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Amnesty or Abolition?

Felons, illegals, and the case for
a new abolition movement

Nearly 10 percent of California's residents are prisoners, parolees, felons,¹ or undocumented immigrants.² Although differently constituted, these groups form a caste of persons living in the Golden State for whom neither democracy nor freedom is guaranteed. Prisoners, parolees, and undocumented immigrants cannot vote. Parolees, felons, and undocumented immigrants are variously denied access to public housing, food stamps, educational loans, and employment. Prisoners, deportees, and immigrant detainees are forcibly removed from their families and communities, while undocumented immigrants, parolees, and persons under warrant live with the constant fear of arrest.³

Disfranchised, denied core protections of the social welfare state, and imprisoned, detained, or under threat of warrant or deportation, the status of undocumented immigrants, prisoners, and ex-offenders in the United States pivots on shared exclusions from full political and social membership. This story of democracy denied and

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freedom unfound is one of clear racial significance across the country, with Blacks and Latinos comprising an extraordinary 60 percent of the total prison population in the United States. Home to a substantive slice of the nation's undocumented and incarcerated populations, California is a heartland of racial exclusion in the United States today.

In recent years, legal scholars have detailed the increasingly tangled world of exclusion rooted in felony conviction and unsanctioned migration.⁴ The series of civil disabilities that have been heaped on citizens convicted of felony charges since the 1970s, namely drug offenders, have gutted the substance of their citizenship rights. Today, according to legal scholar Juliet Stumpf, the “status of an ex-felon strikingly resembles that of an alien” as “criminal offenders [have been]—literally—alienated” by limitations upon the right to vote, restricted employment opportunities, and exclusions from welfare benefits.⁵ The criminal justice system, in other words, has created a legal framework by which the rights and benefits of citizenship are stripped away from US citizens until they mirror (and, at times, dip below) those of noncitizen immigrants within the United States. As US citizens have slipped toward what Stumpf describes as “alienation” through the criminal justice system, the status of immigrants in the United States has tipped toward criminalization through the implosion of criminal law and immigration law. In particular, Congress has greatly expanded the list of offenses that trigger deportation for *legal* immigrants while immigration law enforcement has become better coordinated among federal, state, and local officials. The result is that everyday criminal law enforcement activities are now harnessed to identify undocumented immigrants and enforce US immigration law. The rise of “crimmigration” law, as legal scholars like to say, has transformed the lives of immigrants in the United States. Minor criminal violations and everyday legal infractions, ranging from shoplifting to traffic violations, now routinely trigger one of the state's most consequential sanctions—deportation.

This essay explores the historical development of the alienation of citizen offenders and the criminalization of immigrants in the United States; in particular, it chronicles how immigration control and mass incarceration emerged as the systems of social control that frame alienated citizens and criminalized immigrants as a racialized caste of outsiders in the United States today. Pulling back the layers

of citizen alienation in our modern democracy, and charting how our nation of immigrants came to deport so many for so little, reveals a story of race and unfreedom reaching back to the era of emancipation.

Immigration Control

Perhaps most Americans believe their ancestors arrived legally in the United States but few today are aware that Congress left immigration almost unregulated for almost a century after the Revolution. During that time, practically any person who reached American shores of their own volition could enter the United States to work. Immigration control began nearly 150 years ago, during the US Civil War, long before our current struggles at the US-Mexico border.

About one year into that brutal war, Northern congressmen learned of a devious plot by slaveowners in Louisiana. Ever more anxious about the specter of emancipation, plantation owners had quietly begun to import Chinese contract workers. Popularly known and derided as “coolies,” these workers were regarded as a racially inferior and unfree political caste that, in the case of emancipation, could be used to replace black slave labor across the South. Learning of the plan, Congress passed the Anti-Coolie Act of 1862, which prohibited US citizens from importing these workers into the United States. Passed to prevent the reinvention of slavery in the American South, the Anti-Coolie Act of 1862 functioned as the nation's “last slave-trade act and its first immigration law.”⁶

Keeping Chinese workers out of the country, Congress reasoned, would prevent the creation of a new form of “unfree” labor in the United States. And yet, even as they considered additional “protective” measures, Frederick Douglass, the brilliant abolitionist orator and former slave, offered a stinging critique. Douglass firmly supported unrestricted immigration from the world over and challenged claims that Chinese immigrants would reintroduce “the slave problem” to the United States.

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“It was not the Ethiopian as a man, but the Ethiopian as a slave and a coveted article of merchandise, that gave us trouble,” argued Douglass.⁷ The problem of slavery, in other words, was not rooted in the bodies of enslaved persons but rather in the laws that organize inequitable social relations and protect the marginalization of humans. This was the radical abolitionist critique that Douglass had cut during the movement, and then war, to end slavery. When he applied his wisdom to the congressional effort to halt Chinese immigration, he hinted that the quest for immigration control was at its core an anti-abolitionist project. It degraded human rights, fueled forms of racial thinking, and encompassed strategies of exclusion that African Americans were battling against in the years after the Civil War in their struggle to achieve full emancipation. In this,

the black freedom struggle was directly tied to immigration politics and Douglass recognized the critical importance of opposing the rise of immigration control.

