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## Immigrant Defense Funds for Utopians

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# Immigrant Defense Funds for Utopians

César Cuauhtémoc García Hernández\*

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## *I. Introduction*

There was a cold front hitting the Eastern Shore of Canada and the United States in February 2008 when my partner and I left Boston for a long weekend in picturesque Quebec. Stopping for lunch at Derby Line, Vermont, we entered the one-room opera house turned library. Like something from the *Wizard of Oz*, a strip of yellow tape marked the boundary between the two countries. Books were displayed in the United States, the circulation desk sat in Canada. Just outside, a sign halfway up the block marked the dividing line yet again. Quickly, we walked around the block, my fascination acting as a buffer against the sub-zero temperatures. Born and raised in south Texas, I was astonished at the contrast. There were no guards, no guns, no fences. Only cute houses and piles of snow.

Borders are not born; they are made. As creatures of law and brute force, they shift shapes. Speaking at a large industry

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convention called the Border Security Expo in early 2018, Elaine Duke, the Deputy Secretary of Homeland Security, alluded to the role that law and law enforcement play in turning geographical spaces into juridical dividing lines.<sup>1</sup> “We used to distinguish between border security and interior enforcement. Now we’re lumping it all under border security,” she said.<sup>2</sup> The border, it seems, is now everywhere.

Duke’s comments laid bare the ugly, uninterrupted reality that has existed in many communities of color for many years. Just as the nation’s interior is now the border, the United States border has long been the interior. Three decades ago, the internal operations of my poor, Mexican community in south Texas were my personal and communal interior; this was the place I called home just as millions of others do now. Yet my interior was someone else’s border. Immigration policing, the keen observer of urban life Mike Davis wrote almost twenty years ago, sits in Latinos’ front yard.<sup>3</sup> The border could be policed exceptionally because it was removed from the lived experiences of legislators and policy advocates in the nation’s interior. Meanwhile, my border was someone else’s interior. Stepping off an airplane for the first time as a high school student, I visited the foreign landscape of Washington, D.C. A few years later, I drove from south Texas to Rhode Island, staring bewilderingly at the changing landscape and New England’s foreign culture. As Duke’s comments suggest, law and policy alter borders. So, too, do culture and rhetoric.

In the second year of the Trump Administration, legislators and advocates find themselves facing shifting borders in another way. Political norms that were once off-limits are now accepted pressure tactics. This is no more evident than in tensions over

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1. Elaine Duke, Deputy Secretary, Department of Homeland Security, Opening Keynote at the Border Security Expo (Jan. 31, 2018).

2. See Roque Planas (@RoqPlanas), TWITTER (Jan. 31, 2018, 6:45 AM), <https://twitter.com/RoqPlanas/status/958712785189433345> (last visited Sept. 20, 2018) (on file with the Washington and Lee Law Review). A similar development is occurring in Southern Europe. See MATTEO AMBROSINI, IRREGULAR IMMIGRATION IN SOUTHERN EUROPE 68 (2018) (“Border controls . . . are increasingly being supplemented with policies of exclusion and discouragement of those unwanted aliens who passed the border.”).

3. MIKE DAVIS, MAGICAL URBANISM: LATINOS REINVENT THE U.S. CITY 59 (2000).

immigration policies. As the Trump Administration continues to ratchet up the severity of the federal government's immigration policing tactics, state and local officials find themselves in an unfamiliar light. To high-level officials in the Trump Administration, elected officials who do not follow the Administration's heavy-handed approach to immigration law enforcement are no different from the migrants the federal government is targeting. They are, as acting head of the Immigration and Customs Enforcement agency Thomas Homan said of the Oakland mayor, akin to gang members.<sup>4</sup>

The Trump Administration's equivalent vilification of migrants and their allies presents an opportunity, but not one without substantial complications. Liberal elected officials, long accustomed to avoiding the ire of personal liability, are seeing their traditional insulation come under attack.<sup>5</sup> Faced with federal officials who view them as complicit in endangering the public, they are presented with the opportunity to embrace a politics of solidarity with migrants by pushing the boundaries of previously acceptable policies.<sup>6</sup> No example has gained more currency since President Trump entered the White House than immigrant defense funds, pools of public or private dollars intended to assist migrants facing the possibility of immigration imprisonment or removal.<sup>7</sup> Several immigrant defense funds now exist, and others are in the planning stages.<sup>8</sup> As they have gained currency, however, immigrant defense funds have become sites of contestation between competing visions of who deserves to belong in the United States.<sup>9</sup> Membership in the political community is

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4. *US Immigration Attacks Oakland Mayor for Warning of Raid That Arrested 150*, GUARDIAN (Feb. 28, 2018), <https://www.theguardian.com/us-news/2018/feb/28/ice-immigration-raid-northern-california-oakland-mayor-warning> (last visited Sept. 20, 2018) (on file with the Washington and Lee Law Review).

5. See *infra* notes 19–24 and accompanying text (discussing the acting ICE Director's criticism of public officials' efforts to limit cooperation with ICE).

6. See *infra* notes 19–24 and accompanying text (describing the acting ICE Director's frustration with "sanctuary cities").

7. See *infra* Part III (discussing immigrant defense funds under the Trump administration).

8. See *infra* Part III (describing an increase in immigrant defense funds).

9. See *infra* Part III (noting the debate surrounding the funds'.

being hashed out through debates about limitations on the use of immigrant defense funds' finite resources.<sup>10</sup>

This Essay examines the increasing popularity of immigrant defense funds with a critical lens toward common exclusions against people convicted of certain crimes.<sup>11</sup> It argues that framing these funds as progressive responses to the Trump administration's unjustified targeting of migrants is conceptually and politically problematic.<sup>12</sup> Treating migrants as victims of excessive cruelty fosters an innocence narrative that is factually misleading because migrants in need of legal counsel are not any more innocent than anyone else.<sup>13</sup> Constructing defense funds around false narratives means that the rationale for the defense funds' existence is likely to crumble and, with it, the funds themselves. For the many migrants who stand to benefit enormously from defense fund legal representation, this is too much of a risk. Instead, this Essay urges advocates and elected officials to envision immigrant defense funds as responses to embedded racial and class discrimination in the substance and procedure of criminal and immigration law practices as they have melded into crimmigration.<sup>14</sup>

## II. Converging Interests

For good reason, elected officials are insulated from prosecution for carrying out their legislative duties.<sup>15</sup> Free of the

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disbursements).

10. See *infra* Part III (discussing immigrant defense funds).

11. See *infra* Part IV (explaining that immigrant defense funds exclude people with certain criminal records).

12. See *infra* Part V (exploring the intersection of morality and jurisdictions' imagined identities).

13. See *infra* Part V (noting issues stemming from a misconception of innocence).

14. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 381 (1951) (explaining that legislators are free from arrest or civil process for what they do or say in legislative proceedings).

15. *Id.* at 377 ("Legislators are immune from the deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.").

threat of imprisonment, they are able to serve “the public good.”<sup>16</sup> Elaborating, the U.S. Court of Appeals for the Tenth Circuit explained,

Legislative immunity enables officials to serve the public without fear of personal liability. Not only may the risk of liability deter an official from proper action, but the litigation itself “creates a distraction and forces legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation.”<sup>17</sup>

Protecting the public by insulating their representatives, wrote Justice Clarence Thomas for a unanimous Supreme Court, has been part of Anglo-American law since “the Parliamentary struggles of the Sixteenth and Seventeenth Centuries’ and was ‘taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.’”<sup>18</sup>

Despite the doctrine of legislative immunity’s impressive lineage and adamant support within the judiciary, a Trump Administration top immigration law enforcement official became harshly critical of legislators who took positions out of line with administration objectives.<sup>19</sup> A holdover from the Obama Administration, Thomas Homan served as Immigration and Custom Enforcement’s (ICE) acting director for most of the administration’s first two years.<sup>20</sup> Homan took a broad view of ICE’s authority that fits comfortably within the heavy-handed approach favored by President Trump and Attorney General Jeff

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16. *Id.*

17. *Sable v. Myers*, 563 F.3d 1120, 1123–24 (10th Cir. 2009).

18. *Bogan v. Scott-Harris*, 523 U.S. 44, 48–49 (1998).

