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Migrants Resist Systemic Discrimination and Dehumanization in Private, For-Profit Detention Centers

Elvia R. Arriola* and Virginia M. Raymond**

It gives me much pleasure to participate in this hunger strike. I cannot bear this punishment any more. I am dying of desperation, of this injustice, of this cruelty. We are immigrants, not criminals. To treat us like this—they must have no heart, they are of iron—as if we are not human. They treat us like dogs.¹

Maribel, in the T. Don Hutto Detention Center, Taylor, Texas, October, 2015

Abstract:

In June 2014, the U.S. Department of Homeland Security initiated a policy of detaining

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1. Maribel's full statement about the strike is at the Grassroots Leadership website. Maribel, *M's Letter* (2015), <http://grassrootsleadership.org/sites/default/files/uploads/M%27s%20letter.pdf>.

women and children asylum-seekers in detention centers across the country, rather than releasing them after arrest to pursue their claims while living in the community with extended family members, churches, shelters run by non-profit organizations, or other private individuals. Human rights advocates at the local, national, and international levels have condemned the fact of detention, the pretense that these refugees pose any “threat to national security,” the length of detention, and the conditions of detention facilities. Moreover, many of the detention facilities are run by private, for-profit prison corporations, meaning that their operations are even less transparent than federal or state operated institutions. Despite harsh conditions, women asylum-seekers and immigrants have consistently resisted their incarceration. In explaining the origins and consequences of this policy, as well as of the burgeoning phenomenon of “cimmigration” (the intersection of criminal law with immigration law) this article argues that there is a punitive character to the supposed “civil” immigration detention process. The article argues that the punitive and inhumane aspects of for-profit based immigration detention can and should be linked to broader historical and political aspects of U.S. racial history, including the rise of the prison industrial complex and the social construction of the undocumented border crosser into a presumptive criminal identity. The article explains that once in detention arrested migrants face a range of inhumane consequences stemming from the overall impact of recent changes in Department of Homeland Security policy. The article argues that the harshest impact of these changes in law and policy by immigration authorities is on members of vulnerable groups who turn themselves in at the border and request asylum. Once in the system they must overcome obstructive, procedural barriers while also being detained and treated like presumed criminals by staff in for-profit detention centers who are not accountable for their mistreatment of detainees. The article draws upon the words of women and LGBT detainees themselves to illustrate the discriminatory effects of the government’s continued reliance on for-profit prison corporations to operate immigration detention centers. The narratives herein were gathered by the authors’ first-hand knowledge, either from Dr. Raymond’s representation of formerly detained refugees or from an educational delegation produced by Professor Arriola which included first-hand meetings and interviews with migrants at the South Texas Detention Center.

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I. INTRODUCTION

Maribel is indigenous Garifuna,² the mother of three, and a woman who had long suffered persecution from distinct violent forces in her native Honduras. Her ex-husband, “A,” had beaten and threatened to kill her, but it was not until he sexually assaulted their infant daughter that Maribel realized the depth of the man’s depravity. Fleeing with her three children from him did not bring peace; her ex-husband’s enemies also sought to harm her and the children to exact revenge on *him*, for “A” had killed their family members and fellow gang members. When Maribel found a new partner, “Guillermo,”³ she continued to face danger from her ex-husband, her ex-husband’s enemies, and other people who were

2. The Garifuna are a racial and ethnic group whose hybrid identity is rooted in the history of colonialism in the blending of the Africans brought to the Americas as slaves with the native-Americans of the countries referred to today as Central America. See *A Brief History of the Garifuna People*, GLOBAL SHERPA, <http://globalsherpa.org/garifunas-garifuna/> (last visited Aug. 17, 2016).

3. Not his real name.

threatening the life of her new partner, who might have been the same as those who had already killed his father and brother. Fearing for their lives, and unable to bring the three children with them, Maribel and Guillermo fled to the United States.

When they arrived in Texas on January 4, 2015, the U.S. Department of Homeland Security (DHS) immediately arrested and separated the couple. After a relatively short stay in custody of the U.S. Customs and Border Protection (CBP) at the border, DHS sent Maribel and Guillermo to detention centers in Central Texas and South Texas, respectively. They were never to meet again. Guillermo was incarcerated for approximately nine months in the South Texas Detention Center, run for Immigration Control and Enforcement (ICE) by the for-profit prison company GEO Group⁴ at Pearsall, Texas. Apparently, Guillermo applied for asylum and perhaps other relief from removal, was unsuccessful, did not appeal, and was removed (deported) back to Honduras in September 2015. Friends and family members told Maribel that Guillermo was “disappeared” in San Pedro Sula soon after his involuntary return to Honduras; he is presumed dead.⁵

Maribel was held by DHS from January 4, 2015, until the day she “bonded out” of the detention center—or, more accurately, prison—in Laredo, Texas, on February 12, 2016. During most of this period, ICE kept Maribel in the “T. Don Hutto Residential (sic) Center,” a massive complex of buildings encircled by high, thick concrete walls topped with barbed wires,⁶ in which the day-to-day operations of policing and control of the detainees are performed by employees of another private, for-profit prison company, the Corrections Corporation of America (CCA).⁷ Soon after Maribel and other immigrant and refugee women declared a hunger strike in October, however, ICE moved her to Laredo. Other outspoken strike participants also were sent to Laredo or to Pearsall, both detention centers that were much further from their lawyers and other support.

For asylum seekers, the policy of continued detention left a person like Maribel thoroughly confused, depressed, exasperated, and frustrated. Why was she being treated like a criminal? What wrong had she committed other than appearing at the Southwestern doorstep of the nation seeking asylum that would merit the prisoner-like treatment of being detained indefinitely for months? Why for example, did CCA staff tell Maribel that she risked getting a disciplinary write-up⁸ if she continued demanding medical care and attention because she suffers from sickle cell anemia?⁹ Why were the group

4. The Geo Group, Inc. provides prison and detention services worldwide. *See generally* GEO GRP., INC., <http://www.geogroup.com> (last visited Oct. 29, 2016); Geo Group, Inc. stock trades on the New York Stock Exchange as “GEO,” and is currently available at \$23.50 per share. *See Geo Stock Quote*, MARKET WATCH, <http://www.marketwatch.com/investing/stock/geo> (last visited June 13, 2016).

5. As of this writing, advocates have been unable to find a death certificate or otherwise confirm the date or manner of his presumed murder.

6. Photos of detention centers are available online. *See WOMEN ON THE BORDER*, <http://womenontheborder.org/migrants-militarized-border/>.

7. *See CORR. CORP. OF AM.*, <http://www.cca.com/facilities/t-don-hutto-residential-center> (last visited Oct. 29, 2016).

8. Written statement of Maribel Z. (on file with authors).

9. Maribel’s lawyer, author V. Raymond, believes that CCA staff in Hutto and Laredo did not understand sickle cell anemia, a disease that disproportionately and uniquely affects persons of African descent.

of women with children, who went on a hunger strike¹⁰ to protest what they experienced as cruel and discriminatory aspects of their detention, then subjected to varied punitive measures by CCA staff such as isolation, segregation and relocation to detention centers far away from other strike participants and their lawyers?¹¹ How is it that the “civil detention” process in current immigration policy tolerates conduct by ICE staff that treats non-citizens, including mothers with small children, as presumptive criminals when there is no evidence whatsoever that as asylum seekers they pose a threat to the nation’s security? This article attempts to answer those questions by outlining a few crucial political, economic, and social forces acting within the U.S. and the northern triangle of Central America during the last several decades that explain why migrants like Maribel have fled their home countries in order to escape terroristic levels of personal and systemic violence.

The authors believe that not enough attention is being paid to the human rights crisis in the immigration version of “mass incarceration,”¹² which prevents people like Maribel from being given the benefit of the doubt when they arrive in this country as asylum seekers begging for safety and protection. Instead, they are treated like criminals and detained in facilities operated by corporations that profit from the new industry of criminal immigration imprisonment. The government’s approach to treating undocumented migrants, in particular those arriving from countries where poor people of color are a powerless majority, as presumptive criminals¹³ who can be mistreated and detained indefinitely without proper legal assistance, is deeply flawed and suspect under constitutional and human rights law norms. In support of these conclusions, Part II of this article explains the overall historical U.S. foreign policy and ideological contexts of neoliberal economics that are linked to the phenomena of migration surges from Central America and places like Honduras, Maribel’s home country. Part III argues that the current “crimmigration” system,¹⁴ i.e. the intersection of immigration law procedures with criminal law, is ultimately punitive in its operative effect on undocumented migrants. Its punitive aspects can be linked to broader historical and political aspects of U.S. racial history, including the rise of the discriminatory prison-industrial complex. Part III also explains the procedural hurdles for asylum seekers in the immigration law system, including the impact of the DHS “no-bond” (no release) policy¹⁵ on vulnerable migrant women arriving in this country with children. Part IV brings to life the experiences of migrant detainees through personal narratives acquired in the course of an educational delegation and tour of the South Texas Detention Center at Pearsall, Texas in May 2014. These stories offer a glimpse of the human condition of migration, arrest, and detention and bolster the charge that the current system unnecessarily deprives innocent persons, deemed criminals, of the fundamental right to human dignity. Part V is the Conclusion.

10. Hunger strikes by detainees occurred in 2015 at Karnes. See Tony Cantú, *Detainees Strike for Freedom: Hunger Strikes Call Attention to Conditions at Karnes, Elsewhere*, AUSTIN CHRONICLE (Apr. 17, 2015), <http://www.austinchronicle.com/news/2015-04-17/detainees-strike-for-freedom>.

11. See *infra* Part IV.

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

13. AVIVA CHOMSKY, *UNDOCUMENTED: HOW IMMIGRATION BECAME ILLEGAL* 22 (2014).

14. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 3 (2015).

15. This policy was in place from June 2014 until February 20, 2015. See discussion *infra* note 97.

II. THE EXTREME VIOLENCE OF THE NEOLIBERAL STATE FORCES WOMEN, MEN, AND CHILDREN OUT OF THE NORTHERN TRIANGLE OF CENTRAL AMERICA

Neoliberalism is . . . a theory of political and economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee . . . : First—the quality and integrity of moneySecond—military, defense, police and legal structures and functions to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Third—if markets do not exist . . . then they must be created, by state action if necessary. Beyond these tasks the state should not venture.¹⁶

As David Harvey explains in *A Brief History of Neoliberalism*, economists from the University of Chicago found their first opportunity to test neoliberalism in Chile, following the CIA-backed coup of 1973 that wrested power from the democratically elected president, Salvador Allende, and installed General Augusto Pinochet. This violent “experiment,” however nasty a shock to the Chilean people and much of the rest of the world,¹⁷ was a natural extension of U.S. intervention in Latin America for the benefit of U.S.-based global corporations. U.S. economic “interests” had repeatedly doomed democratically-elected leaders who sought to return control of land and economic policy to their own people through legitimate state actions. Guatemalans, for example, elected Jacobo Arbenz their president in 1950, but his plans for agrarian reform posed a direct threat to the United Fruit Company, a U.S. company with a virtual monopoly in the international trade for import and export of tropical fruits throughout the U.S. and Europe. John Foster Dulles and Allen Dulles, with the U.S. Department of State and CIA, manufactured a coup that replaced President Arbenz with a military junta.¹⁸ Anti-Communist fear and fervor provided the political justification for this action, if indeed any were needed within the United States. Similar motivations and rhetoric underpinned U.S. interventions in El Salvador and Nicaragua through the 1960s, 1970s, and 1980s.¹⁹

While there is no precise analogy for U.S. intervention in Honduras in that period, the U.S. began to use Honduras as something of a “parking lot” for its military equipment and troops.²⁰ The U.S. and Honduras military have been collaborating at least since 1965, when they began to conduct joint training exercises at the Soto Cano or Palmero Air Force Base, but dramatically increased when the U.S. government established a military presence at Soto Cano in 1983.²¹ From this base, the Nicaraguan

16. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2005).

17. See NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM*, chs. 2 & 3 (2007), for a detailed account of the violent overthrow of the Allende presidency.

18. STEPHEN SCHLESINGER & STEPHEN KINZER, *BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA* (rev. ed. 2005).

19. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 571-72 (1980, 2003).

20. In a forum on Central America in Austin, Texas, in late 1982 or 1983, attended by author V. Raymond, an audience member commented, “I see what the U.S. is doing in Nicaragua and El Salvador, but what does it want with Honduras?” Speaker Milton Jamail, answered, “[a] parking lot.”

21. *Soto Cano Air Base, Honduras*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/facility/sotocano.htm> (last visited Apr. 28, 2016).

contras, with the support of U.S. Green Berets and the CIA, launched attacks on Nicaragua.²² There is evidence—including three mass graves—of grotesque human rights violations taking place at El Aguate, an army base built for the *contras* by U.S. troops.²³

War, grotesque human rights violations including genocide against Mayan peoples, and instability in Central America during the 1980s produced a mass exodus of refugees, including children, in that decade and in the 1990s, especially from El Salvador. Many who came were boys in their early teens, and they came alone, or at least without parents or adult relatives. Many of these undocumented and unaccompanied boys and teens flocked to Los Angeles. Lacking access to any kind of assistance programs, some turned to each other for a sense of family, protection, and literal sustenance. They survived by committing petty crimes and looking out for one another. These self-created families eventually became the international criminal gang Mara Salvatrucha, or MS-13.²⁴ According to T.W. Ward, there is no evidence of any mastermind among the former refugees from the Salvadoran civil war who set out to create a transnational narcotics trafficking organization. T.W. Ward explains,

The spread of MS from its origins in Los Angeles to other states and across international borders was unintentional. It occurred initially as a result of the secondary migration of Central Americans within the United States—moving to find jobs—and later as the result of mass deportations of gang members back to their home countries in Central America.²⁵

Nevertheless, the then-youthful gang members, having never known peace or stability in their own lives, returned to home countries that remained deeply riven and wounded. El Salvador, Guatemala, and Honduras were vulnerable. With many of the structures of the civil society undermined or even destroyed by civil war (in El Salvador), genocide (in Guatemala), and the effects of U.S. militarism (Honduras), these nations provided fertile ground for the growth and increasing power of the MS-13 and other crime networks. In time, these criminal organizations fused with law enforcement and other government officials and agencies, thereby producing environments saturated with violence and impunity.

The issue of migration and the treatment of undocumented migrant women seeking asylum presents major problems of gender violence in today's global economy. Maribel's case needs to be placed into the larger context of the historic political, economic and foreign policy relationships between the U.S. and Mexico or Central and Latin America. Maribel's story illustrates a socio-political-economic development in Central America similar to the systemic outbreak of killings and rampant gender violence

22. Alex Sánchez, *Honduras Becomes U.S. Military Foothold for Central America*, NACLA, <https://nacla.org/news/honduras-becomes-us-military-foothold-central-america> (last visited Mar. 27, 2016).

