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Immigration, Criminalization, and Disobedience

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This symposium essay explores two contending visions of immigration justice: one focused on expanding procedural rights for immigrants, and a second associated with a movement of immigrant youth who have come out en masse as "undocumented and unafraid," issuing a fundamental challenge to immigration restrictionism. As immigration enforcement in the United States increasingly relies on criminal prosecution and detention, advocates for reform have increasingly turned to constitutional criminal procedure, seeking greater procedural protections for immigrants. But this essay argues that this focus on enhanced procedural protections is woefully incomplete as a vision of immigration justice. Although a right to counsel, for example, may provide comfort and aid to certain vulnerable individuals, such procedural protections are unlikely to change the quasi-criminal character of immigration enforcement or to address the plight of the millions of people without a path to lawful status. Just as U.S. constitutional criminal procedure failed to ameliorate the harshness of substantive criminal law, more robust immigration procedural protections would likely fail to reorient immigration enforcement in a more humane direction. By contrast, a growing movement of immigrant

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youth offers a more expansive conception of immigration reform. As these immigrant youth lay claim to a "right to remain," infiltrate immigration detention centers, and crash the border, they have reshaped our political and legal discourse, gesturing towards an alternative vision of immigration justice.

INTRODUCTION

There are more than fifty million people worldwide internally displaced in camps or living as refugees, often in desperate conditions, in squalid tents, dependent on handouts of food, with little or no access to clean drinking water or health care to prevent outbreaks of cholera, malaria and other diseases.[1] Thousands more die each year attempting to flee conditions of poverty and violence by sea or in the desert borderlands that separate the United States from Mexico.[2] Of those who succeed in crossing the U.S. border, approximately eleven million live in the United States without lawful immigration status, under the threat of deportation or removal.[3] The United States confines and removes roughly 400,000 of these immigrant men, women, and children each year,[4] holding these persons

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[1] *See World Refugee Day: Global Forced Displacement Tops 50 Million for First Time in Post-World War II Era*, UNITED NATIONS REFUGEE AGENCY (June 20, 2014), http://www.unhcr.org/53a155bc6.html.

[2] *See* INT'L ORG. FOR MIGRATION, FATAL JOURNEYS: TRACKING LIVES LOST DURING MIGRATION 11, 22 (Tara Brian & Frank Laczko eds., 2014).

[3] *See* Julia Preston, *Illegal Immigrants Number 11.5 Million*, N.Y. TIMES, Mar. 24, 2012, at A14.

[4] *See* Gretchen Gavett, *Map: The U.S. Immigration Detention Boom*, PBS (Oct. 18, 2011), http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/.

in detention centers, jails, and prisons, in cuffs, shackles, behind barbed wire, subject to solitary confinement for rule violations.[5] In the face of these circumstances, there is increasing awareness that the United States' immigration regulatory regime is "broken" and in need of thoroughgoing repair.[6]

Much immigration law scholarship and advocacy in the United States urges that certain of these problems could be at least partially redressed by extending to immigrants enhanced judicially enforced procedural protections, especially a right to counsel. In 1984, the U.S. Supreme Court held in *Immigration and Naturalization Service v. Lopez-Mendoza* that the Fourth Amendment exclusionary rule does not apply in immigration proceedings because, among other reasons, these proceedings are civil rather than criminal.[7] Reversing *I.N.S. v. Lopez-Mendoza* would ensure, or so these accounts suggest, those constitutional protections that would flow from recognizing immigration proceedings as criminal or quasi-criminal rather than civil.[8] Recognizing immigration proceedings as quasi-criminal

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[5] *See* Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATLANTIC Q. 621 (2014); Alison Mountz et al., *Conceptualizing Detention: Mobility, Containment, Bordering, and Exclusion*, PROG. HUM. GEOGR. 1 (2012).

[6] *See, e.g.*, *Taking Action on Immigration*, THE WHITE HOUSE, https://www.whitehouse.gov/issues/immigration (last visited Sept. 17, 2015) ("America's immigration system is broken.").

[7] *See, e.g.*, I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (noting that because deportation is not punishment, "the provision[]of the constitution . . . prohibiting unreasonable searches and seizures . . . ha[s] no application").

[8] *See, e.g.*, Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1623 (2010) ("The application of the exclusionary rule to removal proceedings is a meritorious proposal to address the procedural problems previously discussed. . . ."); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1897, 1935 (2000) ("We should view deportation functionally and treat it as subject to the type of constitutional limitations placed on analogous government control of individual behavior.") ("It is time to recognize that deportation . . . is punishment. If it must be done, then it must be done with specific, substantive constitutional protections. It should at the very least not be done retroactively, without counsel, or without a right to bail."); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 350–51 (2008) (exploring how the protections of the Sixth Amendment right to counsel, the Ex

could enable not just application of an exclusionary rule in immigration proceedings, but also a right to appointed counsel, among other protections—revolutionizing constitutional immigration procedure as did the Warren Court revolution in constitutional criminal procedure.[9] In the meantime, advocates have organized outside the courts to expand access to counsel and other procedural protections in immigration cases.[10]

This symposium essay will explore why this focus on procedural enhancement is woefully incomplete as a vision of immigration justice, even as it serves to protect certain vulnerable individuals. Although a right to counsel, for example, may provide comfort and aid to certain vulnerable individuals, such procedural protections are unlikely to change the quasi-criminal character of immigration enforcement or to address the plight of the millions of people without a path to lawful status. Just as the Warren Court revolution in constitutional criminal procedure failed to ameliorate the harshness of substantive criminal law, more robust immigration procedural protections would likely fail to reorient immigration enforcement in a more humane and sustainable direction.

By contrast, this essay will consider an alternative vision of immigration justice associated with a growing movement of immigrant youth activists who have come out en masse as "undocumented and unafraid."[11] As these youth activists call for an end to deportations,

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Post Facto Clause, the exclusionary rule and other federal evidentiary rules, and criminal due process venue requirements should be applied in certain immigration proceedings); Marc L. Miller, *Immigration Law: Assessing New Immigration Enforcement Strategies and the Criminalization of Migration*, 51 EMORY L.J. 963, 972 (2002).

[9] *See, e.g.*, Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109 (2008); Jonathan L. Hafetz, *The Rule of Egregiousness:* INS v. Lopez-Mendoza *Reconsidered*, 19 WHITTIER L. REV. 843, 845–46 (1998); *Developments in the Law: Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1657 (2013).

[10] *See, e.g.*, NEW YORK IMMIGRANT FAMILY UNITY PROJECT, IMPROVING ACCESS TO JUSTICE IN DEPORTATION PROCEEDINGS (2015), http://www.nationalconsortium.org/~/media/Microsites/Files/National%20Consortium/Conferences/2015/Materials/Improving-ATJ-in-Deportation-Proceedings.ashx.