But Douglass’s abolitionist critique went unheeded. Congress continued to pass legislation restricting immigration into the United States. In time, the rise of a US immigration control regime would write a new chapter in the story of unfreedom. In particular, increasingly restrictive immigration legislation created the “illegal alien” as a substantively marginalized political category in American life.

Creation of the Illegal Alien

The creation of the illegal alien unfolded in the decades following the Anti-Coolie Act, as Congress dramatically

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expanded the limitations placed on legal entry into the United States. In 1882, Congress banned Chinese workers and all “lunatics, idiots, convicts, those liable to become public charges, and those suffering from contagious diseases.” In 1885, *all* contract workers were prohibited from entering the United States. In 1891, polygamists were added to the list of banned persons and, in 1903, anarchists, beggars, and epileptics joined the growing list. In 1907, Congress also excluded imbeciles, feeble-minded persons, unaccompanied minors, those with tuberculosis, and women of immoral purposes. That same year, the President signed a Gentlemen’s Agreement with Japan that strictly regulated and limited Japanese immigration to the United States. By 1924, Congress had categorically prohibited all persons of Asian origin from entering and introduced a national origins system, which limited how many immigrants could enter the United States each year; it favored Western European immigrants. In effect, Congress had prohibited much of the world from legally entering the United States.

The congressional project to restrict immigration thus took shape between the 1880s and 1920s as the United States, from northeastern manufacturing to southwestern agribusiness, was rapidly becoming one of the world’s most robust industrial economies. Despite numerical and categorical limitations, immigrant workers still arrived by the hundreds of thousands. Not all were qualified to legally enter the country. To evade immigration restrictions, they crossed the borders without inspection, used fraudulent documents to enter at ports of entry, overstayed visas, and violated conditions of legal residency.⁸ Immigration restrictions in an era of mass global migration, in other words, triggered the creation of “illegal immigration” as a new realm of social activity. As people from other countries stepped around US immigration restrictions, they stepped into the socio-political category of the illegal alien.

As immigrants entered in violation of US immigration laws, the Supreme Court faced tough new questions regarding the status of persons not formally authorized to be

within the United States. In a series of decisions made during the late-nineteenth century, often referred to as the Chinese Exclusion cases, the court established a framework for shaping the rights and status of unauthorized persons living in the United States. In *Chae Chan Ping vs United States* (1889), the Supreme Court established that immigration control was, as a matter of foreign affairs, a realm of unmediated congressional and executive authority.⁹ According to the decision, “The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States . . . cannot be granted away or restrained on behalf of anyone . . . The political department of our government . . . is alone competent to act upon the subject.” Thus, the US Supreme Court limited the “reach of the Constitution and the scope of judicial review” over the development of immigration law by defining it as a matter of sovereignty and thereby a zone of unmediated federal power.¹⁰

In the 1893 *Fong Yue Ting* decision, the court held that the federal government’s right to expel foreigners was “absolute” and “unqualified”; therefore, immigrants, even lawful permanent residents, could be deported from the country at any time for any reason. This decision also established that “deportation is not a punishment for crime” but rather an administrative process of returning immigrants to the place where they belonged. Defining deportation as “an administrative process” was highly significant because much of the Bill of Rights applies only to criminal punishment. Accordingly, the court held in *Fong Yue Ting*, “the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable search and seizures, and cruel and unusual punishment, have no application.”¹¹ In these two decisions, each saturated with ideas of Chinese immigrants as “hordes of barbarians” and “alien races incapable of assimilation,” the foundation for the rights and status of persons coming to be known as “illegal aliens” in the United States was established.¹² For the first time since slavery, an entire category of people in the United States could be imprisoned without a trial by jury. Their homes

could be searched without warrants, they could be detained without being arrested, and punished by Americans in ways Americans could not be.

Over the next century, the Supreme Court would decide immigration cases when framed as constitutional issues regarding the rights of persons in the United States; but the federal project for immigration control, in general, developed with little oversight from the courts and limited application of the Constitution.¹³ Therefore, the “illegal alien” developed as a uniquely marginal, political category of persons in post-Civil War America.

The Threat of Deportation

For unauthorized immigrants, their distance from the Constitution and the formal power of immigration control are compounded by the fear of deportation, which limits their ability to fully exercise their rights as persons and workers in the United States. In particular, as the regime of US immigration control expanded over the course of the twentieth century, the threat of deportation—once a fairly remote concern—now hangs over workplace disputes, limits mobility along roadways, and shapes the most intimate family decisions about marriage, divorce, housing, and child rearing. In effect, the US immigration regime has constructed the political category of the illegal alien as an expansive site of social inequalities that constitutes, as historian Mae Ngai argues, a “caste unambiguously situated outside the boundaries of formal membership and social legitimacy.”¹⁴

No institution in US history has played a more significant role in defining the caste of “illegal aliens” than the US Border Patrol. With the mandate to detect and apprehend persons for unauthorized entry into the United States, Border Patrol officers spend their working hours literally bringing bodies to the consequential but relatively broad and abstract political category of illegal immigrant. Unauthorized immigration is a field of social activity constituted by everything from expired visas and border jumping to false statements and unemployment. The Border Patrol translates this broad field of social activity into an identifiable social reality of persons policed, apprehended, detained, and deported for violating US immigration law. Therefore, the making of the political category of the “illegal alien” an everyday reality in American life is rooted in the decisions

and discretions made by the US Border Patrol in the pursuit of immigration law enforcement.¹⁵

