

Black Beyond Borders: An Analysis of the 1996 Immigration Laws and the Invisibility of Black Immigrants

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INTRODUCTION

The histories of Black immigrants and African Americans intertwine throughout American history. As early as the beginning of the twentieth century, Black immigrants, namely those from the Caribbean, had established communities within the United States in cities such as New York City, Hartford, and Miami.¹ Although this immigration has occurred for over a century, broader conversations about immigration typically exclude Black immigrants, as these conversations usually center non-Black people from Latin America. The intersection of their identities as both immigrant and Black, however, places Black immigrants in a precarious condition. Black immigrants, particularly undocumented immigrants, navigate an immigration system designed to exclude them, while their Blackness increases the likelihood of their surveillance and criminalization.

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1. Violet Showers Johnson, *Afterword: The Black Presence in US Immigration History, in A NATION OF IMMIGRANTS RECONSIDERED: US SOCIETY IN AN AGE OF RESTRICTION, 1924-1965*, at 273, 274 (Maddalena Marinari, Madeline Y. Hsu & María Cristina García eds., 2019).

The United States's current immigration system, based primarily on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA),² unfairly persecutes Black migrants by using criminal law decisions as grounds for detention and deportation. Since President Lyndon B. Johnson declared a "war on crime" in 1965, legislative and popular media narratives surrounding crime have resulted in the dehumanization and criminalization of Black people, framing them as threats to "ordinary Americans."³ President Richard Nixon continued this "war on crime" and stressed the importance of "law and order."⁴ This language, while facially neutral, targeted urban communities and Black Americans. The era's emphasis on the "war on crime" demonstrated a national interest in the policing and criminalization of Black people, who, amidst the civil rights movement, were conceptualized as threats to American society. As identified by migration scholar Harsha Walia, "[t]he convergence of 'tough on crime' and 'tough on immigration' sustains racialized control" and ensures the existence of a compliant labor force through the containment of surplus labor.⁵

This Paper will tie anti-Black carceral logics to those found in the immigration system, highlighting the connections between the criminal legal system and the immigration system. I use the phrase *anti-Black carceral logics* to define the particular discourse surrounding carcerality and criminalization that has resulted in the mass criminalization, incarceration, and policing of Black communities. Further, this Paper highlights how the State continues to use racist logics that emerged during the transatlantic slave trade to continue to harm and subjugate Black people, maintaining a system of global racial capitalism. To draw the comparison between the criminal law system and the immigration system, this Paper will analyze IIRIRA and AEDPA, known together as the 1996 Immigration Laws, through a Critical Race Theory lens. In doing so, this Paper will underscore how these acts, in tandem with the 1994 Crime Bill,⁶ result in the detention and deportation of Black migrants at higher rates than non-Black migrants.

Part I situates Blackness as a global concept to highlight how power structures have defined the Black experience both within and outside the United States. This section underscores how the United States has subjugated Black foreigners since its founding. Part II argues that the criminal legal system is a badge and incident of slavery, as it disproportionately impacts those who descend from enslaved people and

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 28 U.S.C.).

3. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 139 (2016).

4. *Id.* at 141.

5. HARSHA WALIA, BORDER AND RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 53 (2021).

6. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (current version as amended transferred to scattered sections of 34 U.S.C.). This piece of legislation is also colloquially known as the "1994 Crime Bill," and will be referred to as such throughout the piece.

relegates them to a status of civil/social death. Part III highlights how contemporary immigration legislation disproportionately impacts Black migrants, arguing that the system, as it exists today, represents an afterlife of slavery, as coined by African American studies scholar Saidiya Hartman. Here, I analyze how the immigration system employs anti-Black carceral logics to deport and detain migrants. Part IV argues for abolishing immigration detention and deportation as they currently exist by utilizing a framework of abolition constitutionalism based on badges and incidents of slavery.

Finally, this Paper concludes with an overview of the intersectional nature of the Black migrant experience while emphasizing the importance of a positive abolitionism, which creates new institutions and practices that permit human flourishing. Thus, this Paper underscores the connections between the prison system and the immigration system, ultimately calling for the abolition of the current immigration system to create a new system where Black life is not inherently criminalized and subjugated.

I. CONCEPTUALIZING GLOBAL BLACKNESS

The contemporary lives of African-descended people in the Western Hemisphere demonstrate the consequences of the violent kidnapping and subsequent displacement of Africans during the transatlantic slave trade centuries before. The construction of the so-called “New World” was precipitated by the taking of humans from Africa and the subjugation of those kidnapped and enslaved in the Western Hemisphere. Although the practice of enslaving Africans and their descendants officially ended in the Americas by the beginning of the twentieth century, these new worlds continued to subjugate Black life. Within the context of the United States, following their emancipation, Black Americans endured decades of both private and public violence that perpetuated their oppression. Today, Black Americans are disproportionately policed, criminalized, and incarcerated.⁷

While much attention is paid to the subjugation of those who were enslaved in the Americas and the unequal treatment of their descendants, far less attention is given to how American and foreign immigration policy treats the descendants of those enslaved elsewhere. In this section, I will highlight how African-descended people from outside of the United States were also subject to the anti-Black logic that subjugated African Americans domestically. Throughout this Paper, I will define African American as the descendants of those who were enslaved within the United States. Further, I will define Black as those whose ancestors originally hail from Africa, encompassing African Americans, Black Caribbeans, Black Latin Americans, and Black Africans. Finally, when I use the term Black American, I refer to all those who are Black, with American citizenship, regardless of their recent ancestry.

