates and Money Transfer Fees*, N.Y. TIMES (June 26, 2014), http://www.nytimes.com/2014/06/27/business/in-prisons-sky-high-phone-rates-and-money-transfer-fees.html?_r=0; Marisa Lagos, *Mirkarimi Looks to Cut Costs Paid by Inmates, Families*, S.F. CHRON. (July 24, 2014), <http://www.sfgate.com/crime/article/Mirkarimi-looks-to-cut-costs-paid-by-inmates-5642361.php>.

208. Kunichoff, *supra* note 136 (internal quotation marks omitted).

209. Urbina, *supra* note 24.

showers, with extra free time.²¹⁰ Other detainees have reported being punished for not participating in the VWP. Similar to Hassall Moses, the detainee from Northwest Detention Center who was allegedly put in solitary confinement for encouraging a work stoppage,²¹¹ a detainee in CCA’s Stewart Detention Center in Georgia²¹² reported that he was placed in segregation for a week for declining to work and organizing a work strike.²¹³

Another Stewart detainee, Eduardo Zuñiga, was injured while working in the kitchen as he waited to be deported to Mexico:

[Zuñiga] tore ligaments in one of his knees after slipping on a newly mopped floor, leaving him unable to walk without crutches. Despite doctors’ orders to stay off the leg, Mr. Zuñiga said, the guards threatened him with solitary confinement if he did not cover his shifts. Now back in Mexico . . . he must walk with a leg brace.²¹⁴

Yet another Stewart detainee reported that he “was threatened with segregation if he refused to work less than eight hours a day,” and alleged that this was “not atypical.”²¹⁵ Such stories have compelled the ACLU to conclude that, “[e]ven though the [VWP] is supposed to be voluntary, detainees’ experiences are illustrative of its coercive nature.”²¹⁶

Another issue reported by detainees is discrimination in the administration of the VWP. One specific manner in which discrimination has manifested is in who gets work. Detainees held at the Central Arizona Detention Center, for example, have reported that there are limited jobs available to them relative to prisoners: “Detainees were permitted to work jobs only within the pod, whereas federal marshal prisoners could work in positions throughout the facility. Even with this restriction, the few jobs that did not require leaving the pod were frequently assigned to federal prisoners instead of the detainees.”²¹⁷ At Eloy Detention Center, also in Arizona, “[n]ew detainees, particularly those who are not favored by the guards, which often correlated with being non-English speaking and less acculturated to the United States, faced the most obstacles in

210. *Id.*

211. *See supra* Introduction. Other detainees from the Northwest Detention Center who protested the rate of pay were allegedly retaliated against by not even getting a dollar a day: “Detainees who have complained about doing janitorial work for only a dollar a day are now being given a single candy bar or a bag of chips for volunteer work.” Blumenthal, *supra* note 2.

212. Stewart is the largest immigration detention facility in the country. DET. WATCH NETWORK, EXPOSE AND CLOSE: STEWART DETENTION CENTER GEORGIA 1, *available at* <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/ExposeClose/Expose-Stewart11-15.pdf>.

213. *See* ACLU, *supra* note 120, at 57.

214. Urbina, *supra* note 24.

215. ACLU, *supra* note 120, at 57.

216. *Id.*

217. Rabin, *supra* note 206, at 733-34.

securing a job.”²¹⁸

III. DETAINEE LABOR AND THE THIRTEENTH AMENDMENT

The range of problems associated with the Voluntary Work Program calls for an array of solutions, some of which are outlined in the Conclusion. This Part will address the core constitutional concern associated with the VWP, which turns on whether the work performed by detainees is in fact voluntary. Specific detainees’ experiences related to the VWP discussed above that could constitute forced detainee labor include being placed in solitary confinement and otherwise being punished for not wanting to work, refusing to work more than eight hours a day, and calling for a work strike. This Part explores how cases of involuntary detainee labor are a violation of the Thirteenth Amendment’s prohibition of involuntary servitude. Courts have cited the Exception Clause provided within the constitutional provision to uphold forced labor in the context of the criminal justice system. As discussed below, this exception is not applicable to the civil system of immigration detention in which the VWP operates.