[11] *See* WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANFORMED THE IMMIGRANT RIGHTS DEBATE 1-7 (2013).

initiate populist legal mobilizations, and engage in acts of civil disobedience, they gesture towards a broader vision of political and legal reform.[12] Through their bold, disruptive actions and discontent with immigration restrictionism, these youth offer the preliminary contours of an immigration reform agenda for which procedural protections may serve as a partial means but which is decidedly committed to other ends.[13]

I. HOPE FOR A REVOLUTION IN CONSTITUTIONAL IMMIGRATION PROCEDURE?

The litigation that culminated in *I.N.S. v. Lopez-Mendoza* began with two separate immigration raids in 1976 and 1977.[14] Immigration enforcement officers arrested Adan Lopez-Mendoza and Elias Sandoval-Sanchez at their separate places of employment.[15] Both Lopez-Mendoza and Sandoval-Sanchez were placed in deportation proceedings and both sought to have their proceedings terminated on the grounds that their arrests violated the Fourth Amendment's protection against unreasonable searches and seizures.[16]

Until 1979, when the Board of Immigration Appeals declined to apply the exclusionary rule in a separate deportation case, the exclusionary rule was understood to apply in deportation proceedings and the major treatise in immigration law reported that the exclusionary rule was available to individuals facing deportation.[17] The immigration judges in Sandoval-Sanchez and Lopez-Mendoza's cases, however, declined to suppress the evidence in question, entered orders of deportation in both cases, and the Board of Immigration Appeals affirmed.[18]

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[12] *See id.*; *see also* Luisa Laura Heredia, *Of Radicals and DREAMers: Harnessing Exceptionality to Challenge Immigration Control*, 9 ASSOC. MEXICAN-AMERICAN EDUCATORS (AMAE) 74 (2015); Michael May, *Los Infiltradores*, THE AM. PROSPECT (June 21, 2013), http://prospect.org/article/los-infiltradores.

[13] *See* Leti Volpp, *Civility and the Undocumented Alien*, *in* CIVILITY, LEGALITY AND JUSTICE IN AMERICA 92–95 (edited by Austin Sarat) (2014).

[14] *Lopez-Mendoza*, 468 U.S. at 1035–37.

[15] *See id.*

[16] *See id.*

[17] *See id.* at 1059 (White, J., dissenting) (citing C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.2c at 5–31 (rev. ed. 1980)).

[18] *See id.* at 1035–38.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed.[19] In reversing Sandoval-Sanchez's deportation order, the Ninth Circuit held that his arrest and detention violated the Fourth Amendment, that his admission of illegal entry was the product of this unconstitutional detention, and that the exclusionary rule barred its use in a deportation proceeding.[20] The court vacated Lopez-Mendoza's deportation order and remanded for further review of the alleged Fourth Amendment violations in his case.[21]

But the United States Supreme Court, in a 5-4 opinion authored by Justice O'Connor, reasoned that the civil nature of a deportation proceeding rendered the various procedural protections that attach in the context of a criminal trial, including the Fourth Amendment exclusionary rule, generally inapplicable: "A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime."[22] To determine whether the exclusionary rule applies notwithstanding the civil designation of immigration proceedings, the majority balanced what it determined to be the minimal deterrent benefit of the exclusionary rule in this context against the considerable cost of permitting a person to remain in the United States when his continuing presence, in the majority's estimation, "constitutes a crime."[23]

The majority noted, however, that its "conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."[24] The majority also left open the remedy of exclusion under the Due Process Clause in the case of "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[25]

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[19] Lopez-Mendoza v. I.N.S., 705 F.2d 1059 (9th Cir. 1983), *rev'd*, 468 U.S. 1032 (1984).

[20] *Id.* at 1063.

[21] *Id.* at 1075.

[22] *Lopez-Mendoza*, 468 U.S. at 1038.

[23] *Id.* at 1047.

[24] *Id.* at 1050.

[25] *Id.* at 1050–51.

Justices White, Brennan, Stevens, and Marshall dissented. Justice White, in a dissent joined by Justices Brennan, Stevens, and Marshall, objected to the majority's "incorrect assessment of the costs and benefits of applying the rule in such proceedings . . . ."[26] According to Justice White, "INS agents are law enforcement officials whose mission is closely analogous to that of police officers and because civil deportation proceedings are to INS agents what criminal trials are to police officers," the deterrent effect of exclusion in immigration proceedings is likely equivalent to its effect in criminal proceedings.[27] Further, the dissenters discredited the majority's account that it is a "continuing crime" for a non-citizen to be present in the United States when he or she entered without authorization, underscoring that the few cases to construe the criminal unlawful entry statute have held "that a violation takes place at the time of entry and that the statute does not describe a continuing offense."[28]

Justice Brennan put forward an additional basis for dissent in a separate opinion: that the exclusionary rule is "found in the requirements of the Fourth Amendment itself" and is not only applicable by virtue of the weight of its deterrent force relative to its costs.[29] Justice Marshall likewise emphasized the "constitutionally mandated character of the exclusionary rule":

> [A] sufficient reason for excluding from civil deportation proceedings evidence obtained in violation of the Fourth Amendment is that there is no other way to achieve the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.[30]

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[26] *Id.* at 1052 (White, J., dissenting).

[27] *Id.* at 1053 (White, J., dissenting).

[28] *Id.* at 1056–57 (White, J., dissenting).

[29] *See id.* at 1051 (Brennan, J., dissenting).

[30] *Id.* at 1060–61 (Marshall, J., dissenting) (internal quotations and citation omitted).

Despite the force of the arguments of the dissenters, the *Lopez-Mendoza* majority opinion has informed immigration procedure for more than thirty years, limiting the procedural rights available to the millions of individuals who have been removed from the United States during this period. In many instances, suppression and termination are the only means to protect a person facing removal from being returned to a country where he or she may face poverty, violence, separation from his or her family, and other grave personal harms.

Accordingly, numerous commentators have argued for the reversal of *Lopez-Mendoza* on two grounds: the first relates to the applicability of the exclusionary rule in immigration proceedings; the second concerns the designation of immigration proceedings as purely civil, thereby curtailing the application of other criminal procedure rights to these proceedings, particularly a right to counsel.[31] Though the remedy of suppression remains available in immigration court under *Lopez-Mendoza* for "egregious" violations, many cases are lost due to the absence of more robust procedural protections in immigration court.[32] The more routine availability of the remedy of suppression—and the recognition of the "close connection" between

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[31] *See, e.g.*, Elias, *supra* note 9; *Developments in the Law: Immigrant Rights & Immigration Enforcement*, *supra* note 9, at 1657 ("The status quo is failing. Lower courts have attempted but largely failed to transform *Lopez-Mendoza*'s vague notion of egregiousness into a workable standard consistent with contemporary exclusionary rule doctrine. . . . Most importantly, changes to immigration enforcement . . . have undermined the decision's analysis and amplified its distinguishing flaws, in particular its de facto exemption of ICE from meaningful Fourth Amendment scrutiny. In short, the case for starting over has never been stronger.").

