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Surrogates and Subcontractors: Flexibility and Obscurity in U.S. Immigrant Detention

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Merging Instruments of Authority

In the past decade the emerging global dimensions of U.S. "wartime" detentions amplified by the war on terror have cross-fertilized with domestic immigrant detention policy, affecting and being affected by the incarceration of immigrants at ports of entry and within the nation's interior.[1] Both systems achieve increased power and flexibility due to legal exceptionalism and juridical ambiguity, historiographic compartmentalization, muted recognition in contemporary debates about comprehensive immigration reform, and, as discussed in this chapter, the use of surrogate actors and partners in the material execution of noncitizen incarceration. The existence of a parallel, global detention regime dramatically shifts the meaning and scale of immigrant detention and should be considered at once *a part of* the domestic noncitizen detention project but also *apart from* it. Because international detainees are arrested outside the United States and generally on one of the so-called battlefields in the war on terror—the exception being migrants intending to unlawfully enter the United States but who are captured while transmigrating through third-party nations or while at sea—global detainees should not be conflated automatically or uncritically with the majority of immigrant

detainees held in the U.S. deportation regime. Nonetheless there are important similarities in terms of their categorical racialization and criminalization, their location vis-à-vis national security frameworks, the conditions of their incarceration, their lack of legal rights and access to due process protections, and, crucially, their invisibility and remoteness from the majority of society as a result of the regime's reliance on surrogate partners in effecting their detentions.

Global detainees, in this way, are a major segment in the unfolding chapter of immigrant detention exacerbated by 9/11 and the war on terror. They are known and unknown at the same time. They stir outrage domestically and internationally and at times shadow and obscure the ongoing domestic counterparts to surrogate detention. Further, each system of antiterror or anti-immigrant suspicion can work as a pretext for the other, enhancing the flexibility of immigrant detention as an enforcement tool. This is to say that, on one hand, the war on terror has allowed the United States to push its borders outward and expand its detention project globally. For example, the international detention structure has included the prisons at Guantánamo Bay Naval Base in Cuba and Abu Ghraib in Iraq under its broad "homeland security" umbrella. Because terrorism is transnational, the argument goes, so should U.S. policies against suspected terrorists. On the other hand, the global war on terror, like past efforts to secure the nation, has doubly underscored the links between homeland security and the control of domestic migration. Whereas the principal concern in the national security context is terrorism and more broadly defined associations with terrorism, the primary result has been an expanded domestic detention regime, impacting noncitizens within the United States from around the world, but in particular the demographically significant and increasingly targeted Latin American immigrant communities throughout the nation.

Boundaries between domestic immigrant detention and the global detention infrastructure are thus blurred. In the popular imagination and strengthened by the federal government, terrorism seems to exist due to the presence of immigrants. As Thomas Faist suggests in his post-9/11 essay "*Extension du domaine de la lutte*: International Migration and Security before and after 11 September 2001" (translation: Extension of the Combat Zone), "The responses to the events on September 11 have reinforced the security-migration nexus, dramatizing a publicly convenient link between international migration and security."[2] Key elements to this "convenient link" are the historical persistence and robust flexibility of detention and deportation laws, policies, and practices. The U.S. detention regime is a critical site of the security-

migration nexus, operating at home and abroad to further consolidate state power—formulating and defending U.S. nationalism and sovereignty by constructing and controlling what is foreign *inside* and *outside* the United States.

This chapter briefly contextualizes contemporary securitization efforts, providing examples of cumulative precedents and patterns in immigrant detention that help explain this regime's ongoing obscurity and challenge its exceptionalist foundation. I illuminate the continuities of racial criminalization by exploring the detention regime's historic reliance on surrogate partners domestically and internationally. I also problematize prevailing logics of reform and resistance to detention expansion such as the use of prosecutorial discretion to prioritize so-called criminals and grant relief to low-priority detainees, often referred to as noncriminal or "innocent" noncitizens. Overall I seek to unmask the obscured discursive and institutional formations of immigrant detention in the United States, checking its flexible and coercive technologies used to exercise state power and violence far beyond the control of undocumented migration.

