

Hispanic/Latino Issues in Philosophy



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APA NEWSLETTER ON

Hispanic/Latino Issues in Philosophy

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VOLUME 17 | NUMBER 2 | SPRING 2018

FROM THE GUEST EDITORS

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The present issue of the newsletter opens with Francisco Gallegos's article "Surviving Social Disintegration: Jorge Portilla on the Phenomenology of *Zozobra*," winner of the 2017 APA Prize in Latin American Thought. In the article, Gallegos argues Jorge Portilla's conception of *zozobra*, of the anxiety that arises when a community's shared "horizon of understanding" becomes disintegrated and the basic norms that govern life in a society become unstable, is not merely *psychological* but *existential* in nature, and as such, it undermines our freedom at a deep, structural level, while giving rise to tendencies toward quietism, cynicism, nostalgia, and apocalyptic thinking. He further argues that Portilla's analysis of *zozobra* sheds light on the current situation in the US in the wake of the extremely divisive 2016 presidential election, and that it can help us evaluate various strategies for engaging in cultural politics.

We then turn to a series of discussion articles focused on immigration. While immigration is now a mature topic in the philosophical literature, political philosophers working on the issue have largely ignored how immigration law is in fact enforced. Despite a rich and substantial literature, there has been little sustained discussion of detention, deportation, or raids, or of the significant role private organizations and foreign governments play in enforcing domestic immigration policies. What work has touched on these topics has tended to remain highly abstract and to not closely deal with existing institutions and practices. The result is that morally and politically salient issues—often the issues that immigrant communities and activists consider the most salient—have largely escaped philosophers' scrutiny. The papers included in this issue of the *APA Newsletter on Hispanic/Latino Issues in Philosophy* hope to remedy this to a degree, and to spark more philosophical interest in examining how immigration law actually functions in a number of different situations.

In the first article, José Jorge Mendoza explores the serious problems that arise when criminal law and immigration law are comingled. Although it may seem to make intuitive sense to combine the systems, especially in an attempt to remove so-called "criminal aliens," the costs of doing so, Mendoza shows, are high. By attaching immigration

consequences—deportation—to criminal offenses, non-citizens arguably face unjust double punishment if they commit a crime. Furthermore, the interaction between immigration and criminal law greatly limits the legal options available to non-citizens charged with crimes, as many plea bargains, a typical way to address a criminal charge in countries such as the US, would result in a removal order. Finally, the fact that immigration decisions are adjudicated in administrative law courts which lack full independence and many other procedural protections further highlights the dangers of combining immigration and criminal law. This mixture also makes it difficult for law enforcement to function well in immigrant communities because of fear and distrust of the police, interaction with whom may lead to immigration consequences. These concerns suggest that strong walls are needed between criminal law and immigration law, and that the lower level of civil rights protections found in immigration courts and in the way that immigration law is made should be revised.

Stephanie J. Silverman examines the system of detention used in the UK to both discourage unauthorized migration and to prevent those awaiting deportation or status determination from absconding, and finds them wanting. Using detention as a means of deterrence is not empirically supported, Silverman argues, and also violates both liberal values and basic human rights principles. It is also at best unclear, Silverman shows, that detention is either a necessary or even effective means of pursuing compliance with immigration proceedings. Given the high moral and fiscal costs of immigration detention to both the state and to those detained, there is therefore good reason to seek alternatives.

Alex Sager addresses the growing number of ways that states have "externalized" border enforcement. States use a variety of different methods to externalize border control, including interdiction at sea, paying foreign governments (or those in control of territory) to divert or detain groups seeking to migrate, transferring would-be asylum seekers to offshore detention facilities, and providing strong financial incentives, in the form of potential fines, to airlines and others providing travel, to check for visas and other transit documents. All of these tactics, Sager argues, extend states' power over the lives of migrants while simultaneously making border enforcement less visible and less accountable. The results have been predictable—human rights abuses and failure to live up to international treaty obligations. Moreover, serious consideration of the externalization of border control demands that we rethink how we conceive immigration enforcement and consider new metaphors and models for the regulation of human mobility.

Matthew Lister addresses the question of how a society should respond to unauthorized immigration, considering the question through the lens of the theory of civil disobedience. Using the protests and public self “outings” by young unauthorized immigrants brought to the US as children—the “Dreamers”—as a starting point, Lister asks what we can learn from the theory of civil disobedience to respond to unauthorized immigration. In at least some instances, he argues, this perspective provides a justification for applying prosecutorial discretion in favor of unauthorized immigrants in the short term, and for solidarity in seeking to change laws to support the legalization of the unauthorized in the longer term. We can see the protests led first by the Dreamers and followed later by others as being within the civil disobedience tradition, asking the larger society to recognize the injustice of their situation and demanding that a change—a change that those protesting cannot bring about on their own—be made.

As the philosophical literature on immigration has become more mature, it has moved from abstract speculation with little close attention to or connection with actual immigration policies to more and more detailed and careful discussion of real immigration practice. This is a trend the contributors to this symposium support. This development in the philosophical literature had not yet, however, typically addressed the actual enforcement of immigration law. We hope that these contributions will help spark further development in this area, including work addressing immigration enforcement in other jurisdictions.

SUBMISSION GUIDELINES

The *APA Newsletter on Hispanic/Latino Issues in Philosophy* is accepting contributions for the spring 2019 issue. **Submissions are due November 15.** Our readers are encouraged to submit original work on any topic related to Hispanic/Latino thought, broadly construed. We publish original, scholarly treatments, as well as reflections, book reviews, and interviews.

Please prepare articles for anonymous review. All submissions should be accompanied by a short biographical summary of the author. Electronic submissions are preferred. All submissions should be limited to 5,000 words (twenty double-spaced pages) and must follow the APA guidelines for gender-neutral language and the *Chicago Manual of Style* formatting.

All articles submitted to the newsletter undergo anonymous review by members of the Committee on Hispanics.

BOOK REVIEWS

Book reviews in any area of Hispanic/Latino philosophy, broadly construed, are welcome. Submissions should be accompanied by a short biographical summary of the author. Book reviews may be short (500 words) or long (1,500 words). Electronic submissions are preferred.

DEADLINES

The deadline for spring issues is November 15. Authors should expect a decision by January 15. The deadline for fall issues is April 15. Authors should expect a decision by June 15.

Please send all articles, book reviews, queries, comments, or suggestions electronically to the editor,

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FORMATTING GUIDELINES

The *APA Newsletters* adhere to the *Chicago Manual of Style*. Use as little formatting as possible. Details like page numbers, headers, footers, and columns will be added later. Use tabs instead of multiple spaces for indenting. Use italics instead of underlining. Use an “em dash” (—) instead of a double hyphen (--). Use endnotes instead of footnotes. Examples of proper endnote style: John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 90. See Sally Haslanger, “Gender and Race: (What) Are They? (What) Do We Want Them to Be?” *Noûs* 34 (2000): 31–55.

THE 2018 ESSAY PRIZE IN LATIN AMERICAN THOUGHT

The APA’s Committee on Hispanics cordially invites submissions for the 2018 Essay Prize in Latin American Thought, which is awarded to the author of the best unpublished, English-language, philosophical essay in Latin American philosophy/thought. The purpose of this prize is to encourage fruitful work in this area. Eligible essays must contain original arguments and broach philosophical topics clearly related to the specific experiences of Hispanic Americans and Latinos. The winning essay will be published in this newsletter.

A cash prize accompanies the award along with the opportunity to present the prize-winning essay at an upcoming division meeting. Information regarding submissions can be found on the [APA website](#). Please consider submitting your work and encourage colleagues or students to do the same. Feel free to pass this information along to anyone who may be interested. **The deadline is June 5, 2018.**

The Committee is also soliciting papers or panel suggestions for next year’s APA three divisional meetings. The deadline for the Eastern APA committee session requests is rapidly approaching. Please send any ideas to Grant Silva (grant.silva@marquette.edu) who will relay these suggestions to the rest of the committee.

ARTICLES

Surviving Social Disintegration: Jorge Portilla on the Phenomenology of Zozobra

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In the wake of the extremely divisive 2016 presidential election, many US Americans are feeling deeply unsettled by the sense that the basic norms that govern life in our society are in a state of flux. Indeed, as the sociologist Arlie Hochschild reports, many people on both the political right and left are feeling like “strangers in their own land”—confused, disturbed, and alienated by the image of the country we see reflected on our screens.¹ What kind of a nation are we? What values do we stand for? Many of us feel as though we no longer recognize the country we live in. We may feel at home in our intimate circles, but those who live on the other side of the political divide often seem completely foreign to us, and their version of the country feels utterly alien. In short, many of us increasingly struggle with the sense of being out of place in our own society, as though we have suddenly found ourselves in a foreign country whose language and customs we do not understand.

How can we best describe and analyze the experience of living in a society so divided, a society whose very normative structure seems to be *disintegrating*? What problematic behaviors might arise in this situation? And how ought we to work for positive social change in this context? In this essay, I explore insights into these issues that may be found in Jorge Portilla’s recently translated essay, “Community, Greatness, and Misery in Mexican Life.”² According to Portilla, when a society’s normative structure begins to lose its cohesion and integrity, everyday life becomes marked by *zozobra*, a profound kind of anxiety that is not *psychological* but *existential* in nature. Portilla argues that *zozobra* undermines our freedom for meaningful action and gives rise to quietism, cynicism, nostalgia, and apocalyptic thinking. After examining Portilla’s analysis of *zozobra*, I conclude by exploring the relevance that his work may have for us today.

Portilla also lived at a time when his society’s norms were in a state of flux.³ In the decades following the bloody revolution of 1910, Mexico had engaged in a project of nation-building, using every means at its disposal to construct a unified sense of *mestizo* national identity that could bind together the various social groups in the country.⁴ This nationalist ideology represented Mexico as having a homogenous language, culture, and race—a preposterous fantasy in a country where the population speaks at least fifty-six different languages, not to mention hundreds of dialects.⁵ By Portilla’s time, Mexico’s project of nation-building was severely strained, even as intense forces of modernization were displacing communities and forcing people to migrate to cities for work.⁶ Thus, from Portilla’s vantage point in Mexico City in the 1950s and ’60s, the promise of a national rebirth after the revolution of 1910

had faded, and Mexican society was gripped by a poignant sense that there was no shared “horizon of understanding” to unite this set of individuals into a genuine *community*.