19. *Acting ICE Director Wants Politicians in Sanctuary Cities Charged with Crimes*, CBS NEWS, <https://www.cbsnews.com/news/acting-ice-director-wants-politicians-in-sanctuary-cities-charged-with-crimes/> (last updated Jan. 3, 2018, 11:54 PM) (last visited Sept. 20, 2018) [hereinafter *ICE Director*] (explaining that Homan believes politicians who run sanctuary cities should be charged with crimes) (on file with the Washington and Lee Law Review).

20. Homan stepped down before action on his confirmation. *See Tom Homan, Acting Director of Immigration and Customs Enforcement, Set to Retire*, CBS NEWS (May 1, 2018, 7:17 AM), <https://www.cbsnews.com/news/tom-homan-acting-director-of-immigration-and-customs-enforcement-set-to-retain/> (last visited Sept. 20, 2018) (“Tom Homan, the acting director of the agency charged with combating illegal immigration, is stepping down . . .”) (on file with the Washington and Lee Law Review).

Sessions.<sup>21</sup> Like his colleagues, Homan frequently criticized city and county efforts to limit cooperation with ICE as “sanctuary cities.”<sup>22</sup> In December 2017, Homan broke ground among leading administration officials by endorsing criminal prosecution of elected officials in these jurisdictions.<sup>23</sup> In an interview aired on Fox News, Homan said, “We’ve got to take these sanctuary cities on, we’ve got to take them to court and we’ve got to start charging some of these politicians with crimes.”<sup>24</sup>

Calling for criminal prosecution of elected officials who support policies that Homan thinks are unwise, even illegal, is a new development in the long-heated political fray over immigration. To threaten political opponents with prosecution—presumably even with imprisonment upon conviction—is to move far beyond the realm of acceptable discourse for top representatives of the federal government. Despite that breach of a political norm, actual conviction and imprisonment is unlikely of any elected official simply for taking a friendlier approach toward migrants than Homan and his colleagues would like. The current political moment is not the first period in which ideological battles have been pitched.<sup>25</sup> In the midst of Cold War hysteria, the Supreme Court noted, “In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed.”<sup>26</sup> Decades later, the legislative immunity doctrine remains robust.<sup>27</sup>

Nonetheless, Homan’s comment illustrates one way in which the Trump Administration has redrawn political alliances related to immigration. A strong immunity doctrine may prevent

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21. See *ICE Director*, *supra* note 19 (describing Homan’s strong approach to California’s “sanctuary state” law).

22. *Id.*

23. *Id.*

24. Elise Foley & Roque Planas, *Trump ICE Chief Wants to Prosecute Politicians Who Won’t Lock Up More Immigrants*, HUFFINGTON POST (Jan. 3, 2018), [https://www.huffingtonpost.com/entry/immigration-ice-sanctuary-policies\\_us\\_5a4d6610e4b06d1621bd0682](https://www.huffingtonpost.com/entry/immigration-ice-sanctuary-policies_us_5a4d6610e4b06d1621bd0682) (last visited Sept. 20, 2018) (on file with the Washington and Lee Law Review).

25. See *e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 380–83 (1951) (debating legislative free speech against a backdrop of fascism and civil rights).

26. *Id.* at 378.

27. See *Bogan*, 523 U.S. at 49 (“State and regional legislators are entitled to absolute immunity from liability.”).

conviction, but it does not stop prosecution and the heavy toll the mere threat of criminal punishment entails. To Homan and his administration's supporters, the distinction between migrant lawbreakers and some supportive elected representatives has blurred to the point of irrelevance. Perhaps it has ceased to exist altogether. President Trump seems to see himself as waging a hero's fight against the myriad forces allied against a white, Christian citizenry. In that battle between good and evil, Trump Administration officials are on the side of good; everyone else has lined up with the enemy.

The Trump Administration's fairy tale version of contemporary politics opens the possibility of innovative oppositional alliances. In his canonical 1980 article, *Brown v. Board of Education and the Interest-Convergence Dilemma*, the late Derrick Bell offered a stinging critique of school desegregation litigation and an equally damning assessment of the hegemony of racism in the United States.<sup>28</sup> "The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites," he wrote.<sup>29</sup> Bell's theory painted racial group interests too broadly,<sup>30</sup> but its central theoretical contribution remains persuasive: the possibility of forward-moving shifts in the law exist in moments in which elite interests align with those of subordinated groups.<sup>31</sup> Like immigration law policing, the law's borders can move. Through the power of opportunistic alliances, the Trump Administration's virulent attacks on the political elites of cities, counties, and states offers a tantalizing moment of interest convergence.<sup>32</sup> If nothing and no

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28. See generally Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

29. *Id.* at 523.

30. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 156, 165–69 (2011) ("[T]he theory's overly broad conceptualization of 'black interests' and 'white interests' obscures the intensely contested disputes regarding what those terms actually mean.").

31. See Bell, *supra* note 28, at 528 ("Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized.").

32. See Cathleen Decker, *Trump's War Against Elites and Expertise*, L.A. TIMES (July 27, 2017 3:00 AM), <http://www.latimes.com/politics/la-na-pol-trump-elites-20170725-story.html> (last visited Oct. 2, 2018) (discussing Trump's various



one is safe from the Trump Administration's threats, then elected officials might as well do what they think is right to defend migrants.

### III. Immigrant Defense Funds

This leads, of course, to the most important question: what is the right thing to do? The U.S. Department of Homeland Security (DHS) can deploy ICE and Border Patrol agents where and how it sees fit in the United States.<sup>33</sup> With almost 40,000 law enforcement officers between them, this is a sizable policing apparatus.<sup>34</sup> Despite renewed interest in "sanctuary" city declarations, no sub-federal government entity can actually guarantee freedom from immigration imprisonment and deportation.<sup>35</sup> As a result, some activists and academics have correctly noted that the "sanctuary" label is incomplete and potentially misleading.<sup>36</sup>

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attacks on political figures) (on file with the Washington and Lee Law Review).

33. See U.S. DEPT OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., AN ASSESSMENT OF THE PROPOSAL TO MERGE CUSTOMS AND BORDER PROTECTION WITH IMMIGRATION AND CUSTOMS ENFORCEMENT 17 (2005) (describing the division of immigration law enforcement authority split between the DHS Customs and Border Protection, including the Border Patrol, and Immigration and Customs Enforcement).

34. See César Cuauhtémoc García Hernández, *ICE Enforcement Actions: Something Old, Something New*, CRIMMIGRATION (Feb. 14, 2017, 4:00 AM), <http://crimmigration.com/2017/02/14/ice-enforcement-actions/> (last visited Sept. 20, 2018) ([W]ith 40,000 employees as his disposal . . . he does have the ability to throw the nightmare of the last eight years into overdrive.) (on file with the Washington and Lee Law Review).

35. See Michael Kagan, *The Truth About Sanctuary Cities*, NEV. INDEP. (June 29, 2017, 3:00 AM), <https://thenevadaindependent.com/article/sanctuary-campaigns-a-political-liability> (last visited Sept. 20, 2018) ("To declare their territory to be a 'sanctuary' sounds like active resistance, implying that they will somehow obstruct federal officers, or that they can grant some kind of immunity from federal law. Of course, they can't. And they don't.>").

36. See, e.g., *id.* ("The word 'sanctuary' suggests a place of safety, protection and shelter. Merriam-Webster says that it can also mean 'the immunity from law.' Therein lies the problem."); Michael Kagan, *What Do We Mean When We Talk About Sanctuary Cities?*, NEV. INDEP. (May 14, 2017, 3:40 AM), <https://thenevadaindependent.com/article/what-do-we-mean-when-we-talk-about-sanctuary-cities> (last visited Sept. 20, 2018) ("No one knows exactly what a sanctuary city is.") (on file with the Washington and Lee Law Review); Shakeer Rahman & Robin Steinberg, *Sanctuary Cities in Name Only*, N.Y. TIMES (Feb. 15,

Whether or not the sanctuary label is used, some elected officials are promoting migrants' place in the United States through the creation of immigrant defense funds.<sup>37</sup> From New York City's pioneering example in 2013 to efforts in Chicago, Los Angeles, and smaller cities like Seattle and Denver, elected officials are attempting to protect migrants by sheathing them with the law.<sup>38</sup> By equipping migrants facing the possibility of removal with legal counsel, local communities can limit the number of people removed because they were too poor to hire a lawyer.<sup>39</sup> Instead of suffering from the morally indefensible vagaries of poverty, communities that have created immigrant defense funds embrace the hallmark of access to justice campaigns; the outcome of judicial processes is not legitimate if people are not equipped to understand, as Justice Sutherland wrote on behalf of the majority of the Supreme Court in *Powell v. Alabama*,<sup>40</sup> "the science of law."<sup>41</sup> Hauled into immigration court without counsel, migrants are essentially forced to fight for their right to remain in