A. The Thirteenth Amendment and Its Exception Clause

The Thirteenth Amendment states: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States Congress shall have the power to enforce this article by appropriate legislation.”²¹⁹ Adopted on December 6, 1865, the Thirteenth Amendment came on the heels of the Emancipation Declaration to place “abolition on a broader and more secure constitutional foundation” than what was provided by the Declaration.²²⁰ The first clause prohibits outright slavery and involuntary servitude, which relate to specific acts whose meanings have evolved over time.²²¹ The second clause of the Amendment confers upon Congress the power to prohibit conduct or laws that subject individuals to degradation similar to that imposed by slavery, i.e. “badges of slavery” or “badges of servitude.”²²² The Thirteenth Amendment is the only constitutional provision currently in effect that can be applied to private persons or entities.²²³

218. *Id.* at 733.

219. U.S. CONST. amend. XIII, §§ 1-2.

220. George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1371 (2008).

221. *See infra* Part III.B.1.

222. Lauren Kares, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 376-77 (1995).

223. James Gray Pope, *What’s Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189, 189 (2011) (“[T]he Thirteenth Amendment stands out

Litigation challenging the terms and conditions of prison labor generally has been unsuccessful in large part due to the “except as a punishment for crime” clause provided by the constitutional provision.²²⁴ Some have made the argument that the Thirteenth Amendment’s exception clause should be limited to prisoners who have been sentenced specifically to work as their punishment.²²⁵ The plaintiff in *Smith v. Dretke*, for example, claimed that the Texas Department of Corrections violated the Thirteenth Amendment by forcing him to perform work in prison despite the fact that his sentence did not call for such labor.²²⁶ The court, however, found that Smith did not have to be sentenced to hard labor in order to be forced to work, and dismissed the suit as frivolous.²²⁷

Another argument advanced to challenge prison labor under the Thirteenth Amendment is that inmate labor in the context of for-profit prisons for little to no pay should constitute prohibited involuntary servitude.²²⁸ Before the enactment of the Prison Industries Act in 1995, “prison labor for the private sector was legally barred for years, to avoid unfair competition with private companies.”²²⁹ Criminal justice expert Ira Robbins, however, has stated,

as the sole rights guarantee that protects not only against government, but also against private concentrations of power’); Rutherglen, *supra* note 220, at 1370 (“[A] ‘private action’ interpretation of the Thirteenth Amendment cannot be viewed as a limitation upon its scope, since the Amendment applies to both state and private action With the repeal of the Eighteenth Amendment, the Thirteenth Amendment stands alone among provisions of the Constitution in having such expansive coverage.”).

224. See, e.g., Villareal v. Woodham, 113 F.3d 202, 206 (11th Cir. 1997) (holding that the Thirteenth Amendment limits prisoners’ rights under the Fair Labor Standards Act); Northrop v. Fed. Bureau of Prisons, No. 1:08-cv-0746, 2008 WL 5047792 (M.D. Pa. Nov. 24, 2008) (noting an earlier holding by the District Court that the Thirteenth Amendment does not apply to plaintiff’s forced labor claim because he is being “held to answer for a violation of a penal statute.”); Wilkinson v. McManus, 216 N.W.2d 264 (Minn. Sup. Ct. 1974) (holding the exception clause to find that plaintiff’s constitutional claims as to the prison labor program generally and the amount of pay specifically have no merit); Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 609 (2008) (“The punishment clause appears to be aimed at an important concern The Thirteenth Amendment, after all, sought to root out the evils of antebellum slavery not the harshness of prison life.”).

225. See, e.g., Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 399-400 (2009) (“[T]he modern doctrine of prison deference presents a comparably formidable obstacle to the adoption of an interpretation of the Thirteenth Amendment’s ‘punishment for crime’ exception that limits it to those inmates who are compelled to work *as punishment*; that is, to the extent they are so sentenced by a judge or jury.”).

226. 157 F. App’x 747, 747 (5th Cir. 2005).

227. *Id.* at 748.

228. See, e.g., Ryan S. Marion, *Prisoners For Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 214 (2009) (“By doing such work in the private context, however, prisoners directly contribute to the profit-making function of the corporation. At the very least, therefore, inmate labor in private prisons constitutes ‘involuntary servitude.’”).

229. Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, NATION

“[O]nce a prisoner is convicted, it appears that the ‘convict labor exception’ applies without regard to the type of facility in which the confinement shall take place, whether public or private.”²³⁰ In the context of the criminal justice system, the Thirteenth Amendment has been generally interpreted to contain “a prisoner exception clause.”²³¹ In addition to the plain language of the Amendment, some have posited that this exception is indicative of the notion that labor in the penal context is nonmarket work.²³²

B. The Thirteenth Amendment in the Context of Immigration Detention

As outlined above, inmates in the criminal justice system have not successfully asserted their Thirteenth Amendment right against forced prison labor. This Subpart explores how custodial labor in the context of the immigration system warrants a different outcome. The broad argument is that the “punishment for crime” exception of the Thirteenth Amendment does not apply to immigration detention, because detention is not punishment, and immigration violations for which detainees are held are not crimes.²³³ Building on this argument, the following discussion will outline how the overall goals of prison labor do not, for the most part, apply to immigration detention. In doing so, it will examine the treatment of prison labor in the context of pretrial criminal detention, contending that immigration detention is at least analogous to the pretrial setting.

The distinction between the criminal justice and immigration systems, namely that the latter is civil, means that there is a normative difference between prison and detainee labor. From the vantage of both the offender and society, the overarching objectives of prison labor are punitive, rehabilitative, and restorative.²³⁴ Institutionally, the goals are administrative, i.e. efficiency

(Aug. 1, 2011), <http://www.thenation.com/article/162478/hidden-history-alec-and-prison-labor>.

230. Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 606 (1989).

231. *Vanskike v. Peters*, 74 F.2d 806, 809 (7th Cir. 1992) (“The Thirteenth Amendment excludes convicted criminals from the prohibition of involuntary servitude”); *Jobson v. Henne*, 355 F.2d 129, 132 (2d Cir. 1966) (“[T]hose in control of institutions for the mentally retarded may subject inmates to a wide variety of programs with both therapeutic and cost saving purposes without violating the Thirteenth Amendment.”); Ghali, *supra* note 224, at 609.

232. See, e.g., Zatz, *supra* note 144, at 897-903 (discussing the distinction between market and nonmarket labor in employment law, and whether the nonmarket nature of prison labor is relevant).

233. See Donald Hancock, *The Thirteenth Amendment and the Juvenile Justice System*, 83 J. CRIM. L. & CRIMINOLOGY 614, 616 (1992) (making an analogous argument in the context of the juvenile justice system that “[b]ecause juvenile court findings are distinct from criminal convictions, juvenile court dispositions which include involuntary servitude may not be exempt under the Thirteenth Amendment”).

234. Timothy J. Flanagan, *Prison Labor and Industry*, in THE AMERICAN PRISON:

and reducing idleness, and financial, i.e. lowering the cost of operating jails and prisons.²³⁵ Immigration detainee labor may share the institutional goals of prison labor,²³⁶ especially in the context of the detention system’s current scope and size, although one can question as a moral matter whether it should. But this is where the overlap ends. Unlike prison labor, detainee labor must be voluntary, as early case law, legislative history, and the programmatic name associated with the practice—tellingly categorized under “detainee services” in ICE’s detention standards—make clear.²³⁷ The individual and societal goals of prison labor do not fit into the civil context of immigration detention.

Since most detainees are awaiting their immigration hearings, the distinction made by prison labor jurisprudence between pretrial and postconviction incarceration is instructive in further fleshing out the difference between custodial labor in the criminal justice and immigration detention contexts.²³⁸ This distinction begins with the language of the Thirteenth Amendment’s exception clause, namely that involuntary servitude may exist “as a punishment for crime” of which a person has been “duly convicted.”²³⁹ Individuals incarcerated pretrial have not been convicted, and as such are protected against conditions that constitute punishment.²⁴⁰ Following this distinction, courts have established there is no rehabilitative purpose for pretrial detention.²⁴¹

In *McGarry v. Pallito*, the Second Circuit cited the non-rehabilitative function of pretrial detention to uphold a prisoner’s Thirteenth Amendment claim against forced labor.²⁴² Finbar McGarry was a pretrial detainee at a Vermont correctional facility where he was allegedly compelled to “work in the prison laundry under the threat of physical restraint and legal process,” namely administrative segregation and disciplinary write-ups.²⁴³

The district court dismissed McGarry’s Thirteenth Amendment claim based on a finding that being forced to work in the prison laundry was “nothing like the slavery that gave rise to the enactment of [the] Amendment.”²⁴⁴ The Second Circuit reversed, holding that the Thirteenth Amendment “intended to prohibit all forms of involuntary labor, not solely to abolish chattel slavery,”

ISSUES IN RESEARCH AND POLICY 137 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989); Lisa C. Phelan, *Making Prisons Work*, 30 LOY. L.A. L. REV. 1747, 1749-51 (1997).