[32] *See* Elizabeth A. Rossi, *Revisiting* INS v. Lopez-Mendoza*: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477, 478, 507–26, 513 (2013) (discussing numerous cases in which courts have found Fourth Amendment violations insufficiently severe to be classified as egregious, and noting one case in which the Seventh Circuit found the exclusionary rule inapplicable, *Gutierrez-Berdin v. Holder*, where—in the course of a suspicionless, warrantless arrest—agents yelled at Gutierrez-Berdin, handcuffed him, and told him: "Sign the fucking papers. You don't have any rights."). *But see* Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1017–19 (9th Cir. 2008) (finding it appropriate to apply the exclusionary rule to suppress evidence in immigration proceedings when the evidence was obtained during an illegal home raid, where officers entered the home without a warrant, consent, or exigent circumstances).

the immigration and criminal processes[33]—would allow more vulnerable people to avoid deportation or removal, an outcome that might otherwise be unattainable.[34]

There are also strong arguments that the factors that animated the *Lopez-Mendoza* majority opinion now, three decades later, suggest the continued, even increased, importance of the reintroduction of the exclusionary rule in immigration proceedings. There is compelling evidence of widespread Fourth Amendment violations by INS' successor agency, Immigration and Customs Enforcement ("ICE"), which the majority in *Lopez-Mendoza* acknowledged explicitly as a circumstance that would support a different result.[35] Additionally, immigration and criminal proceedings have become increasingly entwined, rendering perhaps inapt the civil designation attached to immigration enforcement, or at least altering the balancing of deterrence benefits versus costs relied on by the majority in *Lopez-Mendoza*.

Should we hope, then, for a revolution in constitutional immigration procedure analogous to the Warren Court revolution in constitutional criminal procedure? Would expanded procedural protections serve to repair certain of the failings of U.S. immigration law? Although the application of the exclusionary rule in immigration proceedings is an amply justified corrective to the harshness and abuse that often characterizes immigration enforcement, the short answer is that, whatever its modest advantages, a procedural rights revolution ought not to constitute the sum total, or even the major part, of an agenda for immigration justice.

Of course, an expansion of procedural rights in the immigration context, particularly the right to counsel, would at least partly address the serious needs of a vulnerable group of people for individualized consideration of their cases. But enhanced procedural protections will have limited success in advancing greater immigration justice, and emphasizing the quasi-criminal nature of immigration enforcement also poses underappreciated risks and threatens undesired consequences.

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[33] The United States Supreme Court more recently acknowledged this close connection between criminal and immigration processes in *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

[34] *See Padilla*, 559 U.S. at 366.

[35] *See, e.g.*, Elias, *supra* note 9, at 1128–35.

The expansion of procedural rights would do little to address the vulnerability of those millions of people without any path to lawful status in the United States despite long residence, or that of the millions more who are trapped in camps, the hundreds of thousands detained in immigration prisons each year, or those who die trying to cross the border.[36] Even as lawyers may provide some comfort and aid to those persons in removal proceedings, without more thoroughgoing reform to substantive immigration law, more widespread legal representation and enhanced procedural protections promise relatively minimal change.

A further concern with this procedural rights reform agenda is that this approach may further ingrain the interconnections between criminal and immigration enforcement. Yet, if expanded procedural rights are to have the presumably desired effect of mitigating the harshness of immigration enforcement, resituating immigration law and policy *outside* a quasi-criminal framework may be necessary. But decriminalizing immigration enforcement stands in potential conflict with an emphasis on the quasi-criminal nature of deportation that animates much of the procedural rights reform agenda.

There are, certainly, other ways to reach the result of expanded procedural protections in immigration proceedings beyond reversing *Lopez-Mendoza*'s (and *Fong Yue Ting*'s[37]) holdings that immigration enforcement is a civil rather than criminal or quasi-criminal process. For example, in *J.E.F.M. v. Holder*, a class of juveniles in removal proceedings have claimed they are entitled to a lawyer to represent them at government expense in connection with their immigration cases under, inter alia, the Fifth Amendment Due Process Clause. In his order denying the government's motion to dismiss, Judge Thomas Zilly of the U.S. District Court for the Western District of Washington recognized:

> A fundamental precept of due process is that individuals have a right "to be heard 'at a meaningful time

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[36] Some of the analysis in this Part draws from my recent article on criminal-immigration law enforcement. *See* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 169 (2012).

[37] *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

> and in a meaningful manner'" before "being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction." . . . . Unlike some other legal doctrines, due process is "not a technical conception with a fixed content unrelated to time, place and circumstances," but rather is "flexible and calls for such procedural protections as the particular situation demands."[38] . . The removal proceedings at issue in this case pit juveniles against the full force of the federal government . . . . Moreover, courts have repeatedly recognized "[w]ith only a small degree of hyperbole" that the immigration laws are "second only to the Internal Revenue Code in complexity." . . . .[39] Although the financial constraints and border-policing concerns raised by defendants must play a role in any analysis concerning plaintiffs' assertion of a right to appointed counsel under the Due Process Clause of the Fifth Amendment, at this juncture, they are not sufficiently quantified or developed to allow the Court to engage in the balancing required . . . .[40]

Importantly, Judge Zilly noted the critical importance of juvenile access to counsel in immigration proceedings without likening those proceedings in any respect to criminal proceedings. [41]

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[38] Order at 6–7, J.E.F.M. v. Holder, No. 14-1026 (W.D. Wash. Apr. 13, 2015), ECF No. 114 (internal citations omitted), https://www.aclu.org/sites/default/files/field_document/jefm_v_holder_mtd_order_4_13_15.pdf.

[39] Order at 30, J.E.F.M. v. Holder, No. 14-1026 (W.D. Wash. Apr. 13, 2015), ECF No. 114 (internal citations omitted), https://www.aclu.org/sites/default/files/field_document/jefm_v_holder_mtd_order_4_13_15.pdf.

[40] Order at 36, J.E.F.M. v. Holder, No. 14-1026 (W.D. Wash. Apr. 13, 2015), ECF No. 114 (internal citations omitted), https://www.aclu.org/sites/default/files/field_document/jefm_v_holder_mtd_order_4_13_15.pdf.

[41] *Id.* at 33 n.26 ("Youth, however, generally correlates with a lack of proficiency in reading and comprehension, even in a native language. For those whose school-age years were stained by violence, poverty, parental neglect, or similar hardships, literacy might be an as-yet unachieved goal. . . . [E]ven when juveniles successfully navigate themselves to removal proceedings, age might still play a role in increasing their risk of receiving an erroneous ruling.").