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2017), <https://www.nytimes.com/2017/02/15/opinion/sanctuary-cities-in-name-only.html> (last visited Sept. 20, 2018) ("It's not enough for cities like New York to declare themselves 'sanctuaries,' which simply means that the local police won't detain noncitizens on the federal government's behalf.") (on file with the Washington and Lee Law Review); Sophie Quinton, *Controversy Over "Sanctuary" Campuses is Misleading, Legal Analysts Say*, PBS (Dec. 17, 2016), <https://www.pbs.org/newshour/nation/sanctuary-campus-controversial> (last visited Sept. 20, 2018) ("There's no consensus on what it means to be a sanctuary campus. And the word 'sanctuary' inflates the relatively minor demands that activists are asking of college administrators.") (on file with the Washington and Lee Law Review); Alex Kotlowitz, *The Limits of Sanctuary Cities*, NEW YORKER (Nov. 23, 2016), <https://www.newyorker.com/news/news-desk/the-limits-of-sanctuary-cities> (last visited Sept. 20, 2018) ("What these mayors didn't say, however, was how their municipalities would be able to prevent the federal government from exerting its authority—and what they mean by the term 'sanctuary city.'") (on file with the Washington and Lee Law Review).

37. See, e.g., Maura Ewing, *Should Taxpayers Sponsor Attorneys for Undocumented Immigrants*, ATLANTIC (May 4, 2017), <https://www.theatlantic.com/politics/archive/2017/05/should-taxpayers-sponsor-attorneys-for-undocumented-immigrants/525162/> (last visited Sept. 20, 2018) (exploring how some cities and states are funding pro-bono legal counsel for deportation proceedings) (on file with the Washington and Lee Law Review).

38. See *id.* (describing municipal legislation funding defense funds).

39. See *id.* (describing the funding of pro-bono legal services).

40. 287 U.S. 45 (1932).

41. *Id.* at 69.

the United States blindfolded and with one hand tied behind their backs. Defense funds are one concrete attempt to force a sense of fairness into immigration law, long criticized as a present-day bastion of de jure discrimination.<sup>42</sup>

The success that immigrant defense funds ultimately have is constrained by multiple design limits. Funding is the most obvious. Cities, counties, and states are facing the prospect of making sizeable financial contributions to the well-being of migrants. Offsetting some of the cost, a number of individual and private philanthropists have shown themselves willing to partner with government entities.<sup>43</sup> In addition, the small number of fiscal analyses that have been done of immigrant defense funds indicate that they partly offset their operational costs by avoiding expenses associated with facing immigration court cases without legal counsel.<sup>44</sup> Nonetheless, the financial outlay is substantial.<sup>45</sup> Where the political will is present, though, some governments at least have proven themselves able to find the money.<sup>46</sup>

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42. See, e.g., Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE. W. RES. L. REV. 993, 1010 (2016) (explaining that “law enforcement agencies frequently employ race as a central investigatory tool in contemporary criminal and immigration enforcement”); D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 87–88 (2011) (criticizing a Supreme Court opinion holding that the Fourth Amendment did not apply to a Mexican citizen arrested and brought to the United States at the behest of United States law enforcement officers and whose home was searched by United States agents); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1133 (1998) (describing the disparate impact of facially neutral immigration laws since 1965).

43. See, e.g., Press Release, Vera Inst. of Just., SAFE Cities Network Launches: 11 Communities United to Provide Public Defense to Immigrants Facing Deportation (Nov. 9, 2017) (describing the Vera Institute of Justice’s Safe Cities Network as providing, among other things, grant funds to governments willing to use public money to operate immigrant defense funds) (on file with the Washington and Lee Law Review).

44. See JENNIFER STAVE ET AL., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 58 tbl.14 (2017) (estimating that New York City’s immigrant defense fund resulted in \$2.7 million in federal, state, and local taxes annually).

45. *Id.*

46. *Id.*

A second implementation obstacle arises directly from the question of political will. As immigrant defense funds have been planned and launched, advocates and policymakers have repeatedly grappled with the question of eligibility.<sup>47</sup> That is, who should the fund help? In search of cost-cutting measures, policymakers have frequently supported an exclusion for people convicted of certain criminal offenses.<sup>48</sup> These people are prohibited from accessing services paid for by immigrant defense funds.<sup>49</sup> To date, almost all jurisdictions that have created an immigrant defense fund have excluded people with certain criminal histories.<sup>50</sup> Even in New York City, which pioneered immigrant defense funds and where a robust advocacy network exists that is firmly committed to universal representation, the mayor has held firm to his position that people convicted of well over 100 crimes should not receive city funding.<sup>51</sup> After a heated campaign, opposing sides agreed to find private dollars to cover the people who the mayor wanted to exclude.<sup>52</sup>

Going far beyond measuring a jurisdiction's ability to allocate financial resources, immigrant defense fund exclusions implicate important normative questions of membership. Debates over excluding some people and not others flag important but hidden

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47. See Emma Whitford, *Immigrant Advocates Say NYC Legal Defense Funding Plan Limits Due Process*, GOTHAMIST (May 11, 2017, 3:30 PM), [http://gothamist.com/2017/05/11/immigrant\\_legal\\_defense\\_nyc.php](http://gothamist.com/2017/05/11/immigrant_legal_defense_nyc.php) (last visited Sept. 20, 2018) (“Mayor Bill de Blasio highlighted \$16.4 million to fund legal representation for non-citizen defendants in immigration court . . . [b]ut the funding is conditional, excluding New Yorkers who have been convicted of any of 170 felonies . . . .”) (on file with the Washington and Lee Law Review).

48. See *id.* (excluding those who have committed felonies deemed “violent and serious”).

49. See *id.* (noting the felony exemptions from New York City’s sanctuary protections).

50. *Id.*

51. *Id.*

52. See Emma Whitford, *Anonymous Donation Secures Immigrant Defense Funding Without Restrictions*, GOTHAMIST (Aug. 1, 2017, 10:42 AM), [http://gothamist.com/2017/08/01/anonymous\\_donation\\_secures\\_immigran.php](http://gothamist.com/2017/08/01/anonymous_donation_secures_immigran.php) (last visited Sept. 20, 2018) (“An injection of private cash is behind a compromise this week that will fund legal representation for all indigent immigrant New Yorkers at risk of deportation regardless of their criminal history. . . .”) (on file with the Washington and Lee Law Review).

ideological commitments about who deserves to make claims on the United States. As articulated in immigration scholarship, membership theory focuses attention on the markers of belonging in a particular community.<sup>53</sup> While it is clear that migrants participate in United States civic, economic, and political life, it is equally clear that, as a matter of law, they are not considered full members in the political community.<sup>54</sup>

The historical treatment of migrants as “Americans in waiting”<sup>55</sup> has become much more attenuated, especially for individuals who have engaged in criminal activity. For most of its history, the United States did not rely heavily on criminal law to indicate that a particular migrant was poorly suited to live or work within its borders. By the end of the twentieth century, though, criminal law and immigration law had become heavily entangled.<sup>56</sup> The Supreme Court recognized this radical restructuring of both areas of law in its landmark 2010 decision *Padilla v. Kentucky*.<sup>57</sup> Though formally focused on the Sixth Amendment right to effective assistance of counsel, the Court prefaced its doctrinal intervention through a historical exegesis:

While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The ‘drastic measure’ of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.<sup>58</sup>

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53. See *infra* notes 59–60 and accompanying text (examining immigration scholarship that addresses membership theory).

54. See Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2012) (defining “alien” in opposition to “citizen”).

55. See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2007).

56. See Yolanda Vázquez, *Enforcing the Politics of Race and Identity in Migration and Crime Control Policies*, in *RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING* 142, 144 (Mary Bosworth et al. eds., 2018) (describing recent effects of criminal law and immigration law’s entanglement).

57. 559 U.S. 356 (2010).