Historically, Blackness and American citizenship were diametrically opposed. In 1857, the United States Supreme Court ruled in *Dred Scott v. Sandford* that a Black person, whose ancestors were imported into this country and sold as slaves, could not “become a member of the political community formed and brought into existence

7. Hum. Rts. Watch & ACLU, *Racial Discrimination in the United States: Joint Submission to the United Nations Committee on the Elimination of Racial Discrimination*, HUM. RTS. WATCH (Aug. 8, 2022), <https://www.hrw.org/report/2022/08/08/racial-discrimination-united-states/human-rights-watch/aclu-joint-submission> [https://perma.cc/H2XG-CFQK].

by the Constitution.”⁸ The case further stated that free Black people were also excluded from the concept of citizenship, thus holding that Black people could not be considered citizens under the United States Constitution, as the founders did not intend for them to be included under the protections of citizenship.⁹

Although the *Dred Scott* decision came in 1857, it is clear through American foreign policy that the United States had already demonstrated an unwillingness to grant equal political treatment to those racialized as Black. This anti-Black logic is particularly evident in the United States’s treatment of Haiti, the world’s first Black republic. A former colony of France, enslaved Haitians revolted in 1791 and led a thirteen-year struggle against colonization and slavery, resulting in their declaration of independence on January 1st, 1804.¹⁰ While Haiti had declared itself an independent state, furthering the mission of democracy in the Western world, the United States was slow to provide diplomatic recognition for the new country.¹¹ As noted by Southern politicians throughout this period, recognition of Haiti would call into question the United States’s treatment of Black people domestically.¹² It was difficult to recognize a nation of Black leaders while simultaneously disenfranchising and enslaving Black people domestically. Thus, it was not until decades after the Haitian Revolution that the United States would officially recognize Haiti. The relationship between Haiti and the United States in early American history demonstrates how perceptions of Blackness impacted Black people domestically and abroad. The American system of chattel slavery impacted not only how Black Americans were treated domestically but also the nation building of Black states abroad.

Key to understanding the interconnected nature of Blackness in the region is the intra-American slave trade, where enslaved Africans were bought and sold throughout the Americas after having been previously enslaved within the Western Hemisphere.¹³ To understand the history of slavery, it is important not to center the United States as the focal point, but to understand how anti-Black logics of racial capitalism required the subjugation of all Black people throughout the Western hemisphere. This subjugation of all African descendants becomes particularly relevant in the discussion of the treatment of Black migrants. In understanding the rationale behind the treatment of Black people by the United States both domestically and abroad, it becomes evident why anti-Black carceral logics are replicated onto Black migrants. When slavery is understood as a global process that demanded the dehumanization of all Black persons, it becomes clear how the experiences of Black migrants within the United States became (and remain) intrinsically connected to the experiences of African Americans.

8. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403-05 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

9. *Id.*

10. Charles. H. Wesley, *The Struggle for the Recognition of Haiti and Liberia as Independent Republics*, 2 J. NEGRO HIST., 369, 370 (1917), <https://doi.org/10.2307/2713395> [<https://perma.cc/Z4DD-KCT5>].

11. *Id.* at 371.

12. *Id.* at 374.

13. Database of Slave Voyages Made by Enslavers in the Trans-Atlantic and Intra-American Slave Trade, SLAVEVOYAGES, <https://www.slavevoyages.org/american/database> [<https://perma.cc/5V83-FHNV>] (last visited Apr. 23, 2025).

II. THE CRIMINAL JUSTICE SYSTEM AS A BADGE AND INCIDENT OF SLAVERY

The Thirteenth Amendment was added to the Constitution to end slavery. The amendment, in conjunction with the Fourteenth and Fifteenth Amendments, overturned the *Dred Scott* decision to ensure no class would again be relegated to the status of second-class citizenship.¹⁴ Section Two of the Thirteenth Amendment, the Enabling Clause, has been interpreted by the Supreme Court as empowering Congress to enact legislation to abolish any burdens and restrictions on fundamental rights suffered by enslaved people, and to abolish all badges and incidents of slavery. The criminal justice system, as it has developed post-emancipation, is a badge and incident of slavery, as it disproportionately impacts those who are descendants of enslaved people and relegates them to a status of civil and social death, as slavery once did.

The condition of those enslaved within the United States is best defined as one of “social death.”¹⁵ As defined by historian and sociologist of race and slavery Orlando Patterson, the term social death describes the condition of those who are not accepted as fully human by wider society.¹⁶ In the context of enslavement, social death refers to the non-existence of an enslaved person outside of their relationship to their enslaver, their dislocation from the community, and their natal alienation from the family or tribe of their birth.¹⁷ Orlando Patterson’s framework is useful for understanding the particular harms that defined slavery within the American context, and thus is useful in making sense of what the writers of the Thirteenth Amendment sought to abolish with the amendment’s implementation. In this section, I argue for a radical interpretation of the Thirteenth Amendment, one that is supported by the passage of the Civil Rights Act of 1866¹⁸ shortly after emancipation, as well as the Supreme Court case of *Jones v. Alfred H. Mayer Co.*,¹⁹ which recognized housing discrimination as a badge and incident of slavery.

By ratifying the Reconstruction Amendments and subsequent civil rights legislation, radical members of the 39th Congress established their vision of a country devoid of racial subjugation. The Thirteenth Amendment did more than release Black people from their literal chains—it provided grounds to combat all forms of racial discrimination that resulted from the enslavement of Black people. Nearly one century after the Thirteenth Amendment was ratified, in *Jones v. Alfred H. Mayer Co.*, the Supreme Court named housing discrimination as a badge and incident of slavery, reaffirming the power of the 13th Amendment to eradicate such occurrences.²⁰ Specifically, the Court held that the Enabling Clause provided Congress with the right to “determine what are the badges and incidents of slavery, and . . . to translate that determination into effective legislation.”²¹

14. U.S. CONST. amends. XIII–XV.

15. ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 38 (1st ed. 1982).

16. *Id.*

17. Jana Králová, *What is Social Death?*, 10 CONTEMP. SOC. SCI. 235, 236 (2015).

18. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as reenacted and amended at 42 U.S.C. §§ 1981–1982).

19. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

20. *Id.* at 441–43.

21. *Id.* at 440.

Because the Court has not laid out a specific definition of what constitutes a badge and incident of slavery, the contemporaneous discussions surrounding the original intention of the amendments can be used as evidence of what the members of the 39th Congress intended. Specifically, the Radical Republican proponents of the Reconstruction Amendment suggested that these amendments guaranteed a set of “natural” or “civil” rights that would extend beyond simple emancipation.²² Some senators, like James Harlan of Iowa, even went so far as to frame the denial of any social, political, or civil rights as a badge and incident of slavery.²³ Specifically, Harlan named the inability to marry, raise children, own property, or testify in court, and the denial of education, as limitations to liberty that would constitute badges and incidents of slavery.²⁴ African American politicians from southern states also shared this point of view, insisting that the abolition of slavery was not only concerned with outlawing slavery and servitude, but also eliminating every vestige of the slave system.²⁵