But beyond the problems associated with characterizing immigration proceedings as quasi-criminal, a separate concern involves the actual impact of process protections on criminal law administration. Attending closely to the harshness and dysfunction of the U.S. criminal process—where defendants have access to a full panoply of constitutional procedural rights, including the benefit of the Fourth Amendment exclusionary rule and the Sixth Amendment right to appointed counsel—illuminates some of the further potential limits of the proceduralist project as a framework for immigration justice.

Enhanced procedural protections may be confused in this work for meaningfully transformative substantive ends, in part because of a general inattention to the outcomes associated with procedural rights in the criminal context. For instance, the Sixth Amendment right to effective assistance of counsel in criminal cases often offers minimal protection as the vast majority of criminal defendants plead guilty in rushed proceedings and the resources and quality of counsel for indigents—disproportionately poor people of color— are frequently deficient. Stephen Bright and Sia Sanneh describe fifty years of failure to implement a right to effective counsel in criminal cases in these terms:

> Every day in thousands of courtrooms across the nation, from top-tier trial courts that handle felony cases to municipal courts that serve as cash cows for their communities, the right to counsel is violated. Judges conduct hearings in which poor people accused of crimes and poor children charged with acts of delinquency appear without lawyers. Many plead guilty without lawyers. Others plead guilty and are sentenced after learning about plea offers from lawyers they met moments before and will never see again. Innocent people plead guilty to get out of jail. Virtually all cases are resolved in this manner in many courts, particularly municipal and misdemeanor courts, which handle an enormous volume of

> cases. But it is also how many felony cases are resolved.[42]

Moreover, despite the Eighth Amendment's protection against cruel and unusual punishments, the U.S. Supreme Court has upheld even life sentences for relatively minor offenses, for example, for a nonviolent recidivist offender who sought to pass a forged check in the amount of $88.30.[43] Further, according to one of the leading Criminal Procedure case books, the exclusionary rule itself is subject to so many exceptions that in fact, "[c]umulatively, the exceptions may be the rule."[44] Yet, as Paul Butler has explained, the right to counsel in criminal proceedings nonetheless "invests the criminal justice system with a veneer of impartiality"[45]

Other potential problems that may be associated with a procedural rights revolution in the immigration context are elucidated by the work of William J. Stuntz and Charles D. Weisselberg in their respective studies of the Warren Court revolution in constitutional criminal procedure. Stuntz has revealed how the combination of robust procedural protections and a political commitment to aggressive crime control coincided with pervasive exceptions to proce-

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[42] Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon*, 122 YALE L.J. 2150, 2152 (2013); *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836–37 (1994) (describing "the pervasiveness of deficient representation . . . [and] the reasons for it"); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1759 (1993) ("[T]he Sixth Amendment right is hardly an entitlement to robust advocacy."); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 18 (1978) ("The modern public prosecutor commands the vast resources of the state for gathering and generating accusing evidence. We allowed him this power in large part because the criminal trial interposed the safeguard of adjudication against the danger that he might bring those resources to bear against an innocent citizen—whether on account of honest error, arbitrariness, or worse. But the plea bargaining system has largely dissolved that safeguard.").

[43] *See* Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978) .

[44] *See* RONALD JAY ALLEN, WILLIAM J. STUNTZ, ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND THE RIGHT TO COUNSEL, 2D ED. 449 (2011).

[45] *See* Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

dural safeguards and with an excessive ratcheting up of the harshness of substantive criminal law.[46] This one-way ratchet is a product in part of legislative and public perceptions that procedural protections interfere with the efficient regulation of crime—a misimpression to which "politicians responded with a forty-year backlash of overcriminalization and overpunishment."[47]

In his study, *Mourning Miranda*, Charles Weisselberg focuses on the influence of *Miranda v. Arizona*'s regime of warnings and waivers on custodial interrogation practices.[48] He finds that *Miranda* ultimately failed to secure the voluntariness of suspects' participation in custodial interrogations because the warnings "cohere[] with a sophisticated psychological approach to police interrogation, rather than operating apart from it as the *Miranda* Court intended."[49] Weisselberg laments that Miranda's prescribed procedures—what he regards as *Miranda*'s "hollow ritual"—distract from whether the values sought to be served by the procedure are actually protected.[50]

The import of this is not that the Warren Court revolution in constitutional criminal procedure caused the escalating brutality of criminal law enforcement in the years that followed, or that it is responsible for other forms excesses in U.S. criminal law administration. Nor is it to suggest that a parallel rights revolution in the immigration context would result in increased severity in immigration enforcement. But just as the revolution in criminal procedure rights failed to transform the excesses of substantive criminal law, a revolution in immigration procedure would likely fail to reorient immigration enforcement, particularly without a clearly articulated horizon for reform beyond the expansion of procedural protections.

What, then, might serve as meaningful horizon for immigration reform beyond more expansive procedural protections? And how might the law act in service of those ends? The bold actions of immigrant youth activists calling for a different form of immigration

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[46] *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 792 (2006).

[47] *Id.* at 850; *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

[48] *See* Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1521–22 (2008).

[49] *Id.* at 1522.

[50] *See id.* at 1523.

justice—as they come out as "undocumented and unafraid," "work cases," and infiltrate immigration detention centers in their "#NotOneMoreDeportation" and "Bring Them Home" campaigns—offer surprising and compelling alternative conceptions of just immigration reform far beyond mere procedural enhancement, and beyond the limited path to citizenship and liberalization associated with comprehensive immigration reform.[51]

II. DISOBEDIENT DREAMERS

Through wide-ranging civil disobedience, undocumented youth activists have begun to catalyze a capacious, far-reaching agenda for immigration justice.[52] These youth activists became politicized as they organized to pass the Development, Relief, and Education for Alien Minors Act (or DREAM Act) to address their own unauthorized immigration statuses.[53] After multiple Congresses failed to pass immigration legislation, the Dreamers—frustrated with the dysfunction of conventional political and legal processes—began to "work cases" themselves in their own communities.[54] In "working cases," the youth activists identified sympathetic individuals facing deportation or removal, produced and distributed videos on the internet, reached out to the press, coordinated petition drives, and persuaded legislators and other influential community members to send letters of support.[55] Through this work, the youth spearheaded a form of populist legal engagement, achieving legal outcomes, such as the termination of removal proceedings, by laying claim to a higher form of law—one that recognized, in their words, a human "right to

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[51] *See* Volpp, *supra* note 13, at 92-95.

[52] *See* NICHOLLS, *supra* note 11; *see also* May, *supra* note 12; Volpp, *supra* note 13, at 92–95.

[53] *See* S. 952, 112th Cong. (2011); *see also* NICHOLLS, *supra* note 11.

[54] *See* Laura Corrunker, *"Coming Out of the Shadows": DREAM Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEGAL STUD. 143, 160 (2012).