58. *Id.* at 360 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

Membership theory is remarkably well situated to examine the exclusions being debated and built into immigrant defense funds. “In its simplest form, membership is about belonging and inclusion,” writes D. Carolina Núñez.<sup>59</sup> At times defined according to territorial presence, at times according to status recognition conferred by formal law, membership theory arises in immigrant defense fund conversations as a “substitute[] for a more principled analysis of an individual’s membership in the United States.”<sup>60</sup>

#### *IV. Playing with Morality*

Policymakers’ consistent insistence on excluding people with certain criminal records from accessing immigrant defense funds suggests that criminality is a reliable measure of moral worth. This loose approach runs through immigration law and policy rhetoric. From President Trump to Attorney General Sessions to ICE Acting Director Homan, high-ranking officials repeatedly harp about the dangers migrants pose.<sup>61</sup> President Obama famously described his Administration’s immigration law enforcement priorities as targeting “felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.”<sup>62</sup> For his part, President Trump repeated his depiction of migrants as murderous gang members throughout his campaign and in more rarified events such as his 2018 State of the Union speech.<sup>63</sup>

Excluding migrants from defense funds because of their interactions with the criminal justice system follows in this vein.

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59. Núñez, *supra* note 42, at 112.

60. *Id.* at 138.

61. See, e.g., Jane C. Timm, *Trump Says ‘Caravans’ of Immigrants are Headed for the U.S. What’s He Talking About?*, NBC NEWS APR. 2, 2018, 4:43 PM), <https://www.nbcnews.com/politics/politics-news/trump-says-caravans-immigrants-are-headed-u-s-what-s-n862136> (last updated Apr. 5, 2018, 11:20 AM) (last visited Sept. 20, 2018) (discussing the President’s tweets about the dangerous “caravans” of immigrants headed to the U.S. border, bringing drugs and crime with them) (on file with the Washington and Lee Law Review).

62. Barack Obama, President of the U.S., Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014).

63. See Donald J. Trump, President of the U.S., State of the Union Address (January 30, 2018) (“For decades, open borders have allowed drugs and gangs to pour into our most vulnerable communities.”).

It presupposes that some people are not worthy of the government's assistance and that criminal histories are suitable proxies of worth. This logic is as simple as it is flawed. Accepting the logic that crime is a suitable marker of membership requires ignoring a series of prudential and normative pitfalls. First, this logic assumes that it is possible to determine who has engaged in criminal activity and who has not. To begin, people who have been convicted of a crime cannot necessarily be said to have performed the required actions, along with the mandated mental state, to satisfy the various elements of a given offense of conviction. Almost all convictions in recent years have resulted from the "horse trading" of plea negotiations between prosecutor and defense counsel, leading the Supreme Court to declare plea bargaining "not some adjunct to the criminal justice system; it is the criminal justice system."<sup>64</sup> Numerous examples exist of people who pleaded guilty only to have scientific evidence later unravel the conviction.<sup>65</sup> Similarly, it is common for people to plead guilty to a lesser offense to ensure that a prosecutor backs off pursuing conviction for a more serious crime. Though judges are required to ensure that there is a factual basis for a plea before accepting it,<sup>66</sup> it would defy all but the most superficial familiarity with plea negotiations to believe that this standard is fail-safe.

Second, focusing solely on the formal metric of criminality is imprecise because the very gauge used to determine if criminal activity occurred—a conviction—is itself contested. The definition of "conviction" used for purposes of immigration law does not conform to many penal definitions of the term, thus treating as criminals some people who the criminal justice system has not marked as such.<sup>67</sup> The Immigration and Nationality Act explicitly treats as a conviction any proceeding in which an "adjudication of

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64. *Missouri v. Frye*, 566 U.S. 134, 144 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

65. See BRANDON GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 150 (2011) (noting that, of the first 250 convicted individuals who were later exonerated by DNA evidence, 6% had been convicted by plea).

66. See FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

67. See generally INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2012).

guilt has been withheld.”<sup>68</sup> Many states do not.<sup>69</sup> As such, it is not unusual for a state criminal proceeding to decline to impose criminal punishment on the very individual who is viewed as a criminal for purposes of federal immigration law.<sup>70</sup> This results in the odd, but common, situation in which a person is both a criminal and not a criminal: a criminal under federal immigration law, but not a criminal under the state criminal law that actually governed the person’s criminal proceeding.<sup>71</sup>

Third, neither policing nor substantive criminal law in the United States aspire to comprehensively identify all perpetrators of crime. On the contrary, “discretion is essential to the criminal justice process,” the Supreme Court explained in *McCleskey v. Kemp*.<sup>72</sup> Most crime is not reported to the police.<sup>73</sup> When it is, police officers are not required to investigate all allegations of criminal activity.<sup>74</sup> On the contrary, individual officers and law enforcement agencies are afforded substantial discretion about how to deploy investigative resources.<sup>75</sup> Likewise, prosecutors are rarely under an affirmative obligation to pursue criminal charges.<sup>76</sup> The strength of evidence is irrelevant.<sup>77</sup> The Supreme Court is quite

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68. *Id.*

69. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 28–29 (2015) (describing the state standards for criminal conviction).

70. See *id.* (highlighting the differences between the criminal and immigration systems).

71. See *id.* (emphasizing inconsistencies that result from different definitions of “criminal”).

72. 481 U.S. 279, 296 (1987).

73. See JENNIFER L. TRUMAN, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION, 2015 5 (2016), <https://www.bjs.gov/content/pub/pdf/cv15.pdf> (reporting that, in 2015, less than half of violent crime and property crime was reported to police).

74. See Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 552 (1960) (noting that police officers sometimes do not investigate activity that they believe constitutes crime).

75. See Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 32 (2003) (“[S]carce resources do not permit officers to investigate everyone.”).

76. See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (explaining that the prosecution has broad discretion as to whom to prosecute).

77. See *id.* (“Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily



clear that the judiciary will rarely second-guess prosecutorial decisions.<sup>78</sup> In *McCleskey*, the Court turned in part to “the policy considerations behind a prosecutor’s traditionally ‘wide discretion’ [which] suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties” to reject a racial justice-motivated constitutional challenge to death sentences.<sup>79</sup> Even then, courts will only examine claims that prosecutions have moved forward on the basis of discrimination for a protected reason, and they will do so with a “presumption of regularity.”<sup>80</sup> As a result of the combined discretion granted to law enforcement and prosecutors, most criminal activity in the United States is not met with conviction.<sup>81</sup> Quite simply, most criminal offenders go free.

Fourth, using criminal activity to determine qualification for membership in the political community requires accepting that criminal activity marks people as good or bad. A prominent strain of criminal law’s theoretical justifications certainly claims to anchor criminal law in a collective morality.<sup>82</sup> The problem with this theory is that it no longer stands the rigor of close scrutiny, if ever it did.<sup>83</sup> The gap between shifting visions of morality and penal prohibitions is simply too large when it comes to many of the activities that lead migrants to immigration troubles because of

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susceptible to the kind of analysis the courts are competent to undertake.”).

78. See *id.* (noting a potential chilling effect on law enforcement).

79. *McCleskey*, 481 U.S. at 296.

80. *United States v. Armstrong*, 517 U.S. 456, 463–64 (1996) (internal quotations omitted).

81. See German Lopez, *The Great Majority of Violent Crime in America Goes Unsolved*, VOX (Mar. 1, 2017, 3:10 PM) <https://www.vox.com/policy-and-politics/2017/3/1/14777612/trump-crime-certainty-severity> (last visited Oct. 2, 2018) (“Meanwhile, less than half of violent crimes and less than one-fifth of property crimes that are reported are actually cleared by police and referred to prosecution.”) (on file with the Washington and Lee Law Review).

82. See, e.g., *Tropp v. Dulles*, 356 U.S. 86, 86 (1958) (describing one of the functions of criminal law as “reprimand[ing] the wrongdoer”); MODEL PENAL CODE & COMMENTARIES §§ 1.02(1)(a), (c) (1962) (claiming that the Model Penal Code is primarily concerned with preventing harm to people and to exclude from criminalization “conduct that is without fault”).