235. Flanagan, *supra* note 233, at 137.

236. For example, the legislative history of immigration detainee labor mentions the goal of maintaining order in detention facilities. *See supra* text accompanying note 155.

237. *See supra* text accompanying notes 191-94.

238. Those who are not awaiting hearings are waiting for ICE to execute their deportation, which is also not a conviction.

239. U.S. CONST. amend. XIII, § 1.

240. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

241. *McGarry v. Pallito*, 687 F.3d 505, 513 (2d Cir. 2012).

242. *Id.*

243. *Id.* at 509.

244. *Id.* at 510 (citation omitted) (internal quotation marks omitted).

and that the Amendment does not exempt pretrial detainees.²⁴⁵

Although immigration detention is a civil system, it has also been compared to criminal pretrial detention.²⁴⁶ Addressing the rights of ICE detainees, the Ninth Circuit held that “conditions of confinement for civil detainees must be superior not only to convicted prisoners, but also to pre-trial criminal detainees.”²⁴⁷ Despite this seemingly uncontroversial legal distinction, forced labor in the context of immigration detention as a violation of the Thirteenth Amendment is not a settled principle. In fact, the Fifth Circuit in *Channer v. Hall*, the only case that has addressed the subject, rejected this supposition.²⁴⁸ Claudious Channer claimed that he was subject to involuntary servitude in violation of the Thirteenth Amendment as an immigration detainee compelled to work in the Food Services Department of Oakdale Federal Correctional Institution.²⁴⁹ The Court found that, even assuming that he was compelled to work through the threat of solitary confinement, Channer’s Thirteenth Amendment right was not violated.²⁵⁰ In doing so, the Fifth Circuit relied upon a characterization of Channer’s work as the performance of “housekeeping tasks,” which the Indiana Supreme Court categorized as labor that fit within the “civic duty” exception of the Thirteenth Amendment.²⁵¹ The court went on to hold that “the federal government is entitled to require a communal contribution by an INS detainee in the form of housekeeping tasks, and that Channer’s kitchen service, for which he was paid, did not violate the Thirteenth Amendment’s prohibition of involuntary servitude.”²⁵²

It is significant that the *Channer* decision predates ICE’s detention standards, the latter of which was first issued in 2000.²⁵³ These standards make clear that detainees cannot be required to work,²⁵⁴ and while they state that the performance of “personal housekeeping” is an exception to the voluntary work

245. *Id.* In doing so, the Court acknowledged, “it is clearly established that a state may not ‘rehabilitate’ pretrial detainees.” *Id.* at 513.

246. See, e.g., Clay McCaslin, “*My Jailor is My Judge*”: *Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS*, 75 TUL. L. REV. 193, 224 (2000).

247. SUNITA PATEL & TOM JAWETZ, ACLU NAT’L PRISON PROJECT, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES 2 (2007) (citing *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005)), available at www.aclu.org/files/pdfs/prison/unsr_briefing_materials.pdf.

248. *Channer v. Hall*, 112 F.3d 214, 218-19 (5th Cir. 1997).

249. *Id.* at 215.

250. *Id.* at 218. The claim therefore satisfied the standard set in a seminal Thirteenth Amendment case, *United States v. Kozminski*, 487 U.S. 931 (1988), in which the Supreme Court held that for involuntary servitude to exist, there must be physical or legal coercion. *Id.* at 217.

251. *Id.* at 218-19. In doing so, the court noted that such tasks have been upheld in the context of mental institutions. *Id.*

252. *Id.* at 219.

253. Sayed, *supra* note 84, at 1854 n.115.

254. See WORK PROGRAM STANDARDS, *supra* note 192, at 382.

rule, the definition provided does not encompass the type of work at issue in *Channer*.²⁵⁵ ICE’s own guidelines regarding the Voluntary Work Program, therefore, are in contravention to the Fifth Circuit’s preceding, almost two-decades-old decision on the subject. The *McGarry* decision upholding Thirteenth Amendment rights in the pretrial criminal detention context should further weigh against adherence to the *Channer* holding.