Precedents, Patterns

What legal and political histories paved the way for such "exceptional" detention authority in the war on terror? For over a century immigration law, especially the body of law facilitating the detention process, has been used to address national crises because it is anomalous to and evasive of normative forms of governmental checks and balances and because immigrants are not provided even the limited and deeply flawed constitutional safeguards of criminal law. Because immigration policies are often steeped in frameworks of sovereignty as opposed to constitutional parameters, judicial deference to Congress's extraordinary plenary power over immigration matters has largely been the rule, from the era of Chinese exclusion, through the mid-twentieth-century solidification of anti-Mexican immigration control, to the period prior to and after 9/11.

Even before the consolidation of the federal immigration authority in the late nineteenth century, colonial, federal, and local government entities forcibly removed or restricted the mobility of poor and often nonwhite undesirables. Much like criminal imprisonment, immigrant detention draws from the heritage of slave labor, the control of free black persons, and the recapture of fugitive slaves. In fact the control of nonwhite noncitizen mobility played a critical function in labor management, the industrial development of the U.S. West, and establishment of national sovereignty. For the purported nation

of immigrants the exclusion and removal of poor persons from local British colonial communities, federal Indian removal programs, the capture and return of fugitive slaves, and restrictions on free black persons in the United States "foreshadowed," according to Daniel Kanstroom, "the federal deportation system."[3] Although often unrecognized, this "lost century" of immobilization and forced removal is part of the contemporary detention and deportation regime.[4]

Racial anxieties and animosities in particular are paramount in detention history, producing a meandering racial genealogy of detention and deportation that is closely aligned with racial states of emergency.[5] Following the formation of the Bureau of Immigration in the 1890s, we see an unbroken chain of racist immigrant anxieties leading to persistent detention and deportation campaigns against varied groups of immigrants. Whereas anti-Asian angst dominated the late nineteenth- and early twentieth-century fears of immigrants, today anxieties about Latina/o migration play this role, both popularly and in enforcement efforts. Latinas/os, for example, represent 88 percent of all detainees and 93 percent of all removals from the United States.[6] Over the past one hundred years differing security crises occurred in a variety of political contexts, including fears of contagion, the demonization of "foreign" ideologies, international military conflicts, refugee streams, and domestic wars on crime, drugs, and terrorism. Race and racist practices have proven to be malleable and productive across this genealogy, as racist animosities were transposed from one social group to another in immigration enforcement. Racialized immigration enforcement, abetted by surrogate detention partners, discretionary practices of the executive branch, secrecy, and invented legal categories—such as "aliens ineligible to citizenship," "internee," and "enemy combatant"—has thus been a fundamental and flexible tool in the detention process, often uninhibited and thus advanced by the courts, since the inception of the Bureau of Immigration in the late nineteenth century.

Obscurity and Exceptionalism in the Detention Regime

Despite a long, albeit muted, history of immigrant detention in the United States, noncitizen detention and the popular figure of the detainee dramatically entered (or reentered) the U.S. lexicon in the past decade from outside its borders, generating a renewed focus on detention's domestic form. Disturbing photos and unsettling narrative accounts from Abu Ghraib and Guantánamo Bay familiarized the nation and the world with the sensational and deadly consequences of U.S. antiterrorist detention policies. More recently, after

the transition from the Bush to the Obama administration, more knowledge has come to light about "black sites" in the war on terror, in which the Bush White House seized extraordinary unchecked powers in labeling "enemy combatants" and effecting the torturous conditions of their incarceration. Despite official protests articulated through the legislative and judicial branches, and because of official acquiescence, such unilateral powers and practices occurred beyond the reach of these ostensibly balancing and regulatory federal branches and with indifference toward supranational bodies of law. The 2006 Military Commissions Act stripping Guantánamo detainees of habeas corpus is but one example of the congressional green light to these practices. The Obama administration, for its part, has "decommissioned" the "remaining sites" for secret rendition of terror suspects.[7] However, it has also retained its authority to render suspects or hold detainees in secrecy.[8] As well, the Obama administration has declined to prosecute interrogators, airline companies, and the principal designers of U.S. torture policies, declaring through the former CIA director that agency officials conducting "past interrogation practices" "should not be investigated, let alone punished."[9] In this manner the Pentagon, CIA, and White House of the past two administrations have constructed and maintained a guise of exceptionalism that cloaks, rationalizes, and absolves the practices of the U.S. war on terror. Under this cover, reports of the U.S. rendition program under Clinton, Bush, and Obama and further details of secret U.S. prisons worldwide indicate a story only partially told, in which the widespread web of detention facilities signals a global detention infrastructure devoid of legal constraints, with limited media coverage, and without an independent evaluation mechanism. That is to say, the U.S. criminalization and incarceration regime for racialized migrants is a global regime, immense and obscured inside the nation but also reliant on global constructions of national security that demonize immigrants.