Portilla’s term for the experience of lacking a communal horizon of understanding—“*zozobra*”—was a word that was on the minds of his contemporaries as well. His fellow philosophers in Mexico City were alarmed by what Emilio Uranga described as a widespread sense of anxiety, uneasiness, or even anguish—a painful and peculiar sense of not being at home in the world—that permeated everyday life in Mexico.⁷ However, Portilla’s contemporaries tended to analyze *zozobra* in *psychological* terms, often describing “the Mexican mind” in ways that may strike today’s reader as being ridiculous or offensive. For example, in *The Labyrinth of Solitude*, Octavio Paz argues that the Mexican personality is constructed around a tragic *machismo*, which he diagnoses as being a defensive reaction to Mexico’s cultural *mestizaje*—a reaction to being part colonizer and part colonized, and simultaneously loving and hating both sides. In his view, the internal conflict produced by these competing attachments manifests in violence, self-destruction, and a nihilistic worldview. In his famous essay “The Sons of La Malinche,” Paz writes:

The Mexican does not want to be either an Indian or a Spaniard. Nor does he want to be descended from them. He denies them. And he does not affirm himself as a mixture, but rather as an abstraction: he is a man. He becomes the son of Nothingness. . . . That is why the feeling of orphanhood is the constant background of our political endeavors and our personal conflicts.⁸

In a similar vein, Uranga describes the Mexican way of being as marked by the oscillation between conflicting extremes, a painful “convergence-repulsion of the ‘Christian and the indigenous,’ of ‘hypocrisy and cynicism,’ of ‘brutality and gentleness,’ of ‘fragility and toughness,’ and so on.”⁹

What makes Portilla’s analysis of *zozobra* uniquely insightful is that, unlike his contemporaries, he saw *zozobra* not as a *psychological state* but as an *existential condition*—not a state of mind generated by conflicting attachments but a state of existing in a world in which there is a lack of any real communal horizon of understanding. Because *zozobra* is not merely *psychological*, it is something no amount of therapy could address: its source is not an individual’s mind or conflicting attachments but the disintegration of the normative structure of society itself.

To understand Portilla’s existential-phenomenological account of *zozobra*, we must first understand his externalist views regarding the meaning of actions. For Portilla, the meaning of any action (as distinct from mere bodily movements or behaviors) is socially constructed. For example, whether your speech act constitutes a humorous joke or a cruel insult, whether your behavior at work is a sign of an industrious work ethic or contemptible servility, the significance of any action is determined by the socially instituted norms and concepts that constitute a society’s framework of interpretation, or what Portilla calls a “horizon of understanding.” For this reason, he says, whenever

we perform an action, we must rely on a background understanding of the norms and concepts that define the meaning of our action. We must anticipate how others will interpret our behavior because this social interpretation will determine what the meaning of our action will be. As Portilla puts it,

our action . . . is not carried out in the middle of the desert, but in community. We cannot project any action whatsoever without counting on others. . . . Our action is inconceivable to ourselves if a somewhat precise halo is not attached to it, one of approval or reproach, of incentive or of obstacle, whose source is the community, those “others.”¹⁰

Just as a writer cannot write without implicitly imagining a reader, every one of our actions—from the way we speak, to the way we dress, to the way we eat, and so on— involves an implicit anticipation of how others will receive our action.¹¹

When things are going well, we tend to take this interpretive horizon for granted. Indeed, we typically only notice its importance when things go wrong. When we travel to a foreign country, for example, we may discover that the norms and concepts in this place are quite different than those we are accustomed to and that our actions are interpreted in ways we did not expect. In this case, we may find it difficult to properly make a joke, give a compliment, and do things that express our character. Likewise, when the interpretive horizon within a community changes over time, a person from an older generation may find, to his dismay, that what once counted as a funny joke or a nice compliment is now interpreted as an instance of racism or sexual harassment. As such experiences illustrate, “These horizons [of understanding] have critical importance for human action. One of their primary functions is that of serving as walls against which bounce the echoes that carry the meaning of our actions”—a fact that becomes painfully obvious to us when the “echo” that bounces back “makes it evident that our [action] did not have the exact meaning that we were giving to it.”¹²

In large and complex societies like Mexico, a person may be located within many overlapping communities at the same time. As Portilla puts it,

we always live in a multiplicity of communal horizons that mix and weave with each other and that remain always potential or actual, depending on whether our action reveals or conceals them. We live always simultaneously immersed in a national community that can take various forms, from the political to the aesthetic: in a professional community; in a guild; in a class; in a family.¹³

These various, smaller horizons of understanding, Portilla says, may be more or less tightly “integrated” within a larger horizon of understanding that binds together the society as a whole. In this way, Portilla imagines a spectrum between a “sub-integrated” society and “super-integrated” society. He suggests that Germany, for example, may be an instance of a “super-integrated” society, where the

norms and concepts governing a person’s national identity are clearly defined, stable, and coherent, thus providing clear and substantive guidance for people as they seek to interpret the meaning of a given action. In this super-integrated society, the various social roles a person may occupy—worker, parent, music-lover, and so on—all fit together in a tight, cohesive package, so that all of a person’s activities work together to express the national way of life.¹⁴

Portilla argues that people in this kind of super-integrated society enjoy a certain kind of freedom, which we might call “agential freedom”—namely, the freedom to anticipate the meaning of any given action—so that they can simply set their minds to acting as they are willing and able to act. In this society, Portilla says, the “atmosphere seems to be a space of incredibly open opportunities for individual action, something like a paradise for the industrious man.”¹⁵ On the other hand, he argues, people in a super-integrated society suffer from a pronounced lack of a different sort of freedom, which we might call “normative freedom”—the freedom to alter the norms and concepts that determine the meaning of their actions. They may do things that violate social norms, of course, but they do not enjoy the kind of freedom that comes from occupying a social space in which the norms and concepts that govern the meaning of their actions are more vague, inchoate, and open to innovation.¹⁶

In Portilla’s view, Mexico is on the other side of this spectrum of social integration—it is a “sub-integrated” society. As he puts it, in Mexico “everything happens as if these structures of transcendence that we have named horizons of community suffered . . . from a lack or in-articulation.”¹⁷ Although Mexicans are not “smothered” by rigid social norms (and so enjoy an abundance of normative freedom), in Portilla’s view, the interpretive horizons in Mexico are so unclear and poorly defined that basic conditions for the possibility of meaningful action are undermined (together with the possibility of agential freedom). In other words, at a certain point, the freedom from being governed by social norms is not liberating at all but disorienting—and indeed, when normative freedom is taken to the extreme so that there is no stable normative horizon to resist one’s interpretations of the meaning of actions, it becomes unclear whether one’s actions can have any social meaning whatsoever. For this reason, Portilla describes the state of sub-integration as “a species of social malnutrition that forms a thin yet suffocating spiritual atmosphere for whomever must form their personality within it.”¹⁸

Thus, on Portilla’s view, *zozobra* arises from the disintegration of a society’s horizon of understanding. This state of affairs is existential rather than merely psychological, and as such, it undermines our freedom for meaningful action at a deep, structural level. However, although *zozobra* is not primarily a psychological phenomenon, Portilla notes that *zozobra* tends to manifest psychologically in three distinctive ways. First, the experience of *zozobra* tends to make people hesitant to take action of any sort.

In effect, if the community’s reception or response in regard to our action cannot be determined with

a certain amount of clarity, it is likely that we will indefinitely postpone the demanded action until the horizon clears up and, if this does not happen, we will carry it out only when the circumstances themselves turn it into a demand that cannot be postponed, and then it will probably carry within itself the mark of improvisation. Nothing slows down the impetus toward action more than uncertainty in regard to the manner in which the work to be done will be received.¹⁹

Second, hand-in-hand with this sort of *quietism* comes a tendency toward *cynicism* that is also characteristic of *zozobra*.

Thus, in a disarticulated community such as ours, the man of action, and even the intellectual, will find himself affected by a certain cynicism which is nothing more than a defensive maneuver or a movement of self-affirmation, which can be described with the analogy of whistling or humming in the dark so as to forget one's fears.

It is clear that a failed, unnatural, or badly interpreted action will turn us into introverts, melancholic and hopeless. Action becomes imaginary: everyday conversation in Mexico is filled with stories about men who attempted a noble act, who tried to realize a useful or noble endeavor, an act that was ultimately crushed by the harshness of the external world, or invalidated by collaborators who were inept or of bad faith.²⁰

Another way cynicism expresses itself, Portilla says, is in a tendency toward introversion, sentimentality, and nostalgia—a desire to escape into fantasy or into memories of a bygone era when life made sense.²¹

Lastly, Portilla argues, the experience of *zozobra* manifests itself in an apocalyptic imagination and a profound sense of the fragility and contingency of life. In a fascinating passage, Portilla compares what it is like to live without a clear and stable communal horizon of understanding to the situation of an “explorer or sailor working with a malfunctioning compass. Her horizon, in this case a geographical horizon, has become confusing and more than likely threatening.”²² Likewise, he says, a person who is attempting to navigate everyday life in a disintegrated society must contend with an anxiety-provoking sense of disorientation and fragility.

The individual, prevented from securely founding his being on the web of human relations, finds himself painfully exposed to the cosmic vastness. We live always simultaneously entrenched in a human world and in a natural world, and if the human world denies us its accommodations to any extent, the natural world emerges with a force equal to the level of insecurity that textures our human connections.²³

Our sense of security, in other words, is largely a function of our sense of community. When the horizon of

understanding in our society is fragmented and weak, how can we feel capable of coping with the disasters that seem to be impending at every turn?

By way of conclusion, then, I will briefly mention some ways that Portilla's work might shed light on the current political moment in the US. First, Portilla's analysis of *zozobra* can help us to understand our own tendencies to indulge in quietism, cynicism, nostalgia, and apocalyptic thinking. These are understandable but ultimately unhelpful reactions to the lack of clarity in the norms and concepts that govern everyday life in our own society.²⁴ Likewise, Portilla's work can help us understand one reason why people on both the political right and left sometimes react with outrage to the language and attitudes expressed by their fellow citizens, even when no one is directly harmed by these expressions. When the people in our community act in a way that disrupts the horizon of understanding governing everyday life, these disruptions in the normative order can constitute a genuine and profound loss of freedom for us. Just as when we visit a foreign country and find ourselves unable to act effectively in the world or freely express our character, when we do not understand or identify with the norms and concepts that govern everyday life in our own society, we are truly less free.²⁵ When this happens, it is as though we are living in a foreign country, except there is nowhere to return that is more familiar and understandable; we are strangers in our own land.