The Supreme Court case of *Jones v. Alfred H. Mayer Co.* demonstrates the Court’s affirmation that the 13th Amendment did more than simply emancipate enslaved Americans from physical bondage. Joseph Lee Jones, a Black man, alleged that a real estate company in Missouri refused to sell him a home because of his race.²⁶ Joseph Lee Jones and his wife, Barbara, were federal employees of the Veterans Administration who sought to buy a house together in a St. Louis, Missouri, neighborhood, Paddock Woods, in 1965.²⁷ The issue presented in the case was whether the defendant, Alfred H. Mayer Company, violated 42 U.S.C. Section 1982, a section of the Civil Rights Act of 1866 that guarantees equal rights to all citizens making real estate transactions.²⁸ In its opinion, the Court held that Section 1982 was intended to prohibit all discrimination against Black people in the sale and rental of property. The Court further reasoned that this enforcement power came from the Thirteenth Amendment’s Enabling Clause, which empowered Congress to eliminate racial barriers to the acquisition of property, as a badge or incident of slavery.²⁹ Nearly a century after the ratification of the Thirteenth Amendment, the Court maintained the position that badges and incidents of slavery encompass more than coerced labor. This interpretation provides a basis for meaningful reform, particularly regarding harms that are experienced disproportionately by those who descend from the enslaved. In choosing to acknowledge that Black people still experience the residual harms of slavery, Congress could prioritize remedying those harms.

22. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 175-78 (1951).

23. James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 434 (2018).

24. *Id.*

25. *Id.* at 435.

26. *Jones*, 392 U.S. at 412.

27. *Why You Should Know J.D. Shelley and Joseph Jones’ Names*, RE/MAX NEWS (Feb. 1, 2020), <https://news.remax.com/why-you-should-know-jd-shelley-and-joseph-jones-names> [https://perma.cc/TN3W-PNL4].

28. *Id.*

29. *Id.*

Under this interpretation of the Thirteenth Amendment, the contemporary criminal justice system is a badge and incident of slavery. Particularly, the system of mass incarceration, which disproportionately impacts Black people in America,³⁰ must be criticized from a lens that centers the Thirteenth Amendment. Legal scholar Jennifer Mason McAward defines the badges and incidents of slavery as “public or widespread private action, aimed at any racial group that has previously been held in slavery, that mimics the law of slavery” through the potential of “re-enslavement or legal subjugation of the targeted group.”³¹ As highlighted by Michelle Alexander in her work *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, the criminal justice system has been used as a vehicle to discriminate against African Americans in a manner reminiscent of Jim Crow.³² In her analysis, Alexander argues that we have not ended the racial caste once enforced by Jim Crow; we have simply redesigned it through the use of a criminal justice system that strips civil liberties from incarcerated people and those who were formerly incarcerated.³³ Jim Crow laws were a direct extension of slavery because they stripped civil rights and liberties from those recently emancipated. By that same logic, a system that disproportionately impacts Black Americans and strips them of their civil liberties also operates as an extension of slavery.

The War on Drugs, a project aimed at criminalizing and subjugating Black Americans, drove mass incarceration. Nixon’s chief of staff best demonstrates the original intent behind the War on Drugs in his diary, writing that “[President Nixon] emphasized that you have to face the fact that the whole problem is really the blacks’ ‘The key is to devise a system that recognizes this while not appearing to.’”³⁴ Nixon’s White House Counsel, John Ehrlichman, corroborated this view, stating that they “understood [they] couldn’t make it illegal to be young or poor or Black in the United States, but [they] understood that [they] could criminalize their common pleasure.”³⁵ Under subsequent presidential administrations, Reagan, Bush, and Clinton continued to entrench America further into the War on Drugs and tough-on-crime approach.³⁶ These three administrations continued to federalize more crimes and create draconian sentencing regimes, leading to the rise of mass incarceration and increased instances of police violence towards Black Americans.³⁷

Scholars of African American studies have theorized the lingering impacts of slavery on the lives of Black Americans today. Through her concept of the “afterlife of

30. See E. ANN CARSON, U.S. DEP’T OF JUST., NCJ 305125, PRISONERS IN 2021 – STATISTICAL TABLES, at 14 tbl. 6 (2022), <https://bjs.ojp.gov/media/68246/download> [<https://perma.cc/7PQF-3AUD>] (indicating that Black residents were imprisoned at the highest rate of any racial group between 2011–2021).

31. Jennifer M. McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 561 (2012).

32. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (The New Press 10th anniversary ed. 2020).

33. *Id.* at 70–73.

34. Larry Gabriel, *Joining the Fight*, DETROIT METRO TIMES (Aug. 10, 2011), <https://www.metrotimes.com/weed-2/joining-the-fight-2148184/> [<https://perma.cc/U9F3-FA9X>].

35. *Id.*

36. Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1120 (2020).

37. *Id.* at 1120–21.

slavery,”³⁸ Saidiya Hartman asserts that “[B]lack lives are still imperiled and devalued by a racial calculus and a political arithmetic that was entrenched centuries ago.”³⁹ Specifically, Hartman points to skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment as examples of afterlives of slavery.⁴⁰ The concept of an afterlife of slavery is useful in an analysis of what constitutes a badge and incident of slavery. Using both a humanities and a legal lens, this framework offers a powerful way to understand how seemingly mundane features of American society can serve as relics of slavery. The brutalities of the criminal justice system—particularly those that result in housing discrimination, employment discrimination, voter disenfranchisement, the denial of public benefits, and the exclusion from jury service—are relics of slavery that could not have been conceptualized without the United States’s sociopolitical system’s reliance on logics of enslavement.

The anti-Black logics that result in a system of mass incarceration could not be conceptualized without the system’s reliance on preceding logics that were developed during the period of slavery in the New World. Following the death of Dr. Martin Luther King Jr., Black Americans took to the streets to continue demanding a change in their living conditions, conditions which had been determined by their ancestral ties to American chattel slavery.⁴¹ The institutions and practices that subordinated Black people, such as peonage, Jim Crow, mass incarceration, housing segregation, and school segregation, were animated by the same ideologies of white supremacy and Black inferiority created to justify slavery. As a response to riots in major cities, politicians promoted the view that the State had to reinforce what they deemed as “order.”⁴² In response to this national call for action, states and the federal government began to enact laws that lengthened the sentences for many crimes.⁴³ Such politics culminated in the passage of the bipartisan Violent Crime Control and Law Enforcement Act of 1994, also known as the 1994 Crime Bill.⁴⁴ These new laws and push toward punitive measures rested on a fear of Blackness, evident through the response to the riots that broke out following the death of Martin Luther King Jr. Instead of attempting to address the root cause of violence, legislators rested on anti-Black logics to continue subjugating a population that had been rendered outside the realm of citizenship since the founding of America.

38. SAIDIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE* 6 (2007).

39. *Id.*

40. *Id.*

41. Peter B. Levy, *The Dream Deferred: The Assassination of Martin Luther King, Jr., and the Holy Week Uprisings of 1968*, in *BALTIMORE ‘68: RIOTS AND REBIRTH IN AN AMERICAN CITY* 3, 3-25 (Jessica I. Elfenbein, Thomas L. Hollowak & Elizabeth M. Nix eds., 2011).

42. JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUST., *HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED?* 3 (2016), https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf [<https://perma.cc/B5AC-T2TX>].

43. *Id.* at 4.

44. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (current version as amended transferred to scattered sections of 34 U.S.C.).

In 1994, Democratic political leaders produced a bill that would call for 100,000 new police officers, more prisons, and an expansion of the death penalty.⁴⁵ The 1994 Crime Bill was the culmination of a decades-long push by both Republicans and Democrats to declare a war on drugs and crime.⁴⁶ This federal bill shaped state legislation and resulted in states producing their own tough-on-crime agendas.⁴⁷ The bill “encouraged the construction of state prisons, led to the expansion in size and scope of police and corrections departments, and led to the militarization of police and corrections departments across the country.”⁴⁸ After the passage of the 1994 Crime Bill, the incarceration rates of Black and Brown people increased throughout the United States. For example, in Florida, the number of incarcerated people increased by 67% between 1994 and 2010, and in Wisconsin, by 134% during the same period.⁴⁹

Today, Black Americans experience disproportionate rates of arrests, convictions, and incarceration. Black people are arrested at 2.5 times the rate of white Americans.⁵⁰ When Black people are arrested, they are more likely than white people to be convicted, and once convicted, they are more likely to experience longer prison sentences.⁵¹ Further, Black people are more likely to be sentenced to prison and less likely to be sentenced to probation. In 2010, in Washington, D.C., where roughly 50% of the population is Black, 91% of all marijuana arrests were of Black people.⁵² The disparate impact of the criminal justice system makes clear that the system operates as a badge and incident of slavery. Additionally, sentencing laws are used in a racially discriminatory manner that results in the creation of a second-class citizenship. Because incarceration typically leads to one losing their civil rights, the higher rate of Black incarceration results in Black people entering a state similar to that produced by Jim Crow laws.⁵³

The criminalization of Blackness, particularly as it has intensified since the post-Civil Rights period, impacts the immigration system as well as the criminal justice system. Because immigration law, particularly the laws that govern detention and deportation, is intrinsically connected with the criminal justice system, Black migrants

45. Darren Wheelock and Douglas Hartmann, *Midnight Basketball and the 1994 Crime Bill Debates: The Operation of a Racial Code*, 48 SOCIO. Q. 315, 315 (2007).

46. See ALEXANDER, *supra* note 32, at 70-71.

47. Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), <https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis> [<https://perma.cc/73CF-Z8UV>].

48. TIMANTHA GOFF ET AL., M4BL, CRIMINALIZING BLACKNESS: AN ANALYSIS OF THE IMPACTS OF THE 1994 CRIME BILL AND 1996 IMMIGRATION BILL ON BLACK PEOPLE AND POLICY RECOMMENDATIONS TO ADDRESS THE HARMS CAUSED 2 (2022), https://m4bl.org/wp-content/uploads/2022/12/CB_REPORT.pdf [<https://perma.cc/86V6-84DV>].

49. *Id.* at 3.

50. See Juliana Morgan-Trostle & Kexin Zheng, *Part II: Black Immigrants in the Mass Criminalization System*, in THE STATE OF BLACK IMMIGRANTS pt. 2, at 15 (2016) <https://stateofblackimmigrants.com/assets/sobi-fullreport-jan22.pdf> [<https://perma.cc/VS84-ZHRC>].

51. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENT’G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/> [<https://perma.cc/5LU4-QBR6>].

52. SEEMA SADANANDAN & JENNIFER WEDEKIND, ACLU OF D.C., BEHIND THE D.C. NUMBERS: THE WAR ON MARIJUANA IN BLACK AND WHITE 4 (2013), <https://www.acludc.org/en/publications/war-marijuana-black-and-white-behind-dc-numbers> [<https://perma.cc/VL69-3ALU>].

53. See ALEXANDER, *supra* note 32, at 5, 8.

experience a harsher, more punitive immigration system than their non-Black counterparts.⁵⁴ Specifically, rates of detention and deportation are higher for Black migrants than for any other immigrant racial group.⁵⁵ The 1994 Crime Bill, along with subsequent immigration legislation, namely the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), allowed anti-Black logics of criminalization, exclusion, and subjugation to permeate immigration law, resulting in a disparate impact on Black migrants.

III. IMMIGRATION LEGISLATION AS AN AFTERLIFE OF SLAVERY

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) operate together with pre-existing criminal justice legislation as an afterlife of slavery, as they strip those descended from the enslaved of dignity. This modern framework for immigration legislation functions as a detention and deportation regime, one that “increases the risk that conviction for a crime will result not only in criminal punishment, but also in . . . [forced relocation] and family separation.”⁵⁶ This section will highlight how IIRIRA and AEDPA, commonly known together as the 1996 Immigration Laws, disproportionately impact Black migrants due to the connections between the criminal justice system and the immigration legal system. Particularly, this section will discuss how the 1996 Immigration Laws build on the logics of criminalization, punishment, and exclusion codified two years earlier in the 1994 Crime Bill.

The 1996 Immigration Laws ushered in a new era for immigration enforcement, particularly concerning what constituted grounds for deportation. Before the new legislation, deportation, particularly for permanent residents, was a two-step process.⁵⁷ Under the first step, a judge would determine whether the non-citizen was deportable, based on whether they had violated a particular law.⁵⁸ Next, under the second step, the judge would consider whether the person had shown rehabilitation, how deportation would impact their family members, and whether the person had strong ties to their home country.⁵⁹ Under this two-step process, there was procedural relief for those who had received an order of deportation. After the 1996 Immigration Reforms, the number of immigrants deemed deportable under the first step increased greatly, while the second step of the process has effectively been eliminated, as there is no longer an individualized assessment that determines whether the deportation is appropriate in one’s specific case.⁶⁰ Under this new formulation of immigration law, it is more likely that a non-citizen with a prior criminal conviction will be subject to detention and a subsequent deportation, even if they have a

54. See Morgan-Trostle & Zheng, *supra* note 50, at 26.

55. *Id.* at 25, 39-40.

56. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1937 (2000).

57. *Id.* at 1938.

58. *Id.*

59. *Id.*

60. *Id.* at 1938-39.

permanent visa or other legal status. Furthermore, it is more likely that anyone with a deportation order will be prohibited from receiving procedural relief from a judge.⁶¹

Private prison corporations have become financially and politically invested in the maintenance and expansion of immigration detention.⁶² As César Cuauhtémoc García Hernández identifies in his article, *Abolishing Immigration Prisons*, “[w]ithout [im]migrants identified for imprisonment, [governmental actors like] DHS, USMS, and the BOP would have no reason to contract with private prison corporations that operate the facilities that local governments often own.”⁶³ Consequently, “without [these] contracts, neither the private corporations nor the . . . [governmental] entities [would] receive the revenue that has become a . . . [necessity] for many cash-strapped jurisdictions.”⁶⁴ Detention centers are thus undergirded by the same logics of racialized capitalism that illuminated the transatlantic slave trade and the system of chattel slavery: They are both concerned with racialized profit.

The 1994 Crime Bill and the war on drugs and crime that preceded it set the stage for the implementation of the 1996 Immigration Reforms. Under this logic of Black criminality, it was possible to cast some immigrants as good and others as bad.⁶⁵ This logic undergirds both IIRIRA and AEDPA, as their goal, explained below, is to distinguish between immigrants deemed criminal and those deemed non-criminal. Under an American racial logic, where Black people are already perceived as deviant, Black migrants experience a magnified form of criminalization, one defined both by their Blackness and non-citizen status. Take the story of Ousman Darboe as an example. Born in Gambia, Ousman and his family moved to the United States when he was just six years old.⁶⁶ Like many African immigrants in the late twentieth and early twenty-first century, Ousman’s family settled in the Bronx, New York, an area known for its heavy policing of minority communities.⁶⁷ Living in the Bronx, Ousman had several interactions with the police throughout his youth. One encounter, where he was charged with cell phone theft, resulted in his detention at Rikers Island for over two years.⁶⁸ Months after his release, a neighbor in his parents’ apartment building was robbed of a gold chain, and Ousman was labeled as a person of interest, even though he was attending a reentry program at the time of the alleged crime.⁶⁹ Ousman was charged with multiple

61. *Id.* at 1939.

62. See César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 249, 285-86 (2017).

63. *Id.* at 259.

64. *Id.*

65. See generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, WELCOME THE WRETCHED: IN DEFENSE OF THE “CRIMINAL ALIEN” (2024) (highlighting the way the U.S. categorizes immigrants).

66. Immigrant Just. Network, *Ousman Darboe*, #NEWWAYFORWARD (Mar. 3, 2022), <https://newwayforwardact.org/2022/03/03/ousman-darboe/> [<https://perma.cc/QK9X-YQL3>].

67. N.Y.C. DEP’T OF CITY PLAN., IMMIGRANT SETTLEMENT PATTERNS IN NEW YORK CITY 89 (2013), <https://www.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/nn2013/chapter.pdf> [<https://perma.cc/XBB4-6L9J>].

68. Shamira Ibrahim, *Ousman Darboe Could Be Deported Any Day. His Story Is a Common One for Black Immigrants.*, VOX (Feb. 5, 2020, at 11:58 ET), <https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison-deportation-pipeline> [<https://perma.cc/PK6D-PCJZ>].

69. Immigrant Just. Network, *supra* note 66.

offenses, “three counts of robbery plus assault, criminal possession of stolen property, and harassment.”⁷⁰ He took a plea deal for time served.⁷¹ Five months later, Immigration and Customs Enforcement (ICE) officers arrived at his door under the pretense of having a warrant for someone else in the neighborhood. Ousman was detained on July 31, 2017, and remained in custody for the next three years while awaiting deportation proceedings.⁷² In custody, Ousman missed the birth of his first child and was kept isolated from his community.⁷³ His case demonstrates the intersections between living in a heavily policed Black community while simultaneously living as a non-citizen. Black immigrants face the additional threat of their criminal convictions resulting in long periods of detention and subsequent deportation.

Although contemporary immigration discourse tends to center non-Black migrants hailing from Latin America, this Paper sheds light on an often undiscussed group, Black migrants. While the immigration system undoubtedly criminalizes and ostracizes non-Black Latinos, resulting in profound material harm, this Paper centers Black migrants to interrogate the distinct intersection between Blackness and non-citizen status, and to examine how anti-Blackness inflicts disproportionate harm on Black people navigating the immigration system. According to 2022 findings about Black immigrants in the United States, there were approximately 4.6 million Black immigrants living in the United States as of 2019.⁷⁴ As a result of the historical criminalization of Blackness, police officers tend to surveil and police African American and Black communities at much higher rates than white communities.⁷⁵ Black immigrants, upon arriving in the United States, often live within the same communities as African Americans. Thus, Black migrants are also policed at a higher rate and, consequently, more likely to receive a criminal conviction.⁷⁶ Although Black migrants represent a small percentage of the immigrant population, they are disproportionately represented among immigrants facing deportation on criminal grounds.⁷⁷ Immigration enforcement, particularly the detention to deportation pipeline, operates through the same logics that marginalize Black people in America. The 1996 shift towards the criminalization of immigrants was only possible through policy decisions that criminalized and subjugated African Americans domestically.

The Illegal Immigration Reform and Immigrant Responsibility Act expanded the definition of what constitutes an aggravated felony, significantly broadening the

70. Ibrahim, *supra* note 68.

71. *Id.*

72. *Id.*

73. *Id.*

74. Christine Tamir, *Key Findings About Black Immigrants in the U.S.*, PEW RSCH. CTR. (Jan. 27, 2022), <https://www.pewresearch.org/?p=8612> [<https://perma.cc/EZY7-DNKJ>].

75. Robin Smyton, *How Racial Segregation and Policing Intersect in America*, TUFTS UNIV.: TUFTS NOW (June 17, 2020), <https://now.tufts.edu/2020/06/17/how-racial-segregation-and-policing-intersect-america> [<https://perma.cc/3CF2-N29B>].