23. *Id.*

24. T.W. WARD, *GANGSTERS WITHOUT BORDERS: AN ETHNOGRAPHY OF A SALVADORIAN STREET GANG* 75 (2012).

25. *Id.* at xvii.

at the Mexican border, which followed the implementation of the North American Free Trade Agreement (or NAFTA)²⁶ in the 1990s.²⁷

The NAFTA, for example, triggered structural changes at the border, connected to the rapid introduction of “maquiladoras,” factories owned by American companies now operating with subsidiaries at the Mexican border, in regions of northern Mexico also known for being active gateways for drug trafficking. As argued by Deborah Weissman,²⁸ the heavy industrialization introduced by NAFTA created an environment where systemic gender discrimination and violence could be linked to the economic success of Juarez City as a “free trade” success story. Hundreds of factories appeared nearly overnight in Juarez, but also within a few years, it became a hostile environment for women’s safety. Soon the name “Juarez” was associated with “femicides,” killings of women just because they were women, and hundreds of kidnappings, disappearances and violent examples of pre-death torture. A political economy of violence thus means that one of the obvious byproducts of expanding “free trade” market economies into less wealthy countries is an increase in systemic gender violence.²⁹

CAFTA-DR30 and its similar negative effects may be, however, only one relatively recent aspect of a wider and much longer series of interventions of both U.S. corporations and the U.S. government in Central America. These interventions have factored into the regional transformation of the Northern Triangle of Central America into an extremely hostile social and economic environment for citizens where daily they are exposed to horrific examples of systemic and domestic violence, including kidnappings and retaliatory killings.³¹ Intervention in Central America has included U.S. aid to fund the training, first of anti-communist and later anti-narcotics tactical forces, weapons and expansion of training for military personnel. Arguably, concerns similar to the impact of NAFTA, surround the impact and implementation of the multi-lateral treaty CAFTA-DR, signed in 2005 by President Bush, creating additional export processing zones for seven countries in Central America and the Caribbean. But, we are also seeing the impact of historic law and policy agendas involving the U.S.’s interests in establishing military bases, fighting the so called War on Drugs and otherwise fostering changes in the legal and political culture of Central America that support the interests of foreign investors. In other words, the region is reflecting an ongoing effect of the implementation of neoliberal political agendas favoring privatization of natural resources distribution and governmental deregulation.

26. The NAFTA can be read at <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>.

27. Elvia R. Arriola, *Accountability for Murder in the Maquiladoras: Linking Corporate Indifference to Gender Violence at the U.S.-Mexico Border*, 5 SEATTLE J. FOR SOC. JUST. 603, 603-40 (2007).

28. Deborah M. Weissman, *The Political Economy of Violence: Toward an Understanding of the Gender-Based Murders of Ciudad Juarez*, 30 N.C. J. INT’L L. & COM. REG. 795 (2005).

29. Arriola, *supra* note 27.

30. The full text of the CAFTA-DR, or The Dominican Republic-Central American Free Trade Agreement can be found at <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

31. *See generally* DAWN PALEY, DRUG WAR CAPITALISM (2014).

Post-NAFTA, the ever expanding neoliberal agenda has continued to develop and implement other structural changes in law and policy in the Central American region, not unlike those in Mexico, including free trade agreements, militarization of police forces, and funding for anti-drug trafficking. All of these have produced social disruptions and economic insecurity for the working poor, and served as incentives for waves of mass migrations. As Dawn Paley has documented, increased migration flows to the U.S. can be seen as the fallout from our own government's supportive role in the law and policy surrounding drug war capitalism and its transfer from Colombia to Mexico and Central America in recent decades. As she argues, a central feature of the consequences of drug war capitalism is foreign investors directly benefitting from constant displacement of the rural poor from territories that are rich in the natural resources of great interest to global big businesses of oil, gas, mining and commercial agriculture. In those terrains, the villages made up of subsistence farmers and indigenous populations stand in the way of a corporate foreign investor's intended extractive activities.³²

Paley describes how some of the displacements have taken the form of murderous and terroristic removal of almost entire villages, or killings and disappearances of anyone associated with opposition activists who are then labeled guerrillas or members of drug cartels. She argues that the violent disruption may also be linked to criminal networks fighting the government, private police on behalf of big corporations³³ or paramilitaries linked to gang members, former military or police. With each introduction of U.S. "aid" intended to clear the path for foreign investments and to intensify "drug wars" Paley argues, there is an increase in homicides and rural displacements as well as a rise in violence against the poor, indigenous, and against migrants.³⁴ Thus, rather than a war on drugs it is viewed by Paley as a war on the poor, working people and migrants.³⁵

The evidence documented by Dawn Paley³⁶ chillingly links the extreme violence by organized gangs, paramilitaries and government acquiescence in Central America, to social, political and legal changes that value more the interests of big corporations than the human rights to life and safety of the working poor. This is the overall impact of the neoliberal model for international trade—to create a legal architecture³⁷ explicit in its intent to protect foreign business interests,³⁸ without any concern

32. *Id.*

33. *Id.* at ch. 2.

34. *Id.*

35. *Id.*

36. The foreword describes Paley as doing "an incredible job explaining the complexities of the hemispheric dilemmas that have brought death and destruction, while benefitting corporate interests. She has done exhaustive field research in key places that exemplify the basic dynamics of drug wars in the Americas. Guadalupe Correa-Cabrera, *Foreword to DRUG WAR CAPITALISM*, *supra* note 31, at 9.

37. The NAFTA created a free trade zone with Mexico, U.S. and Canada. CAFTA-DR covers Costa Rica, Nicaragua, El Salvador, Guatemala, Honduras and the Dominican Republic. *See* discussion in Arriola, *supra* note 27, at 620-26, on how the legal architecture of NAFTA empowered the foreign investor/employers, while the labor side agreement, the North American Agreement on Labor Cooperation (NAALC), weakened workers' rights.

38. *See also* AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSECURITY* (2004).

for the consequences of massive social and economic disruptions giving rise to widespread public insecurity, extreme poverty, drug trafficking and in due time, waves of human migration.³⁹

Neoliberalism to expand capitalism without restraint, i.e., to deregulate and privatize the extraction, production, and/or distribution of natural resources, continues to transform the wealth potential for rich and poor, with the former getting wealthier, as in Honduras,⁴⁰ while the lives of the working poor worsen. For Central Americans, the introduction of new trade agreements explicitly designed to protect foreign interests produce a fall-out of systematic violence, torture, kidnappings and disappearances associated with drug war capitalism.⁴¹ The result is a society saturated with heightened levels of public insecurity where daily life has people becoming witnesses to or victims of extreme violence and threats, while the police stand by, unable or unwilling to protect the populace.⁴²

All of these socio-political and economic changes effect dramatic disruptions, primarily in the lives of working poor farmers and peasants.⁴³ In the case of NAFTA, for example, the same migration flow that lured migrants and their cheap labor to the northern Mexican maquiladoras, ironically produced higher levels of cross-border migrations into the U.S. The same can be said of the migrations from Central America, where U.S. foreign policy is closely tied to protecting the interests of an international business and political elite both in the U.S. and in the host (poor) country, without any regard for how

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39. Héctor Perla, Jr., *The Impact of CAFTA: Drugs, Gangs, and Immigration*, TELESUR (Mar. 1, 2016), <http://www.telesurtv.net/english/opinion/The-Impact-of-CAFTA-Drugs-Gangs-and-Immigration-20160301-0008.html>; see also *Fact Sheet: Unjust Trade and Forced Migration*, WITNESS FOR PEACE.ORG, http://witnessforpeace.org/downloads/Fact%20Sheet_Unjust%20Trade%20and%20Forced%20Migration_2010.pdf; in Mexico the expansion of the global economy led to the proliferation of new factories and forms of trafficking operating alongside channels for illicit drug and human trafficking. The femicides of Ciudad Juarez are attributed to the dramatic effects. See PALEY, *supra* note 31, at ch. 4, and Arriola, *supra* note 27; there are likely parallels occurring as CAFTA-DR has contributed to a celebrated increase in exports from small businesses to the Central American countries, yet there is no clear evidence that for the working poor the free trade agreement delivered on the promises of economic or social success. Compare John Murphy, *CAFTA-DR: A Resounding Success*, U.S. CHAMBER OF COMMERCE (Dec. 2008), <http://www.aaccla.org/files/2010/12/CAFTADRAResoundingSuccess.pdf>, with PALEY, *supra* note 31, in support of the conclusion that neoliberal “free trade” has produced mostly very negative social changes for the rural or working poor in countries like Guatemala and Honduras.
40. PALEY, *supra* note 31, at ch. 7 (on Honduras generally, a country described as having the greatest socio-economic disparities in Central America).
41. *Id.*
42. *Id.* at 18-19. As Paley explains, “[a] key means through which globalized capitalism can penetrate new territories and social worlds is through the use of terror against the populations . . . Terror creates fertile ground for new forms of social control . . . The creation of anti-drug police forces and army units and spending on the drug war must be understood within the context of global capitalism and global warfare. In this context the acquisition of territory and resources, including increased control over social worlds and labor is a crucial motivating factor. Drug war discourses promoted by states and reported by mainstream media provide an efficient smokescreen, provoking moral panic in the population, which can also calcify and exaggerate divisions among communities (like between those who are and who are not involved in illicit activities), and impact relationships down to the level of neighborhoods, community groups and *campesino* (peasant farmer) organizations.”
43. This too resembles the social disruption caused by the introduction of NAFTA in Mexico which triggered mass migrations in the mid-nineties by southern Mexican farmers to cities and the northern border to find work. For a post-NAFTA critical assessment a few years after its implementation, see MAQUILA: A TALE OF TWO MEXICOS (2000) (documentary film).

the changes will impact the lives of the rural and working poor. Those people forced to migrate away from their villages or homes in Mexico, El Salvador, Guatemala, and Honduras, due to the ensuing economic crises and increased violence, have been met in the U.S. by hostility and harsh treatment for simply being migrants desperate to reclaim a personal sense of economic safety or security.⁴⁴

III. POLITICAL SCAPEGOATING OF RADICALIZED IMMIGRANTS AND THE CARCERAL ECONOMY FATALLY UNDERMINE THE U.S. RESPONSIBILITY TO PROTECT ASYLUM SEEKERS

In the face of systemic pitting of the powerful, whether with money, arms or policy, against the poor, the weak and defenseless who cannot escape the culture of violence that surrounds them, the working poor must escape for their lives by migrating. To their great misfortune, those who migrate to the U.S. are met with institutional hostilities.

From the outset, U.S. immigration policy has always been determined, in large part by foreign policy, domestic politics, and by racism. *There has never been a time in this nation free from anti-Black racism.* Neither has there ever been a time when the dominant institutions of the U.S. valued Native or indigenous peoples, their languages, lands, contribution, or traditions.⁴⁵ Other racisms have waxed and waned, as politicians and political actors, cultural workers, the press, educators, racialized communities, and everyone else, have disputed the questions—*Who belongs? Who is worthy? And even who is human* in legal as well as cultural venues?⁴⁶

We are in a period characterized by extreme xenophobia and racial backlash,⁴⁷ but other historical periods could be described in the same way. What is the same, and what is different, about the anti-immigrant landscape of the two-thousand-teens?

A. The “liberal” in “neoliberal”: perennial traditions in seasonal clothing

An old idea that models different clothing over the decades is ideological: that the U.S. is the shining beacon of freedom, but one beset by enemies from within and without. In the earliest decades of the

44. In this election year (2016), the rhetoric of anger directed at Mexicans and immigrants fueled a populist upset win in the presidential election for multi-billionaire Donald Trump. See Dominic Tierney, *Donald Trump’s Unspeakable Strategy to Erase His Past*, THE ATLANTIC (Feb. 10, 2016), <http://www.theatlantic.com/politics/archive/2016/02/trumps-unspeakable-strategy-to-erase-his-past/458748/>.

45. See generally ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES (2014).

46. See IAN HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

47. A notable example is the tone in the campaign of presidential hopeful Donald Trump. See Sean McElwee and Philip Cohen, *The Vile Core of Trump’s Appeal: Here’s the Research that Shows How Racism Animates his Campaign*, SALON (Mar. 27, 2016), http://www.salon.com/2016/03/27/the_vile_core_of_trumps_appeal_heres_the_research_that_shows_how_racism_animates_his_campaign/. The effect of Trump’s divisive rhetoric and the stunning win of the election appeared in the unleashing of numerous examples of public harassment and bullying by Trump supporters. See *Ten Days After: Harassment and Intimidation in the Aftermath of the Election*, SOUTHERN POVERTY LAW CENTER (Nov. 29, 2016), <https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election>.

nation, “America” meant “freedom” (notwithstanding the peculiar institutions of slavery, forced removal, and “genocide committed against Indigenous peoples”⁴⁸ by the U.S.) while “Europe” represented constraint. Catholics, at earlier historical moments, personified by the Irish, Italians, and Mexicans, for some posited a different kind of threat to freedom.⁴⁹ During the long Cold War, Communists represented the antithesis of freedom,⁵⁰ and currently, for many, Islam is the ideological enemy.⁵¹

Ideological enemies will keep some people awake at night, but don’t scare everyone. In a culture of fear only scary monster enemies who do actual damage to real human beings frighten the public. The flesh-and-blood monsters, like the ideological enemies, also vary over time: drug dealers, smugglers, rapists (Willie Horton standing in for all prisoners, or even all Black men⁵²; or Mexicans according to Trump⁵³), and “terrorists” in the extreme form such that all “Arabs,” or “Muslims” are perceived as a threat to frightened Anglo-European Christian whites.

A culture of fear also calls for physical structures and rituals to protect us from those scary monsters: Jim Crow laws and de facto laws and rules for separate schools, bathrooms, water fountains, swimming pools, theatres or parks, along with campaigns urging citizens to build bomb shelters, perform safety drills, install security equipment and government installment of metal detectors, passports, ID cards, green cards and national data bases. *Fear generates the idea of a pervasive threat from those who are not like us.* The ideologies of racism and xenophobia have served and still serve as tools for renewing the need to restrict the conduct and liberties of “The Other” who is perceived as a threat to the privileged status quo.⁵⁴ Some targets have remained constant—there is *no* moment in U.S. history that is free of anti-Black racism. Other targets of the legislative impulse to control, restrain and segregate have changed depending on foreign policy and the manipulation of public feeling (e.g., Chinese and Japanese, Germans and Russians).⁵⁵

B. What is New?

1. Domestic Legal Infrastructure of Neoliberalism

48. DUNBAR-ORTIZ, *supra* note 45, at 9.

49. ZINN, *supra* note 19, at 221, 226, 265.

50. *Id.* at 426-28.