The Border Patrol

Congress established the US Border Patrol in 1924 to enforce the enormous web of immigration restrictions that had developed since the passage of the Anti-Coolie Act of 1862. Their jurisdiction stretched along the Canadian border, spanned the US-Mexico border and, in time, extended to include the Florida Gulf Coast region and various coastlines. In addition to preventing persons from crossing into the United States without official sanction, the Border Patrol’s job included policing borderland regions to detect and arrest persons defined as illegal immigrants. At first, Border Patrol officers in the US-Mexico border region were confused about how to translate their broad mandate and jurisdiction into a practical course of law enforcement. Thousands of excluded persons—Asians, unaccompanied minors, persons with trachoma—regularly violated US immigration law. Even US citizens routinely violated immigration restrictions by refusing to cross through official ports of entry. Working in far-flung offices in border communities, Border Patrol officers were given no guidance from national immigration officials regarding how to prioritize the enforcement of US immigration restrictions. The officers, for example, could have raided brothels or policed the primary racial targets of US immigration restrictions, namely Asians. But the early officers of the US Border Patrol took an unexpected approach.

Hired from local border communities, Border Patrol officers along the US-Mexico border focused almost exclusively on apprehending and deporting undocumented Mexican workers. Ironically, Mexico’s migrant workers were not categorically prohibited from entering the United States, but they often evaded the administrative requirements for legal entry, such as paying entrance fees and passing a literacy test and health exam. For the working-class white men, hired from local border communities, who worked as Border Patrol officers during the 1920s and 1930s, directing US immigration law enforcement toward Mexican border crossers—the primary labor force for the region’s dominant agribusiness industry—functioned as a means of wresting respect from agribusinessmen, demanding deference from Mexicans in general, achieving upward social mobility for their families, and/or concealing racial violence within the



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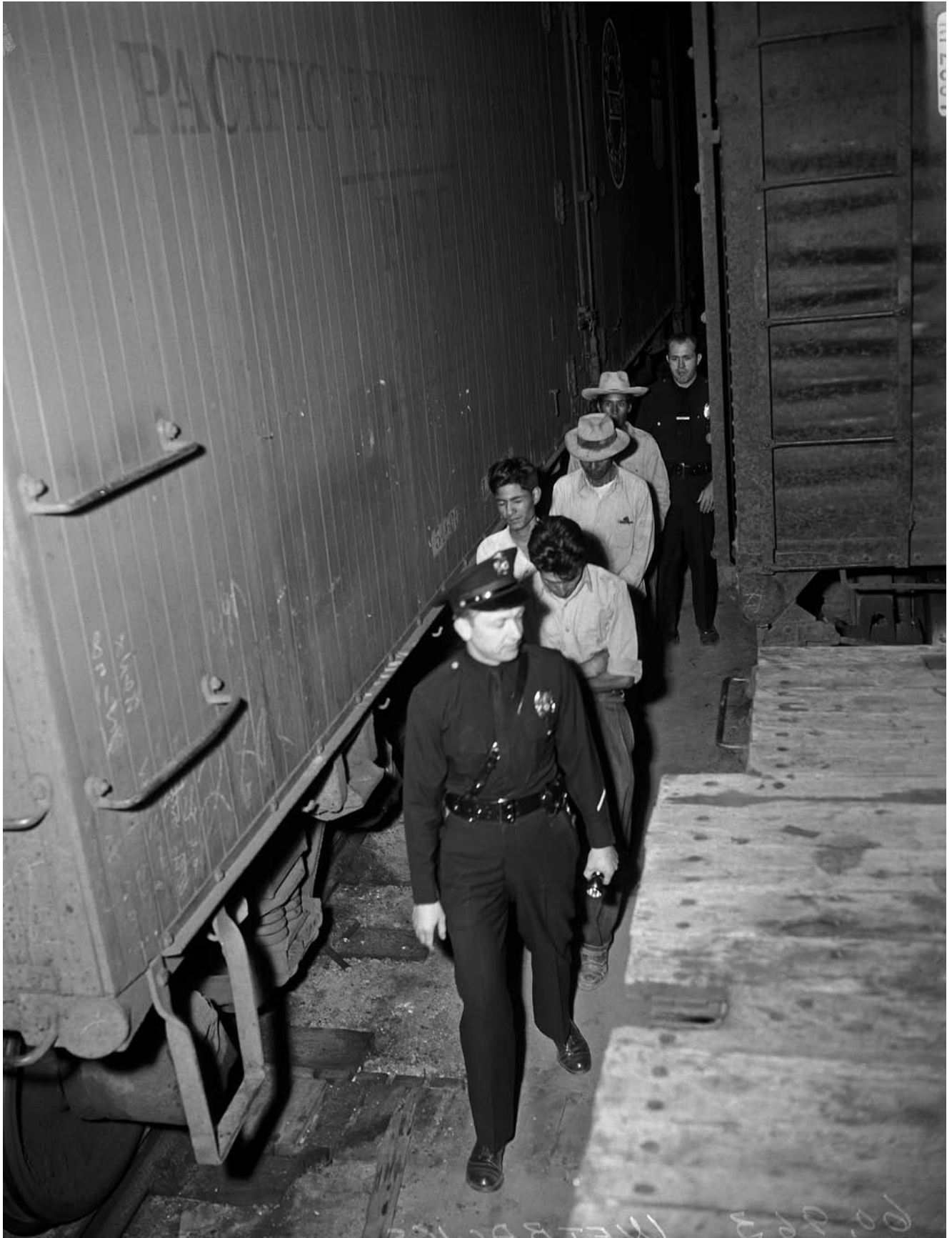
COURTESY OF LOS ANGELES TIMES PHOTOGRAPH ARCHIVE, CHARLES E. YOUNG RESEARCH LIBRARY, UCLA.