1. The Thirteenth Amendment’s Application to Immigrant Detainee Labor

It is relatively noncontroversial that the scope of the Thirteenth Amendment extends beyond the physical acts of slavery imposed on African Americans. The Amendment’s broad scope was first asserted in its legislative history by Senator Lyman Trumbull’s “badges and incidents of slavery” discussion.²⁵⁶ Congress thereafter invoked the power conferred by this second clause to designate several southern states’ Black Codes as badges of slavery.²⁵⁷ Modern-day examples include discrimination in the making or enforcement of contracts and in the sale or lease of housing. Generally, “[t]he meaning of the Thirteenth Amendment has diverged widely at different moments in history—emphasizing the right to contract during the *Lochner* era, New Deal labor and economic rights in the 1930s and 1940s, and desegregation and antidiscrimination during the civil rights era of the 1960s.”²⁵⁸

Furthermore, the Supreme Court, soon after the passage of the Thirteenth Amendment, acknowledged its applicability to noncitizens. In *The Slaughterhouse Cases*, Justice Miller stated that the constitutional provision does not only apply to slavery against African Americans, but also to “Mexican peonage and the Chinese coolie labor system.”²⁵⁹ In fact, “[t]he language of the

255. *Channer*, 112 F.3d at 219; WORK PROGRAM STANDARDS, *supra* note 192, at 382.

256. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968); see *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 92 (1872); see also William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 82-86 (2004) (arguing that giving only Congress power to address badges of slavery is inconsistent with the Thirteenth Amendment’s legislative history and recent Supreme Court precedent); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 73-74 (1996) (outlining a broad view of Thirteenth Amendment’s scope). *But see* Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 388 (1967) (arguing that the Thirteenth Amendment was only intended to bring about the emancipation of African Americans); Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1341 (2009) (citing *The Civil Rights Cases*, 109 U.S. 11, 19 (1883), where the Court referred to the Thirteenth Amendment as “simply abolish[ing] slavery”).

257. Kares, *supra* note 222, at 376-77.

258. Risa L. Goluboff, *The Thirteenth Amendment in Historical Perspective*, 11 U. PA. J. CONST. L. 1451, 1452 (2009).

259. Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 1 (1995) (“[T]he Thirteenth Amendment’s promise of ‘universal civil and political

Thirteenth Amendment has never been limited to the concept of citizenship, and consequently, this provision has always applied to noncitizens as well as citizens.”²⁶⁰ The *Valmonte* court, however, has limited the Amendment’s applicability to prohibiting the forced service of one to another.²⁶¹ Today, the Thirteenth Amendment has been invoked to protect the rights of immigrant workers, including in the context of guest worker programs and domestic workers.²⁶² In this landscape, the Thirteenth Amendment stands out as a potentially valuable tool to protect against forced immigrant detainee labor.

CONCLUSION: CHIPPING AWAY AT PUNITIVE IMMIGRATION DETENTION

As discussed in the previous Part, involuntary detainee labor should be prohibited as a violation of the Thirteenth Amendment’s ban on slavery and involuntary servitude. The constitutionality of involuntary labor in immigration detention, however, is not the only concern related to the practice. As outlined in Part II.B.2, the management of immigration detention is plagued by lack of meaningful enforcement and oversight. This is particularly worrisome given that ICE contracts out about half of the facilities in the vast detention system to for-profit prison companies. Early in its first term the Obama administration acknowledged the need to improve agency oversight over immigration detention.²⁶³ It even announced an intention to build a “truly civil” system, recognizing that detention has veered considerably into the realm of the

freedom’ applies to citizens from any race or class who have been branded with a badge of inferiority or involuntary servitude.”); Torok, *supra* note 256, at 72 (“The [Thirteenth] Amendment relates to Chinese immigrants because ‘coolieism’ was often viewed as a species of slavery.”); Tsesis, *supra* note 256, at 1340 (citing *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 72 (1872)).

260. Torok, *supra* note 256, at 72.

261. *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998) (denying a Thirteenth Amendment cause of action to non-citizen nationals of U.S. territories).

262. Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941 (2007); Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923 (2007); Maria L. Ontiveros & Joshua R. Drexler, *The Thirteenth Amendment and Access to Education for Children of Undocumented Workers: A New Look at Plyler v. Doe*, 42 U.S.F. L. REV. 1045 (2008) (arguing that the Thirteenth Amendment should apply to migrant workers’ children); Vanessa B.M. Vergara, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 NW. U. L. REV. 1547 (2000). See generally Alexander Tsesis, *Into the Light of Day: Relevance of the Thirteenth Amendment to Contemporary Law*, 112 COLUM. L. REV. 1447, 1457 (2012) (citing Professor Richard Delgado’s call for a more active application of non-Thirteenth Amendment remedies for non-African Americans, such as Native Americans and Latinos).

263. Spencer S. Hsu, *ICE to Strengthen Oversight of Immigrant Detention*, WASH. POST (Aug. 7, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/06/AR2009080601543.html>.

punitive, but it has failed to make much progress on fulfilling this promise.²⁶⁴ The creation of a system of accountability for immigration detention would help ensure that the Voluntary Work Program is not misused to the detriment of detainees.

Another considerable concern related to detainee labor is the rate of pay. Some have argued that the Fair Labor Standards Act’s minimum wage protection should be extended to detainee labor.²⁶⁵ Professor Stevens contends that the FLSA should apply to the modern immigration detention system regardless of historical context:

The history suggests that whatever Congress in 1950 may have intended for the wages paid to aliens held under immigration laws, it has little bearing on the program in place today. The worker/employer relation in today’s ICE facilities is much closer to the factors contemplated in the FLSA than it is to the economics and management of the multi-faceted alien internment, prisoner of war, and immigrant detention laws and policies in the 1940s.²⁶⁶

Even assuming *arguendo* that detainee labor is not covered by the FLSA, the paltry sanctioned rate of one dollar a day—a rate that has not changed since 1950—is ripe for revision. The statute requires that the rate of pay be reviewed “from time to time” through Congress’s appropriations process,²⁶⁷ but the last time this occurred was in 1979. In addition to a potential violation of the letter of the law, there is a moral concern: the rate of pay under the Voluntary Work Program, which in the words of Hassall Moses is akin to “modern-day slavery,”²⁶⁸ is now a cornerstone for the profits made by companies running the facilities. Put another way, “[t]he financial necessity for privately run ICE detention facilities to have available detainee labor has reportedly created perverse incentives to coerce detainees into the VWP.”²⁶⁹

In arguing for a critical examination of “voluntary” immigrant detainee labor, this Article joins those calling for legal and policy reforms to the immigration enforcement system “with the goals of scaling back or altering the nature of detention to conform to its status as a civil, rather than penal,

264. Susan Carroll, *ICE Paints Bleak Picture of Detention System*, HOUS. CHRON. (Oct. 10, 2011), <http://www.chron.com/news/houston-texas/article/ICE-paints-bleak-picture-of-its-detention-system-2209428.php>.

265. See Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail Work Programs—A History and Legal Analysis, 1943-Present* 14-15 (May 15, 2014) (working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434006.

266. *Id.* at 95. Professor Stevens filed a Freedom of Information Act lawsuit against ICE regarding the Voluntary Work Program contending, *inter alia*, that ICE is in violation of Department of Treasury rules and the separation of powers based on Congress’s failure to address the rate of pay issue through its appropriations process. Complaint at 4, *Stevens v. U.S. Dep’t of Homeland Sec.*, No. 1:14-cv-03305 (N.D.Ill. May 6, 2014).

267. 8 U.S.C. § 1555(d) (2013).

268. Moses, *supra* note 6.

269. Complaint, *supra* note 266, at 5.

institution.”²⁷⁰ Detainee labor, and the significant problems and moral questions associated with it, is another attribute of a “cimmigration” system that has gone too far. At the heart of the matter is a bloated detention system, unmoored from its original rationale, which is operating without meaningful checks and balances within a broken immigration system.²⁷¹ Reforming the Voluntary Work Program would constitute one way to scale back what has become an unjustifiably punitive institution.

270. Das, *supra* note 16, at 138.

271. “[T]he civil nature of immigration enforcement suggests, rather than merely different *conditions* of detention, that the overall system should employ detention less.” Mark Noferi, *New ABA Civil Immigration Detention Standards: Does “Civil” Mean Better Detention or Less Detention?*, CRIMMIGRATION (Aug. 28, 2012), <http://cimmigration.com/2012/08/28/new-aba-civil-immigration-detention-standards-does-civil-mean-better-detention-or-less-detention/>.