Portilla's work may also help us to be a bit wiser in choosing our strategies for engaging in cultural politics in a society whose communal horizon of understanding seems to be disintegrating. For example, it may make us more skeptical of the value of satirical political comedy in this particular context. This comedy often expresses contempt for people on the other side of the political divide, and to the extent that such expressions of contempt further erode our shared horizon of understanding, they may only exacerbate our *zozobra* and ultimately undermine our freedom. Instead, it may be wise for those who seek to work for positive social change in this context to take up a strategy that Portilla calls “Socratic irony.” In Socratic irony, we maintain sincere fidelity to the mainstream values of our society, even while we subtly shift the expectations regarding what upholding these values actually requires of us—as Socrates did when he maintained his loyalty to the *polis* even while questioning what justice and piety requires.²⁶ In a similar way, Portilla suggests, social critics within disintegrating societies can position themselves as giving voice to mainstream, non-partisan positions, even while calling for change in particular policies and practices.

By choosing to articulate our concerns as expressions of mainstream concerns and intuitions—rather than as radical critiques of the mainstream launched from the margins of the society (as philosophers often do)—this strategy may promote positive change in ways that reinforces our fragile normative order, rather than destabilizing it. Radical critique is appropriate and necessary in moments of relative social stability. But when a society's horizon of understanding disintegrates, basic democratic forces, such as communal deliberation about important matters, can get no grip.

In these ways, Portilla's work, which reveals zozobra as an existential condition grounded in social disintegration, is a valuable resource for navigating the contemporary world.

NOTES

1. Arlie Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right* (New York: The New Press, 2016).
2. Jorge Portilla, "Community, Greatness, and Misery in Mexican Life (1949) by Jorge Portilla," in *Mexican Philosophy in the 20th Century: Essential Readings*, ed. Carlos Sánchez and Robert Sánchez (Oxford: Oxford University Press, 2017), 178–95.
3. For an excellent discussion of Portilla and his historical and intellectual context, see Carlos Sánchez, *Contingency and Commitment: Mexican Existentialism and the Place of Philosophy* (Albany, NY: SUNY Press, 2015).
4. See Mary Kay Vaughn, *Cultural Politics in Revolution: Teachers, Peasants, and Schools in Mexico, 1930–1940* (Tucson, AZ: University of Arizona Press, 1997).
5. Jorge Hernández-Díaz, "National Identity and Indigenous Ethnicity in Mexico," *CRSN* 21, no. 1-2 (1994): 71–81.
6. For an in-depth discussion of Mexico's post-revolutionary nation-building project, see Gavin O'Toole, *The Reinvention of Mexico: National Ideology in a Neoliberal Era* (Liverpool: Liverpool University Press, 2010).
7. Emilio Uranga, *Análisis del ser del mexicano y otros escritos sobre la filosofía de lo mexicano (1949–1952)*, ed. Guillermo Hurtado (Mexico City: Bonilla Artigas Editores, 1952).
8. Octavio Paz, *The Labyrinth of Solitude*, trans. Lysander Kemp, Yara Milos, and Rachel Phillips Belash (New York: Grove Press, 1985), 26–27.
9. Emilio Uranga, *Análisis del ser del mexicano y otros escritos sobre la filosofía de lo mexicano (1949–1952)*, ed. Guillermo Hurtado (Mexico City: Bonilla Artigas Editores, 1952), 82. Quoted in Sánchez, *Contingency and Commitment*, 69.
10. Portilla, "Mexican Greatness, Misery, and Community," 187.
11. *Ibid.*, 190.
12. *Ibid.*, 184.
13. *Ibid.*, 183f.
14. *Ibid.*, 187f.
15. *Ibid.*, 189. He continues, "a paradise that frequently transforms itself into the dominion of the predator."
16. In this vein, Portilla quotes a German academic who, after visiting South America, wrote: "Central Europeans of today, who are at the point of smothering our healthy members with a system of well intentioned bandages and of making ourselves immobile by force of organization, can take example in the free spirit of independence of the Latin American" (*ibid.*).
17. *Ibid.*
18. *Ibid.*, 131.
19. *Ibid.*, 187.
20. *Ibid.*, 188.
21. *Ibid.*
22. *Ibid.*, 184.
23. *Ibid.*, 189.
24. I have not offered much argument for my claim that the US is what Portilla would call a "sub-integrated society." It is beyond the scope of this article to address this important issue in more depth, but I will note here two questions that would need to be answered in order to make this argument persuasively. First, while it is clear that the US is a polarized society, this does not necessary make it a society whose basic normative framework is unstable or disintegrating. What is the relationship, then, between political polarization and social disintegration—in general, and in the case of the US? Second, the people who Hochschild reports

as feeling like "strangers in their own land" tend to be white, Christian, and heterosexual, and her work confirms that much of their feeling of alienation stems from their sense that the social group to which they belong no longer enjoys unquestioned social supremacy. Does their experience of zozobra simply track the relative privilege and power of their social group, rather than reflecting a genuine disintegration of their society's horizon of understanding?

25. One might object here that this analysis overemphasizes the importance of a society's horizon of understanding. Even if our country is in a state of social disintegration at a national level, perhaps we should not necessarily expect there to be a widespread sense of zozobra, so long as people continue to be at home in their more local communities. Why, then, does Portilla place so much importance on the stability of a society-wide horizon of understanding? Addressing this question is also beyond the scope of this article, but it is clear Portilla would insist that "we cannot, in any way, place ourselves outside of our national community, in the same way that we cannot truly situate ourselves outside of our own familial community" (*ibid.*, 182).

26. Jorge Portilla, "The Phenomenology of *Relajo*," in *The Suspension of Seriousness: On the Phenomenology of Jorge Portilla*, ed. Carlos A. Sánchez (Albany, NY: SUNY Press, 2012), 171ff.

DISCUSSION ARTICLES

The Contradiction of Crimmigration

José Jorge Mendoza

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INTRODUCTION

On July 1, 2015, Juan Francisco López-Sánchez recklessly fired a handgun in San Francisco's crowded Embarcadero district. The bullet ricocheted off the concrete, striking Kathryn "Kate" Steinle in the back and ultimately ending her life. If López-Sánchez were a US citizen or if this were his only serious lapse of judgment, this horrific incident might have long been forgotten. Today, however, it serves as a rallying point for two draconian amendments to the US Immigration and Nationality Act. The first takes its name from Steinle, Kate's Law, and would increase the fines and prison time undocumented immigrants with criminal convictions face if they reenter the US without authorization. The second, entitled the No Sanctuary for Criminals Act, aims to inhibit the autonomy of "sanctuary cities," a status indicating that the particular city does not allow its local public institutions (e.g., police or schools) to be used in the enforcement of federal immigration law. The No Sanctuary for Criminals Act would bar federal grants from going to "sanctuary cities" and allow the victims of crimes perpetrated by undocumented immigrants to sue the city if the city is a "sanctuary city."

So how are these two proposed amendments related to the fateful events of July 1, 2015? Prior to that night, López-Sánchez already had seven prior felony convictions and had been deported from the US five times. López-Sánchez is therefore the poster child for the "criminal alien," one of the "bad hombres" that Donald Trump—first as a presidential hopeful and now as president of the United States—has constantly cited as proof that the US needs stricter immigration enforcement. Supporters of Kate's Law argue that if something like this law had been in place,

López-Sánchez would not have been on the Embarcadero that fateful night.

Supporters of these laws also believe that if the San Francisco Sheriff's Department (SFSF) had simply handed over López-Sánchez to US Immigration and Customs Enforcement (ICE), Steinle would be alive today. Instead, since San Francisco is a "sanctuary city," SFSF ignored ICE's request and released López-Sánchez after charges against him were dropped. The aim of the No Sanctuary for Criminals Act is therefore to pressure cities to cooperate with the federal government in immigration enforcement matters.

The death of Kathryn Steinle is nothing short of a tragedy, and one cannot help but wonder if something could or should have been done to prevent it. The two proposed pieces of legislation seem tailor-made to address such tragedies, and given that their primary targets are "criminal aliens," it might initially seem very difficult to find the harm in passing such legislation. One possible response might be to point out that the killing of Steinle is more of an anomaly than a regular occurrence. By and large, immigrants commit far fewer crimes than citizens, and there is no evidence that the crime rate among immigrants, especially violent crime, is dramatically on the rise.¹ So instead of addressing a threat to public safety, it turns out that these laws are really aimed at generating a kind of negative perception or fear of immigrants, which can then play a key role in future debates about immigration reform.²

Still, we cannot deny that there are troubling cases like the death of Steinle, and regardless of whether or not these sorts of cases are the exception rather than the rule, many believe that if combining immigration enforcement with criminal law enforcement—a trend that has come to be known as "cimmigration"³—could prevent even a fraction of these cases from occurring, then we have an obligation to do so. I want to suggest in this essay, however, that there are other reasons, in addition to the worries about stoking xenophobia, for rejecting an approach like this. Cimmigration sets up a situation where we, in fact, get the worst of all worlds: where those facing criminal penalties are denied important constitutional protections that should be afforded to all persons at risk of losing life, liberty, or property; where those who have already been punished for their offenses stand to face still further penalties that in most other contexts would be considered cruel and unusual (i.e., indefinite imprisonment or exile); and where tactics aimed at protecting and serving local communities get usurped by the federal government in ways that conflict with, if not outright violate, the Constitution. I will therefore try to show that even if cimmigration could bring about some good consequences (e.g., saving the lives of people like Kathryn Steinle), there are nonetheless weightier concerns that need to be taken into account and that speak in favor of rejecting this conflation of criminal law enforcement with immigration law enforcement.

DEPORTATION AND PUNISHMENT

At the end of the nineteenth century, a series of cases known as the Chinese Exclusion Cases went before the US Supreme Court. Now infamous in the annals of US immigration law, these cases upheld the constitutionality

of excluding Chinese nationals on racist grounds. The Chinese Exclusion Acts have since been repealed, but the precedent set by these cases, known as the "plenary power doctrine," has yet to be overturned. This doctrine holds that the US federal government has almost complete discretionary control over matters concerning immigration. In other words, the federal government (and not state or local governments) has the ultimate say in determining which noncitizens may be admitted, excluded, or removed, and most importantly (and too often underappreciated), this power is largely beyond the scope of judicial review. What this means is that immigration courts in the US are *not* technically part of the judicial branch. They are a part of the Department of Justice (DOJ), which falls under the executive branch and is part of administrative law. Furthermore, decisions in immigration court are not made by a jury of one's peers, but by judges appointed by the DOJ rather than confirmed through Congress or elected by the people.