51. See AKBAR S. AHMED, ISLAM UNDER SIEGE 1 (2003).

52. See Morgan Whitaker, *The Legacy of Willie Horton Ad Lives on 25 years later*, MSNBC (Oct. 28, 2013), <http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives>.

53. Hunter Walker, *Donald Trump Just Released an Epic Statement Raging Against Mexican Immigrants and ‘Dis-ease,’* BUSINESS INSIDER (July 6, 2015, 4:47 PM), <http://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7>.

54. For an analysis of the “politics of Otherness” as a manifestation of white supremacist values, see Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356-86 (1988).

55. See, e.g., Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans); discrimination against German-Americans following the outbreak of World War I; and the anti-Communist culture of fear spawned by the Cold War between the U.S. and Russia. See ZINN, *supra* note 19, at 361-66, 425-46.

The domestic legal infrastructure of neoliberalism as developed over the past forty years in the federal courts, values property rights and “liberty” for those who can afford it, while largely eschewing responsibility for equality.

The roots of the systemic inequalities in today’s immigration law and policy can be found in a post-*Brown*⁵⁶ jurisprudence in which the Supreme Court limited the ability of courts to interpret broadly the promise of equality in the 14th Amendment. Beginning in 1973 and through 1982, the federal courts began to abandon the goal of articulating a broader principle of equality that could hold government accountable while enhancing the value of “liberty” via “privacy.” In the same period, the Supreme Court delivered *Roe v. Wade*⁵⁷ on the one hand, and *San Antonio I.S.D. v. Rodriguez*⁵⁸ on the other. While *Roe* enshrined an expanded notion of personal liberty in a woman’s right to choose, *Rodriguez* rejected the claim that education is a fundamental right and also rejected the idea that children who lived in poverty ought to constitute a protected class. The *Rodriguez* decision initiated a pattern of restrictions on the kinds of social groups who might invoke the constitutional protection of “equality under the law” against blatant examples of unfair discrimination.⁵⁹ The decade would produce decisions refusing to hold government and other institutions accountable for the ongoing effects of slavery and Jim Crowism.⁶⁰ At the same time, decisions like *Harris v. McRae*⁶¹ demonstrated that the personal freedom recognized by the Court for women in *Roe*, was only guaranteed to women who could afford to purchase their own privacy.⁶² By 1982, the Supreme Court majority signaled the end of a broader meaning of equal protection with *Plyler v. Doe*, even as it marked a tremendous practical victory for

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56. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (state mandated racial segregation in public schools violates the Fourteenth Amendment’s constitutional guarantee of equal protection of the laws).
 57. *Roe v. Wade*, 410 U.S. 113 (1973).
 58. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).
 59. *Id.* (rejecting claim by Mexican-American residents that race and class based discrimination were perpetuated by Texas’ property values based taxes for funding public education).
 60. *See, e.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974) (preventing federal courts from implementing inter-district busing in order to address the racial re-segregation of metropolitan Detroit in the years following *Brown v. Bd. of Educ.* (1954)); *Washington v. Davis*, 426 U.S. 229 (1976) (claim of racial discrimination against federal government requires more than evidence of racially discriminatory effects; plaintiffs bear burden of demonstrating proof of discriminatory purpose in the creation and use of hiring policies); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (municipality will not be held accountable for extensive racially discriminatory impact of zoning regulations); and *City of Memphis v. Greene*, 451 U.S. 100 (1981) (city’s construction of a residential wall separating white residents from predominately black neighbors found not unconstitutional or racially motivated). For an analysis of racism as both practice and social illness, see Charles Lawrence III, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).
 61. *Harris v. McRae*, 448 U.S. 297 (1980).
 62. *Id.* (holding that there is no governmental duty to extend to poor women the means (e.g. public funding) for getting an abortion); *see also Maher v. Roe*, 432 U.S. 464 (1977) (government may constitutionally withhold, despite *Roe*’s assertion of a fundamental right of a woman to terminate a pregnancy, funds for non-therapeutic abortions).

undocumented immigrant children.⁶³ The Supreme Court did not promise a free public education to undocumented children on the same basis to other children because the former were a protected class, or because education was a fundamental right.⁶⁴ Rather, the majority emphasized the *innocence* of undocumented children while using the derogatory term “illegal alien” to refer to their parents. Where “equal protection” depends on “innocence,” it ceases to be meaningful.

2. The “War on Drugs,” the “Severity Revolution,” and “Golden Gulags”

The current system of immigration detention is characterized by evidence of racially disproportionate negative effects. It is arguably an extension of the phenomenon of mass incarceration of people of color through systems and procedures purportedly set up and defended by governments as neutral and colorblind. Scholars have offered at least three terms and overlapping descriptions of what we now know as mass incarceration. All point to the so-called “War on Drugs,” beginning in the late 1960s under the administration of President Nixon and accelerating in the 1970s through the first decade of the 21st century. This “war” has entailed increased policing and the militarization of police (for instance, the creation of “Special Weapons and Training” or “SWAT” teams), increased collaboration among federal, state, and local law enforcement agencies, and harsh sentencing schemes. The sentencing schemes resulted in shockingly different outcomes for people accused of drug violations, depending on race and ethnicity, giving rise to what Michelle Alexander has termed “The New Jim Crow.”⁶⁵

Jonathan Simon believes that from about 1780 to 1980, thinking about prisons and punishment moved towards a relatively humane, rehabilitation-oriented philosophy. He does not argue that humanitarian policies were ever fully implemented anywhere, or that the philosophy was acclaimed in every part of the U.S., or applied without regard to race, ethnicity, or class. Nevertheless, the “robust trend,” Simon argues, was for almost two centuries—towards “a greater concern for the ‘humanity’ of the person being punished.”⁶⁶ Since 1980, however, “legislatures, executives, and courts have openly

63. *Plyler v. Doe*, 457 U.S. 202, 203 (1982) (holding on the one hand that the undocumented status of children attending Texas public schools is not constitutionally irrelevant, but on the other, despite its decision in *Rodriguez* (education is not a fundamental right), holding that the State could not “deny a discrete group of innocent children the free public education that it offers to other children residing within its borders . . .”).

64. *Plyler*, 457 U.S. at 230 (Justice Thurgood Marshall’s concurrence emphasized his continued belief, first articulated in *San Antonio Indep. Sch. Dist. v. Rodriguez*, that “an individual’s interest in education is fundamental . . .”); *Id.* at 231 (he also maintained that “a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment.”); Justice Marshall did not need to discuss economic class as it was not an explicit issue in *Plyler*, but it was clearly a sore point; in both *Dandridge v. Williams*, 397 U.S. 471 (1970), and as in *Rodriguez* Marshall had urged that equal protection ought to encompass class-based discrimination. In both cases state officials insisted that they had not *intended* to discriminate against low income children in their welfare or school financing schemes, respectively. Justice Marshall looked not at the *intent* of the legislatures in either case, but at the *effects* on children.

65. ALEXANDER, *supra* note 12.

66. Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217 (2001).

espoused severity of punishment as an overarching good and have abandoned the long tradition of minimizing pain and cruelty in the penal process.”⁶⁷

Writing about California, Ruth Gilmore demonstrates that the prison population grew nearly 500% between 1982 and 2000, even as crime rates declined and illegal drug use, specifically, declined, and that the State engaged in a veritable orgy of prison building during the 1980s, 1990s, and first decade of the twenty-first century. Among the factors that facilitated the mass incarceration—predominantly of people of color—were several new state laws with harsh sentencing schemes, deindustrialization, the withdrawal of federal military spending, cuts to programs that constituted the “safety net,” and capital “trapped” in unused rural land.⁶⁸ “Convicts,” Gilmore writes, as a class, “are deindustrialized cities’ working or workless poor,”⁶⁹ which is also to say surplus labor. While her full argument is too detailed and complex to summarize, Gilmore locates the phenomenon of “superincarceration” in profound structural changes in the economy, some of which were specific to California while others (beginning in the early 1970s) were global, along with criminal laws targeting racialized populations.

3. ***“Crimmigration”***

César Cuauhtémoc García Hernández, who attributes the term “crimmigration” to Juliet Stumpf,⁷⁰ describes the phenomenon of the intersection of immigration law and procedure, with criminal law and procedure as having “three heads.” First, an increasing number of crimes come to have immigration consequences. That is partly because of the so-called “War on Drugs” and partly because of a trio of federal laws.⁷¹ Second, immigration itself is becoming criminalized. Actions, such as re-crossing the U.S. border after having been deported, are now federal crimes with serious consequences. A few years ago, Latinos became the largest population in federal prisons,⁷² and most of those incarcerated were there because of immigration-related convictions. Third, increasing harshness of treatment of immigrants: detention and the conditions of detention; high release bond requirements (which, unlike bonds for criminal cases, are almost impossible to get and in many places there are no honest agencies that provide bonds for immigrants); presumption of criminality; deemed dangerous.⁷³

One of the most disturbing features of “crimmigration” is the persistent fiction that immigration is just a “civil” matter, despite the widespread acknowledgement, including by the U.S. Supreme Court, that the outcome of immigration proceedings can determine the course of a person’s life.⁷⁴ The fact

67. *Id.* at 219.

68. See generally RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007).

69. *Id.* at 7.

70. Hernández, *supra* note 14; see generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); see also *Introduction to SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR* (Maria Joao Guia et al. eds., 2014).

71. See discussion *infra* Part III.B.4.

72. Solomon Moore, *Study Shows Sharp Rise in Latino Federal Convicts*, N.Y. TIMES (Feb. 18, 2009), http://www.nytimes.com/2009/02/19/us/19immig.html?_r=0.

73. Hernández, *supra* note 14, at 9-15.

74. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

and conditions of detention are unquestionably punitive as demonstrated further below in the way Honduran Maribel and other hunger strikers like her were treated. And, in 2014 the Department of Homeland Security (DHS) frankly acknowledged that henceforth it would detain Central American mothers and children for the purpose of deterring others from coming to the U.S.⁷⁵

4. **Expedited removal and reinstatement of removal and their expansion**⁷⁶

In 1996, a Democratic Congress during President Bill Clinton's administration, enacted three major pieces of legislation aimed at limiting the rights and material welfare of marginalized persons: the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) (often called the "Welfare Reform Bill"), the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA, usually pronounced "Ira-Ira"). These three bills are the product of vicious fear-mongering and barely-coded hate speech against "welfare queens," "drug smugglers," and "convicts" who were allegedly playing the system, plaguing the courts with their supposedly endless frivolous lawsuits.

Moreover, almost everyone reviles government bureaucracy; "reform" is almost universally applauded. Thus, the sales pitch promising to "strengthen and streamline U.S. immigration laws" and referring to both "reform" and "responsibility" proved effective. IIRIRA, however, was no benign attempt to rationalize the code. Rather, the law introduced harsh new mechanisms with which to expel non-citizens, including refugees, with as little muss, fuss, or due process as possible.

IIRIRA brought two new ways to deport, or in its terminology, broadened the authority of immigration officials to "detain" many non-U.S. citizens and to summarily deport (or in the new term the bill introduced, "remove") them, with little to no due process and in many cases without ever seeing a judge.

People who have been in the U.S. less than two years, who entered the country without having been admitted or paroled, and who have been determined to be inadmissible, are subject to expedited removal. The grounds for inadmissibility include (1) having used fraud or misrepresentation in attempting to obtain an immigration benefit, or (2) lacking a valid visa or other document granting permission to enter the U.S. In the years immediately preceding IIRIRA, only a judge could order deportation, but IIRIRA gave immigration officers—law enforcement, in other words—the power to issue expedited removal orders.

At the same time, IIRIRA granted immigration officers the authority to issue reinstatement of removal orders against people who had been previously deported or removed from the U.S.

75. See Declaration of Philip T. Miller, Department of Homeland Security, ¶ 15-16 (Aug 7, 2014), <http://womenontheborder.org/wp/wp-content/uploads/2016/03/ICE-Bond-Packet-copy.pdf> [hereinafter Decl. of Miller] (Miller is the Assistant Field Officer for Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement).

76. Expedited removal and reinstatement of removal do not apply to unaccompanied children, for whom different rules apply and who go through separate processing. That topic is beyond the scope of this paper.

At the time IIRIRA went into effect, the Immigration and Naturalization Service (INS) enforced immigration laws. Following the attacks of September 11, 2001, the DHS came into being, first as an office in the White House, and then, via the Homeland Security Act of 2002, a federal agency. The INS ceased to exist, and its functions were reorganized into three agencies within DHS: CBP, ICE, and U.S. Citizenship and Immigration Services (USCIS).

INS initially only employed the expedited removal process at ports of entry. DHS expanded the use of expedited removal in 2002, 2004, 2005, and 2006, and today uses expedited removal at the national borders and within one hundred miles of any border.⁷⁷ What this means is that Central Americans entering, or attempting to enter, the U.S. today are all subject to the expedited removal process. Those who have been previously deported or removed from the U.S. are subject to reinstatement of removal.

There are only a few ways an immigrant or asylum seeker can attempt to escape from the expedited removal or reinstatement of removal proceedings into the “regular” removal proceedings. A person who claims U.S. citizenship or legal permanent resident status, or who already has refugee or asylum status, are to be referred to immigration judges.

People who have not been deemed, by the U.S. government, to be asylees or refugees, but who nevertheless express a fear of persecution or torture in their home countries, must go through a more convoluted and uncertain process before ever getting to see an immigration judge.

a. Arrest and detention by Customs & Border Protection

A woman, man, or child, who crosses the U.S. border, or who presents him or her self to a U.S. official on a bridge, and who does not have a visa or other entry document, will be arrested and questioned by a CPB officer (colloquially, the “border patrol”), and detained. If he or she expresses fear of returning to his or her home country, he or she is supposed to be referred to an asylum officer. The reports of the first interactions between asylum-seekers and CPB are not reliable, however, seemingly following a common script. In a 2015 amicus brief to the Board of Immigration Appeals, the American Immigration Lawyers Association (AILA) cited one such script, in which the CBP officer supposedly told a non-U.S. citizen, “I want to take your sworn statement,” and that “[t]his may be your only opportunity to present information to me and the Department of Homeland Security to make a decision.”⁷⁸ In answer to the official’s question, “Why did you leave your home country or country of last origin?” the non-U.S. citizen purportedly replied, “to look for work.”⁷⁹ The authors then commented

Y-F-’s interview, so painstakingly transcribed, sworn, signed and counter-signed, almost certainly never happened in the format in which it was memorialized. The impossibility of the interview, in spite of the DHS officers’ affirmations of veracity and the rule of government regularity is plain on the face of the writings themselves: Y-F- was three years old at the time he was

77. National Immigration Law Center, *DHS Announces Latest in Series of Expedited Removal Expansions: Entire U.S. Border Now Covered*, 20 IMMIGRANTS’ RIGHTS UPDATE (March 23, 2006).