framework of police work. Although they were satisfying more personal and local interests in immigration control, by targeting unsanctioned Mexican immigrants instead of the many other possible targets of immigration control, Border Patrol officers effectively Mexicanized the set of inherently and lawfully unequal social relations that emerged from the regime of US immigration control in the Mexican border region. Mexicanizing the caste of illegals remained a regional story until concerns regarding national security during World War II forced the Border Patrol to become a more centrally operated institution.

During World War II, Congress transferred the Border Patrol's parent agency, the Immigration and Naturalization Service (INS), from the Department of Labor to the Department of Justice. Located within the Department of Justice,

immigration control entered into the growing bureaucracy of federal law enforcement under the US Attorney General and alongside the FBI, US Marshals, and the Bureau of Prisons. With new resources, tighter supervision, more personnel, and improved training, these were the years when the Border Patrol's national focus turned toward policing unsanctioned Mexican immigration.

This turn was primarily influenced by the establishment of the Bracero Program, a US/Mexico contract labor program launched in 1942. Between 1942 and 1964, over four million Mexicans legally worked in the United States through the Bracero Program. Still, a large number of Mexican nationals crossed the border without sanction in search of work. To protect a binational program designed to import legal Mexican workers in the United States, the



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US Border Patrol adopted an aggressive campaign to work with Mexican authorities to deport illegal Mexican workers. To increase the number of deportees, Special Mexican Deportation Parties were established. By 1944, this program had significantly increased the number of Mexicans apprehended each year. Concurrently, the number of Mexicans as a percentage of the total number of apprehensions nationwide shot up to over 90 percent.

By the early 1950s, the US Border Patrol's Special Mexican Deportation Parties were apprehending hundreds of thousands of Mexican immigrants each year. In May 1954, the Border Patrol announced that a crisis of unsanctioned Mexican immigration had developed along the US-Mexico border and that it would soon launch a major campaign to end that crisis. A few weeks later, in the now infamous Operation Wetback campaign of 1954, Border Patrol task forces swept across the Southwest and declared to have solved the so-called "wetback problem" by deporting over one million Mexican nationals.

After the campaign and into the mid-1960s, Border Patrol apprehensions along the US-Mexico border dropped dramatically.

Operation Wetback is often cited today as evidence that immigration law enforcement, if aggressively pursued, can successfully end unsanctioned migration. But aggressive enforcement is not how the Border Patrol scored its successes during the summer of 1954. The Border Patrol significantly overreported the number of persons apprehended during Operation Wetback and achieved a declining number of apprehensions after the campaign by demobilizing the task forces. Assigned to two-man horse patrols, officers simply could not apprehend the same number of persons as the days when they worked in deportation task forces. Reduced immigration enforcement, rather than aggressive immigration enforcement, was how the US Border Patrol achieved a declining number of apprehensions in the years after Operation Wetback. Still, the Border Patrol's proclamations of triumph along the US-Mexico border opened a series of questions regarding practices and priorities of US migration control in the future.

Rise of the Criminal Alien

In the years after Operation Wetback, Border Patrol officials carefully reinvented immigration control as a matter

of crime control. As early as November 1956, officers were instructed that, "the word 'wetback' . . . should be deleted from the vocabulary of all Immigration officers" because "today's apprehensions consist in the main part of criminals, often vicious in type, and of hardened and defiant repeaters." To defeat the image of a poor worker crossing the border without sanction, a Border Patrol supervisor instructed officers that, "whenever a criminal record exists, we use the words, 'criminal alien,' and when no criminal record exists, the words, 'deportable alien.' I feel this change will have a psychological effect on the public and courts that will benefit the Service."¹⁶ The linguistic turn toward approaching migration control as a matter of crime control, supported by the emerging War on Drugs throughout the country, reconfigured the everyday activities of immigration law enforcement.

Drug Wars

The War on Drugs is most often associated with Ronald Reagan and the 1980s but the 1940s and 1950s were critical years in the development of the campaign.¹⁷ Between 1946 and 1951, the Uniform Narcotic Drug Acts created mandatory minimum prison sentences for drug convictions. In 1951, the Boggs Act established a mandatory minimum of two years even for first-time offenders. The ascent of drug control legislation reached a new level with the passage of the Narcotics Control Act of 1956, which imposed life imprisonment and even the death penalty for certain drug offenses, and made drug convictions a trigger for deportation for immigrants. Here were the state's ultimate sanctions: life in prison, death, and banishment.