This is an enormous amount of unchecked power for any one branch of the federal government to have, so how has such a doctrine continued to pass constitutional muster, especially given the US's deep commitment to individual liberty and a government of checks and balances? It has done so largely because it rests on a distinction between criminal offenses (e.g., murder, robbery, or assault) and administrative violations (e.g., overstaying a visa or unlawfully entering the country). This distinction was clarified in the 1896 Supreme Court case *Wong Wing v. United States*. At stake in the case was whether Wong Wing could be sentenced to sixty days of hard labor and subsequently deported without having received a trial by jury. The court ruled that there was nothing unconstitutional about deporting Wing without a jury trial. Deportation, after all, was merely an administrative matter and was not taking away his life, liberty, or property. The sixty-day hard labor provision, however, was unconstitutional because it would deprive Wing of his liberty without proper due process. So regardless of the fact that Wing was an immigrant, and therefore subject to removal at the discretion of the federal government, he was still a person and thereby entitled to the full range of constitutional protections if the government sought to take his life, liberty, or property.⁴

In short, the *Wong Wing* decision formalized a kind of trade-off that makes the plenary power doctrine consistent with a federalized form of government built on a respect for individual rights and a system of checks and balances. In cases where the government can potentially exercise the maximum amount of coercion (i.e., taking away a person's life, liberty, or property) individuals ought to be entitled to the maximum set of protections, but in cases where the government is not (at least not technically) coercing individuals, then those individuals are not necessarily entitled to the maximum range of protections. Also key here is that immigration regulation is considered to be exclusively within the domain of the federal government, so state and local governments have no right to admit (e.g., develop their own guest-worker program), exclude (e.g., keep immigrants out of their territory who have already been admitted into the US), or remove (e.g., create their own immigration enforcement taskforce) immigrants.⁵ In

other words, state and local governments are *not* in the immigration business.

I have argued elsewhere that the plenary power doctrine is unjust and that a commitment to individual freedom and universal equality ought to entitle immigrants to a much wider set of rights than they currently enjoy.⁶ However, for the purposes of this essay I will assume that something like the plenary power doctrine is justifiable. In other words, that national states (not supra or subnational governments) have a near-absolute right to admit, exclude, and remove noncitizens. For constitutional democracies, exercising such unchecked power can be tricky, but whatever tensions arise from its exercise can be, as we saw in *Wong Wing*, ameliorated if the use of such power is confined to an area that does not violate the rights of citizens (i.e., immigration) and so long as the consequences are noncoercive (i.e., the penalties are administrative not criminal). Crimmigration, however, seems to upset this very delicate balance.

CRIMMIGRATION

According to immigration law professor César Cuauhtémoc García Hernández, there are three aspects that come together to make up the phenomenon now known as crimmigration:

1. Criminal convictions carrying immigration consequences
2. Violations of immigration law leading to criminal punishments
3. Criminal law enforcement tactics being used for immigration enforcement⁷

In this section, I would like to offer some reasons for why each of these aspects is morally (and, for some people, existentially) worrisome. I will conclude by suggesting that the only consistent way of dealing with the problems raised by crimmigration is either to maintain the strict separation between immigration enforcement and criminal law enforcement on which the plenary power doctrine is built, or to reject the plenary power doctrine altogether. Either choice, however, limits the discretion the federal government is normally thought to have in matters concerning immigration and would grant immigrants more rights (especially more protections from removal) than they currently enjoy.

There is nothing necessarily new about the first aspect of crimmigration, about criminal convictions having immigration consequences. What is new, however, is the number of crimes that today carry immigration consequences and the vague criteria (e.g., moral turpitude) called upon to determine whether a crime amounts to a removable offense. Incentivizing immigrants to obey the law by threatening them with deportation might, for some, have a kind of intuitive appeal. This approach, however, raises at least three interrelated worries: Do such consequences not essentially punish a person twice for the very same offense? Do they not alter the process and procedure for determining a person's guilt or innocence? And should they not always be off the table (i.e., be

considered "cruel and unusual")? The worries I raise here, just to be clear, have nothing to do with feeling sympathy for folks like López-Sánchez but have everything to do with a sense of fairness and a desire to avoid creating parallel justice systems.

In determining matters of guilt or innocence, justice requires that the procedures we use to determine the fate of the accused be the same for everyone regardless of their race, sex, or even immigration status. Attaching immigration consequences (i.e., deportation) to criminal convictions puts immigrants in a very difficult position when trying to defend themselves in criminal proceedings. Immigrants cannot, for example, accept most plea bargain deals as such agreements would lead to their automatic deportation. Yet given the way the US criminal justice system has developed, the accused are now often strongly encouraged to take plea agreements—even when they are innocent—rather than risk taking their case to court where they could be hamstrung by inadequate council and stand to face much longer jail sentences.⁸ For long-term immigrant residents, the immigration consequences they face (e.g., deportation) for a criminal conviction (which is what a plea agreement would be) are often far worse than the maximum sentence they could receive for almost any crime. Again, this is not to say that people who commit crimes should never suffer any repercussions for their actions. This is to say that regardless of a person's immigration status, they should have access to the same system of justice—with all its kinks and nuances—and that punishments that are deemed too cruel and unusual for citizens (e.g., exile) should also be seen as too cruel and unusual for noncitizens.

The second aspect of crimmigration has to do with the criminalization of immigration violations. A little known fact about the US is that before 1929 it was not actually a crime to enter the country without authorization. Today, immigration law violations and, in particular, illegal reentry constitute the largest category of federal offenses.⁹ There are strong reasons for thinking that immigration violations, much like parking violations, should rarely, if ever, be treated as criminal offenses. This is because they are not merely different in degree but different in kind. But even if we put these sorts of reasons aside, we should recall that the federal government's power to control immigration (i.e., the plenary power doctrine) is based on such a distinction. The problem with increasingly criminalizing migration, as the court in *Wong Wing* was correct in observing, is that it lets the federal government have its cake and eat it too. It allows the federal government to take away a person's liberty on a conviction obtained through its very own special court (DOJ), not a regular judicial court, and in a manner that does not extend to the accused the full set of constitutional protections. In short, if violations of immigration law are to have coercive consequence (i.e., jail time), then we need to radically rethink the current setup, which today gives the federal government virtually all the power and the accused (i.e., immigrants) almost none.

Finally, there is the use of criminal law enforcement tactics for the purposes of immigration enforcement. There are at least two places where this can become very problematic.

The first is when civilians whose only infraction is a potential immigration violation are held in custody for an indefinite period of time without proper due process.¹⁰ The second is partnerships between local police and federal immigration enforcement. These partnerships tend to have bad consequences, as they sow mistrust among immigrant communities and police. When police function as auxiliary immigration enforcement agents, immigrants are less likely to call them when they are the victims of crime or come forward as witnesses to help police solve crimes. Also, citizens who live in mixed households are less likely to call or talk to police for fear that interactions with police might lead to the deportation of family or friends. Despite these consequences, there is also a deeper question about federalism: Can the federal government force state and local governments to assist in an area where it—and not state and local governments—has exclusive control, especially when this kind of cooperation could undermine the very aims those state and local institutions are designed to achieve? This is the reason some cities have chosen to become “sanctuary cities.” They believe that the federalism enshrined in the US Constitution¹¹ allows them to prioritize the equal protection and education of their residents over and above assisting the federal government in an area like immigration.

CONCLUSION

As I have tried to show in the last section, there are reasons to be alarmed about collapsing the distinction between immigration and criminal law enforcement. Notably, these concerns are not hypothetical but are being lived in cities and towns across the US today. These concerns should prompt us either to reject the plenary power doctrine entirely or to be stricter about maintaining the separation between criminal law and immigration law. I grant that the death of Steinle presents us with a very difficult case, but as the old adage goes, hard cases make for bad laws. In short, whatever good could come from laws like Kate’s Law and No Sanctuary for Criminals Act, it will be far outweighed by the potential injustices those laws will give rise to.¹²

NOTES

1. Richard Pérez-Peña, “Contrary to Trump’s Claims, Immigrants Are Less Likely to Commit Crimes,” *New York Times*, January 26, 2017, <https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html?mcubz=0>.
2. See Christopher N. Lasch, “Sanctuary Cities and Dog-Whistle Politics,” *New England Journal on Criminal and Civil Confinement* (forthcoming).
3. See Juliet Stumpf, “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power,” *American University Law Review* 56.2 2006.
4. *Wong Wing v. United States*, 163 U.S. 228 (1896).
5. See, for example, the Supreme Court’s ruling in *Arizona v. United States*, 567 U.S. ___ (2012).
6. See José Jorge Mendoza, *The Moral and Political Philosophy of Immigration: Liberty, Security, and Equality* (Blue Ridge Summit, PA: Lexington Books 2016).
7. See César Cuauhtémoc García Hernández, *Crimmigration Law* (Chicago IL: American Bar Association Publishing, 2015).
8. Jed S. Rakoff, “Why Innocent People Plead Guilty,” *The New York Review of Books*, November 20, 2014, <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty>.

9. Hernández. *Crimmigration Law*, 11.
10. For more on the injustice of this practice, see Stephanie J. Silverman’s contribution to this symposium.
11. See, for example, the Tenth Amendment to the United States Constitution.
12. Special thanks to Matt Lister, Alex Sager, and Stephanie J. Silverman for their invaluable comments and suggestions that made this piece much better.

Under the Umbrella of Administrative Law: Immigration Detention and the Challenges of Producing Just Immigration Law

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Immigration detention is the lynchpin enabling immigration control. Lacking a universal legal definition, detention can be understood as the incarceration of people who the state knows, or suspects, to have broken immigration rules. Similar in some ways to the more familiar pretrial detention in the criminal justice system, detention’s legitimacy is premised on its role as a mechanism to facilitate deportation. Although mostly operating out of sight, the common understanding of detention is that it is natural and unavoidable, when it is visible at all. States position detention to respond to, and bolster, the untrue idea that irregular immigration is a crime. The effect of detention on migrants is to feel like punishment¹ and for citizens to shore up the idea that migrants can never be like “us.”²

Picking up from these ideas, this contribution aims to unravel the British State’s “regrettable but necessary”³ justification for detention into its key components: first, deterrence of future migrants, and, second, as a means to prevent absconding, also known as flight risk. I will argue that neither component of this justification is credible. The end result is to denaturalize and challenge the propriety of practicing long-term detention in a liberal community.