78. Brief for American Immigration Lawyers as Amici Curiae Supporting Respondents, *Matter of M-R-R*, 3 (June 2, 2015) (No. 15061201) (filed with the BIA by Stephen W. Manning and Andres C. Benach, Counsel for Amicus American Immigration Lawyers Association).

79. *Id.*

interrogated.⁸⁰

Despite the unreliability of this report, and the fact that an alarming number of CPB reports illustrate the use of a strikingly similar script, whether or not the person will be referred to an asylum officer is, in the first instance, up to the officials at the border. An unknown number of asylum-seekers who have entered, or attempted to enter the U.S., are people whose primary language, and sometimes only language, is a Mayan one, such as K'iche', Mam, Q'eqchi', Kakichel, Q'anjobal or Akateco, creating an obvious barrier at first contact for there to be an effective exchange of questions and answers.

CBP detains immigrants and asylum-seekers for up to three or four days.⁸¹ Countless refugees describe their experiences in the notorious CBP detention center in McAllen, Texas as "las hieleras," (ice-boxes) because the agency keeps the air conditioning at such low temperatures. In these often extremely overcrowded centers, adults and children sleep on the floor or attempt to sleep standing up,⁸² in rooms where the artificial lights stay on twenty-four hours a day.⁸³

DHS officials always have the discretion to release non-U.S. citizens on "parole" (which has a different meaning in the immigration context than in the criminal one) for humanitarian reasons or when it is in the national interest.

Typically, DHS would send adult women and men subject to expedited removal to detention centers, at least for a period. Between 2009, when the Obama Administration ended an earlier experiment with family detention, and June 2014, the agency typically refrained from detaining women and their children who fled violence or persecution in their home countries. Instead, it would fingerprint the women, take their photographs, find out where they planned to go, and issued grave reminders to stay in touch (sometimes via periodic mandatory check-ins at ICE). DHS warned asylum-seekers they would need to come to immigration court at a time to be determined. If the person did not keep ICE informed of her address, she would not receive a notice from the court, and if she did not report to the court on the specified day and time, she would receive a removal order *in absentia*. In June 2014, DHS under President Obama reversed its position. Instead of releasing women and children, it sent them to the euphemistically named "family residential centers."⁸⁴

b. Detention and Credible or Reasonable Fear Interviews

After two to four days in CBP detention, DHS typically sends an adult woman or man subject to expedited removal, but who has claimed a fear of returning to her or his country, to ICE. ICE detention centers may either be run by ICE itself, or by a private corporation or state or local entity with which

80. *Id.* at 5.

81. Memorandum in Support of Motion to Enforce Settlement of Class Action at 17-19, *Jenny Lisette Flores v. Jeh Johnson*, C.D. Cal. W. Div. (Jan. 30, 2015) (CV-85-4544-RJK(Px)).

82. *Id.* at 19.

83. *Id.* at 18 (See the complete motion for much more detail about the punitive conditions in the cells.)

84. Ranjana Natarajan & Denise Gilman, *Report Regarding Grave Rights Violations Implicated in Family Immigration Detention at the Karnes County Detention Facility*, INTER-AMERICA COMMISSION ON HUMAN RIGHTS, 1-3 (Sept. 26, 2014), <http://womenontheborder.org/wp/wp-content/uploads/2016/02/Report-re-Rts-Violations-in-Fam-Detention-at-karnes-.pdf> (the Report was made to the Inter-American Commission on Human Rights).

ICE has contracted for that purpose, such as CCA⁸⁵ or Geo Group.⁸⁶ DHS sent Maribel to the T. Don Hutto detention facility in Taylor, Texas, one of hundreds of places that ICE detains non-U.S. citizens.⁸⁷

Beginning in June, 2014, DHS also began to send hundreds of mothers who arrived with their minor children to ICE detention: first in Artesia, New Mexico, and then to Karnes City, Texas beginning in August 2014. The Karnes City facility had gone by the name of the Karnes County Civil Detention Facility, to distinguish it from an adjacent larger, higher security facility that incarcerated male so-called “criminal aliens” and other men that DHS or the U.S. Marshal deemed dangerous.

In the fall of 2014, DHS began to close the Artesia facility while it prepared a very large facility in South Texas. In December, 2014, the South Texas Family Residential Center opened in Dilley, Texas. At this writing, there are three family detention centers in the U.S.: one in Berks County, Pennsylvania; one in Karnes City, Karnes County, Texas, with a current population of about 600 people; and the largest in Dilley, Frio County, Texas. Dilley will eventually hold up to 2,400 people.⁸⁸

Whether in detention or “residential” centers, those seeking safety in the U.S. will have an interview with an asylum officer, a civilian, lay (typically not a lawyer) employee of the Asylum Office within USCIS. Unlike ICE and CBP, USCIS is not itself a law enforcement agency, although it is part of the much larger DHS, which is composed of numerous law enforcement agencies. Asylum officers receive training that includes

topics such as international refugee law and the U.S. Asylum Program’s role in world-wide refugee protection, U.S. asylum law and its interpretation by the Board of Immigration Appeals and federal appellate courts, interviewing techniques, researching country of origin information, and decision-making/writing. Separate training sessions address interviewing survivors of torture, identifying possible cases of victims of trafficking, handling cases of children, and handling claims that may be specific to women. The training course also includes lessons regarding the Asylum Program’s history, organizational structure, mission, goals, and values, ethics, and an overview of the Asylum Program’s process and procedures. Other topics covered include fraud identification and evaluation techniques, and national security concerns.⁸⁹

85. See CORR.CORP. OF AM., <http://www.cca.com>; On the New York Stock Exchange (NYSE) CCA trades as CXW:US and sells today at approximately \$34.35 per share. See BLOOMBERG, <http://www.bloomberg.com/quote/CXW:US> (last visited June 13, 2016).

86. See GEO GROUP, INC., <http://www.geogroup.com>. See *Geo Stock Quote*, *supra* note 4 (NYSE trade data on GEO).

87. *New Data on 637 Detention Facilities Used by ICE in FY 2015*, SYRACUSE UNIVERSITY IMMIGRATION TRACKING DATA BASE “TRAC,” <http://trac.syr.edu/immigration/reports/422/> (in 2015, ICE used 637 detention facilities).

88. *ICE’s new family detention center in Dilley, Texas, to open in December*, U.S. Department of Homeland Security (Nov. 17, 2014), <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december> (Thomas S. Winkowski, Acting Director of ICE, cited in ICE News Release); *South Texas Family Residential Center*, CORR. CORP. OF AM., <https://www.cca.com/facilities/south-texas-family-residential-center> (last visited Apr. 27, 2016) (Note that in this press release ICE was still being relatively honest in calling detention centers by that term, rather than “residential centers” and on the CCA website); *Cf.* the listing for the “South Texas Family Residential Center.” U.S. DEP’T OF HOMELAND SEC., <https://www.ice.gov/detention-facility/south-texas-family-residential-center> (last visited Apr. 27, 2014), and on the CCA website. CORR. OF CORP. AM., <https://www.cca.com/facilities/south-texas-family-residential-center> (last visited Apr. 27, 2016).

89. *Asylum Division Training Programs*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs> (last updated Mar. 5, 2012).

Given their training and general orientation (some have expressed a desire to “help people” or work in human rights), asylum officers, in general, are more likely than CBP, ICE, or private prison staff to understand the trauma refugees have experienced. Of course, individual officers still vary in their sensitivity and interviewing skills. For example, an asylum officer listened to a young woman describe an attack on her family in which her sister fell, lifeless, into her lap after this sister had been shot in the head. The asylum officer responded brightly: “But you’re okay!” Other asylum officers project empathy.⁹⁰

Credible or reasonable fear interviews may be conducted by telephone, but asylum officers more typically come to detention centers to interview women and children.

c. The difference between “credible” and “reasonable” fear

A person who has never before been removed or deported from the U.S., and who expresses a fear of returning to her home country or last country of residence, will be interviewed by an asylum officer to determine whether she has a “credible fear” of persecution on the basis of one of the five grounds of asylum eligibility (race, religion, nationality, political opinion and membership in a particular social group).⁹¹ She must establish, to the satisfaction of an asylum officer, that there is “significant possibility, taking into account the credibility of the statements made by the alien (sic) in support of his or her claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208 of the INA.”⁹² “Significant possibility” is a relatively low standard.

A person who has been previously deported or removed from the U.S. undergoes a similar interview with an asylum officer, but with a key difference. She must not only establish a “credible” fear, but a “reasonable” one. She must convince the asylum officer that there is a “reasonable possibility” that she would be persecuted in the future on account of her race, religion, nationality, membership in a particular social group, or political opinion, or that there is a “reasonable possibility” that she would be tortured by actors in a manner that would qualify her for protection under the Convention Against Torture (CAT).⁹³

90. These comments are from V. Raymond based on both personal experience and conversations with asylum-seekers and with other advocates in her practice as an immigration attorney: “While I perceive some asylum officers to project empathy and even kindness, I should note that I am a native-English-speaking Anglo/white woman whom asylum officers recognize as a lawyer (I would not be allowed in the interview were I not one). Some women have told me that asylum officers who were once openly hostile to them, when they were interviewed without a lawyer present, behaved much more courteously when I accompanied my clients to a rescheduled or new interview.”

91. See *Asylum*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum>.

92. Immigration and Nationalization Act, 8 U.S.C. § 1225(b)(1)(B)(v); see also Convention Against Torture (CAT) and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Dec. 10, 1984), <http://womenontheborder.org/wp/wp-content/uploads/2016/06/CONVENTION-AGAINST-TORTURE.pdf>.

93. CAT, *supra* note 92.

The difference between a “significant” and “reasonable” possibility is not intuitively obvious, but according to the Immigration and Nationality Act (INA), the “reasonable” possibility is a higher standard.

d. After a Positive Credible Fear Finding

Once an asylum officer finds that an adult has established a “credible” or “reasonable” fear of returning to her home country, the Asylum Office will notify ICE, which will issue a “Notice to Appear” (similar to a charging document), and “regular” removal proceedings – that is, those conducted under Section 240 of the INA.

Section 240 proceedings are administrative law hearings. Immigration judges are employees of the U.S. Department of Justice, that is, the Executive Branch; they are not members of the judiciary and they have no authority to rule on the constitutionality of any law, rule, or practice. Rather, immigration judges must rigorously follow the narrow statutory and regulatory scheme of the INA, relying on guidance principally from the Board of Immigration Appeals (BIA) as well as, on the decisions of the federal courts of appeal in their respective districts and the U.S. Supreme Court.

Nevertheless, removal hearings under Section 240 of the INA resemble more hearings conducted by the judicial branch of government than anything that has happened earlier in the expedited removal process. In a hearing on the merits of a claim for asylum, the person’s lawyer conducts direct examination and cross-examination, may call witnesses including expert witnesses, and present documentary evidence. The asylum seeker also has a right to appeal the denial of her claim to the BIA as well as to the federal appellate court.

Maribel “passed” her credible fear interview. Thus, she was able to get off the speedy “expedited removal” train and into “regular” removal proceedings.

e. After a Positive Reasonable Fear Finding

An adult who convinces an asylum officer that she has a “reasonable fear,” proving to an immigration judge that it is more likely than not that she would be subject to persecution based on race, religion, nationality, membership in a particular social group, or political opinion, may proceed to removal proceedings. She will not be eligible to apply for asylum, but only to apply for statutory withholding of removal and protection under the CAT. While an asylum applicant need only prove a “well-founded” fear of persecution based on one of the five enumerated factors, a person must prove that it is *more likely than not* that she will be persecuted based on race, religion, nationality, membership in a particular social group, or political opinion, in order to establish eligibility for withholding of removal. To be eligible for CAT proceedings, a person must also meet the higher “more likely than not” standard, showing a probability that she would be tortured as defined in that treaty.

f. After a Negative Credible or Reasonable Fear Finding

When an asylum officer issues a negative credible or reasonable fear finding, the person has a right to a *review* by an Immigration Judge. This review in no way resembles a hearing. While an attorney can be present (if the person obtains one at no cost to the government), the attorney does not have the right to ask her client questions. Only the judge conducts the examination of the applicant. Some judges will, sometimes, allow attorneys to suggest areas of further questions or to articulate a theory of the case. Other judges will not. The Immigration Judge may either affirm or vacate the asylum officer's finding. If the Immigration Judge affirms the finding, there is no appeal. If the judge vacates the finding, either Section 240 or 241 (withholding-only) removal proceedings will ensue.

In either event, the INA contemplates no appeal of the Immigration Judge's decision, and Immigration Judges typically make clear, "There is no appeal of this decision." Doubtless that will continue to be the case in the vast majority of instances. The Ninth Circuit, however, has recently ruled that it may review an Immigration Judge's negative reasonable fear finding for substantial evidence.⁹⁴

In practice, zealous advocates who believe that the Immigration Judge has ruled incorrectly or unfairly against their clients will often ask the Asylum Office to reconsider the case and grant a new interview.

g. Bond

A person for whom an asylum officer has made a positive credible fear finding is normally eligible for bond, unless there is some specific reason to believe that the person poses a flight risk, a threat to national security, or a danger to the community.

From June 2014 to February 20, 2015, however, DHS announced a new policy: it would refuse to set bonds for *any* Central American women or their children, maintaining that they *all* presented a threat to national security, and that detention of these families was necessary to deter other Central Americans from coming to the U.S.⁹⁵

This draconian policy required asylum-seekers to seek relief from immigration courts in every single instance, presenting evidence to the courts that they posed no flight risk, threat, or danger to anyone. Immigration judges typically granted such requests for bond (and sometimes for release on the women's own recognizance), although the size of the bonds varied from \$1,500 to \$8,500. Typically, the judges would grant the children release without necessity of the bond, while requiring that mothers could only be released with their children and children could be released only with their mothers.

Meanwhile, the "no-bond" policy did not apply, at least across the board, to immigrants or refugees from other parts of the world, to men, or to women who came to the U.S. without their children.

94. Nelson Andrade-Garcia v. Loretta Lynch, No. 13-74115, Apr. 29, 2016, *available at* <http://cdn.ca9.uscourts.gov/datastore/opinions/2016/04/29/13-74115.pdf>.