76. Tanya Golash-Boza, *Structural Racism, Criminalization and Pathways to Deportation for Dominican and Jamaican Men in the United States*, 44 SOC. JUST. 137, 137-38 (2017).

77. See generally Morgan-Trostle & Zheng, *supra* note 50 (explaining how race and immigration status intersects to disproportionately harm Black migrants).

categories of offenses that trigger deportation.⁷⁸ This marked an important shift in immigration law by tightening the link between criminality and criminal convictions, on the one hand, and detention and deportation, on the other. Before IIRIRA's passage, one was only considered deportable for an aggravated felony if they received a sentence that was longer than five years.⁷⁹ Under this new immigration regime, however, legal immigrants can be detained and deported for offenses that are "old or insignificant."⁸⁰ IIRIRA, working in tandem with AEDPA, has made it so that "many crimes with potential sentences of as low as one year" constitute an aggravated felony.⁸¹ Further, under this regime, detention becomes mandatory for those whom the government tries to deport based on their criminal history. Detention remains mandatory for the non-citizen even if they have served their criminal sentence, or even if they pose no danger or flight risk.⁸² In the first ten years following its passage, IIRIRA was responsible for more than 200,000 deportations and tens of millions of dollars spent maintaining detention facilities.⁸³ Its codification allowed for the United States to transform into the largest immigration detention system in the world.⁸⁴

Like IIRIRA, the Antiterrorism and Effective Death Penalty Act, or AEDPA, expanded the definition of aggravated felony.⁸⁵ Additionally, AEDPA's retroactive definition of "aggravated felony" permits the detention and deportation of lawful permanent residents and other non-citizens for pre-1996 offenses, including crimes for which they had already completed their sentences.⁸⁶ These changes in immigration law have resulted in the increased detention and deportation of individuals for criminal offenses. Under this immigration regime, the federal government can expel lawful permanent residents based on minor criminal convictions.⁸⁷ The racialized nature of the criminal justice system results in Black migrants experiencing the brunt of this immigration legislation. Racism thus results in Black migrants' increased likelihood of being charged and convicted of a crime. The distinct experience of Black migrants demonstrates how the U.S. immigration system operates through the same anti-Black logics that perpetuate the mass incarceration of Black Americans.

78. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 322, 110 Stat. 3009, 3009-627-3009-628 (codified as amended in 8 U.S.C. § 1101(a)(43)).

79. Morawetz, *supra* note 56, at 1939, 1939 n.17.

80. Judy Rabinovitz, *Ending the Laws That Fuel Mass Detention and Deportation*, ACLU (Oct. 20, 2011), <https://www.aclu.org/news/immigrants-rights/ending-laws-fuel-mass-detention-and> [https://perma.cc/TE9M-DNLP].

81. Dawn M. Johnson, *AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 482 (2001).

82. Qainat Khan, *A Mistake Shouldn't Mean Exile or Prolonged Mandatory Detention*, ACLU (May 13, 2024), <https://www.aclu.org/news/immigrants-rights/a-mistake-shouldnt-mean-exile-or-prolonged-mandatory-detention> [https://perma.cc/2TT8-DCN5].

83. Am. Immigr. Laws. Ass'n., *AILA Acknowledges Tenth Anniversary of IIRIRA*, AILA (Sept. 29, 2006), <https://www.aila.org/library/aila-acknowledges-tenth-anniversary-of-iirira> [https://perma.cc/6F7Y-FJHN].

84. Erica Bryant, *25 Years of IIRIRA Shows Immigration Law Gone Wrong*, VERA INST. OF JUST. (June 28, 2022), <https://www.vera.org/news/25-years-of-iirira-shows-immigration-law-gone-wrong> [https://perma.cc/T84C-8TP9].

85. Morawetz, *supra* note 56, at 1939-40.

86. Johnson, *supra* note 81, at 483.

87. See Morgan-Trostle & Zheng, *supra* note 50, at 14-22.

The criminalization of Blackness that leads to these convictions also results in Black migrants being overrepresented in immigration detention.⁸⁸ “[W]hile Black immigrants make up only 7.2% of the noncitizen population in the U.S.,” “[m]ore than one out of every five people facing deportation on criminal grounds . . . is Black.”⁸⁹ Like Black people in America generally, Black immigrants are also disproportionately stopped, searched, arrested, and killed by police.⁹⁰ Although it is more common for non-citizens to be detained for immigration violations, the reverse is true for Caribbean immigrants, who tend to be Black. Caribbean immigrants “are almost twice as likely to be detained for a [prior] criminal conviction than an immigration violation.”⁹¹ Further, “76 percent of Black immigrants are deported on criminal grounds.”⁹² The criminalization of Black people has also resulted in longer detention periods than their non-Black counterparts. While in 2019, the average migrant in ICE custody spent about fifty-five days in detention, Black migrants are typically held for significantly longer.⁹³ One Human Rights Watch study found that of forty-one “Cameroonian asylum seekers who had been deported between 2018 and 2020, . . . all but one were detained for prolonged periods ranging from one to three years,” much higher than the fifty-five-day average.⁹⁴ In 2022, Human Rights First found that since the beginning of President Biden’s tenure, ICE detained asylum seekers from Black countries 27% longer on average.⁹⁵

Under the first Trump administration, ICE operated several family detention centers throughout the United States where they disproportionately detained Black migrants.⁹⁶ In July 2020, Berks Family Residential Center (an ICE detention center used to jail families) was entirely populated by people hailing from Black countries.⁹⁷ This data suggests that Black migrants are particularly susceptible to detention and

88. *Id.* at 26.

89. *Id.* at 20.

90. BLACK ALL. FOR JUST IMMIGR. ET AL., ANTI-BLACK DISCRIMINATION AGAINST NON-CITIZENS AND ONGOING VIOLATIONS OF INTERNATIONAL PROTECTIONS FOR MIGRANTS, REFUGEES, AND ASYLUM SEEKERS OF AFRICAN DESCENT 13 (2022), https://humanrightsfirst.org/wp-content/uploads/2022/09/US-Coalition_anti-Black-Discrimination-in-Immigration_CERD-Report_072222.pdf [<https://perma.cc/B9QB-DVQQ>].