I operate here within the “Conventional View” on borders, asylum, and immigrants. The view holds that the state has a moral right to adjudicate who crosses its borders and who gets to live permanently inside its territory.⁴ One could challenge that assumption, of course, but to understand the phenomenon of detention and even to appreciate the internal tensions it generates within liberal democratic states like the UK, it is helpful to work within the Conventional View. I am also referring to detention of forty-eight hours or more.

1. INCARCERATING IMMIGRANTS AND DRAWING LINES

Simultaneously a policy and a practice, detention has historically been positioned as innocuous and unavoidable. The state detains people in order to more efficiently realize other immigration-related goals, usually deportation. The

Conventional View suggests that, barring some exceptions, the state is morally justified in using violence to preserve citizens' rights and privileges at the expense of those of noncitizens. On this view, the "usual rules" about incarceration and prisoners' rights fall away: although it is undoubtedly confinement, detention is governed through a palimpsest of laws, rules, regulations, statutes, and emergency legislations. The peculiar nature of detention allows it to operate outside of, parallel to, and often overlapping with judicial incarceration at, within, and beyond the state's borders.⁵ With little to no foresight or planning, detention grows from omission.

As part of administrative law, there is little judicial oversight over detention. Its lawfulness is usually adjudicated through tribunals and internal review mechanisms where the issues are procedural not fundamental or natural justice, a distinction that I think is misplaced given the grave harms of long-term detention. In theory, international law curbs the harshest edges of detention and ensures that each detention is subject to a series of individualized tests with respect to the justification of that detention. One implication of these requirements is that it is not permissible under international law to detain immigrants, even those who have arrived without authorization, for the purpose of discouraging others from migrating.

The UK typifies troubling trends across the liberal, democratic world in its approach to developing and implementing immigration policy: it defaults to detention in a context of enforcement-focused and militarized immigration control; it exhibits substantial legal and conceptual crossovers between criminal justice and immigration detention as well as between punishment and administrative convenience; and it typifies poor caseworking on migrant files, leading to people becoming "lost" or "forgotten" in the detention estate.⁶

Immigration detention in the UK is ordered mostly at the discretion of individual officers, vested in power by the Home Office, and whose decisions are directed by statutory and internal guidelines. The number of people recorded as entering UK detention increased from 250 in 1993 to 28,900 in 2016⁷ with an average of 30,000 detainees annually over the past couple of years. Almost half are people seeking asylum.⁸ The majority of detainees are men hailing from former British colonies, most notably Bangladesh, India, Jamaica, Nigeria, and Pakistan.⁹

The UK Home Office justifies detention as an appropriate measure when there is "a realistic prospect of removal within a reasonable time."¹⁰ Surprisingly, then, two-thirds of long-term detainees are released into the community and not removed from Britain.¹¹ The consequences of the futility of long-term detention is redoubled by the global medical literature's finding that the negative impact of detention on the mental health of detainees increases the longer detention persists.¹² As Stephen Shaw concluded in this government-commissioned review of the UK detention estate, "there is too much detention; detention is not a particularly effective means of ensuring that those with no right to remain do in fact leave the UK."¹³

2. DETERRENCE PARADIGM AND LOGIC OF THE ABSCONDING JUSTIFICATION

The two key rationales repeated by British officials to justify detention are (i) that the threat of detention and its harms can deter people from undertaking dangerous migration journeys, shorthanded here to detention-as-deterrence; and (ii) that detention, coupled with the power of deportation, can discourage migrants from absconding from the status regularization process. While both uses are, indeed, preventive detention for deterrence, I separate the (i) justification as being directed at foreigners abroad while the (ii) justification is for noncitizens inside the state's territory. I will use my remaining space to explain why both justifications are related to crimmigration and neither is credible.

Since the use of civil or administrative detention as deterrence is illegal, state officials justify detention-as-deterrence by pointing to the riskiness of the migrant's journey to the West. In response to the domination of European political debate and media coverage of the perceived "crisis" of Syrian refugees fleeing to Europe in 2015,¹⁴ European governments implemented deterrence strategies. Sager, in this collection, explains how these governments committed valuable resources towards disrupting smuggling networks, preventing departures of migrant-carrying boats from Libya, and transferring refused asylum seekers amongst themselves and Turkey.

The argument for deterring people from migrating for their own good is superficially appealing. The deaths of migrants in the Mediterranean Sea and across the land routes are tragic.¹⁵ There are indeed no lawful pathways to permanent residence for some people who arrive without prior authorization. However, the idea of detention-as-deterrence fails on plausibility. There is no credible link between detention-as-deterrence and reduced immigration, nor can it filter out the criminal aliens who are allegedly the priority for arrest and return.¹⁶ A variation of the detention-as-deterrence justification runs that mass detention of incoming groups can net the smugglers who are ferrying the migrants and causing great distress to them and their families along the way. Research, however, calls this into question by showing that the agent travels *near to the border, not up to or across the border* where detention occurs; migration flows are often "mixed" with refugees, economic migrants, and others coming together to travel; and that the "smuggler" is often a passenger assisting others to reach safety, including his own family members. A major research report suggests that "State officials, the military, law enforcement and border guards were also involved in smuggling" along the land and sea routes to Europe.¹⁷ A more nuanced, grounded understanding of "smuggling" is slowly but surely being reflected in legal decisions,¹⁸ thereby calling into question crimmigration's representation of smugglers as criminals and undermining a key rationale for immigration detention. In more general terms, the global rise of detention has coincided with increased migration, and many states hosting robust detention systems experience large immigration flows.

On the topic of *future* migrants, any links between detention and deterrence are purely speculative or conjecture: it is virtually impossible to prove that the threat of detention caused someone not to migrate precisely because they did *not* migrate, and no one factor in decision-making is definitive due to the complexity of the push-pull dynamics of global migration and control. Further still, even if detention were demonstrated to be effective as a deterrent, it would still be incompatible with the principles that liberal states claim to respect and with international law. Liberal societies are not supposed to deprive people of their liberty if they have not committed a crime, and especially if they pose no threat to society if they are left free. Even in the extreme case of terrorists, the judicial application of principles of proportionality insists that preventive detention cases be screened for rationality and less restrictive means for achieving the goal.¹⁹ Moreover, as I have observed previously, under international law, it is not permissible to detain some in order to deter others. Ultimately, it is wrong to detain in an effort to thwart unknown people's migrations and mobilities, and detention-as-deterrence is not credible.

The second justification for detention is to thwart absconding. The underlying assumption of this argument is that some noncitizens will not willingly comply with the requirements of immigration hearings, procedures, and outcomes. Absconding matters to state bureaucracies because loss of contact disrupts deportation; it matters to political actors because it speaks to, amplifies, and provides a ready response to public anxieties about "foreign criminals" roaming the streets.²⁰ For example, in 2014, the Ministry of Justice introduced secondary legislation that denies notification of lost appeals to refused asylum seekers, a measure taken "to prevent the parties absconding."²¹

Given the Conventional View's prerogative that states are entitled to control immigration, it makes sense that they undertake to prevent or thwart absconding. The problem is that the thresholds of evidence to identify a potential absconder are low and shaky. Again, the onus of proof is reversed from the criminal justice context and the migrant must show a disinclination to abscond. Further, data on absconding is scarce. In 1995 the British government acknowledged that the absconding rate of refused asylum seekers was 0.59 percent; since then, the Home Office has remained silent, with no other credible, primary research on the rates of absconding in the UK being published. On the other hand, scholarly research finds that asylum seekers who have arrived in destination states like the UK "rarely abscond while awaiting the outcome of a visa application, status determination, or other lawful process."²² Likewise, a global survey of programs facilitating conditional release from detention found that more than 90 percent of enrollees did not abscond.

From a moral perspective, it is important to note that absconding is rarely a deliberate choice or decision; rather, it is often the result of bureaucratic delays or obstacles, and a lack of information or comprehension of duties and responsibilities. This is because living underground or

clandestinely is onerous with probable risks of poverty and destitution. Absconders often become dependent on the charity of friends, strangers, and religious or community organizations for survival.

Further, I argue that states like the UK provoke many of the minority of migrants into absconding through making compliance onerous if not virtually impossible. This is accomplished in at least three ways that snowball into an often-untenable situation: (i) the UK policy objective of rendering asylum seekers destitute, particularly those whose refugee claims have been refused; (ii) the undermining of a trust relationship between asylum seekers and the state, significant because trust is a necessary condition for a fair hearing and for guaranteeing compliance during the immigration and refugee status regularization processes; and (iii) using detention as an animating threat to force compliance, thereby further damaging trust and heightening fears of destitution. Through recognizing that legal, bureaucratic, and policy instruments can overlap into provoking some people into absconding, it is possible to argue that the state provokes people to abscond, but then points to the perceived threat of absconders as a justification for detention. This tautology is unreasonable and must be destabilized to reveal state complicity in prompting absconding and the overall unnaturalness and impropriety of practicing long-term detention in liberal communities.

NOTES

1. Mary Bosworth, and Gavin Slade, "In Search of Recognition: Gender and Staff Detainee Relations in a British Immigration Removal Centre," *Punishment and Society* 16, no. 2 (2014): 169–86.
2. *Ibid.*, 182.
3. Stephanie J. Silverman, "'Regrettable but Necessary'? A Historical Study of the UK Immigration Detention Estate and Its Opposition," *Politics and Policy* 40, no. 6 (2012): 1131–57.
4. Joseph H. Carens, "An Overview of the Ethics of Immigration," *Critical Review of International Social and Political Philosophy* 17, no. 5 (2014): 538–59.
5. Stephanie J. Silverman and Amy Nethery, "Understanding Immigration Detention and Its Human Impact," in *Immigration Detention: The Journey of a Policy and Its Human Impact*, ed. Amy Nethery and Stephanie J. Silverman, 1–12 (London: Routledge, 2015), 1.
6. Sarah Turnbull, "'Stuck in the Middle': Waiting and Uncertainty in Immigration Detention," *Time and Society* 25, no. 1 (2016). Eiri Ohtani and Jerome Phelps, "Without Detention: Opportunities for Alternatives," 2016, [http://detentionaction.org.uk/wordpress/wp-content/uploads/2016/09/Without Detention.pdf](http://detentionaction.org.uk/wordpress/wp-content/uploads/2016/09/Without%20Detention.pdf).
7. UK Home Office, "National Statistics: Detention: 3 March 2016," 2016, <https://www.gov.uk/government/publications/immigrationstatistics-october-to-december-2015/detention>.
8. Stephanie J. Silverman, "Immigration Detention in the UK," *Migration Observatory Briefings* (Oxford: Migration Observatory, 2016).
9. Emma Kaufman and Mary Bosworth, "The Prison and National Identity: Citizenship, Punishment, and the Sovereign State," in *Why Prison?*, ed. David Scott, 170–88 (Cambridge: Cambridge University Press, 2013).
10. UK Home Office, "Government Response to Stephen Shaw's Review into the Welfare in Detention of Vulnerable Persons," 2016b, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492227/gov_paper__2_.pdf.