83. See Richard C. Fuller, *Morals and the Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 624, 625 (1942) (describing examples of conduct “although criminal in the legal sense, is not offensive to the moral conscience of a considerable number of persons”).

criminal activity. No shift in public attitudes toward criminalized activity is more well-known than possession and use of small amounts of marijuana.<sup>84</sup> While this remains a federal crime, by the start of 2018, eight states and Washington, D.C. had legalized recreational possession and use.<sup>85</sup> Most other states have decriminalized or legalized marijuana use for medical purposes.<sup>86</sup> My university, located in the heart of the country's pioneering experiment with recreational use legalization, offers courses on marijuana regulation and one of my colleagues holds a professorship in marijuana law.<sup>87</sup>

Despite this movement in public attitudes, reflected in public opinion polls, curricular course offerings, and state penal codes, federal immigration law remains constant. The Immigration and Nationality Act's two controlled substance offense provisions promise imprisonment and removal for "violation[s] of any law . . . of a State, the United States, or a foreign country relating to a controlled substance."<sup>88</sup> Criminal law's claim to mark moral

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84. See Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779, 782 (2018) ("Through acts of direct democracy, eight states plus the District of Columbia since 2012 have 'legalized,' within tight limits, the possession, use, cultivation and distribution of marijuana for recreational purposes.").

85. See *State Marijuana Laws in 2018 Map*, GOVERNING (Mar. 30, 2018), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Sept. 20, 2018) (demonstrating current state marijuana laws) (on file with the Washington and Lee Law Review).

86. See *id.* (detailing states where marijuana use is acceptable for medicinal purposes).

87. See, e.g., *Daniels Launches Business of Marijuana Class* (Mar. 24, 2017), <http://news.du.edu/daniels-launches-business-of-marijuana-class/> (last visited Sept. 20, 2018) (describing a course at the University of Denver's Daniels School of Business) (on file with the Washington and Lee Law Review); *Cannabis Journalism*, <https://www.du.edu/specpro/interterm/fall/cannabis.html> (last visited Sept. 20, 2018) (on file with the Washington and Lee Law Review); *Faculty and Staff Directory: Sam Kamin*, U. DENV. STURM C.L., <https://www.law.du.edu/faculty-staff/sam-kamin> (last visited Sept. 20, 2018) (listing Sam Kamin's title as the "Vicente Sederberg Professor of Marijuana Law and Policy," named after a prominent marijuana industry law firm) (on file with the Washington and Lee Law Review).

88. See INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2012) (declaring individuals who are convicted of or commit this activity inadmissible to the United States); *id.* § 1227(a)(2)(B) (declaring individuals who are convicted of this activity deportable from the United States). Though the deportation

worth loses its persuasiveness when immigration consequences attach differently based on the jurisdiction in which identical activity occurs. Possession of marijuana is celebrated as a pillar of Colorado's economy and a contributor to what makes the Denver metropolitan region a top destination for young internal migrants.<sup>89</sup> Two states over, Texas continues to criminally punish low-level drug offenses.<sup>90</sup> Is moral worth to be assessed differently because the drug use happens in Denver rather than Dallas? Relying on criminal laws that treat similar conduct so differently to mete out immigration law consequences subverts the power of immigration law to lay claim to a national standard of morality.

Lastly, using criminal adjudications as the foundation upon which to apply immigration consequences requires a misplaced faith in the ability of government officials to properly assess citizenship. While United States citizens and migrants are both subject to criminal law, citizens are immunized from immigration imprisonment and removal.<sup>91</sup> Law's formal immunization of citizens falls apart when government officials incorrectly identify a person's citizenship status. It is not clear how often this occurs, but academic findings, complemented by journalistic exposes, indicate it does with alarming regularity.<sup>92</sup> Political scientist

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provision exempts individuals convicted of "a single offense involving possession for one's own use of 30 grams or less of marijuana," migrants are subject to the inadmissibility provision if they ever leave the United States and attempt to return. Removal under either provision results in mandatory detention. *Id.* § 1226(c).

89. See Diego Zambiasi & Steven Stillman, *The Pot Rush: Is Legalized Marijuana a Positive Local Amenity?*, IZA Discussion Paper No. 11392, at 12 (2018), <ftp://repec.iza.org/RePEc/Discussionpaper/dp11392.pdf> (concluding that "potential migrants [from elsewhere in the United States] view legalized marijuana as a positive amenity" leading to increased in-migration after recreational use of marijuana was legalized); *Marijuana Tax Data*, COLORADO DEPT' OF REVENUE, <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> (last visited Oct. 2, 2018) (reporting a consistently growing rate of revenue generated from marijuana taxes, licenses, and fees) (on file with the Washington and Lee Law Review).

90. See, e.g., VERNON'S TEX. CODE ANN., HEALTH & SAFETY CODE § 481.121(a) (2009) ("[A] person commits an offense if the person knowingly or intentionally possesses a usable quantity (criminalizing possession of marijuana).").

91. See generally INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2012).

92. See Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POLICY & L. 606, 630 (2011)

Jacqueline Stevens estimates that from 2003 to 2011, ICE detained approximately 20,000 United States citizens.<sup>93</sup> Whatever the actual number, the impact on affected individuals is enormous. Davino Watson, for example, was imprisoned by ICE for 1,273 days—roughly three and a half years—before convincing a judge of his citizenship.<sup>94</sup> Luis Fernando Juárez was deported and convicted of illegal reentry, a federal felony, before also convincing a judge that he had likely been a United States citizen for years.<sup>95</sup> The experiences of citizens mistaken for non-citizens means that even at its most basic level (demarcating between citizens and not), immigration law routinely fails. Adding immigration consequences to criminal adjudications means that citizens will be doubly impacted.

Despite these problems, using criminal law to distinguish between desirable and undesirable people remains alluring. Its simplicity is appealing. Its morality tale is clear. There is a palpable comfort to tarring migrants stained by criminality even where the staining process is riddled with deficiencies because the mysticism of legal processes makes room for delusion. Declarations that “the law is the law” or “what don’t you understand about illegal?” highlight a barebones perspective on law and legal processes that does not reflect the reality of either. The rush to mark some migrants as dangers who are properly cast out from the political community reveals a desire to shape the composition of the political community along the same racial and class cleavages that are prevalent in United States criminal and immigration law enforcement practices.

The messiness of the actual law or legal processes as they in fact transpire are relegated to the margins of relevance because of the underlying ideological function that criminal law and immigration law perform. As these two areas of law have converged into crimmigration, they have augmented each area’s

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(detailing the rate at which ICE is detaining and deporting U.S. citizens).

93. See *id.* (discussing the significant number of ICE detentions).

94. See *Watson v. United States*, 865 F.3d 123, 136 (2d Cir. 2017) (“In sum, there is no doubt that the government botched the investigation into Watson’s assertion of citizenship . . .”).

95. See *United States v. Juarez*, 672 F.3d 381, 384–85 (5th Cir. 2012) (describing his various attempts to prove citizenship).

membership selection power. Both, writes Juliet Stumpf in her article articulating crimmigration law for the first time, “are, at their core, systems of inclusion and exclusion. They are similarly designed to determine whether and how to include individuals as members of society or exclude them from it. Both create insiders and outsiders.”<sup>96</sup> She might have added that both are also constitutive of the other. There can be no insiders without outsiders. Marking some people as unworthy of participation in the political community means that others are worthy. Targeting people thought to be migrants based on the moral stain attached to criminality allows everyone who escapes this target to imagine themselves as more deserving. Physical segregation—whether through imprisonment or forcible removal to somewhere outside the territorial boundaries of the United States—is therefore justified by a commitment to an ideology of marginalization and its corollary, exploitation. By identifying some people as less worthy than others, it is possible to shift them around the face of the earth—from the isolation of an immigration prison to the distance of another country—with little concern for the psychological and physical toll that they or their loved ones experience. Indeed, the deservingness trope permits the deserving to feel good about hoisting pain onto others. There is pleasure in the infliction of pain because the latter is the price of the rule of law; the price of legality; the cost of civilization. Without pain, the rule of law, law itself, our way of life would crumble—or so goes the tale.

#### V. *This is Not a Morality Play*

The poor fit between morality on the one hand and law and legal processes on the other illustrates that fights over membership are not primarily about moral worth.<sup>97</sup> Rather, contests about the proper composition of any political community are principally concerned with ideology and politics—with the questions of the jurisdiction’s imagined identity and the process of

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96. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367, 380 (2006).