In its first decade the war on terror has been accompanied by a theory of exceptionalism that distorts perceptions of 9/11 and post-9/11 detentions at home and abroad. For both domestic and global detention spaces and apparatuses, 9/11 as well as the resulting war on terror were certainly astonishing, deeply tragic, and to many unthinkable. The federal government articulated national security as a "state of exception," what Giorgio Agamben calls "a technique of government" facilitating suspensions in existing law—"a suspension of the juridical order itself"—in order to confront national crises.[10] But neither 9/11 nor the extraordinary power to detain noncitizens is without precedent, and whether the state of exception is constructed outside, inside, or incommensurate with the law, it is a recurring tool of power

and its accumulation. Terrorism, especially as it has been broadly defined over the past decade—ranging from bombings and political assassinations to lynchings and other racist hate crimes—is not new and has been conducted on U.S. soil by foreign, domestic, and state actors. The genealogy of domestic terrorism in particular is centrally fueled by white supremacist organizations and state apparatuses, and government reactions to terrorism or other national crises bearing these racial contours are similarly fused with popular and racist fears of immigrants producing a long history of violations against noncitizen detainees in the United States.[11] The exceptionalism and sensationalism framing 9/11 and the war on terror, however, endeavor to achieve a status of incomparability, not only justifying any extraordinary governmental response but also contributing to the public suppression of the systematic treatment of noncitizens in the United States prior to 9/11, particularly in the detention process. Detention episodes, largely racialized ones, regularly framed by government authorities as crises in national security, or even by detainee advocates as sensational abuses of power by the government, veil and obscure the precedents, patterns, and century-long consolidation of this institutional authority.

The basic logic entailed in exceptionalist detention rhetoric implies that it is virtually impossible to analyze the historical precursors to the diminished rights of immigrants and detainees. This logic is central to the obscurity of immigrant detention and merges with the spatial execution of the detention authority among diffused actors and remote locations of incarceration. Particularly persons marked by race, religion, or other negatively perceived cultural attributes are further obscured because the national crises usually framing the abuse of noncitizens are regarded popularly and historiographically as having no precedent. Racially targeted enforcement mechanisms, such as those targeting Arabs, Muslims, and South Asians after 9/11, or more recent policies targeting Mexicans, Central Americans, and other Latinas/os in the southern border states over the past decade, make common sense in sensationalist contexts and appear self-evident in a national security framework because, according to John Mueller, "most Americans seem to have developed a false sense of insecurity about terrorism."[12] The much repeated notion since 9/11 that "everything has changed," that we are in a "new era" with "new paradigms of war"—that is, the state of exception—not only masks the history of immigrant detention, but as other scholars have argued, it disappears the larger elephant in the room: the expansion of the U.S. prison industrial complex.[13] Detention episodes, especially those producing evidence of abuse or, as a consequence, popular protest, are thus viewed in history as

isolated events—aberrations disconnected from the history of government policies and judicial rulings that enable them.

With the nation's safety professedly at stake, the federal government purportedly responds to distinct security crises utilizing a supposedly temporary strategy of incarcerating noncitizens, thus protecting the nation and homeland from enemies within and, as 9/11 illustrates, from outside its borders. This historical compartmentalization of detention—focused on particular detainee populations, specific historical episodes, or individuated experiences in detention—has further muted its critical importance as an enforcement mechanism that is productive beyond migration control. The obscurity of detention, framed as exceptional in varying political contexts, thus contributes to popular historical amnesia regarding the detention apparatus. While obfuscated by security crises, immigrant detention is also oblique due to its liminal structure in the deportation process, the enormous shadow of the prison system, and its muted location in immigration reform discourse. The regime of detention and deportation thus relies on spatial and discursive obscurity to enhance the flexibility of its power.