95. Miller, *supra* note 75.

Advocates mounted a challenge to the discriminatory “no-bond” policy,⁹⁶ and on February 20, 2015, the U.S. District Court in Washington, D.C., ordered DHS to begin setting bonds for women who had “passed” their credible fear interviews and who were otherwise eligible for bond: that is, they had not previously been removed or deported from the U.S., were not “arriving aliens,” and that there was no reason to believe that they presented a flight risk, threat, or danger.⁹⁷

Maribel would likely have qualified for bond had she been able to show that she was not a flight risk because she had a place to live and family with whom to live, and was not a danger or a threat to anyone. Maribel could not get a letter from any family member in the U.S. to show the judge. An advocate might have found a shelter or alternative place for Maribel to stay, as ultimately happened a year later. But without family or legal support, Maribel could not persuade either ICE or a judge to set bond for her. Even if ICE or a judge had set bond, Maribel would likely have remained in detention, without funds to pay the bond. When an immigration judge set bond for Maribel in February 2016, advocates in San Antonio at RAICES,⁹⁸ a non-profit immigrant and refugee rights organization, paid the bond, facilitating her release the same day. Most women do not have such support.

DHS and most immigration courts believe that adults, even those women who are detained with their children, are not eligible for bond if they have been previously deported or removed from the U.S.⁹⁹ That belief and policy resulted in many women and children remaining in detention for six, seven, eight, nine months and more between June of 2014 and roughly July 2015.

C. Neoliberalism at Work: The Profitable Business of Imprisonment.

Neoliberalism has had a dramatic effect on the historic governmental business of imprisonment. At all levels of government today, one can see examples of private companies doing the work of imprisonment once performed by civil service employees. While the public sector may take charge of the arrest, trial and conviction processes, many federal, state and local government entities now delegate the operations of detention, transfer, feeding, clothing, policing and monitoring the activities of prisoners or detainees to for-profit corporations.¹⁰⁰ Imprisonment has become big business for corpora-

96. See *infra* Part III.

97. RIL-R v. Johnson, et al, v. Jeh Johnson, et al., Civil Action No. 15-11 (JEB), Order and Memorandum Opinion of February 20, 2015.

98. REFUGEE AND IMMIGRANT CENT. FOR EDUC. AND LEGAL SERV. (RAICES), <https://www.raicestexas.org>.

99. This is a developing area of the law. *Zadvydas v. Davis*, 533 U.S. 678 (2001) (Indefinite civil detention is unconstitutional); *Rodriguez v. Robbins*, 713 F. 3rd 1127 (9th Cir. 2013) (but the courts have not agreed how long is too long, although the Ninth Circuit has ruled that a person detained for six months are entitled to hearings concerning continued custody. Detention should only continue if “the government shows by clear and convincing evidence that continued detention is justified based on [that individual’s] danger to the community or risk of flight.”); meanwhile, the First Circuit has just ruled against the interests of detainees. César Cuauhtémoc García Hernández, *1st Circuit Rolls Back Detention Reforms*, CRIMMIGRATION (Apr. 28, 2016), <http://cimmigration.com/2016/04/28/1st-circuit-rolls-back-detention-reforms/>.

100. For a critical examination of the rise of a prison industrial complex in the U.S., see Gilmore, *supra* note 68; see also andré douglas pond cummings, “All Eyez on Me”: *America’s War on Drugs and the Prison Industrial Complex*, 15 IOWA J. OF GENDER RACE AND JUST. 417 (2012).

tions and their shareholders. The incentive to generate profit around the first activity—imprisonment—obviously generates other economic activities related to the first, and made available to support it. In Texas, for example, the service industry, including the prison industry, is becoming in some areas the dominant mode of production in the neoliberal state.

Disability rights activists have for decades pointed out that people with disabilities serve as a “crop” for entire classes of employees – in large state institutions, nursing homes, group homes, and in a vast array of service providers and therapists. In 2006, ADAPT, a grassroots disability rights organization, coordinated a “National Day of Testimony” held in Nashville, Tennessee. Sixty people who had once been institutionalized on account of disabilities, but had then successfully moved into their own homes, told their stories. Organizer Stephanie Thomas declared

The fact of the matter is for that system what people with disabilities really are is the crop. We are the crop. We are there to fill beds, so they are warm beds, so they get paid. That is what is about, and that is what it’s got to stop being about. It’s got to be about people’s lives.¹⁰¹

Today we are witnessing the growth of the private prison-service industry: those who build and staff detention centers/prisons, barbed wire, security, electronic systems for opening and shutting doors, alarms and fire control, vending machines, the telephone industry, video surveillance, juvenile offenders, case managers, those who design and produce, fit and electronically monitor the “grillettes,” or so-called prisoner “ankle bracelets.”¹⁰² Recall David Harvey’s observation that “if markets do not exist...then they must be created, by state action if necessary.”¹⁰³

D. The Necessary Creation of the “Surge” of “Unaccompanied Children” and “Humane” Liberal Responses

Central Americans did not migrate to the United States in significant numbers until the 1980s,¹⁰⁴ when they began to flee human rights violations, violence, and civil wars. Migration, in general, from Central America declined for a period in the 1990s,¹⁰⁵ but began to increase again in the twenty-first century. CBP reports the number of children, specifically, who were not with a parent when apprehended, between October 1, 2008, and March 31, 2016, as the following¹⁰⁶:

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101. Tim Wheat, *“I’ll Never Go Back.” Testimony of Formerly Institutionalized Americans Documents Human Rights Abuse, Immoral Police*, ADAPT (Mar. 19, 2006), <http://www.adapt.org/freeourpeople/aar/nash06/report01.htm>.
 102. Admittedly, this growth is uneven across the country; most prisoners are still in publicly run prisons or detention centers.
 103. HARVEY, *supra* note 16.
 104. Jie Zong & Jeanne Batalova, *Central American Immigrants in the United States*, MIGRATION POL’Y INST. (Sept. 2, 2015), <http://www.migrationpolicy.org/article/central-american-immigrants-united-states>.
 105. *Id.*
 106. *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last visited Apr. 28, 2016).

Unaccompanied Alien Children Encountered by Fiscal Year

Numbers below reflect Fiscal Years 2009-2015, FY 2016 (October 1, 2015 - March 31, 2016)

Country	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
El Salvador	1,221	1,910	1,394	3,314	5,990	16,404	9,389	7,914
Guatemala	1,115	1,517	1,565	3,835	8,068	17,057	13,589	9,383
Honduras	968	1,017	974	2,997	6,747	18,244	5,409	4,224
Mexico	16,114	13,724	11,768	13,974	17,240	15,634	11,012	5,821

It was not migration from Central America, in general, but that of *children*, that President Obama referenced when he declared a “humanitarian crisis” in June 2014. The first significant increase for children from the Northern Triangle of Central America took place in fiscal year 2012, and the number of children did peak in 2014. People were right to be concerned for “unaccompanied children.”

The response to the so-called and much hyped “surge” of Central American children, however, made no “humanitarian” or fiscal sense. While media displayed images of children in crowded conditions, DHS was rapidly gearing up to detain not children who traveled without their parents, but mothers and children. At the same time that the president announced the “humanitarian crisis,” DHS began detaining women with their children in Artesia, New Mexico, and refusing to set bond for any of them. A CNN headline on June 21, 2014 announced “White House to spend millions to curb undocumented children crossing border,” but one of the “solutions” was family detention. “We’re going to open up some additional detention facilities that can accommodate adults that show up on the border with their children.”¹⁰⁷ While the public wondered what kind of parents would send their children on treacherous treks from Central America through Mexico alone, those mothers—and some fathers—who travelled *with* their children were punished.

The confusion between children coming by themselves and families fleeing together served the Obama Administration well. When a group of concerned advocates spoke with a Congressional representative in early 2015, asking for his help to end family detention, he chastised them for coming to him so late in the legislative season to ask for anything.¹⁰⁸ The images of needy, parentless children

107. Shelby Lin Erdman, *White House to Spend Millions to Curb Undocumented Children Crossing Border*, CNN (Jun. 21, 2014), available at <http://www.cnn.com/2014/06/20/politics/us-central-american-immigration/>.

108. Personal experience of V. Raymond, on March 21, 2015, in the Kenedy Town Hall, with the Hon. Ruben Hinojosa, US. Congressional Representative for the 15th District of Texas by telephone, and with the Congressman’s District Director for the Seguin office, Mr. Mark Gonzales.

were so ingrained in his head that he assumed that the advocates were asking for an increase in funds or programs for unaccompanied children. He did not to hear the actual plea: *We're not asking you to spend money. We are asking you to CLOSE the family detention centers in which U.S. taxpayers are funding the detention of mothers and their children at a cost of well over \$100.00 per day per person.*¹⁰⁹ The humanitarian option—of releasing these families to their extended families, to religious and non-profit organizations, is also the more fiscally responsible option.

The official hostile attitudes towards migrants, including recent changes in immigration law and policy directed at asylum seekers from Central America, in effect *only obfuscate any possibility of understanding how higher migration rates can and should be linked to the influence of U.S. policies in Central America or Mexico.* The DHS' position also perpetuates a rather convenient social construction—all migrants pose a threat to “national security.” If so, then official policy, even in cases of non-threatening women and children arriving from Central America who seek asylum because they fear for their lives, are subject to automatic expedited removal procedures and indefinite detention¹¹⁰ in prison-like centers.¹¹¹

From a basic due process and human rights perspective, the decision of the federal government to treat all migrants as presumed criminals and the detention of those migrants in prison-like conditions in facilities that are operated by for-profit institutions is indefensible.¹¹² Even more problematic is the detention of women with young children seeking asylum in for-profit facilities, euphemistically renamed “residential centers.” The “civil detention” aspects of the government’s approach toward migrants from Central America seeking asylum have been warped into a blatantly discriminatory and unconscionable process.

ICE’s current detention practices, in collaboration with subcontractor staff for CCA and Geo Group¹¹³ facilitate unnecessary and illegal systemic discrimination against non-citizens solely because of their national origin, race, class, gender and sexuality. By delegating the detention process to corporations that generate profit from building, staffing and profiting new prisons facilities, the government also perpetuates a socially constructed lie—that immigration is illegal and that all undocumented migrants can and should be treated as presumed criminals.¹¹⁴ These consequences in turn violate basic notions of due process and the fundamental right to human dignity.

109. *Immigration Detention: How Can the Government Cut Costs?*, HUMAN RIGHTS FIRST (Jan. 2013), <http://www.humanrightsfirst.org/uploads/pdfs/immigration-detention-fact-sheet-jan-2013.pdf> (last visited Apr. 29, 2016) (Human Rights First estimated the daily cost of detention at about \$164.00 per day); *The Math of Immigration Detention*, NAT’L IMMIGRATION FORUM (Aug. 22, 2013), <http://immigrationforum.org/blog/themathofimmigrationdetention/> (last visited Apr. 29, 2016) (the National Immigration Forum figure was \$159.00/day).

110. Miller, *supra* note 75.

111. Dagmar R. Myslinska, *Living Conditions in Immigration Detention Centers*, NOLO, <http://www.nolo.com/legal-encyclopedia/living-conditions-immigration-detention-centers.html> (last visited Mar. 16, 2016).

112. See Gilmore, *supra* note 68; see also Pond Cummings, *supra* note 100.

113. See CORR.CORP. OF AM, *supra* note 85; see also GEO GROUP, INC., *supra* note 86.

114. See CHOMSKY, *supra* note 13.

Our overall argument is that the entire for-profit detention system in which entities like CCA or Geo Group operate facilities similar to prisons, and detains persons who are viewed as criminals for daring to enter the country without permission, utterly strips the system of its supposedly “civil” character. It is a quasi-criminal (or crimmigatory) and discriminatory treatment of innocent persons. In this system, backed by the USDHS, CCA or Geo Group staff are influenced by policies reflecting ignorance and total misunderstanding of why some of the people they will house and treat like prisoners are simply refugees, not criminals, who only seek safety from persecution.

The system encourages misconduct by the staff to dehumanize the identity of the migrant, to deny them any respect at all as citizens of another country, to treat them with outright bias and xenophobic prejudice. This criminalization of the migrant identity, in particular of migrants from Central America who were affected, and indefinitely detained because of the DHS’s “no-bond” policy, is particularly inhumane in light of the socio-political economy of extreme violence and poverty, associated with drug war capitalism, that is pushing so many innocent and scared women and children to flee Honduras, Guatemala, and El Salvador.¹¹⁵ In further support that this system is illegal and unconscionable, the next section offers personal narratives gathered from migrants who were being held in Texas for-profit detention facilities.

IV. ON A MISSION TO UNDERSTAND THE PROCESS OF MIGRANT IMPRISONMENT IN FOR PROFIT CIVIL DETENTION FACILITIES

The narratives used herein stem from one author’s work as a social justice activist and legal educator who has co-produced educational weekend delegations where travelers come to see the human effects of U.S. law in the lives of working people and migrants in the Southwestern borderlands. For many years those delegations have principally focused on the impact of NAFTA at the Mexican border.¹¹⁶ A majority of these delegations have often included university students with interests in international social issues, business, labor, women’s rights and environmentalism.¹¹⁷

Beginning in 2011 organizers for these “NAFTA delegations” felt it necessary to come up with a complementary delegation for seeing the human effects of U.S. immigration law in the borderlands in

115. See discussion of DRUG WAR CAPITALISM, *supra* Part II.

116. See activities of collaborating nonprofits, AUSTIN TAN CERCA DE LA FRONTERA, <http://www.atcf.org> (last visited Oct. 30, 2016); see also WOMEN ON THE BORDER, <http://www.womenontheborder.org> (last visited Oct. 30, 2016) (educational delegations).

117. See also Arriola, *supra* note 27 (registrants travel by van with a delegation leader and Spanish interpreter/translator from Austin to Eagle Pass, TX and cross into Piedras Negras, Coahuila, where they interact with activist maquiladora workers who share their experience about life under NAFTA. These experiential learning opportunities deepen a person’s understanding of concepts like “globalization” or the “global economy” and “international free trade” when they see its human effects. Working women, who sometimes welcome us into their extremely humble houses, share stories of trying to raise a family while enduring, for example, non-living wages, lack of safety or toxicity in the workplace, oppressive work hours, sexual harassment and abuse, and retaliation for trying to organize in order to improve pay and workplace conditions).

response to the strident anti-immigrant discourse that had taken hold nationwide since 2006.¹¹⁸ Some states and cities began to take the issue of “immigration reform” into their own hands by enacting constitutionally suspect legislation. Arizona’s SB 1070,¹¹⁹ for example, deputized local immigration arrests, and imposed criminal penalties on small businesses and landlords who hired or rented to “illegal aliens.” Meanwhile, federal funding for border security was increased and while border wall construction projects¹²⁰ continued so did the erection of more detention centers,¹²¹ built and ultimately staffed by employees of CCA and Geo Group, the world’s largest corporations dedicated to the business of imprisonment.