11. Jerome Phelps, "No Return, No Release, No Reason: Challenging Indefinite Detention," 32 (London: London Detainee Support Group, 2010).
12. Mary Bosworth, "The Impact of Immigration Detention on Mental Health: A Literature Review," in *Centre for Criminology Reports*, 37 (Oxford: University of Oxford, 2016).
13. Stephen Shaw, "Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office," London: UK Home Office, 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf.
14. Heaven Crawley, Franck Düvell, Katharine Jones, Simon McMahon, and Nando Sigona, "Destination Europe? Understanding the Dynamics and Drivers of Mediterranean Migration in 2015," *Unraveling the Mediterranean Migration Crisis (MEDMIG) Final Report*, 2016, p. 12, <http://www.medmig.info/research-brief-destination-europe.pdf>.
15. The International Organization for Migration estimates that 1,011,712 refugees and migrants crossed the Mediterranean Sea to Europe in 2015, of whom nearly 4,000 are thought to have died trying to make this journey (Crawley et al., 2017, 12).
16. Robyn Sampson, "Does Detention Deter?" *IDC Working Papers* (Sydney: International Detention Coalition, 2015); Robyn Sampson, Grant Mitchell, and Lucy Bowring, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (Melbourne: International Detention Coalition and the La Trobe Refugee Research Centre, 2011).
17. Crawley et al., "Destination Europe," p. 12.
18. In Canada, for example, after the Supreme Court decided *In R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754 that the criminal definition of human smuggling is too broad, the British Columbia Supreme Court acquitted four Sri Lankan men of those charges in relation to their arrivals to Canada 72 other migrants on the MV Ocean Lady ship in October 2009. The men said they are relieved they can finally lodge their claims for asylum in Canada (The Canadian Press, 2017).
19. Kent Roach, "Must We Trade Rights for Security? The Choice between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain," *Cardozo Law Review* 27, no. 5 (2005): 2151–222.
20. No discussion of this issue in Britain would be complete without mentioning the infamous "foreign national prisoners scandal" of April 2006 that led to the dismissal of then-Home Secretary Charles Clarke. In response to—and thereby heightening—the public anxieties stoked by fears of "rapists" and "murderers" released from prison, the British State continues to enact harsher legislative measures, bureaucratic practices, and penal policy to ensure that the perceived "threats" of "foreign criminals" are neutralized in detention centers (see, e.g., Kaufman and Bosworth, "The Prison and National Identity," 173–75).
21. David Barrett, "Ministers Announce New Moves to Stop Failed Asylum Seekers Absconding," *The Daily Telegraph* June 9, 2014, <http://www.telegraph.co.uk/news/uknews/immigration/10887982/Ministers-announce-new-moves-to-stop-failed-asylum-seekers-absconding.html>.
22. Sampson, Mitchell, and Bowring, *There Are Alternatives*, 17.

Private Contractors, Foreign Troops, and Offshore Detention Centers: The Ethics of Externalizing Immigration Controls

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EXTERNALIZATION

On February 3, 2017, European Union leaders met in Malta to discuss strategies to close the Central Mediterranean route from Libya. According to the International Organization for Migration, 181,436 migrants arrived in Italy in 2016 using the route. 4,576 died on the journey.¹ The majority of migrants in 2015 came from Eritrea (25%), Nigeria (14%), Somalia (8%), Sudan (6%), Gambia (6%), and Syria (5%), all countries with significant refugee flows.² Europe's response was the Malta Declaration³ in which the EU agreed to give 200m euro to Libya to help prevent migrants from attempting to cross to Europe.⁴

The decision to enlist a failed state torn between rival government forces and militia groups is shocking even to those inured to Europe's callous refugee policy.⁵ The well-documented human rights abuses of migrants in Libya encompass murder, rape, forced labor, and slavery⁶ and include accusations that Libya's coast guard has murdered migrants. Moreover, Libya has no process that allows refugees to apply for asylum.⁷ Despite disingenuous remarks that the Europe only seeks to prevent smuggling, the Malta Declaration is a cynical attempt for Europe to eschew its responsibilities toward refugees.⁸ It is also part of a broader trend in which EU member states take active measures to prevent asylum seekers from lodging claims at their borders by relocating mobility controls abroad.

Attempts to prevent migrants from arriving by outsourcing enforcement to foreign governments are not restricted to Europe. In the 1980s, the United States began intercepting and turning back boats from Haiti after the 1991 military coup, culminating in the repatriation of over 40,000 Haitians without giving them an opportunity to seek asylum.⁹ The US also capitalized on the sea journeys of Haitian refugees to pioneer offshoring asylum processing and detention in Guantanamo Bay.¹⁰ In recent decades, Australia has used offshore detention to deter immigrants and refugees from arriving by boat with horrific results.¹¹

These are all instances of the externalization of migration in which wealthy states seek to prevent migration and avoid their legal and moral obligations by moving the administration of migration elsewhere. Despite the prevalence of externalization, much work in the ethics of immigration assumes that the admission of immigrants is determined by state immigration officials who decide whether to admit travelers at official crossings. This assumption neglects how decisions about entrance have been increasingly relocated abroad—to international waters, consular offices, airports, or foreign territories—often with nongovernmental or private actors, as well as foreign governments functioning as intermediaries.

Mechanisms that allow for externalization include interceptions at sea, carried out by the state itself, a private contractor such as FRONTEX, or a foreign state.¹² In some cases, such as with Australia, interception is combined with offshore detention either in another state or in a territory or in a jurisdiction defined as outside of the territory such as Guantanamo Bay. Visa regimes require foreign nationals to acquire a visa before travel, carrier sanctions leveled against airplane and other transport firms prevent people without the appropriate documents from boarding a plane, even if those documents are being purposefully withheld from them.¹³ Visa regimes are typically imposed on countries in which large numbers of people have a legitimate case for asylum, making it illegal for them to travel to countries where they might seek safety. The result is that much migration enforcement takes place outside of legal and democratic practices. Matthew Gibney vividly summarizes the situation:

With only mild exaggeration one might say that a thousand little Guantanimos have been created in the last two decades: centers of power where states (and their formal and informal agents) act free from the constraints imposed on their activities by the courts, international and domestic law, human rights groups, and the public at large.¹⁴

WHY EXTERNALIZATION IS MORALLY PROBLEMATIC

Externalization poses a fundamental challenge to achieving just migration policies. To begin, externalization reliably harms vulnerable people. Most obviously, the externalization of migration control prevents refugees from receiving protection. Rather than presenting themselves to state officials tasked to determine whether there is a credible case for persecution, refugees find themselves trapped in transit or in camps, forced to resort to smugglers to continue their journeys. Refugees may be returned to regions where they risk unjust imprisonment, torture, or death. By externalizing enforcement, governments effectively undermine the institutions necessary to grant people claiming asylum a right to a fair hearing. Gibney writes, “We have reached the *reductio ad absurdum* of the contemporary paradoxical attitude towards refugees. Western states now acknowledge the rights of refugees but simultaneously criminalize the search for asylum.”¹⁵

Furthermore, the externalization of immigration enforcement leads to human rights abuses. Immigration enforcement is a violent business even when carried out inside countries with a strong commitment to bureaucratic professionalism and rule of law. When it is outsourced to countries that pay little heed to human rights or to private actors who face few repercussions for abuses, the result is predictably grim. Sadly, this result is often intended. As William Maley has noted in the Australian context, “The logic of deterrence has a devastating implication: to be effective as a deterrent, it is necessary that those who are detained suffer in the process.”¹⁶

Harms and human rights violations are compounded by the ways in which externalization allows states to exercise

power without accountability. Again, this is at least partly intentional: states use externalization to pass responsibility on to other actors and thus avoid public scrutiny. Ruben Andersson has noted the political usefulness of what he calls “illegality industry,” namely, that externalization “dissipates blame and accountability across a multitude of actors and over a large geographical area.”¹⁷

The dissipation of blame and accountability creates a serious lacuna in assigning moral responsibility. It undermines accounts that seek to capture extraterritorial migration controls in terms of a principal-agent relationship in which states (the principal) delegate authority to other agents to meet their goals.¹⁸ Under this conception, states are morally responsible when they delegate enforcement to agents that do not respect human rights. For example, Lori A. Nessel holds that states that outsource refugee protection and use external border controls should be liable for human rights violations inflicted on migrants.¹⁹ She makes an analogy between the practice of extraordinary rendition—the outsourcing of torture—and the outsourcing of responsibility toward refugees to countries that do not or cannot respect the Refugee Convention.²⁰ In her view, states that purposely outsource their responsibilities to these countries violate important human rights guarantees such as the right to nonrefoulement and the right to freedom from torture.

While there are cases where it makes sense to think of external migration controls in terms of a principal-agent relationship, this underestimates the extent to which these controls are exercised by multiple, overlapping, sometimes competing organizations. Some are, in theory, accountable to a democratic public, others are indirectly accountable as state proxies, while others have no meaningful accountability whatsoever. This creates a democratic deficit and gives state and nonstate actors the power to interfere in the lives of migrants who have no realistic recourse to contest decisions and policies. Since the loci of responsibility and accountability are indeterminate, it is not clear *who* they would address their concerns to.

THE PARADOX OF EXTRATERRITORIALITY FOR POLITICAL LEGITIMACY

How might we reconcile externalization and a just migration policy? One response is to forgo the externalization of migration policy except to actors which we can ensure are accountable. Though theoretically sound, this proposal is practically unfeasible. Externalization is very much a response to changes in technology and information that facilitate migration: it is a rational way of achieving migration restrictions that could not be achieved by allowing migrants to present their case to state authorities at official borders. Giving up externalization would entail that states publicly endorse a much more generous immigration policy to a skeptical public.