In the context of obscurity it is critical to delineate the detention regime's many strands, "third-party actors," and analytical linkages. According to the political scientist Gallya Lahav, "Few attempts have been made to disaggregate the state and to identify the agencies and actors involved in regulating migration."[14] This is critical, in particular for the institution of immigrant detention, in order to grapple with its diffused and stealth intensity as an enforcement initiative domestically, but also its links to expanded border security beyond the United States in a national security and antiterrorism context. The following section thus examines the outsourcing of detention operations and the ongoing use of dispersed, remote, and strategic carceral locations that lead to ambiguities in legal protection, uncertain government accountability, and nebulous limits to the authority of surrogate jailers.

Decentralizing Detention Domestically and Globally

The decentralization, de-federalization, and at times privatization of detention are well-established practices in the configuration of domestic noncitizen detention. In the early twentieth century, for example, privately owned hotels were contracted by the Bureau of Immigration at the U.S.-Mexico border in order to detain immigrants. In El Paso hotels and private residential facilities were widely used through the 1950s when a permanent government-owned and -operated facility was finally constructed in this migrant-heavy region.[15]

This occurred despite documented instances of abuse inflicted upon detainees due to structural inadequacies and mistreatment by surrogate jailers. As late as the 1990s hotel prisons persisted. Christian Parenti writes, "Many of these prisons are nothing more than run-down motels surrounded by barbed wire and infamous for their wretched conditions, overcrowding, and violence."[16] To be sure, federally run facilities are no guarantee of detainee safety, as abuse, medical neglect, and deaths occur in all facilities, public or privatized. The federal government, for example, which often seeks to "stymie outside inquiry," developed a reporting system for in-custody deaths only in the past ten years, and private jailers consistently seek to hide their records behind corporate rights and protections.[17]

Corporate and third-party incarceration is thus a long-standing practice, strengthening and creating elasticity in the detention regime, as well as enriching the private prison industry. The first modern, privately owned and operated prison in the mid-1980s was an immigrant detention facility run by the Corporations Corporation of America in Texas followed by a facility in Colorado run by the Wackenhut Corporation. According to its former CEO, George Zoley, "it was really the INS [Immigration and Naturalization Service] that started privatized corrections in this country."[18] Privatization of detention operations and the use of nonstate actors permits at least three broad goals: the federal government shares the burden of detaining noncitizens while expanding its capacity to do so; it generates profits and revenues, making it attractive to private and other nonfederal institutions; and it deflects accountability for the violent excesses of detention. These three features, much like the legal and rhetorical framing of detention as an exceptional form of alien incarceration, ensure a robust flexibility in detention operations.

First, the use of private and nonfederal detention facilities rapidly expands the total capacity of the federal government to detain noncitizens nationwide and globally. The United States moderates the overall costs and burden of detaining noncitizens in deportation proceedings by contracting out services to local and county prison facilities and also to privately owned properties and jails. Since the late nineteenth century the federal government has utilized private and nonfederal hotels, hospitals, steamships, storage sheds, "tomato warehouses," and other ad hoc facilities to detain immigrants.[19] In 2008, for example, the government used a "cattle exhibit hall" to detain migrant workers raided and detained en masse in Postville, Iowa.[20] Currently the government rents 80 percent of its bed space for detainees from a web of over 250 nonfederal lockups—down from as many as 370 five years ago—in rural counties and small cities nationwide and from private for-profit jails run

by the Corrections Corporation of America, Wackenhut Corrections Corporation (now the GEO Group), Cornell Companies, Inc., Management and Training Corporation, and others.[21] This is in comparison to 7.4 percent of contracted bed space for persons incarcerated in the federal and state adult prison and jail population.[22] With detainee bed space tripling in the 1990s, and continuing its rise in the past decade, nearly half of major facilities are privately owned and managed. Private and public efforts to expand this infrastructure, even south of the U.S.-Mexico border, are also under way. The federal government is planning to build a private detention facility in Los Angeles to replace the recently shuttered public Terminal Island federal facility.[23] In 2005 the state of Arizona passed legislation, vetoed by Governor Janet Napolitano, that would have created a foreign private prison commission and constructed a private prison in Mexico to incarcerate Mexican nationals serving time in Arizona.[24] Such a project, if passed, would have bridged the narrowing divide between domestic and international detention. California's governor Arnold Schwarzenegger similarly suggested sending twenty thousand undocumented inmates to Mexico and assisting in building a prison for them.[25] These new proposals and the increased reliance on nonfederal partners and surrogates to rapidly expand detention capacity significantly reconfigure immigration control and enforcement in the Department of Homeland Security—where one of every three dollars flows to private contractors[26]—making permanent the role of private contractors in a sensitive jurisdiction of federal enforcement.