[55] *See* NICHOLLS, *supra* note 11; *see also* Ira Glass, *The One Thing You're Not Supposed to Do*, THIS AMERICAN LIFE (June 21, 2013), http://www.thisamericanlife.org/radio-archives/episode/498/the-one-thing-youre-not-supposed-to-do; Volpp, *supra* note 13, at 93–97.

remain."[56] As they worked cases, the youth activists themselves increasingly came out as "undocumented and unafraid,"[57] and their work coalesced into a continuing call for "not one more deportation."[58] In the process, the youth built power in their communities—a core tenet of their advocacy projects—and began to hone their reformist vocabulary, oriented ultimately toward goals beyond immediately achievable immigration reform in Congress, court victories, or otherwise expanded procedural protections.[59]

One of the immigrant youth organizers, Mohammad Abdollahi, has explained how the initial campaigns around individual cases sparked the idea for detention center infiltrations: "it would literally work like dominoes. We would do one case, and then we had somebody else contact us."[60] The activists then planned to scale it up to help a larger group of people by covertly gaining access to the inside of a detention center and organizing there.[61] Inside the detention center, the youth activists would be able to access new information and call additional attention to their work.

In their first detention center infiltration in 2013, a group of five undocumented youth members of the National Immigrant Youth Alliance (NIYA), organized to infiltrate Broward Transitional Center, a GEO detention facility near Fort Lauderdale, Florida.[62] The plan was to organize the men and women inside and obtain information from individuals detained there so that the youth activists could work their cases, identify immigrants eligible for relief, and generate

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[56] *See About*, #NOT1MORE, http://www.notonemoredeportation.com/about/ (last visited Sept. 24, 2015). ("#Not1More accompanies and galvanizes the determination of millions of immigrants who have endured suffering and now are exercising the right to remain in the place they call home.").

[57] *See generally* Hinda Seif, "*Coming Out of the Shadows" and "Undocuqueer": Undocumented Immigrants Transforming Sexuality Discourse and Activism*, 34 J. LANGUAGE & SEXUALITY 87 (2014).

[58] *See About*, #NOT1MORE, *supra* note 56.

[59] *See, e.g.*, Volpp, *supra* note 13, at 93–98.

[60] Glass, *supra* note 55; *see also* Sue Sturgis, *Youth Activists Infiltrate Florida Immigrant Detention Center, Find People Wrongly Held*, FACING SOUTH (July 31, 2012), http://www.southernstudies.org/2012/07/youth-activists-infiltrate-florida-immigrant-detention-center-find-people-wrongly-held.html.

[61] *See* Sturgis, *supra* note 60.

[62] *See id.*; May, *supra* note 12.

media attention to the inhumanity and arbitrariness in immigration law enforcement.[63]

The Broward detention facility is gender-segregated, so the organizers arranged for Carlos Saavedra to work with the men following his arrest and for Lulu Martinez to organize the women.[64] Mohammed Abdollahi would publicize the cases from outside the detention facility and coordinate the outreach campaign.[65] The organizers selected seventy detained individuals and began campaigns around their cases.[66] The activists report that their initial victory came swiftly, as they won release for a Dreamer who had spent five months in detention shortly after the youth organizers publicized his story.[67] After just two weeks in detention, Saavedra and Martinez had met with hundreds of detainees.[68] Using the detention facility's pay phones, the NIYA organizers began to conduct interviews with media outlets.[69] As soon as the facility became aware of their presence, the organizers were released with a stern warning, but they continued to advocate in support of their Broward cases.[70] The NIYA activists report that their work contributed to freeing at least forty detainees, and it garnered national and international attention.[71]

Rather than merely retracing established narratives associated with procedural reform, in the criminal context or otherwise, the youth sought to identify deeply resonant values in American civic culture that conflict with pervasive immigration enforcement practices.[72] By exposing those contradictions, in part by penetrating sites—like detention centers—that are typically hidden from view,

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63 May, *supra* note 12.
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *See* Tania A. Unzueta Carrasco and Hinda Seif, *Disrupting the Dream: Undocumented Youth Reframe Citizenship and Deportability through Anti-deportation Activism*, 12 LATINO STUD. 279, 286–89 (2014).

the youth introduced to public discourse other reformist strategies and vocabulary.[73]

Building on these new strategies and honing their reformist efforts, beginning in July 2013, the "Dream Nine," leaders in the U.S. undocumented youth movement also associated with NIYA, crossed the border to Mexico and turned themselves in at the border alongside other undocumented people who had left voluntarily or had been removed from the United States.[74] Their plan, in initiating this campaign to "Bring Them Home," was to demand to be allowed to return to the United States with applications for humanitarian parole and other relief in hand—relief for which they may qualify, but which is not traditionally sought by long-term residents of the United States or recent deportees.[75] The activists publicized their actions through the national and international media, brazenly claiming lawful membership despite their lack of generally recognized legal status. The youth also linked their membership claims to those

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[73] *See* National Immigrant Youth Alliance, *Bring Them Home: Lizbeth Mateo Checking in From Oaxaca, Mexico*, YOUTUBE (July 17, 2013), https://www.youtube.com/watch?v=sDUyCszvQgk; National Immigrant Youth Alliance, *Bring Them Home: Lulu Martinez Checking in From Mexico City*, YOUTUBE (July 20, 2013), https://www.youtube.com/watch?v=BAvoS2QdHSg; National Immigrant Youth Alliance, *Bring Them Home: Marco Saavedra Checking in From Mexico*, YOUTUBE (July 18, 2013), https://www.youtube.com/watch?v=Eb8q0oVJ1Ys; National Immigrant Youth Alliance, *Maria Checking in after 5 days in solitary confinement, Call from Eloy 8/2/13*, SOUNDCLOUD (2013), https://soundcloud.com/theniya/maria-isolated.

[74] *See* Gene Demby, *The Dream 9 Pushes the Envelope (And Their Allies' Buttons)*, NPR: CODE SWITCH (Aug. 20, 2013, 10:45 AM), http://www.npr.org/sections/codeswitch/2013/08/20/213790881/the-dream-9-pushes-the-envelope-and-their-allies-buttons; Prerna Lal, *Why I Support the Bring Them Home Campaign*, HUFFINGTON POST: THE BLOG (July 22, 2013, 11:48 AM), http://www.huffingtonpost.com/prerna-lal/why-i-support-the-bring-t_b_3628647.html.