97. See *supra* Part IV (explaining that immigrant defense funds exclude people with certain criminal records).

creating and maintaining that self-image. In her analysis of early twentieth century war-torn Europe, Hannah Arendt revealed the ideological dimension of modern humanity's most significant moral failure.<sup>98</sup> Jews, she wrote, became the "scum of the earth" because they were marked by law as unworthy.<sup>99</sup> As the dregs, they were stripped of juridical rights.<sup>100</sup> In the legal framework of the era, the law no longer recognized them as people.<sup>101</sup> Having lost the "right to have rights," they could then be "exp[elled] from humanity altogether" and stripped of life.<sup>102</sup> The civilized communities could turn their backs on Jews' pleas, shut the doors to safety as Jews knocked seeking refuge, and let them meet their waiting fates—all because the law had marked them as outside its protective embrace.<sup>103</sup> Having lost a claim to citizenship in a state, they were ejected "out of legality."<sup>104</sup> Law had instead marked them as fodder for civilization's engine.<sup>105</sup> Arendt's analysis of the Holocaust and post-war Europe signals the extreme end of using law to carve the world into deserving and undeserving enclosures.<sup>106</sup>

Immigrant defense funds arise in a vastly different context, but they similarly suffer from an egotistical belief that some people are good and others bad, and that law and legal processes can determine who falls into which box.<sup>107</sup> This is politics performed under the guise of morality.<sup>108</sup> To exclude people from legal representation based on categorical assessments of worth measured by criminal histories is to ignore the nuances of law and

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98. See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1948) (Harcourt Brace & Company ed. 1973).

99. *Id.* at 269.

100. *Id.*

101. *Id.*

102. *Id.* at 297.

103. See *id.* at 296 ("Even the Nazis started their extermination of Jews by first depriving them of all legal status (the status of second-class citizenship) and cutting them off from the world. . . .").

104. *Id.* at 294.

105. *Id.*

106. *Id.*

107. See *supra* notes 47–52 and accompanying text (describing New York City's choice to limit its defense fund).

108. See *supra* notes 47–52 and accompanying text (noting that funding was available for those without violent felony convictions).

legal processes in favor of feel-good self-righteousness. By excluding people with certain criminal histories, defense funds treat those individuals as disposable. They are characterized as unworthy of public funding because public funding should be reserved for the meritorious uncriminals, the bulk of people who have escaped the criminal label whether or not they have avoided engaging in criminal activity.<sup>109</sup> Casting people with criminal histories as morally unworthy can deflect attention from the ideological function of racially biased criminal and immigration legal processes, but it cannot sanitize—and should not be allowed to conceal—the deceit. Defense fund exclusions, as the latest example of policymakers standing in judgment and distributing the fruits of the public fisc through racially biased policies, offers a renewed opportunity to expose the subterfuge at play. An immigration law enforcement regime built on top of a racially biased criminal justice system is not suddenly, magically cured of that bias. On the contrary, the bias is just buried.

This willingness to write off some human lives because they have been marked with the stigma of criminality represents an opportunity to expand political alliances and subvert dominant discursive frames. In the spirit of Derrick Bell's interest convergence theory, the development of defense funds offers an opportunity to draw parallels between migrants' rights and the decades-long denigration of African American and Latino youth based on racialized markers of undesirability.<sup>110</sup> In many of the urban areas where immigrant defense funds have been created, advocates and elected officials have long grappled with the complexities of race-based criminal policing.<sup>111</sup> Those conversations provide fertile ground for similarly critical discussions of crime-based immigration consequences.

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109. See *supra* notes 47–52 and accompanying text (excluding over 170 individuals from funding for violent felonies).

110. See Bell, *supra* note 28, at 526–33 (explaining why school desegregation has failed and offering ideas for what can be done to bring about change).

111. See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 588–89 (S.D.N.Y. 2013) (describing racially biased criminal policing in New York City); PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 39–57 (1995) (describing race-based criminal policing in Los Angeles).

In highlighting the troubling ideological genealogy of crime-based exclusions to immigrant defense fund participation, the goal should not be to humanize migrants. They are already human. Suggesting that participation in a newly created immigrant defense fund would humanize migrants is, as Agon Hamza wrote of the arrival of Middle Eastern and African refugees in Europe, to “reduc[e], problematically, complexities to a moral order.”<sup>112</sup> While morality forms part of the story of the criminalization of migration, it is only a supporting actor. The lead role is left to political ideology. The discursive focus of immigrant defense funds, therefore, must likewise remain on the political ideology of criminalization.

As with all political contests between competing ideologies, there is substantial risk that immigrant defense funds will develop embedded with familiar racial and class biases. It is difficult enough to launch an immigrant defense fund that the urge to forgo tough political fights about demonized individuals is intense. Measured through the narrow lens of legislative affairs, it is much easier to support exclusion of people with criminal histories.<sup>113</sup> Many campaigns to create immigrant defense funds risk falling into this marginalizing pattern due to the politics of the current historical moment, but it is worth remembering that migrants did not have an easy time under President Obama either.<sup>114</sup> Nicknamed “deporter-in-chief” because he presided over the largest number of removals in the history of any presidential administration,<sup>115</sup> President Obama also governed during a period of a historically unprecedented number of criminal prosecutions

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112. Agon Hamza, *The Refugee Crisis and the Helplessness of the Left*, in *THE FINAL COUNTDOWN: EUROPE, REFUGEES AND THE LEFT* 167, 176 (Jela Krečič ed., 2017).

113. See *supra* notes 47–52 and accompanying text (noting that New York City’s policy to exclude felons was a way to comply with the pressure from the Trump Administration’s immigration policy demands).

114. See *supra* note 62 and accompanying text (explaining Obama’s immigration policies).

115. See César Cuauhtémoc García Hernández, *Removals & Returns, 1892–2015*, CRIMMIGRATION (Feb. 16, 2017, 4:00 AM), <http://crimmigration.com/2017/02/16/removals-returns-1892-2015/> (last visited Sept. 20, 2018) (displaying annual removal data from 1892 to 2015) (on file with the Washington and Lee Law Review).



for immigration activity<sup>116</sup> and a similarly unusually high rate of immigration imprisonment.<sup>117</sup> Yet with the exception of New York City, none of the immigrant defense funds that currently exist were launched during the Obama era.<sup>118</sup> Instead, elected officials and many advocates turned to immigrant defense funds only after Donald Trump won the presidency.<sup>119</sup> Perceiving the Trump Administration as radically more antagonistic toward migrants than its predecessor, elected officials and advocates settled on immigrant defense funds as a means of muting some of the Trump administration's anti-migrant fury.<sup>120</sup>

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116. Compare César Cuauhtémoc García Hernández, *Immigration Continues Lead Role in Federal Criminal Prosecutions*, CRIMMIGRATION (Mar. 28, 2017, 4:00 AM), <http://crimmigration.com/2017/03/28/immigration-continues-lead-role-in-federal-criminal-prosecutions/> (last visited Sept. 20, 2018) (noting that there were 68,314 defendants prosecuted for immigration crimes in fiscal year 2016) (on file with the Washington and Lee Law Review), and César Cuauhtémoc García Hernández, *Immigration Took Center Stage Among Federal Criminal Cases During FY 2011–12*, CRIMMIGRATION (Jan. 29, 2015, 4:00 AM) <http://crimmigration.com/2015/01/29/immigration-takes-center-stage-among-federal-criminal-cases-during-fy-2011-12/> (last visited Sept. 20, 2018) (noting that there were over 90,000 immigration crime cases concluded in fiscal year 2012) (on file with the Washington and Lee Law Review), with César Cuauhtémoc García Hernández, *Immigration Crime Cases in the 1970s*, CRIMMIGRATION (Feb. 26, 2018, 12:18 AM), <http://crimmigration.com/2018/02/26/immigration-crime-cases-in-the-1970s/> (last visited Sept. 20, 2018) (reporting that from 1970 to 1979, there were no more than 14,147 immigration crime prosecutions in a single year) (on file with the Washington and Lee Law Review).

117. See César Cuauhtémoc García Hernández, *Supreme Court to Hear Another Immigration Imprisonment Case*, CRIMMIGRATION (Mar. 20, 2018, 5:28 AM), <http://crimmigration.com/2018/03/20/supreme-court-to-hear-another-immigration-imprisonment-case/> (last visited Sept. 20, 2018) (describing average daily population data for the former Immigration and Naturalization Service and ICE from 2001 to 2016) (on file with the Washington and Lee Law Review); César Cuauhtémoc García Hernández, *Immigration Prison Population Since 1990s*, CRIMMIGRATION (Sept. 19, 2017, 4:00 AM), <http://crimmigration.com/2017/09/19/immigration-prison-population-since-1990s/> (last visited Sept. 20, 2018) (describing the number of prisoners held by the United States Marshals Service and Bureau of Prisons for immigration offenses from 1994 to 2013 and 1990 to 2015, respectively) (on file with the Washington and Lee Law Review).