The Border Patrol was deeply impacted by the rise of drug control as a federal law-enforcement initiative. In 1955, Congress designated all Border Patrol officers as customs inspectors and gave the organization primary authority over drug interdiction between official ports of entry. In addition, the Border Patrol began targeting immigrant prostitutes and drug runners. The INS detention centers along the US-Mexico border had been established to function as staging centers from where detainees were prepared for deportation or the more widely used form of forcible removal known as "voluntary return." With a new focus on arresting and deporting "criminal aliens," these centers adopted new policies and procedures to handle criminals rather than mi-

grants. In particular, the INS began strip-searching all detainees upon entrance to the immigrant detention facilities and detained migrants for longer periods to run criminal background checks on all deportees.

By the late 1970s, immigration control was thoroughly enmeshed in crime control and drug interdiction in the US-Mexico border region.¹⁸ During the 1980s, this implosion of law enforcement activities was reinforced with federal legislation that intimately bound immigration law to criminal law. The Anti-Drug Abuse Act of 1988 established a long list of retroactively applied “aggravated” felonies that triggered deportation for immigrants, including lawful permanent residents. Shoplifting, passing bad checks, and drug possession all constituted aggravated felonies subject to automatic deportation proceedings. The Anti-Drug Abuse Act, therefore, created new ways for immigrants to be marked as illegal and thereby deported.¹⁹ By the mid-1990s, nonviolent offenses including, document fraud, vehicle trafficking, and skipping bail were all added to the list of aggravated felonies that triggered deportation. In 1996, the Antiterrorism and Effective Death Penalty Act defined a single conviction of “moral turpitude” as a deportable offense while the Illegal Immigration Reform and Immigrant Responsibility Act, also passed in 1996, defined any conviction that carried a minimum sentence of one year as a deportable offense. By the turn of the twenty-first century, the new legislation had substantively expanded the deportability of legal immigrants while undocumented immigrants became more likely to be arrested for minor infractions via federal programs that coordinate with and reimburse localities for checking the immigration status of persons detained on ancillary charges.²⁰ The Criminal Alien Program (CAP) and Secure Communities program, for example, have allowed federal authorities to identify undocumented immigrants throughout the country among persons detained for misdemeanors and traffic violations.²¹

Today, over 60 percent of all deportations from the United States are triggered by criminal convictions, mostly traffic offenses, nonviolent drug crimes, and immigration-related violations.²² After serving their criminal sentence, most immigrants who are identified for deportation will spend over one month in a detention facility, most likely a rented-out jail bed in one of several hundred jail facilities throughout the country that contract with Immigration

The state prisoner population increased by nearly 500 percent between 1982 and 2000.

and Customs Enforcement. In this era of mass incarceration, it is in jails and prisons across the United States where the paths of criminalized immigrants awaiting deportation have crossed with those of alienated citizens.

Mass Incarceration

Incarceration is an old story in the United States: jails reach back to the colonial era and prisons developed during the early nineteenth century. However, mass incarceration is a relatively recent phenomenon in American life.²³ Whereas the country’s per-capita prison population remained relatively stable between the mid-nineteenth and mid-twentieth centuries, it began to tick up in the 1970s before exploding during the 1980s. Today, the United States holds over two million people behind bars. A total of seven million people—or 3.2 percent of the total adult population—are currently under some form of correctional supervision, and an estimated 50 million people have criminal records.²⁴

The growth in the prison population has demanded an expansive set of institutions to hold, process, service, and monitor these millions of people. According to political scientist Marie Gottschalk, if one includes prisoners, probationers, parolees and their families, employees of correctional institutions, and residents in communities where prisons are built, mass incarceration directly impacts the daily lives of tens of millions of people throughout the country.²⁵

California hosted one of the most dramatic prison booms in the late twentieth century. Fueled by new drug laws and sentencing practices, the state prisoner population increased by nearly 500 percent between 1982 and 2000. By 1992, California boasted the largest prison system in the Western world, with over 50 percent more prisoners than the US federal prison system and 40,000 more than the prison systems of Great Britain and Germany

combined.²⁶ The state built twenty-three new prisons between 1982 and 2000, compared to twelve prisons built between 1852 and 1964.²⁷ Today, the Department of Corrections and Rehabilitation is California's largest state agency, with over 54,000 employees servicing nearly 161,704 inmates and 104,872 parolees.²⁸

Like immigration control, mass incarceration is a zone of racial inequity. African Americans and Latinos, together, constitute 67 percent of the total state-prison population, but the rate of incarceration is significantly higher for the former. As of 2005, African American men were incarcerated at a rate of 5,125 per 100,000 in the general state population, compared to 1,142 for Latinos, 770 for whites, and 474 for men of other races. By the mid-1990s, five times as many black men in California were in prison than were enrolled in public higher education.²⁹ Among women, African Americans were incarcerated at a rate of 346 per 100,000 in the population, compared to 80 for whites, 62 for Latinas, and 27 for women of other races.³⁰ Today, black women are among the fastest growing prison populations.