91. See Morgan-Trostle & Zheng, *supra* note 50, at 26.

92. GOFF ET AL., *supra* note 48, at 9 (quoting Ibrahim, *supra* note 68).

93. BLACK ALL. FOR JUST IMMIGR. ET AL., *supra* note 90, at 13 (citing AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY (2020), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/immigration_detention_in_the_united_states_by_agency.pdf [<https://perma.cc/ZR7G-G8DU>]).

94. *Id.* (citing HUM. RTS. WATCH, “HOW CAN YOU THROW US BACK?” ASYLUM SEEKERS ABUSED IN THE US AND DEPORTED TO HARM IN CAMEROON 69 (2022), https://www.hrw.org/sites/default/files/media_2022/03/us_cameroon0222_web.pdf [<https://perma.cc/UV3G-KGNZ>]).

95. *Id.* (citing HUM. RTS. FIRST, “I’M A PRISONER HERE”: BIDEN ADMINISTRATION POLICIES LOCK UP ASYLUM SEEKERS 20 (2022), <https://humanrightsfirst.org/wp-content/uploads/2022/09/ImaPrisonerHere.pdf> [<https://perma.cc/LT6Y-SS36>]).

96. *Id.* at 14 (citing *Detention Management*, U.S. IMMIGRS. & CUSTOMS ENF’T., <https://www.ice.gov/detain/detention-management> (on file with authors of the CERD report) (date last visited by authors of the CERD report unknown)).

97. *Id.* (citing REFUGEE & IMMIGRANT CTR. FOR EDUC. & LEGAL SERV. & HAITIAN BRIDGE ALL., *Black Immigrants in Family Detention - Live Stream* (Facebook, streamed July 23, 2020), <https://www.facebook.com/100064456043882/videos/1711275342385292> (on file with authors of the CERD report)).

deportation. As highlighted by legal scholar Brandon Hasbrouck, Black people have been called “the animal, the superpredator, and the monster;” presently the police state operates to keep Black people in their place while serving white business interests.⁹⁸ This interpretation of Blackness not only represents those who descend from American chattel slavery but also encapsulates a global view of Blackness held by Americans, best demonstrated through the historical treatment of Black nations throughout American history and through contemporary treatment of Black immigrants. Thus, while in the United States, Black migrants also experience the afterlives of American slavery.

Because Black people within the United States are more likely to be stopped, arrested, and incarcerated, Black migrants are subsequently more likely to experience the prison to deportation pipeline. The immigration system’s use of deportation and detention against Black people is an afterlife of slavery. Not only are the logics that fuel IIRIRA and AEDPA direct reflections of the criminalization of Black Americans, but their consequences also reflect badges and incidents of slavery. The detention of Black migrants is particularly emblematic of a system in which Black people had no agency over their movement. Deportation is reminiscent of forced migration and family separation, which are systems that could only be conceptualized through the underpinnings of African American slavery within the United States. These forms of dehumanization were utilized during slavery to maintain the racialized social order, which justified a society and a capitalist economy dependent on slavery. Today, they are used to justify a racialized criminal and immigration system that continues to create private profit through the subjugation of Black life. If we are to take the holding in *Jones v. Alfred H. Mayer Co.* seriously, then Congress has the power to legislate against systems that are afterlives of the transatlantic slave trade—including the modern immigration system.

IIRIRA, AEDPA, and the host of anti-Black criminal legislation that both precede and follow them run the risk of turning Black migrants into a permanently subjugated class. Like mass incarceration in the criminal context, mass immigration detention risks becoming a site where those deemed undesirable are effectively disappeared. Further, this use of immigration policy can result in the arbitrary deportation of those deemed criminal or dangerous by the State, as evidenced by the recent detention and/or deportation of students who organize on college campuses or publish a single op-ed in a college newspaper.⁹⁹ This demonstrates the intensification of immigration law and ICE enforcement as tools of state-sanctioned punishment. IIRIRA and AEDPA set a dangerous precedent by relying on the logic of “good” and “bad” migrants to designate who is deemed worthy of remaining in the United States—a designation that the State

98. Hasbrouck, *supra* note 36, at 1114.

99. Jake Offenhartz, *Immigration Agents Arrest Palestinian Activist Who Helped Lead Columbia University Protests*, AP NEWS (Mar. 9, 2025, at 23:37 ET), <https://apnews.com/article/columbia-university-mahmoud-khalil-ice-15014bcb921f21a9f704d5acdcae7a8> [<https://perma.cc/6TMY-NUK5>]; Kathy McCormack & Michael Casey, *Turkish Student Detained by ICE Moved to Vermont Before Judge’s Order, Government Says*, AP NEWS (Apr. 2, 2025, at 19:46 ET), <https://apnews.com/article/rumeyssa-ozturk-deportation-tufts-massachusetts-student-1dd330bef8fb44b05f9818c0020728a0> [<https://perma.cc/3BX7-R78X>].

arbitrarily assigns, and in some cases, abuses.¹⁰⁰ When conceptions of citizenship have always been opposed to Blackness, as evident by the *Dred Scott* ruling, the State will utilize any tools at its disposal to continue to ensure Black people, and those deemed outsiders, cannot claim the rights of equal citizenship within the United States.

IV. ABOLITION CONSTITUTIONALISM AND IMMIGRATION DETENTION ABOLITION

Abolition Constitutionalism provides a basis for abolishing IIRIRA and AEDPA, because this legislation contradicts the original purpose of the Reconstruction Amendments. In her seminal law review article, *Abolition Constitutionalism*, Dorothy Roberts posits that there is a basis for prison abolition within the Constitution.¹⁰¹ Specifically, she argues that the Constitution provides meaningful tools to achieve prison abolition, as the document can be used to build a society based on “principles of freedom, equal humanity, and democracy.”¹⁰² Roberts argues that abolition constitutionalism would utilize a historical approach, one that draws connections between contemporary harms, such as all-white juries, to the system of slavery.¹⁰³ She argues that by adopting the Constitution as a tool in the fight for prison abolition, like Frederick Douglass, contemporary abolitionists should not concede that the Constitution was pro-slavery or that it legitimates slavery’s follow-on institutions.¹⁰⁴ This section builds on the work of prison abolitionists by extending this argument to the detention to deportation pipeline in immigration law, and the use of ICE officers to enforce immigration law. Thus, I argue that the Constitution not only provides Congress with a basis to repeal IIRIRA and AEDPA but also to abolish ICE and end all forms of immigration detention.