A second result of the de-federalization of detention is the introduction of profit and revenue motives into the rationale behind noncitizen detention. Lahav offers this definition of privatization: "Privatization, loosely defined as the shift of a function from the public to the private sector, involves a dependence on market forces for the pursuit of social goods and may turn local actors or contractors into regulators."[27] In both the domestic and the international sphere of U.S. detention, nonfederal regulators of detention and private military contractors cease to serve merely a social function; now their purview is revenue-driven and catalyzed by financial aims, including the economic motives of war and securitization. As part of what the *New York Times* calls the "'immigrant gold rush' that turned the private prison industry from bust to boom,"[28] immigrant detainees in this scenario are commodities that are accumulated, traded, and transferred for the purposes of creating profits for domestic and foreign jailers and private contractors, as well as political currency for public officials seeking to be considered tough on crime, immigrants, and terrorism, all issues that are linked today.

Private detention thus produces, epiphenomenally, a commerce in immigrant detainees, a microeconomy of public dollars for detention that dramatically informs the way we view immigrants. This includes a variety of for-profit service provision, from food and health care to phone services and transportation. For some poor counties and municipalities in the United States, noncitizen detention serves as a popular development strategy, much like prison construction nationwide. In June 1993, for example, the *Harrisburg Patriot-News* in Pennsylvania carried the headline "Prison Board Shopping for Immigrants to Prevent Layoffs." In this article the county commissioner stated, "We tried like the dickens to get some of the Chinese . . . but it didn't pan out. . . . If no immigrants are secured, some layoffs may be inevitable."[29] Similarly, in response to budget cuts in 2009, the Santa Ana Police Department in California converted two multipurpose rooms at its jail to accommodate additional immigrant detainees and proposed raising its per-bed fee that it charges the federal government. According to Police Chief Paul Walters, "We treat [the jail] like a business. . . . The cuts could have been much deeper if it weren't for the ability to raise money there."[30]

When detention is treated "like a business," the social and legal parameters of immigrant detention as well as its stated administrative functions are rendered meaningless, and the more long-term financial downsides of private prison development give way to political demands for immediate profits. Especially for smaller prison towns, residents have learned that detention centers can result in the opposite of economic development, often producing fewer new jobs than expected and chasing away new businesses as well. As Ruth Wilson Gilmore writes, "Prison development has had the intended, although rarely realized, effect of providing jobs."[31] Moreover, although profit motive or cost savings can be motivating factors for surrogate partners in prison privatization, they are consequent to the public system of immigrant detention, as private and nonfederal monetary benefits still derive from taxpayers' public resources. As related to revenue motives, then, privatization might increase government partnerships in the detention regime, but overall it is a "red-herring,"[32] ancillary to the logic of the carceral structure, and not at its core.

Third, de-federalizing the operations of the detention authority has led to a distant, if not absent, oversight by federal detention authorities. Varying regional, institutional, and political contexts create widespread differences in legal rights (such as access to counsel) and carceral conditions of detention (from health care and religious needs to overcrowding and the use of solitary confinement of so-called administrative detainees). Further, just