Scholars and activists have been detailing since the mid-1980s how mass incarceration significantly shapes the life chances of African Americans, specifically as Congress and state legislatures restrict the social rights and benefits afforded to citizens convicted of a felony.³¹ The right to vote, parental rights, and access to welfare benefits, including public housing, food stamps, and educational loans, for example, can be revoked for felony drug convictions. With higher rates of incarceration, African Americans are unevenly impacted by these “collateral consequences” of imprisonment. Yet to fully understand the meaning of mass incarceration at the turn of the twenty-first century, it is important to, once again, return to the nineteenth-century struggle for abolition.

In December 1865, upon Northern victory in the Civil War, Congress ratified the Thirteenth Amendment to the United States Constitution, which declared that “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, or any place subject to their jurisdiction.”³² With its adoption, black emancipation from Southern slavery was accomplished, but the abolition struggle was incomplete, as convicts emerged as legitimate subjects of involuntary servitude. Into the

twentieth century, in prisons and jails across the country, involuntary servitude flourished under the protection of the Thirteenth Amendment. Incarceration, in other words, functioned as a zone of exception in post-emancipation America.³³

In 1868, Congress ratified the Fourteenth Amendment, which protected the citizenship status of freed slaves by firmly conferring citizenship upon all persons born or naturalized in the United States. In the decades ahead, municipalities and states would limit the substance of black citizenship with Jim Crow laws designed to marginalize African Americans under the rubric of “separate but equal.” State legislatures also significantly altered the rights and privileges of citizenship according to convict status. According to California's 1872 Penal Code, for example, persons convicted for felonies and sentenced to life in state prison were defined as “civilly dead,” and those convicted and sentenced to any term less than life in state prison lost *all* civil rights, other than those individually adjudicated or protected.³⁴

Over the years, various rights and protections have been granted to California's inmates—by 1914, the right to receive correspondence: in the 1975 Inmate Bill of Rights, the right to marry, bring civil lawsuits, make wills, and create powers of attorney. Court decisions have also protected inmate access to health care and, most recently, the US Supreme Court upheld an order to protect inmates from the “cruel and unusual punishments” that accompany rampant overcrowding in the California prison system. Still, the many “collateral consequences” for felony conviction constitutes mass incarceration as a rights-stripping modality in the political landscape of the state and nation.

“Collateral consequences” is a term for the many social and political consequences attached to felony conviction. For example, in addition to disfranchisement for incarcerated felons and parolees in the State of California, federal law prohibits persons with drug convictions from being on or near the premises of public housing and maintains a lifetime ban on welfare benefits for persons with drug convictions. Such bans and exclusions are the material evidence that the criminal justice system operates as a broad-reaching system of social stratification that holds persons aloft from full citizenship and social belonging. Given the deeply racialized dimensions of mass

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incarceration in California and across the country, legal scholar Michelle Alexander refers to mass incarceration as the “new Jim Crow.”³⁵

But African Americans have not always constituted such a disproportionate number of inmates in California. In the 1920s, African Americans comprised 7 percent of the state and federal prison population in California.³⁶ During World War II, tens of thousands of African Americans migrated to the West Coast to take jobs in the region’s growing industrial sector. Still, the black presence in the California prison system did not skyrocket until deindustrialization and the War on Drugs accelerated during the early 1980s.³⁷

As the escalation of the War on Drugs swept increasing numbers of underemployed African Americans into the California prison system, it was also increasing funds for immigration control in the US-Mexico borderlands. During the 1970s, new investments in border enforcement for drug interdiction allowed the overall project of immigration control to expand. By the early 1980s, the Border Patrol routinely apprehended over one million persons per year and, by the close of the decade, increasing numbers of undocumented immigrants were being convicted of immigration violations and drug charges prior to deportation. The Urban Institute reports that the number of unauthorized immigrants sentenced in federal courts increased by 167 percent between 1991 and 1995, compared with 13 percent for citizens. In these years, immigration violations and drug crimes, most occurring in the Southwestern United States, constituted 85 percent of all offenses for which undocumented immigrants were convicted.³⁸

The Illegal Immigration Reform and Immigration Responsibility Act (1996) further pushed undocumented immigrants into the prison system for nonviolent crime by increasing penalties for unsanctioned migration and requiring detention of immigrants undergoing deportation

hearings. Today, Latinos, principally Mexicans, make up the largest group of inmates in federal prison; and undocumented immigrants, alongside Black women, represent one of the fastest growing incarcerated populations in California.³⁹

In the jails and prisons of the Golden State, the crossed paths of felons and illegals clarify the meaning of mass incarceration and immigration control. For the Mexicanized caste of illegals, the arrival in US jails and prisons confirms that the US immigration control system is busy not only removing people from the United States but also in delivering them to peculiar institutions where far-reaching and racialized social, political, and economic inequities are now defined within the United States. For the African Americans who are unevenly represented among California’s convict population, the arrival of undocumented immigrants in the prison system strengthens the prison’s function as a special reserve for those without full citizenship rights in the United States. This tangle of alienated citizens and criminalized immigrants is a deeply historical construct that reaches up from the unfinished abolition struggle of the nineteenth century and across the twentieth-century experience with race and inequity to define today’s caste of felons and illegal immigrants.