Another response is to create international and/or global institutions to bring migration management under legal and democratic control. Arash Abizadeh has argued from democratic principles and the coercive nature of immigration enforcement that states should not be

permitted to unilaterally control their borders. He calls for “the formation of cosmopolitan democratic institutions that have jurisdiction either to determine entry policy or legitimately to delegate jurisdiction over entry policy to particular states (or other institutions).”²¹ Similarly, Javier Hidalgo provides evidence that immigration policies unilaterally decided by states are likely to be marred by predictable biases and epistemic deficits that cause or allow harm. He argues that to mitigate the risk of unjust harms, states should transfer decision-making authority to international institutions that would have the authority to regulate states’ immigration policies and would provide feedback and accountability mechanisms, opportunities for citizens of recipient states and potential migrants to contest policy, and impartial adjudication.²²

Would these proposals effectively address the problems of accountability and harm brought about by the externalization of migration policy? Abizadeh and Hidalgo frame border control as an issue of entry policy in which states could be instructed by a higher authority to let people in. Though authority is delegated to an international or global institution, their conception of migration regulation is still very much state-centered and underestimates the extent to which regulation is, in fact, carried out by a dispersed, transnational polyarchy of actors and not just at the border. These include multinational corporations, NGOs, international organizations, and substate groups. In the case of Libya, this includes smugglers and militias. Externalization blurs lines among domestic, international, and transnational policy and makes it difficult to distinguish who is regulating migration and to what ends.

In the absence of a solution, it is worth taking a step back and thinking carefully about our models and metaphors. In particular, we need to diagnose the reasons why states have turned to extraterritorial enforcement. As I suggested above, externalization is a rational approach given certain views about migration. One reason for externalization is securitization: immigrants have been construed primarily as risks and threats.²³ As long as fears about security guide state policy, externalization is a predictable strategy: it seeks to prevent potential threats from reaching the territory.

A second reason for externalization is the conviction that mobility is abnormal. This conviction is part of the cognitive bias of sedentarism that informs much of the social sciences.²⁴ If migration is abnormal, then it should be possible—and likely desirable—to prevent it, either through the use of force or by removing incentives for people to leave. If, in contrast, migration is seen as a normal, human process, then it makes more sense to ask how best it can be supported to maximize benefits and minimize burdens.

A third reason for the attraction of external enforcement comes from the conviction that states with successful immigration policies must be able to prevent immigration (if they desire). The failure to stop immigration when desired is seen as a failure in policy. But regulation does not necessarily entail prevention. For example, successful transportation policy facilitates movement. Instead of thinking about immigration policy as selection combined

with prevention, we should think of it in terms of facilitating human mobility. This will require supranational and transnational institutions, but they needn’t be conceived as to-down or primarily coercive. Nor should their goal be to prevent migration, but rather to work with networks and to correct market failures. If we can radically and progressively change how we think about migration and modify how we imagine its regulation, we can begin to see how externalization could be compatible with justice.

NOTES

1. International Organization for Migration, “Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079,” January 6, 2017, <https://www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079>.
2. The number of Syrians has recently fallen as they have been diverted to the Eastern Mediterranean route. International Organization for Migration, “The Central Mediterranean Route: Deadlier than Other,” Data Briefing Series, Geneva, Switzerland, 2016, https://publications.iom.int/system/files/pdf/gmdac_data_briefing_series_issue3.pdf.
3. European Council, “Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route,” 2017, <http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/>.
4. Al Jazeera, “EU Leaders Ink Deal to Stem Refugee Flow from Libya,” February 3, 2017, <http://www.aljazeera.com/news/2017/02/eu-leaders-ink-deal-stem-refugee-flow-libya-170203151643286.html>.
5. Admittedly, it has Italy’s cooperation with the Gaddafi regime as a precedent. See Violeta Moreno-Lax, “*Hirsi Jamma and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?” *Human Rights Law Review* 12, no. 3 (2012): 575–76, for discussion, as well as the Global Detention Project 2015.
6. United Nations Support Mission in Libya, “Detained and Dehumanised: Report on Human Rights Abuses against Migrants in Libya,” United Nations Human Rights, 2016, <https://unsmil.unmissions.org/Portals/unsmil/Documents/Migrants%20report-EN.pdf>; Emma Graham-Harrison, “Migrants from West Africa Being ‘sold in Libyan Slave Markets,’” *The Guardian*, April 10, 2017, <https://www.theguardian.com/world/2017/apr/10/libya-public-slave-auctions-un-migration>.
7. Katie Kuschminder, “Libya Is Not Turkey: Why the EU Plan to Stop Mediterranean Migration Is a Human Rights Concern,” *The Conversation*, February 15, 2017, <https://theconversation.com/libya-is-not-turkey-why-the-eu-plan-to-stop-mediterranean-migration-is-a-human-rights-concern-72823>.
8. Amnesty International, 2016, “Euro Risks Fueling Horrific Abuse of Refugees and Migrants in Libya,” <https://www.amnesty.org/en/latest/news/2016/06/eu-risks-fuelling-horrific-abuse-of-refugees-and-migrants-in-libya/>; Human Rights Watch, “EU: Put Rights Above Politics Outsourcing Migration Responsibility to Libya Fraught with Risks,” *Human Rights Watch*, February 1, 2017, <https://www.hrw.org/news/2017/02/01/eu-put-rights-above-politics>; Médecins Sans Frontières, 2017, “Migration: MSF Warns EU about Inhumane Approach to Migration Management,” <http://www.msf.org/en/article/migration-msf-warns-eu-about-inhumane-approach-migration-management>.
9. Interceptions continue, including the return of 102 migrants to Haiti in July 2017. See Lori A. Nessel, “Externalized Borders and the Invisible Refugee,” *Columbia Human Rights Law Review* 40, no. 625 (2009): 693. As is often the case, the US Coast Guard frames the interdiction as acting on behalf of the migrants’ safety and characterizes their flight in terms of “illegal immigration,” see Tonya Alanez, “Coast Guard Returns 102 Migrants to Haiti in Biggest Interception in a Year,” *Sun Sentinel*, July 12, 2017, <http://www.sun-sentinel.com/news/florida/fl-reg-haitian-repatriation-20170712-story.html>.
10. Harold Hongju Koh and Michael J. Wishnie, “Sale v. Haitian Centers Council: Guantanamo and Refoulement,” in *Human Rights Advocacy Stories*, ed. Deena Hurwitz and Douglas Ford (Foundation Press, 2008).

11. Paul Farrell, Nick Evershed, and Helen Davidson, "The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Australian Offshore Detention," *The Guardian*, August 10, 2016, <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>.
12. Bernard Ryan and Valsamis Mitsilegas, eds., *Extraterritorial Immigration Control: Legal Challenges*, Immigration and Asylum Law and Policy in Europe, v. 21 (Leiden; Boston: Martinus Nijhoff Publishers, 2010).
13. Tendayi Bloom and Verena Risse, "Examining Hidden Coercion at State Borders: Why Carrier Sanctions Cannot Be Justified," *Ethics and Global Politics* 7, no. 2 (2014).
14. Matthew Gibney, "A Thousand Little Guantánamos: Western States and Measures to Prevent the Arrival of Refugees," in *Displacement, Asylum, Migration: The Oxford Amnesty Lectures 2004*, ed. Kate E. Tunstall, 139–69 (Oxford; New York: Oxford University Press, 2006); Global Detention Project, "Libya Immigration Detention," Geneva, Switzerland, 2015, <https://www.globaldetentionproject.org/countries/africa/libya?platform=hootsuite>.
15. *Ibid.*, 143.
16. William Maley, *What Is a Refugee?* (Oxford and New York: Oxford University Press, 2016), 190.
17. Ruben Andersson, "Europe's Failed 'Fight' against Irregular Migration: Ethnographic Notes on a Counterproductive Industry," *Journal of Ethnic and Migration Studies* 42, no. 7 (2016): 1066.
18. Virginie Guiraudon and Gallya Lahav, "A Reappraisal of the State Sovereignty Debate: The Case of Migration Control," *Comparative Political Studies* 33, no. 2 (2000): 163–95; Javier Hidalgo, "The Case for the International Governance of Immigration," *International Theory* 8, no. 1 (2016): 140–70.
19. Nessel, "Externalized Borders and the Invisible Refugee," 629.
20. *Ibid.*, 682.
21. A. Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders," *Political Theory* 36, no. 1 (2008): 48.
22. Hidalgo, "The Case for the International Governance of Immigration."
23. Jef Huysmans, "The European Union and the Securitization of Migration," *Journal of Common Market Studies* 38, no. 5 (2000): 751–77.
24. Liisa H. Malkki, "National Geographic: The Rooting of Peoples and the Territorialization of National Identity among Scholars and Refugees," *Cultural Anthropology* 7, no. 1 (1992): 24–44.

“Dreamers” and Others: Immigration Protests, Enforcement, and Civil Disobedience

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In this short paper I hope to use some ideas drawn from the theory and practice of civil disobedience to address one of the most difficult questions in immigration theory, one rarely addressed by philosophers or other theorists working on the topic: How should we respond to people who violate immigration law?¹ This paper is a work in non-ideal immigration theory. I will not be addressing the question of what an ideal or fully just immigration policy will be, and I will not address the question of open borders at all. For the sake of this paper, I will assume that states have some degree of authority to set immigration policies but also accept that these policies are all, currently, less

than ideal and less than fully just. My question is how we should respond to violations of immigration law, given this situation. My hope is that in at least some cases, thinking about civil disobedience can give us some guidance here.

I will start with what I take to be the easiest case for my approach—that of so-called “Dreamers”—unauthorized immigrants in the US who were brought to this country while still children (often as infants) and who have spent the majority of their lives in the US. Members of this group have engaged in wide-scale protests, making the civil disobedience paradigm all the more plausible. I will then move on to the case of unauthorized immigrants who have engaged in protests, but who do not fall into the “Dreamer” category. Finally, I will consider whether thinking about immigration law violations from the perspective of civil disobedience—and the proper response to that—can help us think about immigration enforcement more generally.

DREAMERS AND IMMIGRATION PROTESTERS

In 2011, the Dream Act, which would have provided legalization and a path to citizenship if desired for certain unauthorized immigrants in the US who had entered the country as children and who had lived there for a significant period of time, failed to pass in Congress yet again.² In response to this latest failure, several “Dreamers”—would-be beneficiaries of the failed bill—began to engage in a particular sort of protest, publicly “outing” themselves as unauthorized immigrants and daring the government to take action against them. These acts took place at public rallies, at university- and school-sponsored events,³ and, most spectacularly, in the pages of the *New York Times*. Jose Antonio Vargas, a prize-winning journalist, published a story in the *New York Times* about how he had been living in the US without authorization since he was sent to the US from the Philippines by his parents when he was twelve years old.⁴ Vargas soon published other pieces, drawing considerable attention to the case. Soon after this time, large-scale protests, often including large numbers of unauthorized immigrants who were not Dreamers, were staged calling for immigration reform in the US more generally.⁵

HOW SHOULD WE RESPOND TO IMMIGRATION PROTESTS?