as the economic pressures mentioned earlier stimulate the incentive to acquire detainees and maintain their long-term detention, they also serve as disincentives to dispense funds to provide structurally and medically safe and humane conditions for detainees. Jody Kent of the ACLU's National Prison Project states, "We have serious concerns about for-profit prison companies because they are notorious for cutting essential costs that need to be provided to maintain a safe and constitutional environment for prisoners."[33] Over one hundred detainees have died in obscurity in nonfederal and federal facilities over the past decade as a result of cost-saving medical neglect, murky government reporting, and lack of investigative inquiries not mandated by policy.[34] Records of such detainee deaths remain buried in agency reports and private companies' annual reports and files.[35] This lack of oversight and evasion of accountability is buttressed by private prison contractors' exemption from the disclosure of records through the Freedom of Information Act. Prison corporations in particular lobby strenuously to block potential legislation, such as the Private Prison Information Act, which would alter this policy.[36] Private partnerships in detention muddy accountability and misdirect advocacy, as the federal government laments privatized abuses endemic to its very system of immigrant criminalization and incarceration and detainee advocates seek piecemeal solutions for individual detainees or particular detention sites. The detention regime overall remains isolated from larger critiques of criminalization and incarceration, often leading lawyers, detainees, and advocates to argue the innocence of detainees, underscoring the criminality of racialized citizens and noncitizens and undermining critiques of the entire system.

The oversight provisions guiding nonfederal immigrant detention further diffuse accountability and criticism of the detention regime's spatial obscurity. When detention operations are decentralized—again, roughly 80 percent of domestic detainees are in nonfederal facilities—enforcement and regulation fall on many others in lieu of federal authorities: state and local law enforcement and prison operators, private security and detention services, and private legal services working on behalf of detainees. In cases where the federal government has been sued for deadly health conditions in contract detention facilities, government lawyers have cagily utilized lack of federal oversight in its own defense, arguing that it is "completely unfair" to hold accountable the government agency "that has no contact with the detainee on a regular basis."[37]

Over the past decade and a half the inspector general of the Department of Homeland Security, human rights groups, and investigative media have issued numerous reports of abuse and poor conditions for immigrant

detainees. Although abuses occur in both federal and nonfederal facilities, a key issue affecting contracted and private lockups is that "the treatment of immigration detainees, including living conditions, health care, and access to legal materials is governed by a Department of Homeland Security detention manual, which is neither legally enforceable nor universally applied." One former detainee released from a private facility in San Diego stated, "The standards need some teeth or people with continue to get hurt." As a result detainees and immigrants' rights organizations have petitioned the Department of Homeland Security to issue uniform legal regulations for detention that will "establish clear lines of accountability," which are "especially critical in light of the patchwork system of detention currently employed to house detainees."[38] Enforceable detention standards, it should be noted, are but one step toward improving conditions for detainees. Federal oversight has never been a panacea, as federally run immigrant detention centers, much like federal prisons and other public facilities, are persistently spaces of physical danger, neglect, and abuse. For example, of the over 140 deaths in immigrant detention since 2003, about one fourth occurred in federal service processing centers or Bureau of Prisons lockups.[39] Recurring presidential administrations, however, have refused to enact enforceable detention standards, stating that such protocols and "rule-making would be laborious, time consuming and less flexible."[40]

A critical domestic example of the absence of standards and ad hoc assemblage of detainee facilities is the brief tenure of the T. Don Hutto Residential Center for families in Taylor, Texas. Formerly a state prison, and one of the Bush administration's additions to the domestic detention infrastructure, Hutto has been used as a symbol of reform by both the Bush and the Obama administration—by Bush to signal tough enforcement and the end of the so-called catch-and-release policy for some immigrants, and by Obama as a symbol of post-Bush detention reform, moving toward what the Department of Homeland Security calls a "truly civil detention system."[41] Although dubbed a "residential center" for detained families, Hutto originally was replete with barbed wire, an armed guard tower, at one point prison garb for detainees (or what Immigration and Customs Enforcement calls "medical style-scrubs"[42]), and fully authorized punitive disciplinary actions. The Hutto prison was run for profit as a family detention center by the Corrections Corporation of America and earned $2.8 million per month. Half of its inmates were children. In 2007 it was reported that the children were receiving only one hour of daily academic instruction while incarcerated and that the facility was not licensed by the state for education or other child welfare issues.[43] Also in 2007

administrators at the Hutto facility turned away United Nations human rights expert Jorge Bustamante for his previously scheduled visit.[44] A lawsuit by the ACLU and extensive community-based protest in Texas eventually resulted in a cosmetic makeover of the prison prior to the Obama administration's conversion of Hutto from a family detention center to a women's immigrant prison. Continued allegations of sexual abuse by Corrections Corporation of America guards have been lodged at Hutto both as a family detention facility and, later, as a women's prison. Although Hutto is touted as a symbolic example of Obama's commitment to detention reform, its conversion more accurately reflects the Obama administration's expansion of detention capacity through the continued use of private prison operators despite ongoing abuse.