As a counter to the anti-illegal alien movement organizers decided to create an experience where delegates could get beyond the ranting public discourse of immigration and see its effect on the migrants whose labor is essential to the U.S. economy, but whose criminalized identity makes them vulnerable to exploitation, abuse, imprisonment and summary deportation. Our three-day itinerary would involve visiting migrant shelters, immigration advocacy groups, talking to pro bono immigration lawyers, and to environmentalists who also oppose border walls for their harmful impact on human life and wildlife in the Southwest. We also made it a central feature of this delegation we called “The Journey of an Immigrant”¹²² to obtain access to and tour an immigration detention center, especially one of the many in the Rio Grande Valley of Texas, where there is heavy reliance on migrant agricultural labor. It was our ultimate goal to have delegates appreciate an intersection of U.S. law in international “free trade” and immigration policy with its negative and sometimes tragic effects on poor working people and migrant deaths in the borderlands.¹²³

We produced our first Journey of an Immigrant Delegation in 2012 with an intent to see what goes on inside of an immigration detention facility, but we also wanted to get a sense of the entire experience for a migrant laborer, what happened when they were arrested by the border patrol, what it was like in detention, and the motivations for taking the big risk of leaving their home country to come to the U.S. Both delegations, Port Isabel (2012) and Pearsall (2014), included meetings with immigrant

118. The anti-immigrant legislative movements began with “illegal immigration relief ordinances” enacted by the Hazleton, Pennsylvania city council around 2006. The local laws made it a crime to hire or rent to undocumented non-citizens. The lower court had held them to be unconstitutional, while on appeal the court held them preempted by and discriminatory under federal immigration law. *Lozano v. City of Hazleton*, 620 F.3d 170, 181 (3d Cir. 2010).

119. See Ann Morse, *Arizona’s Immigration Enforcement Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (revised July 28, 2011), <http://www.ncsl.org/research/immigration/analysis-of-arizonas-immigration-law.aspx>.

120. See *Sierra Club Borderlands: Border Wall Price Tag Also Miles Long*, SIERRA CLUB, <http://vault.sierraclub.org/borderlands/costs.aspx> (last visited Aug. 1, 2016).

121. pond cummings, *supra* note 100.

122. *Border Delegation: The Journey of an Immigrant*, WOMEN ON THE BORDER (Apr 3, 2012), <http://womenontheborder.org/2012/04/border-delegation-the-journey-of-an-immigrant-may-17-20-2012/> (Description of the 2012 Delegation).

123. Christine Kovic, *Searching for the Living, the Dead, and the New Disappeared on the Migrant Trail in Texas: Preliminary Report on Migrant Deaths in South Texas*, TEXAS CIVIL RIGHTS PROJECT, <https://www.texascivilrightsproject.org/en/wp-content/uploads/2016/06/Report-on-Migrant-Deaths-in-South-Texas.pdf>.

advocacy groups, the Sierra Club, and with organizers for ARISE,¹²⁴ an organization in the McAllen area dedicated to support and empowerment of families living in Texas border communities known as “colonias.”¹²⁵

In 2012 our tour of the Port Isabel detention facility in the Rio Grande Valley (near McAllen, TX), which houses 1,200 persons, did not include meetings with detainees. However, we obtained insights on the migration journey from new residents at the Casa Marianella¹²⁶ migrant shelter in Austin, who described harrowing tales of their migrations and unnecessary cruelties while being held by the border patrol in cells prior to being transferred to a detention facility. For the May 2014 delegation we successfully negotiated access for in-person meetings between delegates and detainees at the South Texas Detention Center at Pearsall, Texas. We learned that most detainees had migrated from the violence-ridden northern triangle of Central America. Most also were awaiting post-CFI hearings and had been at Pearsall for several months.

A. First Impressions of a Typical For-Profit Detention Facility

Everything about the operations of an ICE detention center has the look and feel of a prison.¹²⁷ Yet the administrative process of detention and potential deportation is formally deemed “civil” under federal immigration law, therefore the detained appearing before a judge in a removal/deportation proceeding are not constitutionally entitled to legal counsel.¹²⁸ But, there is no denying the tight security and prison-like atmosphere of a typical ICE detention center today built and operated by either

124. A RESOURCE IN SERVING EQUALITY (ARISE), <http://www.arisesotex.org> (last visited Dec. 22, 2016).

125. See Tex. Sec. of St., *Colonias FAQs*, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> (last visited Aug. 1, 2016); In the U.S., the term “colonia” in colloquial language means two things: a poor neighborhood, typically outside of municipal areas, where unscrupulous landowners and developers have sold homes to low-income people without providing for basic services such as water, sewage, garbage collection, and/or electricity. “Colonia” also means a poor neighborhood near the U.S.-Mexico border. Thus, two distinct ideas are combined, as they often but not always are in reality. The result of this conflation is dangerous. As a practical matter, both federal and U.S. laws require, for funding and other supportive purposes, a “colonia” as to be within a certain number of miles from the Mexican border. This limited definition thus excludes poor rural neighborhoods without basic services that are found in several other parts of the state (Central Texas and the Panhandle region, for example), and deprives the residents of those communities of assistance to which logically and fairly they should be entitled. It also rhetorically erases poverty that is not associated with the Mexican border or Mexican citizens. Like the phrase, “Third World conditions,” the most common colloquial definition and legal definition of “colonia” posits poverty as something that does not belong to the U.S., that comes from somewhere else, or that specifically spills over from Mexico. In real life, of course, the U.S. produces its own poverty – urban, rural, suburban, mixed, and other -- quite efficiently, without the assistance of Mexicans or anyone else.

126. See Casa Marianella, <http://www.casamarianella.org> (last visited Aug. 1, 2016) (“Casa Marianella,” located in Austin, Texas, provides emergency food, service and shelter to homeless immigrants. Its project Posada Esperanza provides shelter for women and children.).

127. In addition to photos online, author and attorney V. Raymond regularly visits detention centers in Texas, and author E. Arriola has been on guided tours of two ICE detention centers which have the look and feel of prisons, i.e., the “residents” are monitored, counted, regulated, restrained, sometimes handcuffed when moved from one location to another. See *infra* Part IV.

128. Congress, the Executive Branch, and courts deem removal proceedings “civil” in nature; because theoretically the person faces no loss of liberty, the Sixth Amendment guarantee of counsel does not apply. In other words,

CCA or Geo Group. Barbed wires surround the concrete walls that encircle a compound. STDC at Pearsall, for example, is 236,000 square feet in size and can house up to 1,900 detainees. At the front entrances large signs advise visitors that they may not bring in cell phones and cameras and that IDs must be checked in and will be returned at the end of a visit. As organizers for each tour, whether Port Isabel facility in 2012 or STDC at Pearsall in 2014, our group access required extensive communication over several months between Department of Homeland Security officials in the San Antonio, Texas office to negotiate everything from how we would notify the detainees of our visit, the procedures the DHS would use in vetting all delegates' backgrounds and IDs, and of course, of the Stakeholder Conduct regulations.¹²⁹

On May 16, 2014, as we approached the main entrance to STDC we were greeted by a tall Anglo rosy-cheeked Assistant Field Director Randall Henderson who took us into a large conference room. There he lectured on various details about the building and operations while many of us took detailed notes and others focused on asking questions. Among the details offered were size and occupancy rate, about 1,850 that day, which Henderson said would come down to 1,698 following that morning's deportation flight to Honduras. He reported further that most of the "aliens" were from Guatemala, Mexico, Honduras, and El Salvador, and that immigration court opens at 8:30 a.m. with three judges and a video conference who conduct hearings until 5 p.m. There are daily deportee flights to Honduras and we learned that 13,000 deportations had taken place in FY 2013, or an average of 23.7 per day. STDC, like Port Isabel, only held men who were dressed in government issued uniforms depending on their

the government is under no obligation to provide anyone with an attorney in immigration proceedings. Scholars, activists, and migrants alike dispute this characterization of removal proceedings. See Anita Maddali, *Paddilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?* 61 AM. U. L. REV. 1, 15 (2011). The extent of a "right to counsel" is that in removal proceedings an immigrant or refugee is allowed to seek assistance from a lawyer, either one whom she hires or one who offers her services via a non-profit legal services organization or on a pro bono basis. They can have a lawyer that they hire or acquires pro bono, but legal services are not to be at the expense of the government. See 8 U.S.C. § 1362 (1996). Not even unaccompanied minors, who may fit the definition of one who needs counsel because of a diminished mental capacity to understand the nature of immigration proceedings, are entitled to counsel. See Jerry Markon, *Former Judges Challenge Official Who Said 3-year-olds Can Represent Selves in Immigration Court*, WASH. POST (Mar. 15, 2016), available at https://www.washingtonpost.com/world/national-security/former-judges-challenge-official-who-said-three-year-olds-can-represent-themselves-in-immigration-court/2016/03/15/d9cb0538-aaaf-11e5-b0fd-073d5930a7b7_story.html.

129. See *Stakeholder Visitor Code of Conduct Form 71-032 (2/11)*, DEPARTMENT OF HOMELAND SECURITY: U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT, <http://womenontheborder.org/wp/wp-content/uploads/2015/08/ICEDHS-VISITOR-CODE-OF-CONDUCT.pdf>.

violation category.¹³⁰ Henderson reported further that in FY 2013 STDC (Pearsall) had “booked”¹³¹ 23,000, transferred 8,000 to other facilities and placed 135 persons on airplanes out of the country every day. Officer Henderson also stated that there were approximately 400 credible fear interviews conducted per day for migrants seeking asylum.

The information provided to our delegations on the “services” aspect of holding persons in detention were similar at Port Isabel and at Pearsall. Detention centers employ dozens of medical staff who can treat minor medical concerns, prescribe drugs and provide dental care. At Pearsall for example, 17,000 prescriptions had been provided in 2013 alone, along with almost 6,000 dental appointments.

B. Discrimination in the For Profit System of Detention

In his study of the rise of the racialized prison industrial complex¹³² Professor andré douglas pond cummings conclusively establishes that in recent decades for profit corporations like CCA and Geo Group, whose explicit mission as corporate entities is to increase profits for shareholders, play a disturbingly essential role in the policing of U.S. citizens for victimless crimes, and in the increased imprisonment of undocumented laborers, Lawful Permanent Residents (LPRs) and migrants.¹³³ As Professor pond cummings argues, since the federalized mission of the 1970s to engage the country in a War on Drugs, which would be manifested in tougher crime laws and mandatory sentencing guidelines, there has been a dramatic rise in the rates of incarceration of mostly young black and brown men for non-violent drug offenses. This phenomenon has been defined and further documented by scholar Michelle Alexander as a racial re-segregation of the U.S., or “the new Jim Crow.”¹³⁴ There are two separate, but related and intertwined developments at work. One has to do with the increase in sentences, racially disparate sentencing schemes, and prison building. The second concerns the privatization of prisons, part of a larger trend toward privatizing government services and institutions generally. A

130. The majority of detainees in both facilities wore the navy blue prison garb, which indicates that the only basis for detention is failure to prove legal residence. The orange uniform indicates that a person has a misdemeanor criminal conviction. The red outfit is reserved for a legal permanent resident who has been convicted of a felony. On both delegations the significant majority of persons we observed during the tour or in the interviews at Pearsall wore the navy blue uniform. See *ICE/DRO Detention Standard: Classification System* (Dec. 2, 2008), DEPT. OF HOMELAND SEC., https://www.ice.gov/doclib/dro/detention-standards/pdf/classification_system.pdf.

131. The language choices by Officer Henderson during his report, e.g., bookings and at all times referring to detainees as “aliens,” speak well to the mischaracterization of detention as civil instead of criminal.

132. pond cummings, *supra* note 100.

133. *Id.*

134. Alexander, *supra* note 12, at 12-13 (Alexander writes: I use the term racial caste in this book the way it is used in common parlance to denote a stigmatized racial group locked into an inferior position by law and custom. Jim Crow and slavery were caste systems. So is our system of mass incarceration. It may be helpful in attempting to understand the basic nature of the new caste system, to think of the criminal justice system—the entire collection of institutions and practices that comprise it—not as an independent system but rather as a gateway into a much larger system of racial stigmatization and permanent marginalization. This larger system, referred to here as mass incarceration, is a system that locks people not only behind actual bars in actual prisons, but also behind virtual bars and virtual walls—walls that are invisible to the naked eye but function nearly as effectively as Jim Crow laws once did at locking people of color into a permanent second class citizenship.).

series of scandals (sexual abuse and others) slowed the private prison boom in the non-immigration context. But fewer people care about immigrants, and the immigrant private prisons are disproportionately in Texas.

Aviva Chomsky makes a similar argument about the racialized aspects of immigration policy in her book *Undocumented: How Immigration became Illegal*.¹³⁵ While the post civil rights era is in theory about a world where society abides by the principle of “colorblindness,” the facts instead describe a complex system of laws and immigration policy that has systematically criminalized the identity of the brown Mexican and other Latinos. In a color blind world society should not be classifying whether one is entitled to benefits or burdens based on one’s race, ethnicity or language difference. But once the status of the undocumented is criminalized and that group or status is predominately held by a majority racial or ethnic group (Mexicans, other Latinos) who live or work in particular categories of labor or in certain communities, then the social construction of the criminal identity is complete.

Collectively, the process by which law and rhetoric have allowed for the criminalization of the immigrant/undocumented laborer supports discriminatory attitudes on the part of the staff who are hired to perform the operations of imprisonment. If the detainees are people of color who are poor, then why should it matter whether the places where they are held are actual prisons or civil detention centers? The residents of both can simply be treated like prisoners because in practice the policy views them as individuals who have intentionally committed a crime. There is therefore, no interest on the part of the detainers ever to have empty beds. For-profit entities like CCA and Geo Group make too much big money from imprisonment and detention.¹³⁶ They are also not motivated to save the taxpayers any money because they are simply subcontractors for a service historically performed by the government. Professor pond cummings illustrates the lobbying efforts that produced laws like Arizona’s SB 1070¹³⁷ which criminalized a range of human activity performed by undocumented immigrants (e.g., driving, renting an apartment) and therefore might guarantee a criminal sanction that would ineluctably lead to an immigration violation, to an immigration jail and then to deportation. Why would corporations in the business of imprisonment then want to stop enjoying highly profitable contracts with governments who can turn over their responsibilities to detain and imprison, but with little regard for the duty to do so constitutionally?

135. See Chomsky, *supra* note 13, at 23-39.

136. Financial reports and notices to shareholders by CCA proudly describe their profitability: A 2010 annual report states: “We believe the successes of our business and financing strategies have provided us with the financial flexibility to take advantage of various opportunities as they arise. During 2010, 2009, and 2008, we generated operating income of \$323.1 million, \$307.4 million, and \$293.5 million respectively. A 2014 Letter to Shareholders animatedly describes their growth potential: “Demand for new facilities continues to rise based on growth in state inmate populations, increased utilization of residential facilities to house families for Immigration and Customs Enforcement (ICE)” *Annual Reports*, CORR. CORP. OF AM., <http://www.cca.com/investors/financial-information/annual-reports> (individual reports and letters to shareholder are found on the CCA).