Soon after the above noted events, the Obama administration put in place the so-called “DACA” program, a policy of granting “deferred action”—a type of prosecutorial discretion—to young, unauthorized immigrants who would have otherwise benefited from the Dream Act. This was seen by some conservatives as an end-run around Congress, an attempt at executive aggrandisement, and, as such, a possible violation of the rule of law. I want to consider both the protests and the response by the Obama administration through the lens of civil disobedience theory.

I draw here from a classic, relatively conservative, account of civil disobedience provided by John Rawls.⁶ Rawls characterizes civil disobedience as a “public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”⁷ With only slight modifications, the actions of Vargas and the Dreamers who outed

themselves fit nicely within this paradigm. While the action of announcing one's self as an unauthorized immigrant is, of course, not itself illegal, it is still an act done so as to draw attention to a contrary-to-law act. It is to announce, "we are here, and we are not going to leave unless we are forced." This is a political act done with the intention of changing the law. The goal is clearly to force the population to see that the only way to consistently enforce the current immigration law is to engage in repugnant actions. This therefore seems like a classic case of civil disobedience.

Was civil disobedience an appropriate tactic in this case (and others like it)? Rawls makes a point of saying that civil disobedience is only appropriate when the law at issue is unjust. Furthermore, the law ought not be "merely" unjust, or somewhat unjust, it ought to be particularly unjust, and it must not be possible, or at least feasible, to change the law in the normal way. Several features of this account are here relevant. While some might debate the issue, the situation faced by the Dreamers is one of the more plausible cases of clear injustice in the current US immigration system. Because they did not engage in any plausible wrongdoing in being brought to the US as children, and because it is a plausible wrongful harm to forcefully deprive someone of the context in which they have been raised and developed, it is not hard to find a significant injustice here. Furthermore, because the people involved here are noncitizens, most of the normal ways to try to change the law are not open to them. (We might here make a parallel with the de facto, even if not de jure disenfranchisement of African-Americans in the Jim Crow era, noting how this helped justify the use of civil disobedience to attack that system.) While most traditional accounts of civil disobedience assume that it is addressed by one citizen to another, and we, formally, lack that here, we can see these actions as saying, in part, that people who ought to have the chance to be citizens are being prevented from having the opportunity.

If the above account is correct, what does it tell us about how to respond to these protests? The right thing to do here would be to change the law to grant, on generous terms, access to full membership to this group. We have, unfortunately, failed to do this. The law hasn't changed. Now, officials typically have a duty to enforce laws against all that they apply to. So should we be rounding up and deporting the Dreamers who have outed themselves, thereby making it unnecessary for the officials to find them? This path has been followed, to a degree, by the Trump administration, with growing fear, even before the proposed ending of DACA, that it will become the norm.⁸ However, even if the law cannot be changed, the uniform enforcement of it may not be required by the rule of law.

As Rawls notes, it can be reasonable to suspend punishment or the enforcement of the law in the face of civil disobedience. The fact that it seems inhumane to punish these people helps to show that our sense of justice has been invoked, and because of this, prosecutorial discretion is plausible. Prosecutorial discretion is not without problems. It may be used in an ad hoc way that allows unjust laws to be used against minorities or unpopular groups, while shielding majorities or favored groups from harm. (This is arguably the case with the application of many drug laws in the

US.) So prosecutorial discretion needs some justification before it is applied. Often this could be because the law is uncertain and there are reasonable disagreements as to what it requires, or because enforcing the law would require people to act against their conscience, as well as the banal reason that we must often direct limited resources to the most important cases. At most, only the last of these reasons clearly applies here. But we might also think that punishment, or other harsh treatment such as deportation, is appropriate only if it will do some good that outweighs the harm done to the people the law is applied to. I claim here that this burden can be met, sometimes easily, in many cases of immigration law, though it seems especially plausible in the case of the Dreamers, making prosecutorial discretion especially plausible here until a more satisfactory, permanent, solution can be reached. This conclusion supports the appropriateness of the DACA program and suggests that it should remain in place until a permanent change to the law is made.

A more difficult case arises when we consider the now-stalled attempts by the Obama administration to extend the protections of the DACA program to other groups of unauthorized immigrants, in particular to people who had entered as adults, but who have US citizen or permanent resident family members. One possible difficulty can be dealt with quickly. While fewer members of this wider group have been involved in protests that are clearly understandable as appeals to our public conscience than have Dreamers, this need not be any more of a problem than was the fact that only a minority of African-Americans were involved in actual civil rights protests. In both cases, those actively involved in protests can stand in for the wider group.

A more difficult issue arises in that this group is less clearly subjected to an injustice, at least if we do not assume all immigration laws are unjust. Unlike the Dreamers, those in this group came to the US (or remained there) in violation of immigration laws as adults, and so could normally be seen as properly held responsible for this action. This might make us wonder if the civil disobedience paradigm is the right one here. However, when we consider another aspect of Rawls's account, a way forward appears. Rawls held that one of the roles of civil disobedience is to signal that fair terms of cooperation have been violated. This claim is particular relevant in this case. We may start by noting that, while the people at issue here have made contributions to society—it's doubtful that large parts of the US economy would function well without their labor; they pay a significant amount of taxes, often without receiving benefits; and they break the law at a rate significantly below average—they have been excluded from many of the benefits and advantages of full membership. Furthermore, if there was no demand for their presence on our part, then there would be many fewer of the people in this class here now. (Recent trends in the unauthorized population in the US suggest this, both the declining overall numbers, and the difficulties faced by agricultural employers and others in light of fear caused by increased enforcement by the Trump administration.⁹)

I argue that it is at least plausible that, in a situation like that which the US has faced for quite some time—where there is a strong demand for immigrant labor that is not met and can't be met through legal means—that it is unreasonable to treat those who do meet the demand as if they were garbage or worn-out machines to be thrown away when they become less useful. Some might argue that deportation is reasonable because, whether their labor was needed or not, the people in question did violate immigration laws. But if, following Rawls, we think that the mere existence of an institution doesn't give rise to obligations unless the institution is reasonably just, this claim would be too quick. And if we think that it may be reasonable to violate the law when fair terms of cooperation are not followed, this may indicate that it is unreasonable to enforce immigration laws here, at least in respect to some unauthorized migrants, and at least until we can come to a more just situation. Importantly, this follows from the logic behind civil disobedience, even if we do not reject the rights states may have to enforce immigration laws altogether. Lack of space prevents me from being able to try to fully determine which unauthorized immigrants the above argument should apply to, but it is at least a significant group.

One final argument must be considered before closing. While civil disobedience often inconveniences the larger population, it is harder to justify when it involves significant wrongdoing itself, or where it is done to seek protection from significant wrongdoing. So we must ask if those who violate immigration laws have engaged in seriously blameworthy acts. Popular rhetoric often suggests this with the use of terms like "line-jumpers." However, there is reason to think that many cases of unauthorized immigration are not seriously blameworthy. First, for many unauthorized immigrants, there is no line which they are jumping. They are not eligible for immigrant (or often temporary labor) visas, and so are not, in any plausible way, "cutting ahead" of anyone else. Secondly, the fact that people enter without inspection does not prevent people who are eligible for visas from entering and gaining what they have some right to. Therefore, they are not plausibly denying anyone else of anything they have a right to. I do not claim that this shows that all enforcement of immigration law is wrong. But these facts ought to make us slow to condemn violators and more willing to treat them humanely and as people who are merely seeking better opportunities and a more just society. When we see this, as looking at these issues through the lens of civil disobedience theories suggests we should, then we can see that even in the case of "typical" immigration violators, we have good reason to not treat them as if they were criminals or willful noncooperators. This does not mean that we must stop all immigration enforcement until we have a just world order. Doing so might well prevent the creation of a just world order. But it does at least suggest that we need, even in this case, humane and reasonable enforcement policies, not the militarized ones that treat immigration violators as criminals that are found in the US and in many other wealthy countries, and may further show the need to struggle to improve immigration laws in wealthy countries.

NOTES

1. An exception to this claim is found in the work of Javier Hidalgo. See, in particular, "Resistance to Unjust Immigration Restrictions," *Journal of Political Philosophy* 23, no. 4 (2015): 450–70; and "The Duty to Disobey Immigration Laws," *Moral Philosophy and Politics* 3, no. 2 (2016). Hidalgo would extend a right to resist immigration laws considerably beyond that discussed in this paper, to a degree that seems unwarranted and incompatible with general principles of liberal democracy, but which fit better with his own libertarian views. I cannot further pursue the differences between our views here.
2. Various versions of the Dream Act had been submitted for several years only to be rejected by Republicans in Congress. This particular version of the Dream Act included requirements that the beneficiaries have no significant criminal record, and that they achieve certain educational standards or enrol in the military.
3. I started significantly thinking about this topic when a University of Pennsylvania undergraduate publicly "outed" herself as an unauthorized immigrant at a Penn student event on immigration reform where I was a panel member.
4. See Jose Antonio Vargas, "My Life as an Undocumented Immigrant," *New York Times Magazine*, June 22, 2011.
5. The threat of ending the DACA program by the Trump administration has revitalized immigration protests around the dreamers. I return briefly to these developments below.
6. I draw on this account not necessarily because I think it is the best available, but because it is well established and "conservative" in the sense of requiring fewer controversial premises than some other accounts of civil disobedience.
7. John Rawls, *A Theory of Justice*, 364.
8. See, e.g., Rory Carroll, "Deportation of 'Dreamer' to Mexico appears to be first under Trump," *The Guardian*, April 18, 2017, <https://www.theguardian.com/us-news/2017/apr/18/trump-first-deportation-dreamer-daca-mexico>; Adam Clark, "ICE Summons Rutgers 'Dreamer,' Stirring Fear of Deportation," *NJ.com*, May 1, 2017, http://www.nj.com/education/2017/05/rutgers_student_ice_meeting_deportation_fears.html. The second story is perhaps especially relevant, as it suggests Dreamers may be targeted for their protest actions.
9. See, e.g., Jens Manuel Krogstad, Jeffrey S. Passel, and D'Vera Cohn, "5 Facts about Illegal Immigration in the US," *PewResearch.org*, <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/>.

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