Jones v. Alfred H. Mayer Co. provides a constitutional basis for the abolition of practices that are badges and incidents of slavery.¹⁰⁵ IIRIRA, AEDPA, and immigration detention have produced a regime that disproportionately targets Black migrants and strips them of due process rights and the ability to be with their families. The United States’s immigration system is defined by family separation.¹⁰⁶ Under IIRIRA and AEDPA, it becomes increasingly possible to detain and deport individuals who have created their entire lives in the United States, as highlighted by Ousman Darboe’s detention and attempted deportation.¹⁰⁷ As these immigration reforms allow for such detentions and deportations of those who have created their lives in the United States, American families are torn apart. Family separation was a defining feature of American slavery. Under the system of slavery, the State utilized

100. Maria Sacchetti & María Luisa Paúl, *Trump Administration Says It Mistakenly Deported Salvadoran Migrant*, THE WASH. POST (Apr. 1, 2025), <https://www.washingtonpost.com/immigration/2025/04/01/trump-el-salvador-maryland-deportation/> [https://perma.cc/D2UX-WF2W].

101. Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 8-9 (2019).

102. *Id.* at 110.

103. *See id.* at 96.

104. *See id.* at 60.

105. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968).

106. Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2322-24 (2019).

107. Ibrahim, *supra* note 68.

family separation as a means to maintain a social order of Black subjugation, as this family separation attempted to prevent enslaved people from forming communities that would call into question the racial order. When immigration deportation is understood as family separation, it becomes evident how this is an afterlife of slavery that should be dealt with under Congress's enforcement power under the Thirteenth Amendment. If IIRIRA and AEDPA were repealed, fewer families would be separated, as there would be fewer legal grounds for the arbitrary separation of these families and the detention and deportation of those who have created lives here.

The current immigration regime centers detention.¹⁰⁸ Although immigration detention is a defining feature of the contemporary moment, American immigration policy did not always prioritize the detention of those subject to deportation.¹⁰⁹ This norm shifted, however, with the war on drugs, again demonstrating the intrinsic connection between the criminalization of Black people and punitive immigration enforcement.¹¹⁰ The movement toward immigration detention is best explained by American racism. The shift toward detention and deportation as a policy, coupled with the new regime of tying criminal convictions to immigration status, can best be explained within a larger context of a national movement that claimed to seek "order" in Black and brown communities. Furthermore, immigration detention operates as a form of class-based exploitation, where those of a non-citizen class, who are mainly non-white, are incarcerated for the benefit of political and economic actors.¹¹¹

Congress must repeal IIRIRA and AEDPA to curb the growth of the detained immigrant population and ensure that immigration proceedings no longer separate mixed-status families. If IIRIRA and AEDPA were repealed, non-citizens would no longer be subjected to detention and deportation for lower-level crimes. The repeal of this legislation would demonstrate an American commitment to ensuring families are kept together and emphasize that, although one is convicted of a crime, they are still worthy of remaining in the country they call home. Thus, I propose that criminal convictions should not serve as a basis for immigration detention and deportation, as the immigration sphere should exist separately from the field of criminal justice.

Congress must go further and abolish ICE, as the agency perpetuates fear in Black and brown immigrant communities. ICE's practices of arresting and detaining non-citizens are reminiscent of the role of the fugitive slave catcher, and like immigration detention, are a badge and incident of slavery. Like the difficulty many face in imagining a world without police, it may be difficult to conceptualize a world without ICE. This, however, should not be the reason to stray from the idea of ICE abolition, particularly because ICE did not exist until after 2001,¹¹² when Islamophobic and

108. Hernández, *supra* note 62, at 246.

109. *Id.* at 275.

110. *Id.* at 248–49.

111. *Id.* at 249.

112. See Homeland Security Act of 2002, §§ 401–402, 6 U.S.C. §§ 201–202 (establishing the Directorate of Border and Transportation Security and conveying power over "immigration enforcement functions"), *repealed and amended by*, Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 802(g)(1)–(2), 130 Stat. 122, 212; Homeland Security Act of 2002 § 442, 6 U.S.C. § 252 (establishing the "Bureau of Border Security" (now known as the Bureau of Immigration and Customs Enforcement), within

xenophobic ideas surrounding safety began to dominate national discourse and immigration policy. As Immigration Law scholar Peter Markowitz argues, it is imperative to imagine an immigration enforcement scheme free from detention, policing, and deportation.¹¹³ Markowitz further asserts that the new immigration regime must nevertheless be effective at increasing compliance with immigration law.¹¹⁴

Allegra McLeod emphasizes that abolition is not simply a negative project but requires the construction of other systems to ensure that the prison, or in this case, the prison detention to deportation pipeline, is rendered obsolete.¹¹⁵

Today, immigration facilities allow for the commodification of those who have been exploited within their home countries and have been forced to migrate to the United States.¹¹⁶ To conceptualize a world without ICE and immigration detention, it is imperative to create an alternative popular moral framework that advocates against the criminalization of migrants and instead calls for their humanization.¹¹⁷

CONCLUSION

The United States's immigration system disproportionately impacts Black migrants, who most often face the criminalization that IIRIRA and AEDPA require. Achieving Black liberation necessitates a concerted effort to advance the rights and liberties of non-citizens as well. When Blackness is understood as a global concept, it becomes evident how systems of power will find different ways to marginalize those marked Black, regardless of their ties to a specific nation-state. To thoroughly conceptualize Black liberation, one must understand the plight of Black migrants as integral to the experience of all Black people within the United States. Abolition constitutionalism provides the tools not only to understand how the immigration system is built using logics of slavery, but provides us with tools to advocate for and litigate for a world without a criminalized immigration regime or detention centers—in which Black people achieve freedom from the afterlives of slavery.

the (now defunct) Directorate of Border and Transportation Security); EXEC. OFF. OF THE PRESIDENT, REORGANIZATION PLAN MODIFICATION FOR THE DEPARTMENT OF HOMELAND SECURITY, H.R. DOC. NO. 108-32, at 3 (renaming the Bureau of Border Security to the Bureau of Immigration and Customs Enforcement, which is today colloquially known as "ICE").

113. Peter L. Markowitz, *Abolish ICE, and Then What?*, 134 YALE L.J.F. 130, 130 (2019).

114. *Id.* at 137.

115. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1163 (2015).

116. Hernández, *supra* note 62, at 285.

117. Markowitz, *supra* note 113, at 136-37.