118. See Ewing, *supra* note 37 (“The New York Immigrant Family Unity Project, launched in 2013 . . .”).

119. See *id.* (“Lawmakers in Los Angeles; San Francisco; Chicago; Washington, D.C.; and New York City have likewise designated public dollars for counsel in immigration courts, . . .”).

120. See *id.* (“The governors of New York and California vehemently oppose

The concern about migrants' welfare that erupted in the aftermath of Trump's victory is a well-meaning and generally positive development, but it is also conceptually limited and ideologically perilous. Envisioning immigrant defense funds as anti-Trump tactics suggests that the present historical moment is unique in its dangers to migrants. The Trump-era spike in popularity suggests that defense funds are needed because the Trump Administration's immigration enforcement practices are so roguish that they are victimizing migrants who do not deserve to be targeted. This rhetoric adopts the discursive frame of migrant criminality and, with it, the ideological commitment to exclude some people from the realm of the deserving. Designing immigrant defense funds around crime-based measures of deservingness suggests that the public's goodwill is reserved for victims of unhinged Trump Administration enforcement practices. Because they are being attacked by a federal government unmoored from reason, cities, counties, and states should step in to offer protection at public expense. This logic reveals a disturbing vision of migrants as victims lacking any agency. Seemingly, they are worthy of collective protection only if they are innocently attacked. Lose either the innocence or the attack and the public's goodwill evaporates. "We love our victims innocent," writes Mladen Dolar; "we empathize with them as long as they appear to be innocent, but the moment they display some trait that is not entirely amiable . . . the sympathy is cut short."<sup>121</sup>

Deploying a characteristic of crimmigration laws and policies, defense fund exclusions use criminal adjudications as markers of lost innocence. In Los Angeles, a Democratic member of the city council pushed to ensure that people convicted of "heinous crimes" could not access the city's contribution to an immigrant defense fund.<sup>122</sup> As an example, she pointed to people who engage in human

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Trump's policies.").

121. Mladen Dolar, *Who is the Victim?*, in *THE FINAL COUNTDOWN: EUROPE, REFUGEES AND THE LEFT* 67, 70 (Jela Krečič ed., 2017).

122. See Dakota Smith, *A \$10-Million Fund Will Help Immigrants Fight Deportations. But Should It Help Those With Violent Criminal Convictions?*, L.A. TIMES (Apr. 17, 2017, 3:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-la-justice-fund-20170417-story.html> (last visited Sept. 20, 2018) (discussing the proposal that those convicted of "heinous crimes" could not access the fund) (on

trafficking.<sup>123</sup> Even the example of human trafficking cannot be reduced to a binary that categorically separates victims from perpetrators. The United States, writes Jennifer Chacón, has adopted a problematic understanding of trafficking that requires people to evidence no consent at any stage of the transportation or employment process to win the “victim” label.<sup>124</sup> As a result, people who willingly participate in their own transportation or unlawful employment are written out of federal anti-trafficking protections.<sup>125</sup> They are, in effect, juridically prohibited from being trafficking victims. Implementing the lost innocence frame, federal officials have sought to remove people who willingly participated in their unauthorized presence in the United States even where they were among the lucky who survived gruesome conditions in the back of a tractor-trailer.<sup>126</sup> Applying Chacón’s analysis, this comes as no surprise.<sup>127</sup> The innocence-laden anti-trafficking legal regime, she writes, reflects the United States’ “out-sized fear of . . . criminal immigrants.”<sup>128</sup> Stripped of innocence, they are deemed unworthy of assistance.

In addition to immigrant defense funds’ troubling reliance on criminality to gauge morality, their newfound popularity among liberal elected officials reveals the political dimension of these officials’ notion of attack. The nightmare that President Obama oversaw was not sufficient to constitute an attack, but the ramped-up nightmare of President Trump’s first months in office

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file with the Washington and Lee Law Review).

123. *See id.* (“Convictions for human trafficking, child abuse, domestic violence and pimping could prevent someone from accessing the fund . . .”).

124. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3022 (2006).

125. *See id.* at 3027 (“Congress is now satisfied that the TVPA protects the only ‘true victims’ of human trafficking . . .”).

126. *See* Ryan Devereaux, *Camión de la Muerte*, *INTERCEPT* (Oct. 1, 2017, 8:00 AM), <https://theintercept.com/2017/10/01/immigrants-helped-prosecutors-after-escaping-death-in-a-smugglers-truck-now-theyre-being-deported/> (last visited Sept. 20, 2018) (detailing a story of immigrants who survived in the back of a tractor-trailer and are now being deported) (on file with the Washington and Lee Law Review).

127. *See generally* Jennifer M. Chacón, *Feminists at the Border*, 91 *DENV. U. L. REV.* 85 (2013).

128. *Id.* at 107.

was somehow measurably different.<sup>129</sup> Surely more migrants are worse off under President Trump than under President Obama, but treating Trump-era policies as a radical diversion from reasonable normalizes the heavy toll of Obama-era immigration policies.<sup>130</sup> Uncritical claims that Trump's policies are heinous suggests that all was fine prior to Trump's assumption of power.<sup>131</sup> This is problematic for the many people whose lives were forever upended under President Obama. It is equally troubling as an ideological matter because it supposes that a significant amount of human devastation is acceptable so long as it is less devastation than is currently being meted out by Trump and his officials. Line-drawing of this sort is imprudent and impossible. As a practical matter, normalizing Obama-era immigration policies shifts the baseline of acceptability to what was then a historically severe level. Separately, it is impossible to adequately line draw between acceptable practices under Obama and excessive practices under Trump.<sup>132</sup> No one can precisely pinpoint the division between acceptable and unacceptable human suffering. An immigration system that forces many people into legal limbo, commodifies the marginality that results, then capitalizes on that marginalized labor, is, at best, morally dubious. At worst, it further buries the very human catastrophe of immigration law enforcement premised on divisions between deserving and undeserving baked in criminal processes that disproportionately penalize poor people and people of color.

There is a crisis in immigration law enforcement, but the crisis did not begin with Trump's ascendance nor will it end with his final day in office. Rather, the immigration law crisis of the early twenty-first century is not so different from the immigration law crisis of the late twentieth century.<sup>133</sup> The crisis arises from

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129. See *supra* notes 62–63 and accompanying text (comparing immigration policies under the Obama and Trump administrations).

130. See *supra* note 62 and accompanying text (presenting the Obama-era immigration priorities).

131. See *supra* note 62 and accompanying text (describing immigration policies in the Obama Administration).

132. See *supra* notes 62–63 and accompanying text (comparing how Obama and Trump discussed immigration policies).

133. See *supra* note 62 and accompanying text (describing immigration

immigration law's convergence with criminal law to birth a crimmigration regime that operates ideologically to create easily exploitable labor. Through its reliance on substantive and procedural laws that impact communities of color most harmfully, crimmigration reproduces racial subordination while simultaneously producing material wealth for the privileged.<sup>134</sup> In the words of Yolanda Vázquez, “crimmigration disparately affects Latinos and . . . reif[ies] the conclusion that Latinos break more criminal and immigration laws due to their behavior choices . . . .”<sup>135</sup> This has the effect, she adds, of “maintaining the status quo of white racial dominance.”<sup>136</sup> At the same time, the network of public and private parties that profit from crimmigration policies is vast.<sup>137</sup>

### VI. Embracing Utopias

Despite the problematic aspect of immigrant defense funds sudden popularity, they offer enormous actual and potential value. Most importantly, the development of immigrant defense funds means that many people will receive legal representation in removal proceedings who otherwise would have faced off alone against a government prosecutor.<sup>138</sup> Bringing a trained legal advocate to the immigration courtroom is a significant improvement that cannot be overstated.<sup>139</sup> To many migrants, it

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policies in the Obama administration).

134. See generally Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO STATE L.J. 599 (2015).

135. *Id.* at 607.

136. *Id.*

137. See César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1507–11 (2015) (naming third parties that benefit from the choice to use imprisonment as a means to enforce immigration laws).

138. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (detailing the results of the first national study of access to counsel in United States immigration courts).