Surrogates and subcontractors in the detention regime are not limited to domestic incarceration. Detention strategies, impacted by contemporary securitization frameworks targeting terrorism, also exist outside of these global anxieties and are executed as a global arm of domestic migration control. For example, before enemy combatants were imprisoned in what has been a called a "legal black hole," Guantánamo Naval Base was used for the detention of Haitian and Cuban migrants intercepted at sea precisely because the vagaries of sovereignty and the boundaries of constitutional protections of detainees made the offshore facility an uncertain, perhaps ungovernable legal entity. The mass detention of Haitians in particular merged the racial exclusion of black "undesirables" with the discourses of national security and public health—in this case, the fear of HIV—in a legal prologue to the domestic and international detentions in the war on terror. Despite a 1990 Centers for Disease Control advisory eliminating HIV as a rationale for exclusion, the United States quarantined Haitian asylum seekers, creating off its shores what Judge Sterling Johnson Jr. of the federal district court called "the only known refugee camp in the world composed entirely of HIV-positive refugees."[45] This episode, a contemporary parallel to border health policies of the nineteenth and early twentieth centuries, underscores the repetitive logics of racialized noncitizen detention and reaffirms the importance of cognizance of detention history. The Haitian HIV detentions also demonstrate the recurrence of what Nayan Shah calls "contagious divides"—that is, fears of contagion and their use as rationales for control of racialized immigrant undesirables, especially the use of off-shore, global detention sites.[46] Moreover Haitian detentions at Guantánamo helped to construct the legal groundwork and material infrastructure for confining enemy combatants in the war on terror.

As with Guantánamo, U.S. military bases overseas are often used for the detention of interdicted migrants destined for the United States. For example,

from April to December 1999 the U.S. Coast Guard intercepted seven Chinese boats destined for the United States and detained almost one thousand migrants at Tinian and Midway islands in the Pacific as well as in detention centers in Guatemala.[47] Other detention sites for interdicted migrants have included U.S. bases in Panama, Ecuador, and Guam and a hospital ship anchored in Kingston, Jamaica.[48] In the late 1990s the United States established the Regional Conference on Migration, or Puebla Process, to create hemispheric partners in drug and immigration control, permitting the U.S. Coast Guard access to the territorial waters of twenty-five nations. Under the guise of drug interdiction, U.S. Immigration and Customs Enforcement (ICE) has worked directly with the Ecuadoran National Police to combat human smuggling, leading to complaints of detainee abuse by U.S. sailors, the destruction of Ecuadoran sea vessels, and the eventual ouster of ICE from Ecuador.[49]

These global detention efforts reflect a diffusion of immigration enforcement, a policy that usually focuses, myopically, on border enforcement—attempting to seal the border from undocumented immigration. Except in this case the border and its enforcement jurisdiction are pushed outward into international waters. As seen in the Caribbean border zone—where apprehension at sea as opposed to the shores of southern Florida significantly alters would-be migrants' legal rights—the government seeks to maintain its detention infrastructure away from the United States. Such transnational border enforcement, even when conducted with binational cooperation, should not be confused with a transnational immigration control policy that might take social networks and global economies into consideration and utilize international development to bolster the economies of immigrant sending nations. This is explicitly border enforcement, exported globally.