In the years ahead, as we grapple with the yet unfulfilled promises of immigration reform and prison reform, the success of our efforts will rest in remembering the history to which we respond. Since the era of emancipation, the rise of immigration control and mass incarceration has created a racialized caste of outsiders within the United States. Bigger jails with better food and improved health care—while immediately needed—will never address the larger and deeper problem of alienated citizens living in states of internal exile, both within and beyond the prison walls. Similarly, amnesty and paths to citizenship—while urgently needed—will never be enough. As the case of

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African Americans makes clear, citizenship can be gained and lost (time and again). Today it is the criminal justice system that renders the substance of citizenship, itself, unpredictable. In other words, a path to citizenship for undocumented immigrants in an era of mass incarceration may not be as valuable as it seems if pursued without a challenge to the inequities of mass incarceration; however, understanding the long history that brought us here carries within it alternatives to consider. At the beginning of it all, there was an abolitionist's critique. "It was not the Ethiopian as a man, but the Ethiopian as a slave and a coveted article of merchandise, that gave us trouble," explained Frederick Douglass in 1869. Like the slave, the caste of felons and illegal immigrants is a construct. We will need an abolitionist critique to imagine and build a world without it.⁴⁰ **B**

Notes

- ¹ In this essay, the terms "illegal alien," "convict," and "felon" are not used to reference human beings but rather political categories created by immigration and criminal law. When referring to persons, either the terms unauthorized immigrant, unsanctioned immigrant, undocumented immigrant, or persons convicted of a felony are used.
- ² California's total state population in 2010 was 37,253,956. Of this number, there are an estimated two million undocumented immigrants, an estimated 1.5 million ex-felons, and 170,000 currently in prison.
- ³ Voluntary Return was a process established during the 1920s to be used in lieu of formal deportation proceedings. Under Voluntary Return, immigrants waive their right to a deportation hearing and are not formally deported from the country but are required to leave the country. Most forced removals from the United States occur as Voluntary Returns rather than formal deportations. Immigrant detainees are persons held in detention facilities that are either administered or contracted with

by Immigration and Customs Enforcement. Most detainees are held while disputing a deportation order or while awaiting deportation.

- ⁴ Examples of recent scholarship include, Nora V. Demleitner, "Preventing Internal Exile: The Need for Restrictions on Sentencing Collateral Consequences," 11 *Stanford Law and Policy Review* 153 (1999); Teresa Miller, "Citizenship and Severity: Recent Immigration Reforms and the New Penology," 17 *Georgetown Immigration Law Journal* 611 (2003); Juliet Stumpf, "The 'Crimmigration Crisis': Immigrants, Crime and Sovereign Power," 56 *American University Law Review* 367 (2006), 367-419; Yolanda Vazquez, "Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System," *Howard Law Journal* 54 (2011), 639-674. See also, "Policing, Detention, Deportation, and Resistance," a special volume of *Social Justice: A Journal of Crime, Conflict and World Order*, v 36, n2 (2009).
- ⁵ Stumpf, "The Crimmigration Crisis," 399.
- ⁶ Moon Ho-Jung, *Coolies and Cane: Race, Labor, and Sugar in the Age of Emancipation* (Baltimore: Johns Hopkins University Press, 2006), 38.
- ⁷ Frederick Douglass, "Our Composite Nationality" (1869).
- ⁸ Patrick Ettinger, *Imaginary Lines: Border Enforcement and the Origins of Undocumented Immigration, 1882-1930* (Austin: University of Texas Press, 2009).
- ⁹ The political branches of government include Congress and Executive Branch through the US Attorney General.
- ¹⁰ Quote from "Crimmigration Crisis," 392. For information on the cases discussed above, see Gabriel Chin, "Chae Chan Ping and Fong Yue Ting: The Origin of Plenary Power," *Immigration Law Stories*, David Martin and Peter Schuck, eds., (Foundation Press, 2005); Ian Haney Lopez, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996).
- ¹¹ *Fong Yue Ting vs United States*, 149 US 698, 730 (1893).
- ¹² Quoted in Chin, 20.
- ¹³ For a discussion of the rights granted to undocumented immigrants, see Miller, "Citizenship and Severity," 620-624
- ¹⁴ Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004), 2.
- ¹⁵ The following discussion of the US Border Patrol is derived from my book, *Migra! A History of the U.S. Border Patrol* (Berkeley: University of California Press, 2010).
- ¹⁶ November 2, 1956 and November 15, 1956 untitled memos. National Archives and Records Administration 56364/43.3, 94, 59A2038.
- ¹⁷ David F. Musto, *The American Disease: Origins of Narcotics Control* (New York: Oxford University Press, 1999), 231. See also