139. See *id.* at 9 (“[I]mmigrants who are represented by counsel do fare better at every stage of the court process—that is, their cases are more likely to be terminated, they are more likely to seek relief, and they are more likely to obtain

means all the difference between a life with their family in the place they call home, and the loss “of all that makes life worth living,” as Justice Brandeis described deportation’s toll many years ago.<sup>140</sup> Secondly, defense funds offer an opportunity to launch critical conversations locally about the problematic expansion of migrant criminality norms. Activists with diverse foci are able to wield their collective knowledge about criminal justice and immigration proceedings.<sup>141</sup> Advocates in New York have done so splendidly as they have formed diverse, expansive coalitions to resist the mayor’s attempts to exclude people with certain criminal records from the city-financed defense fund.<sup>142</sup> Moreover, in the spirit of Bell’s interest convergence theory, the present moment creates an opportunity for elected officials to align with readily exploitable migrants.<sup>143</sup> To paraphrase Homan, if migrants and elected officials are similar threats, they might as well ally.<sup>144</sup>

As conversations continue about immigrant defense funds, it is likely that exclusions will remain part of the political jockeying. It seems inevitable that, at some point, someone who obtains legal assistance through a defense fund will be arrested for a crime. It is even possible that the accusation will center on indefensible violence. No amount of reference to the lower crime rate among migrants than native-born individuals<sup>145</sup> will suffice to stop the

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the relief they seek.”).

140. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

141. *See e.g.*, Press Release, Legal Aid Soc’y, NYC Immigrant Advocates to Mayor de Blasio: Don’t Deny New Yorkers Due Process (May 11, 2017) (describing the immigrants’ rights advocates coalition as consisting of legal aid lawyers, city council members, public defender organizations, “local advocates, labor unions and leading progressive groups”) (on file with the Washington and Lee Law Review).

142. *Id.*

143. *See supra* note 28 and accompanying text (explaining why school desegregation has failed and offering ideas for what can be done to bring about change by aligning black and white interests).

144. *See supra* note 22 and accompanying text (explaining that Homan believes politicians who run sanctuary cities should be charged with crimes).

145. *See* Jacob I. Stowell & Stephanie M. DiPietro, *Ethnicity, Crime, and Immigration in the United States: Crimes By and Against Immigrants*, in *THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION* 505, 508 (Sandra M. Bucerius & Michael Tonry eds., 2014) (studying the results of twentieth and twenty-first century scholarship about criminal activity by migrants).

chorus of complaints that the defense fund's existence endangered the community. Regardless of the details, it will be an opportunity to attack the defense fund's continued viability.

Framing immigrant defense funds around notions of migrants as victims leaves too much space for the inevitable tragedy to become an immigrant defense fund's death knell. Instead, constructing the political rationale for an immigrant defense fund around the vagaries of using criminality as a marker of morality is likely to increase a fund's resilience in the face of criticisms. Rather than imagine defense funds as protecting victims of Trump-era excessiveness, they are more solidly built as limits on the government's coercive powers deployed through crimmigration law and law-enforcement procedures along the axes of race and class bias.<sup>146</sup>

It is certainly a heavy lift to shift conversations about immigrant defense funds away from a frantic reaction to the perception that migrants in the United States are currently living through an unprecedented emergency named Trump.<sup>147</sup> Embracing a more nuanced critical analysis aimed at the more foundational crimmigration legal regime that has received bipartisan support for decades is indeed unlikely. Political calculations designed to address emergent, seemingly exceptional circumstances do not lend themselves easily to nuanced, contextualized critiques of accepted maxims.<sup>148</sup> As such, urging reevaluation of immigrant defense funds even as they become increasingly common in major metropolitan areas throughout the United States admittedly appears utopian. But, as Hamza writes, "it seems increasingly clear that in desperate situations such as we are currently facing, utopias are the only viable solution."<sup>149</sup>

Proposing a utopian perspective on immigrant defense funds is not to embrace futility. It is, rather, an effort to preserve the hard-fought victory that established defense funds represent. If they are premised on the trope of migrant victimization, they are

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146. See *supra* Part VI (explaining the actual and potential value of immigrant defense funds).

147. See *supra* Part V (discussing public and political reactions to immigration policies in the Trump Administration).

148. See *supra* Part V (noting the unique challenges presented by the Trump Administration's policies).

149. Hamza, *supra* note 112, at 176.

essentially the policy version of a papier-mâché figurine: nice to look at, but easy to destroy. Ironically, the utopian vision of defense funds conceived as responses to a crimmigration legal regime that supports racial subordination and reproduces class privileges is the most likely to keep defense funds from becoming policies for this historical moment only. In this sense, the utopian approach to the development of immigrant defense funds may be the approach that most realistically stands a chance of solving the problem of migrants pushed into the immigration detention and removal pipeline without the benefit of legal counsel.<sup>150</sup>

### VII. Conclusion

Immigrant defense funds are an important development in the long struggle to expand migrants' position within the United States. Framing these pools of money as responses to the Trump Administration's rabid approach to immigration law enforcement is reactionary and limiting.<sup>151</sup> Migrants, their families, and their communities were detrimentally impacted by immigration law enforcement practices well before Trump entered the White House.<sup>152</sup> With immigration law being entangled with criminal law, the marker of criminality has become the stigmatizing feature of choice for people interested in carving the migrant population into desirable and undesirable.<sup>153</sup> Pointing to criminality as a measure of a person's moral worth, however, ignores the well-worn racial and class biases of the criminal justice system.<sup>154</sup>

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150. See SLAVOJ ŽIŽEK, *AGAINST THE DOUBLE BLACKMAIL: REFUGEES, TERROR AND OTHER TROUBLES WITH THE NEIGHBORS* 9 (2016) (describing a "[u]topian" response to refugees as "the only realist one").

151. See *supra* Part V (discussing public and political reactions to immigration policies in the Trump administration).

152. See *supra* note 62 and accompanying text (describing pre-Trump immigration priorities).

153. See Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1118–19 (2017) (describing crimmigration law's realignment of the criminal justice system to target migrants and its consequent effect of "restructuring social categories").

154. See *supra* notes 73–80 and accompanying text (detailing the discretionary nature of the justice system).



Instead of ignoring the faults of building an immigration law regime on top of discriminatory criminal justice practices, advocates and elected officials intent on creating welcoming atmospheres in their communities for migrants and their loved ones should dispense with the migrant-as-victim trope.<sup>155</sup> As a whole, migrants are nothing more and nothing less than imperfect, fallible people. States, cities, and counties are right to expand access to legal counsel for individuals facing the possibility of forcible removal from the United States for the simple reason that removal proceedings are complicated affairs affecting, perhaps for a lifetime, complicated people.<sup>156</sup> Flagged for removal by criminal law proceedings embedded with racial and class biases, the imperative only increases.<sup>157</sup> Excluding some people because they were ensnared by discriminatory criminal justice practices only conceals the earlier indefensibility.<sup>158</sup>

Immigrant defense funds are a form of resistance, but not against anything unique to Trump or his top immigration officials in DHS or the Justice Department.<sup>159</sup> These funds, rather, present advocates and elected officials the opportunity to hold back the growth of exploitative laws and legal processes.<sup>160</sup> By recognizing markers of criminality as inherently flawed assessments of moral worth, advocates and elected officials can resist the urge to exclude people from obtaining legal counsel under the auspices of an immigrant defense fund because of a criminal record.<sup>161</sup> If they do this, they will stop immigration law from being just another adjunct of the United States' long history of race and class bias. If they cave to the urge, defense funds are likely to fall prey to the fearmongering that will inevitably develop. When that happens,

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155. See *supra* Part VI (explaining the value of immigrant defense funds).

156. See Press Release, Vera Inst. of Just., *supra* note 43 (describing the Vera Institute of Justice's Safe Cities Network as providing grants to governments willing to use public money to operate immigrant defense funds).

157. See *id.* (explaining the racially disparate impacts of crime-based removals).

158. See *id.* (discussing the disadvantages of crime-based exclusions).

159. See *supra* Part III (providing an overview of the rise of immigrant defense funds).

160. See *supra* Part VI (explaining the potential impact of immigrant defense funds).

161. See *supra* Part VI (noting the differences in criminality between immigration law and criminal law).

cities and states now taking a step toward including migrants more fully in their collective understanding of membership in the political community will take a similarly large step backwards toward the pre-Trump norm of naively embracing the moral significance of criminal adjudications and, with it, the willingness to imprison and remove hundreds of thousands of people annually. The possibility of a policy whiplash affecting untold numbers of migrants and their family members is the avoidable crisis that a superficial interest convergence lays bare.