[75] *See* Lal, *supra* note 74; *see also* Cristina Beltrán, *'Undocumented, Unafraid, and Unapologetic': DREAM Activists, Immigrant Politics, and the Queering of Democracy*, *in* FROM VOICE TO INFLUENCE: UNDERSTANDING CITIZENSHIP IN A DIGITAL AGE 80–104 (D. Allen & J.S. Light, eds., 2015); Heredia, *supra* note 12. Humanitarian parole is a discretionary permission to enter the United States for urgent humanitarian reasons or for significant public benefit related, for example, to family reunification, medical emergencies, or civil and criminal court proceedings among other possible grounds. *See, e.g.*, Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1882 (d)(5); 8 C.F.R. § 212.5.

of more vulnerable and less sympathetic community members by demanding entry alongside others differently situated, and forcing the state's hand by calling upon purportedly shared values.[76]

Among the Dream Nine were Lizbeth Mateo, Lulu Martinez, and Marco Saavedra.[77] Lizbeth Mateo was raised in Los Angeles, it had been fifteen years since she had seen her family in Mexico, and she was just about to begin her first year of law school at Santa Clara University School of Law.[78] Lulu Martinez immigrated to the United States at age three, and Saavedra, a graduate of Kenyon College in Ohio and a poet and painter, also immigrated as a child and worked at his family's restaurant in New York City.[79] All are undocumented and risked being prohibited from entering the United States, or being criminally prosecuted for immigration-fraud-related offenses.[80] Yet, in the demand to "Bring Them Home," the Dream Nine called upon egalitarian and humanist values in U.S. constitutional and civic traditions, and dramatized the interconnection of the Dream Nine's fates with those of others vulnerable to deportation, as well as the more than 1.7 million who have already been removed from the United States.[81]

As Prerna Lal, a formerly undocumented youth organizer, Dreamer, and lawyer, relayed in her essay *Why I Support the Bring Them Home Campaign*:

> Lulu, Lizbeth and Marco are placing incredibly faith in our laws, in our sense of justice, and in our ability to do the right thing for them and the 1.7 million deported by Obama's deportation regime. If they fail to make it to the United States, it is not their failure. It

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[76] *See, e.g.*, Cindy Carcamo, *Immigrant Rights Activists at Odds Over 'Dream 9'*, L.A. TIMES (Aug. 10, 2013), http://articles.latimes.com/2013/aug/10/nation/la-na-ff-dreamer-protest-20130811.

[77] Lal, *supra* note 74.

[78] *Id.*; Aura Bogado, *The Dream 9 Come Home*, COLORLINES (Aug. 8, 2013, 9:02 AM), http://www.colorlines.com/articles/dream-9-come-home.

[79] Lal, *supra* note 74.

[80] *See id.*

[81] *See id.*

> is our failure to respect, honor and uphold human life, human rights and dignity . . . .[82]

One scholarly commentator has characterized similar claims of unauthorized migrants for inclusion despite their status as "presenting states with an existential dilemma: either treat people as humans and risk changing who you are (in terms of the composition of your population), or give up human rights and risk changing who you are (in terms of your constitutive commitments)."[83] NIYA and the "Bring Them Home" participants present this challenge unequivocally: either admit these young people who are members of the U.S. polity but for their immigration status, as well as those many others deported from the United States whose lives and fates are connected, or risk losing claim to equality, lenity, and meritocracy as core American values.

The activists' demands also directly challenge other conceptual and legal bases of U.S. immigration law enforcement, which generally differentiate "good" from "bad" and "criminal" aliens, primarily along lines of legal status and law-breaking. The "Bring Them Home" actions upend this logic by insisting on a claim of belonging despite a lack of legal status, tying that claim of belonging to all of the more than 1.7 million deported, doing so while engaging in law-breaking, and invoking a deeper faith in and form of law and justice.[84]

Critical also to the interventions of the NIYA activists is their direct challenge to the equation of immigration law-breaking with criminality—a flawed premise at the core of the *Lopez-Mendoza* majority opinion and much regressive immigration law and policy.[85]

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[82] *See id.*

[83] *See* Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013*, 54 HARV. INT'L L.J. 315, 315 (2013).

[84] *See* Lal, *supra* note 74; *see also* Linda Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, 16 CRITICAL REV. INT'L SOC. & POL. PHILOSOPHY 344, 350 (2013) ("This notion of amnesty entails a normative reversal: the purported perpetrators were actually in the right, while the government itself is at least partly culpable.").

[85] *See* 468 U.S. 1032, 1038 (1984).

This challenge unfolds through ongoing protests and in the circulation of graphic art challenging criminal-immigration enforcement.[86]

Youth activists have sought instead to align immigration lawbreaking with other social movements that have worked to remove shame from socially subordinated statuses. In publicly claiming the status "undocumented," the youth activists seek to confer upon that identity strength and pride—mobilizing a complicated array of associations, and likening "coming out" of the closet as queer and proud to fearlessly proclaiming one's undocumented status or "coming out as undocumented and unafraid."[87]

The "Bring Them Home" campaign has effectively enabled additional infiltrations, as certain participants were placed in detention upon entering the United States.[88] Once detained, the Dream Nine began to organize to address conditions of confinement at Eloy detention center in Arizona—a large detention center administered by Corrections Corporation of America, a private prison company that contracts with Immigration and Customs Enforcement.[89] Certain of the youth activists began a hunger strike and were placed in solitary confinement as a disciplinary measure.[90]

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[86] For an example of the graphic art associated with the youth movement, see Favianna Rodriguez's piece, entitled "We Can't Wait. We Won't Be Criminalized."

[87] See, for example, Khushboo Gulati's piece, entitled "Undocumented & Unafraid, Queer & Unashamed." *See also* Seif, *supra* note 57.

[88] *See President Obama Tortures Dreamers—Six of the DREAM 9 Are Now In Solitary Confinement*, PRERNA LAL: ADVENTURES OF A QUEER INDO-FIJIAN (July 26, 2013) [hereinafter *President Obama Tortures Dreamers*], http://prernalal.com/2013/07/president-obama-tortures-dreamers-six-of-the-dream-9-are-now-in-solitary-confinement/; Perla Trevizo, *Grijalva, Pastor to Obama: Let 'Dream 9' Stay*, ARIZ. DAILY STAR (July 31, 2013, 12:00 AM), http://tucson.com/news/local/border/grijalva-pastor-to-obama-let-dream-stay/article_df282df9-8966-5c5e-9a1f-19ce36c5d473.html ("Arizona representatives have joined colleagues in the House in a letter sent to President Obama asking him to use his discretion to allow the 'Dream 9' to stay in the country. . . . They remain at the Eloy Detention Center . . . ."); Jonathan Blitzer, *Dreamers at the Border*, NEW YORKER (Oct. 3, 2013), http://www.newyorker.com/news/news-desk/dreamers-at-the-border; Christopher Sherman, *US-Raised Immigrants Remain in Custody at Border*, ALBUQUERQUE J. (Oct. 1, 2013), http://www.abqjournal.com/272488/abqnewsseeker/us-raised-immigrants-remain-in-custody-at-border.html.

[89] *See President Obama Tortures Dreamers*, *supra* note 88.