137. See Laura Sullivan, *Prison Economics Help Drive Arizona Immigration Law*, NPR (Oct. 28, 2010), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>; see also pond cummings, *supra* note 100.

Altogether these scholars' documented analyses confirm a few disturbing realities about the policies and practices associated with immigration detention today: (1) The system reinforces the neoliberal urge to privatize historic government functions by delegating imprisonment to corporations whose success is tied to keeping prisons full; (2) The system has a racially discriminatory impact as in cases like that of Honduran Maribel, a poor woman of indigenous African descent forced to migrate, fleeing examples of terror and violence traceable to the consequences of drug war capitalism in Honduras; and (3) the system justifies inhumane treatment of poor people of color seeking asylum by an unfair process that presumes them to be criminals upon arrest by the border patrol because they aren't citizens, they don't have proper documents and their presence is viewed as a threat to national security.

C. From Inside the Walls of Detention Migrants Speak Their Truth

This section combines information gathered from detainees in the May 2014 delegation and more recent information obtained about the treatment of women and children detainees at the Hutto and Karnes detention centers in Texas, either from statements by detainees like Honduran Maribel, or from information gathered by activists¹³⁸ or lawyers who have assisted detainees in their efforts to be released from prison-like detention.

1. Narratives from Persons Met at Pearsall, May 2014

The material herein on detainees' own words¹³⁹ about their experiences as either migrants or detainees, is based on the collective notes from our delegates or translated direct quotes in Spanish and an overall attempt to extract patterns in the statements from the detainees so that we could in turn produce reports for our relevant groups (e.g., Unitarian Church, etc.). Our main goal was to give a sense of humanity to the empty statistics surrounding the discourse about immigration reform and to see these people as the faces of those upon whom the U.S. labor economy depends. We were quite aware that when we designed this delegation asking, "what is happening to the migrants when they interact with U.S. border officials?" that "immigration" had been socially constructed and racially profiled into a particular type of "illegality" for people caught within our borders without proper documentation (e.g., travel visa, permanent residence card, work permit), and that in some ways the effort to meet and talk to the detainees could serve as a deconstruction of the dominant stereotype and attitudes about the reality of the person who ends up being imprisoned in an immigration detention facility.

Before we drove to Pearsall the organizers made sure all delegates understood that our time with the detainees would be limited so we agreed on a uniform set of basic questions. Our bilingual fliers had generated 85 sign-ups and in the end we could only talk to about five dozen detainees who knew that we were simply members of community groups, not lawyers or advisors, who wanted to better understand the effects of immigration detention. Our "interviews" happened in two large classrooms

138. See GRASSROOTS LEADERSHIP, <http://grassrootsleadership.org> (last visited Oct. 30, 2016).

139. The names herein are pseudonymous for protection of the migrants.

under heavy guard. Every pair had at least one person strong in English-Spanish skills. We invited two detainees at a time to approach our tables for brief exchanges with the questions that took about 10 minutes per person: What is your name and what country do you come from? Why did you migrate? How did you get here? What happened when you were caught? What has your experience been in detention?

The answers to these questions revealed a few patterns:

- a. ***Most of the migrants from the northern triangle of Central America (Honduras, Guatemala, El Salvador) are fleeing extreme levels of fear, poverty, violence and threats to their lives, and trauma. Police corruption is the norm. Sexual minority migrants are often fleeing because at home they are regularly at risk for persecution, harassment and violence from the military and/or corrupt police***

For example, **Marco** from El Salvador had been deported once in 2004. He was seeking asylum because he is persecuted at home for being gay. Marco paid someone to bring him across the border. It took him two months to get to the border. Instead he was kidnapped and threatened to be turned over to cartels to have him killed. He was held for several days. When his family in the U.S. paid \$10,000 to the kidnapers he was tossed over the border only to be quickly arrested by the border patrol. **Fideo**, who had been at Pearsall for two months was seeking asylum because a drug cartel leader killed one of his brothers and a nephew in Honduras. After these events he moved from city to city until he could get enough money to make the journey. He said the police back in his country were corrupt, and had a \$50,000 bounty on his head, which would have him turned over to the cartel leader. This person was on a “wanted” list by the DEA¹⁴⁰ and was the same man who killed his brother and shot up the place where he lived, a neighborhood of forty families.

Rogelio, from Honduras, is a schoolteacher who fled after his entire family was killed. He was captured during his migration journey from Honduras by the Carlos Quintero Cartel for two weeks. “The cartel made me do terrible things, like burying a person, so I ran away.” Rogelio was living in Laredo and turned over to ICE under the Secure Communities program.¹⁴¹ When we met him he’d been in Pearsall for six months. **Memo**, from Honduras said, “I regularly receive death threats and this is no

140. Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; *DEA Mission Statement*, U.S. DRUG ENFORCEMENT ADMINISTRATION, <http://www.dea.gov/about/mission.shtml> (last visited Oct. 30, 2016) (the mission of the federal Drug Enforcement Agency describes the broad jurisdiction of the agency to bring to justice individuals connected to the distribution of controlled substances that are defined as illegal under the Controlled Substances Act).

141. The Secure Communities program gave the ICE a technological presence in local and state jails, allowing the release of fingerprints of a prisoner who may be deportable first to the FBI and then to ICE. The Secure Communities program operated from 2008 to 2014 and was controversial. *See Secure Communities: A Fact Sheet*, AMERICAN IMMIGRATION COUNCIL (Nov. 29, 2011), <https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet>. Secure Communities has been replaced by ICE’s Priority Enforcement Program which now places an emphasis on not releasing into the community convicted criminals and others who pose a threat to public safety. *See Secure Communities: Get the Facts*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities#tab1> (last visited Nov. 12, 2016).

joke.” **Juan**, from Honduras migrated with his partner and her two daughters because of the war-related extortions by gangs. **Santiago**, from El Salvador, fled his country because of the extensive power of criminal networks and police corruption. **Wilfredo**, from Honduras, was robbed by organized crime gangs and threatened by the police. **Jamey**, had been a university student who received a death threat when he refused to push drugs for a gang so he fled.¹⁴²

b. That migrants frequently are financially exploited by coyotes/smugglers who may expose them to the risks of kidnapping by drug cartels, robbery, sexual abuse and rape.

For example, **Jorge**, from Honduras had to sell his taxi in order to afford the \$5,000 (US) the coyote demanded. His partner **Juanita**¹⁴³ said, “the route we went on makes you very anxious. We leave our country because it’s horrible there. I never would have exposed my daughters to what we went through if I’d known what we would encounter.” **Wilfredo** said that traveling through Mexico as a migrant is very dangerous. “I was almost captured by a drug cartel in Reynosa.” **Santiago**, from El Salvador was charged \$7,500 (US) for being smuggled with a group of twenty persons. **Jamey** said the migrants’ route through Mexico is hard. He went several days without eating. “[We] were in places that were very bad if one is homosexual.” When they got to McAllen (group of fifteen men) he was taken to a place where the border patrol immediately showed up. **Wilson**, openly gay and from Honduras, stated that the migrants’ route is risky and that during his journey he was raped, forced by a man from Nicaragua to engage in oral sex.

c. That when they are arrested the trauma of having to leave, along with the dangers of the journey is only further intensified by the ways in which they are treated by the border patrol. Migrants especially note the cruelty of being placed upon arrest into rooms they refer to as “ice lockers” and of being treated inhumanely with no water or little food.

For example, **Rogelio**, whose entire family had been killed, who was captured by a cartel and forced to bury someone, described the “hieleras” used by the border patrol as “inhumane.”¹⁴⁴ **Marco** who had been held without food on a ranch in Mexico for two weeks, then caught by the border patrol in Tucson, described how one of the officers said he was going to put two bullets in their heads. **Orlando** had lived in the U.S. for 16 years when he was caught. He had overstayed a work visa and was arrested

142. Material excerpted from Delegates’ notes for May 16, 2014 tour of South Texas Detention Center (Pearsall) (on file with authors).

143. One of our delegates, a graduate student on a fellowship at the University of Texas and visiting from Spain, was encouraged by Juan to take Juanita’s number so that she could call and check on the condition of Juanita and her daughters.

144. The advocacy group Americans for Immigrant Justice (AIJ) reports that the border patrol’s “hieleras” are so cold that immigrants’ lips chap and split, their fingers and toes turn blue, and they shake uncontrollably. See *News Release: Border Patrol Continues to Abuse Immigrant Women*, AMERICANS FOR IMMIGRANT JUSTICE (May 29, 2013), <http://www.aijustice.org/news-release-border-patrol-continues-to-abuse-immigrant-women/>.

under the Secure Communities program. Orlando was held six days in the ice locker where he said he was treated like a criminal. He was with 100 other people in the same cell and they gave him only one taquito per day to eat. He complained that the water they had been given to drink was for the toilet.

Wilfredo, who had been robbed and threatened by police in Honduras crossed at the river. He reported that the Border Patrol was very abusive; they struck him on the back and he suffered two broken toes which bled. **Santiago**, who had problems with both gangs and corrupt police in El Salvador was beat up by the border patrol when he was caught in Houston, placed in the ice locker and forced to sign self-deportation papers. **Jamey**, who was persecuted in Honduras for being gay and trying to get to Houston to connect with his mother reported that the border patrol officers beat him up, threw him to the floor and placed their boots on his back. He was placed for four days in the “hielera” (ice locker). **Jamey** felt that this treatment nearly killed him as he was extremely cold, was given no blankets, and he had to share water out of a plastic jug with several other people. **Wilson** also left Honduras because he is gay and was seeking asylum. He felt the border patrol officers were very abusive. One of them shoved him against a wall and tried to punch his face. Another officer told him “you will be deported; you’re going to be raped in a Mexican jail.”

d. Inside detention centers LGBT migrants experience harassment, abuse and discrimination, while all migrants experience racism, xenophobia from the staff; the treatment, especially for those seeking asylum triggers depression, anxiety and fear of being sent back to a hostile home country.

For example, **Marco** who had been kidnapped and eventually turned over to where he could be picked up by the Border Patrol was held in an ice locker for 5 days. He thought it abusive that in the holding cells they were given only one sandwich per day and no water. He felt mistreated because of his nationality, and that the staff at Pearsall were rude, always yelling at them. He felt vulnerable; panicky that as a gay man he was placed in a large room with 100 men. He had a difficult time using the toilet in front other men and he was denied a separate area. Instead the CCA staff taunted him and made him the topic of jokes. He was assaulted once by two other detainees who stripped him naked and threatened to rape him. Marco felt he was subject to a lot of racism by the CCA staff and it bothered him that there never were any translators. **Marco** felt very insecure; he left El Salvador because of depression and fear as a gay man; he had requested asylum once before and been deported. He was now on anxiety medication for regular panic attacks and had meetings with a counselor to deal with the discrimination against him because of his being gay. Marco also felt he was homeless and countryless as not even his own family would take him back for being gay and he feared for his life. His anxiety was increased with the ice locker treatment, a near rape by two men in Pearsall and knowing that he has no one to turn to in El Salvador. He said that if he didn’t get asylum in the U.S. he would try to get to Canada.

Jamey, who was fleeing Honduras because of the constant beatings and harassment said he felt like he’d been treated like a criminal. He was handcuffed even while taking a shower (which they get

only 3 times per week). However, he was safer once he was placed with other gay men. He described how one time the gay men, who were always isolated, filed a complaint because one of the staff members wouldn't even look at them and would demand they move over when he was coming through. Another time a medic refused to treat them because they were gay. When they asked the commanding officer why they were not getting treated by the medic he told them to shut up! They complained and the officer denied that anything had happened and that there had been confusion about their request. **Wilson**, who had been raped on his migration journey said that he was very distrustful of the CCA staff because they engaged in a lot of racial discrimination.

Johnny, who had arrived in this country at the age of eight was in detention following a charge for assaulting a police officer. He felt that some of the guards seemed to take pleasure in making the lives of the detainees as difficult as possible, within the extent of their authority. He cited situations in which they would withhold bottles of shampoo and other small commissary items for no apparent reason other than to provoke detainees. He also mentioned that on a particular day there were so many detainees waiting to take a shower that the guards had them all shower together in an open area (as opposed to private stalls). This made him very uncomfortable as other men jeered and made comments. **Roberto**, from El Salvador, was adamant that the guards treated the men as "sub-human", that the food was for *perros* (dogs), and that the detainees could only eat meat twice a month.¹⁴⁵

2. Treating Migrant Women with Children like Criminals

a. Violence, Migration and Repression

By October, when she participated in the hunger strike at Hutto, Maribel was becoming increasingly ill. She has Sickle Cell Anemia, a condition that primarily affects persons of African descent. Not only had she not received adequate medical care, but CCA staff also chastised and punished her when she fainted. Maribel had fallen into a serious depression.

Why had Maribel run away from Honduras? There were multiple reasons, too many to discuss in this article (and recall that Maribel's children are still in Honduras).

I left my home and my country last November [2014] because of threats to my life and that of my three children by a gang. I have suffered beatings, cuts, burns with battery acid and suffered tremendous physical, moral and sexual pain After being threatened by gangs I sought protection in a battered women's shelter because I was raped by the gang members and from them I was infected with Herpes 1 and 2¹⁴⁶

Maribel's reasons for migrating north and seeking asylum are similar to each and every one of the detainees we met face-to-face at Pearsall, who said things like—they murdered my family; I'm afraid I'll be killed; the police are corrupt in my country; I cannot go back. In 2014, the year in which Maribel arrived, the media regularly reported on the Obama administration's efforts to address a massive

145. Notes of conversations with detainees by delegates are on file with the author and available on request.

146. Written statement of Maribel delivered to her lawyer (on file with authors) (translation by authors).

“surge” of migration of people, including unaccompanied children from Central America.¹⁴⁷ How does one make sense of what has been happening to scared, poor migrants coming from Central America like Maribel? Let us note some facts about Honduras as an example.

Dawn Paley shows that 10% of highest earners control 42% of national resources in Honduras, while the lowest 10% of earners receive 0.17% of national income. Hondurans live under the effects of a societal infrastructure of economic injustice, where the empowered define the limits of existence with barriers to any kind of progress, resist the idea of social change, and where organized crime gangs demand extortions, or “war taxes,” which if unpaid, lead to retaliatory homicide. Honduras, where the wealthy own the maquiladoras, the media, banking and energy sources and control telecommunications is also a country that has been heavily influenced by the introduction of neoliberal policy agendas. These produce changes in law making it easier for foreigners to exploit national resources, as they were intended to do.