- Peter Smith, ed., *Drug Policy in the Americas* (Boulder: Westview Press, 1992).
- ¹⁸ See Peter Andreas, *Border Games: Policing the U.S.-Mexico Divide* (Ithaca: Cornell University Press, 2000); Timonny Dunn, *The Militarization of the U.S.-Mexico Border, 1978-1992: Low-Intensity Conflict Doctrine Comes Home* (Austin: Center for Mexican American Studies, University of Texas at Austin, 1996).
- ¹⁹ David Hernandez, "Pursuant to Deportation: Latinas/os and Immigrant Detention," *Latino Studies*, v 6, n 1-2 (Spring/Summer 2008).
- ²⁰ Vazquez, "Perpetuating the Marginalization of Latinos," 655-657.
- ²¹ Hernandez, "Pursuant to Detention," 45. See also, Bill Ong Hing, "The Immigrant as Criminal: Punishing Dreamers," 9 *Hastings Women's Law Journal* 79 (1998).
- ²² Vazquez, "Perpetuating the Marginalization of Latinos," 665. This does not include the nearly one million removed from the United States each year under "voluntary return."
- ²³ For an analysis of the rise of mass incarceration, see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001). See also, Garland, ed., *Mass Imprisonment: Social Causes and Consequences* (New York: Russell Sage Foundation, (2001). See also Heather Thompson, "Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History" *Journal of American History* v 97, n 3 (December 2010), 703-734.
- ²⁴ Demleitner, "Preventing Internal Exile," 12.
- ²⁵ Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge: Cambridge University Press, 2006), 1-3.
- ²⁶ Franklin Zimring and Gordon Hawkins, *Prison Population and Criminal Justice Policy in California* (Berkeley: University of California at Berkeley, Institute of Governmental Studies Press, 1992), 1.
- ²⁷ Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007), 7.
- ²⁸ "Weekly Report of Population, As of Midnight June 8, 2011," Data Analysis Unit, California Department of Corrections and Rehabilitation (June 13, 2011), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Population_Reports.html [accessed 15 June 2011].
- ²⁹ "From Classrooms to Cell Blocks: How Prison Building Affects Higher Education and African American Enrollment in California," Center on Juvenile and Criminal Justice (October 1996).
- ³⁰ "California's Changing Prison Population," Public Policy Institute of California, August 2006.
- ³¹ Some examples of more recent work include, Katherine Beckett and Steve Herbert, *Banished: The Transformation of Urban Social Control* (New York: Oxford University Press, 2010); Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (New York: Oxford University Press, 2006); Sarah Wakefield and Christopher Uggen, "Incarceration and Stratification," *Annual Review of Sociology* v 36 (2010) 387-406; and Bruce Western, *Punishment and Inequality in America* (Russell Sage Foundation, 2006).
- ³² Thirteenth Amendment to the United States Constitution.
- ³³ Opposition from the labor and prison reform movements dramatically reduced the use of coerced prison labor World War II. For information on convict labor between the 1860s and 1940s, see Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (New York: Verso, 1996); Ward McAfee, "A History of Convict Labor in California," *Southern California Quarterly*, v 72 (Spring 1990), 235-54; Rebecca McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* (Cambridge: Cambridge University Press, 2008); David Oshinsky, "Worse Than Slavery": Parchmann Farm and the Ordeal of Jim Crow Justice (New York: The Free Press, 1996); Robert Perkinson, *Texas Tough: The Rise of America's Prison Empire* (New York: Metropolitan Books, 2010).
- ³⁴ For more information on the historical development of the rights of prisoners, see "Civil Death: Capacity of a Convict to Contract," *California Law Review*, v 2, n 5 (July, 1914), 401-402; "Civil Status of Convicts," *Columbia Law Review*, v 14, n 7 (Nov 1914), 592-94; Nathaniel Cantor, "The Prisoner and the Law," *Annals of the American Academy of Political and Social Science*, v 157 (Sept., 1931), 23-32; Alec Ewald, "Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States," *Wisconsin Law Review* (2002), 1045-1138; "Civil Death: Capacity of a Convict to Contract," *California Law Review*, v 2, n 5 (July, 1914), 401-402; Rebecca McLennan, "The Convict's Two Lives: Civil and Natural Death in the American Prison," in eds., David Garland, Randall McGowen, and Michael Meranze, *America's Death Penalty: Between Past and Present* (New York: New York University Press, 2011); M.W.S., "Constitutional Rights of Prisoners: The Developing Law," *University of Pennsylvania Law Review*, v 110, n 7 (May, 1962), 985-1008; Harry David Saunders, "Civil Death—A New Look at a n Ancient Doctrine," *William and Mary Law Review*, v 11, n 4 (1970), 988-1003.
- ³⁵ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010).
- ³⁶ See Patrick A. Langan, "Race of Prisoners Admitted to State and Federal Institutions, 1926-1986," Publication #NCJ-125618, Bureau of Justice Statistics, US Department of Justice, (May 1991) and Patrick Langan, John V. Fundis, Lawrence Greenfield, and Victoria Schneider, "Historical Statistics on Prisoners

in State and Federal Institutions, Yearend 1935–1986,” publication # NCJ-111098, Bureau of Justice Statistics, US Department of Justice (May 1988).

³⁷ Wilson Gilmore, *Golden Gulag*, 110–11.

³⁸ Rebecca Clark and Scott Anderson, “Illegal Aliens in Federal, State, and Local Criminal Justice Systems,” Urban Institute, 30 June 2000. See also, Jonathan Simon, “Refugees in a Carceral

Era: The Rebirth of Immigration Prisons in the United States,” *Public Culture* v 10, n 3 (1988), 577–606.

³⁹ For additional information, see Michael Welch, “The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex,” *Social Justice* v 27, n 3 (2000), 73–88.

⁴⁰ Prison abolitionism is already a robust political movement. See www.criticalresistance.org for more information.