[90] *See id.*

Lulu Martinez, a member of the Dream Nine detained at Eloy, faced disciplinary charges and solitary confinement for "prohibited act #213 – Group Demonstration" after she sought to mobilize women who had been denied access to phone calls to attorneys, family, and friends.[91] Her "Detainee Statement," submitted as evidence at her hearing, captures further dimensions of the youth activists' organizing approach. Martinez wrote the following in her statement submitted for consideration at her disciplinary hearing, where she faced a solitary confinement sentence:

> Several female inmates including myself have not been able to make calls to our attorney, family and friends. All of my calls have been restricted and I have asked countless times to be instructed on how to resolve the issue. The detainee handbook supplement indicates we should have been allowed to make a call within a 24 hr period from the time that we requested assistance. Also several inmates have been advised/warned/intimidated by CCA staff to not speak, communicate or interact with myself and other Charlie inmates. On one occasion detainee Lizbeth Mateo and myself requested to see Ms. Villa about the issues mentioned above, however, we never received notice/a reply from her. Overall communication with inmates, staff and family and attorneys outside the facility has been severely limited or completely restricted. Several inmates and myself have cooperated and abided by the regulations and policy to resolve the above mentioned issues/concerns. Today during dinner chow, inmate Maria and myself announced out loud that we were distributing a free legal hotline number for the female inmates who could not afford and did not have legal representation. We also communicated that if they were being treated unjustly they had to speak up. I know

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[91] *See* ELOY DET. CTR., CORR. CORP. OF AM., FINAL IDP HEARING REPORT: MARTINEZ-VALDEZ, LULU (Aug. 2, 2013) [hereinafter ELOY], http://www.latinorebels.com/2013/08/05/institution-disciplinary-panel-report-dream9-detainee-lulu-martinez-valdez/.

> that many do not speak or read Spanish and/or English and are never informed about the policy/regulation at this facility and therefore do not document concerns. In the spirit of love and community Maria Ines and myself chanted "Sin papeles y sin miedo" "Las calles son del pueblo, el pueblo donde esta? El pueblo esta en las calles exiendo libertad". We were then escorted out of the eating area and the other female inmates were not allowed to leave. . . .[92]

Lulu Martinez was sentenced to fifteen days of disciplinary segregation, effectively, solitary confinement.[93] In total, six of the Dream Nine were placed in solitary confinement.[94]

The actions and protests of the Dream Nine were then publicized by NIYA organizers outside detention to call media attention, as well as government officials' focus, to the plight of non-violent persons—including youth like Martinez—who are placed in solitary confinement for extended periods in purportedly civil detention for the purpose of immigration case processing.[95]Only a few days after the Dream Nine's initial confinement, thirty-three Arizona lawmakers wrote to President Obama to express support for those immigrant youth placed in solitary confinement, recognizing the youth activists as "victims of our broken immigration policy."[96] Lawmakers urged that the youth activists "deserve to come home to the United States," and praised the Dreamers for taking "this courageous step . . . fighting to reunite families separated by the border and mass deportation policies . . . ."[97]

Shortly after, the administration issued new regulations limiting the use of disciplinary segregation or solitary confinement in immigration detention centers.[98] And the Obama administration released

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[92] *Id.*

[93] *Id.*

[94] *President Obama Tortures Dreamers*, *supra* note 88.

[95] *See, e.g.*, *id.* Julio Salgado's piece, titled "Free the Dream 9" is a further example of the graphic art-making associated with the NIYA actions.

[96] *See* Trevizo, *supra* note 88.

[97] *See id*.

[98] *See* U.S. IMMIGRATION & CUSTOMS ENF'T, FEDERAL ENTERPRISE ARCHITECTURE NO. 306-112-002b, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES (2013).

all of the Dream Nine into the United States, indicating, at least for the time being a choice to adhere publicly to certain constitutive commitments of an egalitarian and integrationist character.[99]

The youth activists have made plausible claims that once seemed implausible.[100] By claiming the power to transform immigration law and policy through raising undocumented voices and visibility, by enacting those transformed power relationships from within infiltrated immigration detention centers, and claiming rights beyond those that U.S. law presently contemplates, NIYA's youth leaders simultaneously perform and enact their rallying cry—"undocumented and unafraid."

The youths' increasingly visible activist engagement has also coincided with a broader shift in public opinion about the legitimacy of immigration enforcement and detention practices. A *New York Times* editorial published several months later, "End Immigration Detention," deems U.S. immigration detention "the most indefensible" part of "all the malfunctioning parts in the country's broken-down immigration machinery," noting how it "shatters families and traumatizes children."[101]

Saavedra, a Dreamer and infiltrator, explains NIYA's civil disobedient tactics as efforts, in his own words, "to subvert hegemonic relationships . . . through the theater of the oppressed."[102] Saavedra's account of NIYA's immigrant rights advocacy insists that the rights sought already belong to undocumented people: "We're human beings. We have a claim to rights because, yes, they rightfully belong to us."[103] This formulation fundamentally unsettles immigration law's existing sovereign restrictionist logic and harsh enforcement strategies, both by attributing lawfulness and rightfulness to those elsewhere maligned as law-breakers—inmates in disciplinary segregation or solitary confinement, and those Justice O'Connor in *Lopez-Mendoza* deems a criminal class—and by modeling reconfig-

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99 *See* Bogado, *supra* note 78; Blitzer, *supra* note 88.

100 *See also* Bosniak, *supra* note 84.

101 The Editorial Board, *End Immigration Detention*, N.Y. TIMES (May 15, 2015), http://www.nytimes.com/2015/05/15/opinion/end-immigration-detention.html?_r=0.

102 *See* May, *supra* note 12.

103 *See id.*

ured regulatory processes in which impacted persons have a powerful participatory role.[104] In all of these settings, NIYA's civil disobedience claims higher moral and legal legitimacy for its side and seeks to provoke executive-level and legislative change in line with its agenda—in a manner reminiscent of a tradition of civil disobedience that runs from Saint Thomas Aquinas to Martin Luther King's *Letter from Birmingham Jail*.

On September 30, 2013, the "Bring Them Home" campaign continued as the "Dream Thirty" presented themselves at the Laredo port of entry, sporting caps and gowns, and seeking permission to enter the United States, while chanting en masse "undocumented and unafraid."[105] Almost three-dozen people marched across the U.S.-Mexico border—thirty-four individuals in total, including several minors accompanied by their adult family members.[106] As with the "Dream Nine," the "Dream Thirty" were initially detained, but within hours, some of them were released into the United States.[107]

The "Dream Thirty" action underscored the impossibility of using a large-scale removal program to appropriately sort deserving from undeserving non-citizens, as U.S. citizen children are effectively removed along with their illegally present parents. One of the "Dream Thirty" admitted to the United States immediately following the cross-border action is Elsy Nunez, who is a Honduran national and once undocumented resident of the United States, as well as the mother of a four-year old U.S.-born daughter, Valeria, who suffers from cerebral palsy and a ruptured eardrum. Despite repeated attempts to re-enter the country, Nunez had been turned away and had been unable to access medical care for her daughter. But after participating in the Dream Thirty action, she obtained entry to the

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104 *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1047 (1984).