The range of “anti-drug war” policy agendas for Honduras should be linked, argues Paley, to the extreme poverty and oppression of the poorest of the poor in Honduras.¹⁴⁸ Just like other parts of Latin America where “anti-drug war” has translated into militarization, expensive police training (often U.S. funded) that produces professional killers who regularly turn around and work for transnational companies, paramilitaries, or drug cartels, Honduran society is a culture defined by violence. The culture of violence is a byproduct of the “anti-drugs” policy agenda that began with Colombia, moved on to Mexico, and is now affecting the northern triangle countries of Central America. Corruption among police forces is so widespread,¹⁴⁹ that murders and massacres can be linked to death squads, then to illicit/corrupt activities traceable back to orders by high ranking supervisors. In the background are political agendas connected to the neoliberal program of protecting investments, and policy programs that ease access by foreign investors to the lands and resources for mega-projects (e.g., oil, gas, minerals).¹⁵⁰ This results in authorizations for military personnel to carry out actions (e.g., raids, arrests, disarming of protestors and activists) to remove obstacles for a hospitable environment for the foreign

147. The migration surge of June 2014 produced stringent changes in national security policy that were unjustly applied to migrants from Central America, including those seeking asylum. See Julia Preston & Randal Archibald, *U.S. Moves to Stop Surge in Illegal Immigration*, N.Y. TIMES (June 20, 2014), available at http://www.nytimes.com/2014/06/21/us/us-plans-to-step-up-detention-and-deportation-of-migrants.html?_r=0. Author V. Raymond has collected the chronology of the changes in detention policy and examples of the “bond” packet the government uses to oppose petitions for asylum in court. The packet includes an affidavit by a DHS official (see Miller, *supra* note 75) who announced the new detention policy as justified by the government’s conclusion that the presence of women with children poses a threat to national security. The factual evidence was thin. Miller attached a series of news stories from the New York Times. See *Family Detention in Karnes (& in Dilley), August 2014 – July 2015, and Less Much Complete From August 2015 to the Present: A Chronology Annotated with Primary Documents*, VIRGINIA MARIE RAYMOND, <http://www.virginiaraymond.com/karnes-chronology/> (last visited Oct. 30, 2016) and *Introduction to Karnes Family Detention Chronology, August 2014 – July 2015*, VIRGINIA MARIE RAYMOND, <http://www.virginiaraymond.com/introduction-to-karnes-family-detention-chronology-august-2014-july-2015/> (last visited Oct. 30, 2016).

148. PALEY, *supra* note 31, at 204.

149. *Id.* at 209 (Forty percent (40%) of Honduran police are involved in organized crime).

150. *Id.* at 204-06.

investor, activities that can be easily justified by the state as a war against drug criminals. As Paley notes further, “[a]ll signs point to a deepening of the war on drugs in order for the state to maintain control over the people and their movements.” Human rights organizations’ reports note for example, that in Honduras only 1% of crimes are ever followed up by police investigation.¹⁵¹

Not unlike other migrants who make it to the Mexican border and get arrested, Maribel would be re-traumatized by being treated like a criminal:

The worst thing was crossing the river and asking for help; I was judged and punished, held for two days in the ice box and 2 days in Hidalgo, 2 days in Laredo, and I continue to be punished, I don’t know why, because in this country I have done no wrong, I have not killed, I have not robbed, I don’t deserve this suffering.¹⁵²

b. Resistance and Retaliation Against Hunger Strikers

“I came to the U.S. April 1, . . . I am seeking refuge for me and my family but what they have given me is punishment, how sad my life is.”¹⁵³

Current immigration detention practices have taken on the character of total imprisonment, especially against all undocumented migrants, even for petitioners for asylum who are women arrested with their children.

Detainees in the current immigration system experience their treatment as inhumane, unfair and abusive. To them it feels like incarceration, while CCA or Geo Group staff treat them like convicted criminals.¹⁵⁴ If imprisonment means tight security, monitoring of all activities, lack of privacy, segregation, penalties for violating “rules” for how to eat, sleep, bathe, walk, play, read, or interact with lawyers or visitors, then being in detention today is like being in a prison:

I am dying of desperation for this injustice and cruelty; I am simply an immigrant, not a delinquent and I don’t understand why we are treated this way; They [CCA staff] are heartless, made of steel, treating us as if we are not human, they treat us like dogs; when I’m sick they say I am lying; I have a unique case as a medical patient; I have sickle cell anemia, I have panic attacks, depression, am very nervous and full of stress. The food is very poor; everything results in a report and discrimination. Some of the food has worms . . . Day by day they are destroying me, taking my life, I feel imprisoned, alive but dead; my mental capacity is disappearing; I came here looking for help, I have suffered so much in my country, and now I continue suffering with this punishment and imprisonment in this hellish [place].¹⁵⁵

In 2014 and 2015 several dozen female detainees at Hutto and at Karnes, some with children who had arrived as asylum seekers, who got frustrated by the indefinite detention, the lack of counsel, and

151. *Id.* at 207.

152. Statement of Maribel (translated statement on file with authors).

153. *Id.*

154. The Grave Rights Report to IACHR charges current detention policy as being punitive in nature, therefore in violation of basic due process, and of violating international human rights law which prohibits the use of detention as a deterrent to migration. *See generally* Natarajan & Gilman, *supra* note 84, at 1; *see also Detention Guidelines*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 7, <http://www.unhcr.org/505b10ee9.html> (last visited Nov. 12, 2016).

155. Statement of Maribel Z. (on file with authors).

who worried about what imprisonment was doing mentally to their children, went on a hunger strike.”¹⁵⁶

The women at Hutto were not alone. History will remember 2015 as a year in which refugees and immigrants showed stunning courage. They endured shocking violence in their homes, and difficult, clandestine journeys. Arriving in the U.S., they found not refuge but arrest, holding cells so cold that people call them “hieleras” (ice boxes), incarceration in prisons, some of which the government euphemistically termed “residential centers,” emotional abuse, rancid food, and administrative and legal regimes that would have made Franz Kafka cry.”¹⁵⁷

Yet within weeks of the changed policy the population of women with children in detention expanded, and the government quickly entered into contracts with the major for profit-prison builders CCA and Geo Group.¹⁵⁸ Private prison staff operate these facilities with prisoner style methods that are applied to women and children: strict rules, segregation, body counts and disciplinary tactics designed to control the detainees. Therefore, when the women began to protest with the hunger strike, the notion of these rebels not eating and getting attention from the media, activists, religious organizations, or higher level government officials, was viewed as a problem needing to be controlled. Among the practices described by hunger striking detainees have been isolation or solitary confinement, euphemistically described by the CCA as administrative segregation and “medical assignments,” and threats to have children removed permanently from them.¹⁵⁹

They were heartless; they kept telling me that if I didn’t eat or drink water they would not let me out of this cell, I made them believe that I was eating and drinking water, but I threw it out in the sink so that I could return to the dormitory where the others are. While I was being punished I was not examined by any medic and they gave me no medicine [for my condition]; I know they did this because I participated in the hunger strike.¹⁶⁰

When she began to question ICE/CCA staff about why her client was in isolation she was told that Maribel had a number of “disciplinary issues” in her file, and that Maribel was “aggressive and belligerent.”¹⁶¹

156. Esther Yu Hsi Lee, *Immigrant Women Launch Indefinite Hunger Strike, Asking to be Freed from Detention Center*, THINK PROGRESS (Oct. 29, 2015), <http://thinkprogress.org/immigration/2015/10/29/3717102/hutto-hunger-strike/>; Statement of Maribel Z. (on file with authors).

157. Virginia Raymond, *Resistance and Retaliation: Maribel’s Story Part I*, LA VOZ DE ESPERANZA (Feb. 2016), <http://thisbridgecalldcyberspace.net/FILES/3899.pdf> [hereinafter Raymond, *Resistance and Retaliation*].

158. See *Introduction* to Natarajan & Gilman, *supra* note 84; See also *Family Detention*, GRASSROOTS LEADERSHIP, <http://grassrootsleadership.org/programs/family-detention> (last visited Oct. 30, 2016).

159. *Immigrant Mothers on Hunger Strike in Karnes Family Detention Center Say They Face Intimidation and Retaliation*, GRASSROOTS LEADERSHIP (Apr. 6, 2015), <http://grassrootsleadership.org/tpb-blog/2015/04/immigrant-mothers-hunger-strike-karnes-family-detention-center-say-they-face>.

160. Statement of Maribel Z. (on file with authors).

161. See Raymond, *Resistance and Retaliation*, *supra* note 157, at 11 (“She has an aggressive and belligerent nature,” Attorney Virginia Raymond was told by a deportation officer in late October 2015 at the Hutto Center, located 33 miles from her office in Austin. Maribel’s file included such a note, but later another official (obviously now having to deal with a strong advocate for Maribel) totally denied that there was any disciplinary

As the CCA continued to place pressure on the hunger strikers at Karnes through various retaliatory methods, including use of isolation (in “medical”) and transfers to Laredo and Pearsall, *some* of the women began to re-frame their hunger strike, saying now that they were “not really striking;” “I was praying to God;” “I was just fasting.”¹⁶² The government’s position on detaining petitioners for asylum, even those who have passed the CFI, is “national security” and an official message that they are not welcome in the U.S.A.¹⁶³ What began in summer 2014, arguably as a political reaction by the Obama administration to public criticism of programs like the 2012 DACA,¹⁶⁴ became a radical effort of the U.S. government to engage in speedy summary deportations for anyone coming from Central America. But for some migrants with children, the effect of the government’s change of heart as to asylum seekers, was nothing but a mean and unbearable source of trauma and stress.

In June 2015, Lilian Oliva Bardales was being held at the Karnes residential center with her 4-year-old boy. Lilian fell into the category of persons whom, once in expedited removal, would be detained mandatorily and without the right to seek review of their detention by an immigration judge.¹⁶⁵ For Lilian, the entire process caused a near fatal depression leading her to attempt suicide by cutting her wrists. Even so, and barely six days after she attempted suicide, Lilian and her boy were flown back to Honduras. She fled again and was able to connect with relatives while pro bono lawyers appealed her deportation order. Lilian described the egregious, indefensible conduct on the part of the CCA staff who had found her bleeding:

Oliva described how she stood naked, crying in front of a screaming detention official and two other staffers wearing rubber gloves just minutes after being found bleeding in a bathroom of the Texas family detention center. Oliva told staffers she didn’t want to take off her clothes, she recalled. She promised not to hurt herself again. She wanted to see her son. She recalled that detention staff told her the facility had rules and she needed to follow them. “If you don’t take your clothes off, we’ll tear them off you,” Oliva said she was told. “I was so nervous. So confused,”

issue, or that she had been segregated. Virginia felt the sting of retaliation herself when her client was arbitrarily moved to 237 miles from her office to Laredo, making it much more difficult for Maribel to meet with her lawyer.)

162. *Id.* at 12.

163. The reasoning behind the policy pronounced by the DHS in the summer of 2014 is found in an astonishing paragraph in the declaration of ERO field officer Miller who states: *According to debriefings of Guatemalan, Honduran and Salvadoran detainees, the high probability of a prompt release, coupled with the likelihood of low or no bond, is among the reasons they are coming to the United States. I have concluded that implementation of a “no bond” or “high bond” policy would significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadorans.* Miller, *supra* note 75, at ¶ 9. (One has to seriously question this logic against the powerful evidence documented by Paley in *Drug War Capitalism*, discussed in Part II *supra*, that a culture of violence is widespread in those countries and that U.S. policy has contributed to the changes that are linked to the violence and that working poor people are its primary victims. Therefore those who can escape, are refugees.)

164. DACA is Deferred Action for Childhood Arrivals, an immigration policy that allows certain undocumented immigrant children who arrived in the country before their 16th birthday and before 2007 to receive renewable 2-year work permits and exemptions from deportation. For an analysis of the question, “was the 2014 surge linked to the DACA program?” See Catalina Amuedo-Dorantes and Thitima Puttitanun, *DACA and the Surge in Unaccompanied Alien Children* (2015), PRINCETON UNIVERSITY UPLOADS, <http://paa2015.princeton.edu/uploads/151149> (last visited Oct. 30, 2016).

165. See Natarajan & Gilman, *supra* note 84, at 2.

she recalled. "I took off my shirt. And then pants. 'No!' they said. 'Take off everything! Take off your shoes! Take off your underwear! Take off your bra!'"¹⁶⁶

V. CONCLUSION: THE MAKING OF A CRIMINAL: HOW DARE YOU MIGRATE TO THIS COUNTRY AND ASK FOR PROTECTION

There is something very wrong with our current immigration system. It has been mischaracterized as civil when it in fact is functionally criminal and effectuates inhumane treatment of non-citizens for no other reason than where they come from, their identity, their language, and their lack of access to adequate representation. Currently at the state and local level, we continue to hear proposals for policy and law, derived from a commitment by politicians to nurture the culture of fear over migration "surges" linked to terrorism and the refugee crises connected to the bombings in Paris and the civil war in Syria. The National Conference of Legislatures just reported that in 2015 there was a 26% rise in state laws relating to some kind of immigration reform.¹⁶⁷ Fear mongering produces bad laws for civil and human rights and threatens the values of an open society. The culture of fear is especially threatening to social minorities who can be easily scapegoated. "The nature of injustice is that we may not see it in our time," wrote Justice Kennedy as he authored an opinion that celebrated the fundamental right of every person to human dignity.¹⁶⁸ Yet, social justice lawyers, scholars and activists know that sometimes the law can be a powerful tool for reform, while at other times the law can be an instrument of violence and deprivation of human dignity. This is the case for the continued treatment of the migrant as a presumptive criminal and for the use of taxpayer monies to support in any way the contracts with entities like CCA and Geo Group who make money from detention and imprisonment. We must affirm the principle of a right to human dignity in all contexts, even those involving the regulation of our national boundaries and the treatment of non-citizens who arrive here with the hope of safety from real terroristic violence for which they are not responsible. And we must resist the practices of detention and imprisonment that are perpetuating the false construction of the presumed immigrant criminal, an official lie that is encouraging acts of bias, prejudice, and denial of the right to due process, justice and human dignity.

166. Franco Ordoñez and Sandra Cuffe, *Teen Mom Who Attempted Suicide Speaks Out After Deportation*, MCCLATCHY REPORT (June 17, 2015, 2:50 PM), <http://www.mcclatchydc.com/news/nation-world/national/article25186393.html#storylink=cpy> (her lawyer appealed the deportation and the Board of Immigration Appeals ruled that Oliva did not receive effective legal counsel during the eight months she was held at a south Texas family detention center). See Franco Ordoñez, *Deported Teen Mom Who'd Attempted Suicide Will Return to U.S.*, MCCLATCHY REPORT (March 11, 2016, 1:00 AM), <http://www.mcclatchydc.com/news/nation-world/national/article65343597.html#storylink=cpy>.

167. *State Laws Related to Immigration and Immigrants*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx> (last visited Oct. 30, 2016) (the 2015 reports).

168. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).