105 *See* Sherman, *supra* note 88.

106 *See id.*

107 *See* Roque Planas, *Big Win for Immigrant Activists Who Staged Border-Crossing Protest in Laredo*, HUFFINGTON POST: LATINO VOICES (Oct. 1, 2013, 6:56 PM), http://www.huffingtonpost.com/2013/10/01/dream-30-released_n_4025368.html; Christopher Sherman, ASSOCIATED PRESS, cited in Matt Pearce, *33 'Dreamers' Detained at Texas Border Crossing, Activist Says*, L.A. TIMES (Sept. 30, 2013), http://articles.latimes.com/2013/sep/30/nation/la-na-nn-texas-border-crossing-20130930; *see also* Volpp, *supra* note 13.

United States.[108] Also among the Dream Thirty released immediately into the United States were several other parents and children who traveled together, with the children ranging in age from thirteen to sixteen.[109]

The Dream Thirty likewise sought humanitarian parole, a form of exception to typical immigration procedures granted to address humanitarian emergencies.[110] In addition to claiming humanitarian emergency, the Dream Nine's attorney, Margo Cowan, has explained: "For all intents and purposes, they are Americans, except for on paper"[111]—again, a fundamental challenge to the categories and distinctions that ground immigration law enforcement. The activists' disobedience lies not only in refusing to remain silent and in provocatively challenging immigration law enforcement, but also in aggressively using the law against itself. The immigrant youth activists demand to cross the border en masse in ways not contemplated by existing legal frameworks and arguably in violation of existing law. In so doing, the youth activists have forced the law to bend to their demands (in a more public manner than immigration adjudication, even with enhanced procedural protections would permit), or lose its claim to legitimacy.

III. RE-IMAGINING IMMIGRATION REFORM

What forms of immigration justice are suggested, then, by these disobedient Dreamers? In decrying the illegitimacy of deportation—by insisting that there be "Not One More Deportation"—the youth activists have staked out a position that re-conceptualizes the immigration debate and places the burden on those who aim to curtail the human right to freedom of movement.

Although the Dreamers' claims to a "right to remain" and "freedom of movement" may seem an especially radical reconceptualization of U.S. immigration norms, these youth invoke a deep and longstanding current in U.S. political discourse—and even in U.S. constitutional law—that embraces a human right to freedom of movement. In *Kent v. Dulles*, for example, the U.S. Supreme Court

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108 *See* Planas, *supra* note 107.
109 *See id.*
110 *See Id.*
111 *See id.*

recognized a tradition in U.S. constitutional law that echoes the youth activists' claim. Justice Douglas, writing for the Court, declared: "Freedom of movement is basic in our scheme of values."[112] The Court further noted that the freedom of movement is "deeply engrained in our history":

> Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.[113]

Moreover, the human right to flee one's state is widely known and explicitly adopted in the Declaration on Human Rights, Article 13, as are the moral claims of people for family unity, political expression, and other basic human needs.[114] But to recognize those other fundamental rights, as the youth activists powerfully contend, requires recognition of a human right and a moral right to move, and also a moral right for sufficiently just and livable conditions that one might choose to stay.[115]

Rather than a call for open borders, the youth activists may be understood, in their exhortation that there be "not one more deportation," to invoke an ethic of positive abolition in the immigration reform context.[116] The early twentieth century scholar and activist

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[112] *See* 357 U.S. 116, 126 (1958).

[113] *See id.*

[114] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[115] Kieran Oberman, *Immigration as a Human Right*, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP (Sarah Fine & Lea Ypi, eds.) ("Commitment to these already recognized human rights thus requires commitment to the further human right to immigrate, for without this further right the underlying interests are not sufficiently protected.").

[116] *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 166, 169–70 (2013). Du Bois explains: "The South . . . opposed . . . education, opposed land and capital . . . and violently and bitterly opposed any political power. It fought every conception inch by inch: no real emancipation, limited civil rights . . . ." *Id.* at 166. Du Bois

W.E.B. Du Bois understood abolition to be not just a negative project of eliminating the institution of slavery, but also a positive project of building substitutive social democratic forms of coexistence that would meaningfully displace that unjust and dehumanizing institution.[117] According to Du Bois, Reconstruction failed, in significant part, because the abolition of slavery was not accompanied by the establishment of other egalitarian social and political institutions and frameworks for democratic coexistence.[118] Positive, substitutive abolition in the immigration context likewise contemplates a constellation of substitutive alternatives to immigration restrictions that enable a right to freedom of movement, including a right to remain, and that would tether immigration regulation to economic development and other measures to address human needs rather than restrictionist border enforcement.[119]

Can we imagine a world in which efforts to regulate immigration operate by addressing the push and pull factors that drive migration rather than through a criminal-typed framework of immigration enforcement and a criminal-typed procedurally focused vision of immigration justice? Much of what sustains especially large-scale migration is the capacity to earn more and remit monies home or to flee violence and insecurity. Targeted programs to shape the push factors that cause people to move in large numbers, that incentivize return, and that enable a right to stay would do much to address those large-scale migrations that are the cause of most concern in receiving states. And they would do so in a way less linked to mass human

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concludes: "Slavery was not abolished even after the Thirteenth Amendment. There were four million freedmen and most of them on the same plantation, doing the same work that they did before emancipation . . . ." *Id.* at 169. In response to the question of how freedom was to "be made a fact," Du Bois wrote: "It could be done in only one way. . . . They must have land; they must have education." *Id.* "The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States" or *positive abolition*. *See id.* at 170; *see also* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

117 *See* DU BOIS, *supra* note 115, at 166–70.

118 *See id.* at 166, 169.

119 *See also* Linda Bosniak, *Arguing for Amnesty*, LAW, CULTURE AND THE HUMANITIES 1, 3–4 (2012) (exploring along different lines an analogy between efforts to secure immigration justice and abolition).

suffering than our current multi-billion dollar border fortification efforts, which have operated during a period when millions of people in fact immigrated to the United States without authorization. Of course, the question remains: how might we get from a space of pervasive criminalization that is hard even for those committed to reform to imagine beyond to a political space in which immigration might be addressed through focusing on its underlying causes and consequences and recognizing the deep human needs migration enables?

CONCLUSION

In responding to the urgent call to repair our failing immigration laws and policies, the bold disobedience of the Dreamers may not be replicated by those who study immigration law, administer immigration regulations, serve as legal advocates, or are tasked with enabling legislative reform. But something of the Dreamers' impulse toward justice, their courage in re-conceptualizing the terms of the debate, and their invocation of a higher form of law may already have emboldened those who have sought to humanize U.S. immigration regulation within and outside the government—and it ought, in turn, to expand our collective imagination.