The largest and most well-known target of U.S. border enforcement is the undocumented migration coming from and through Mexico. As a result the United States spends billions of dollars fortifying and militarizing the two thousand–mile U.S.-Mexico border. In addition in the late 1990s the United States launched an international anti–human smuggling operation called "Operation Global Reach," which established over forty international offices in cooperation with "source-country" governments.[50] In the first four years of Operation Global Reach immigration officials claim to have apprehended seventy-four thousand migrants passing through Central American nations. Mexico, for its part, launched its Plan Sur (Southern Plan) in 2001 to control migration across its borders with Belize and Guatemala. Mexico's National Migration Institute detained annually over 100,000 Central Americans and other migrants from twenty-five nations on their way to the United States

in the late 1990s.[51] In 2006 Mexico apprehended over 170,000 migrants.[52] Large numbers of such persons are incarcerated in detention centers funded by the United States in Guatemala and Honduras. Such efforts are consistent with Mexico's partnership in U.S. immigration control during the twentieth century. According to Kelly Lytle Hernández, "Mexican officials actively participated in the imagination and implementation of policing unsanctioned migration along the U.S.-Mexico border."[53] Third-party surrogates abroad, capturing and detaining would-be immigrants, make U.S. security a global effort.

Detaining migrants internationally at surrogate facilities, often with little oversight or accountability by U.S. officials, mirrors detention privatization domestically, increasing stealthily U.S. detention capacity and providing dramatic financial savings. It is far less expensive than detaining and deporting undocumented migrants from the United States. "The cost savings are enormous," stated one U.S. immigration representative in Honduras.[54] In 2000, for example, the United States paid only $173,000 to detain and deport six hundred smuggled migrants from Honduras at an estimated savings of $5 million.[55] Similarly U.S.-funded detention centers in Guatemala housing would-be migrants captured in Mexico are paid a fraction of the cost for daily bed space compared to centers and jails in the United States.[56] Effectively pushing the U.S. southern border and detention infrastructure into Central America, the southern migration of U.S. border policies into Latin America, much like the global relocation of the detention infrastructure in the war on terror, has resulted in an increase in criminalization of and human rights violations against immigrants as well as an increase in the militarization of Latin American borders.

Internationally the dispersion of detention operations in the war on terror has also created a sense of havoc, wherein apprehension, interrogation, and punishment are unstandardized and the absence of accountability and training fosters abuse and deflects responsibility. The U.S. wars in the Middle East, for example, have been called the most privatized war efforts on record, relying on 180,000 private contractors—more than deployed military personnel.[57] Civilian contractors are an intimate part of the detention regime, performing military and intelligence interrogations, security tasks, and medical support, and contractor ranks have been filled with former military personnel, such as when "former military psychologists working under contract for the [Central Intelligence] agency helped design the hard interrogation procedures."[58] Further, it is not insignificant that many of the civilian interrogators (not bound by military law) and military jailers at Abu Ghraib

were trained in U.S. jails and immigrant detention centers. As Michelle Brown has pointed out, the biographies of the reservists in the Abu Ghraib scandal reveal a combination of experience working in U.S. prisons in addition to a total lack of corrections training or cultural knowledge of Iraq.[59] Detention, diffused globally and relying on private contractors, thus provides capacity and flexibility. It permits the deflection of government criticism of the systemic procedures of jailers and accountability of leadership, whereby culpability instead supposedly lies with a "few bad eggs" or simply the "nightshift" at Abu Ghraib. That is, as detention at home and abroad is couched in exceptionality, so are detainee abuses. Curbing carceral state violence is stymied by these constructions and other articulations of state secrets and corporate privacy, making accountability for detainee abuse the exception. Although distinct from the domestic detention of immigrants, the U.S. global detention infrastructure linked to the war on terror produces similar results: increased prison capacities and authority, profiteering and growth by private and governmental agencies, and deniability and obfuscation of detainee abuse.

From Bad to Worse: Obama's Reforms and Record-Breaking Detention Regime

Three days after the inauguration of Barack Obama in January 2009, Dana Priest reported on the front page of the *Washington Post*, "With the stroke of his pen, he effectively declared an end to the 'war on terror' . . . signaling to the world that the reach of the U.S. government in battling its enemies will not be limitless."[60] Priest was referring to the intended closure of Guantánamo Bay Naval Base as a detention site. "The house of cards is finally falling down," said Vincent Warren of the Center for Constitutional Rights, which helped to defend Guantánamo detainees.[61] The public accounting of the abuses that took place during the previous administration's war on terror, however, would never happen. In the same year the Obama administration began instituting a series of administrative reforms to the domestic detention infrastructure. Director of ICE John Morton stated, "We're trying to move away from [a] 'one size fits all'" model for detaining immigrants toward a "truly civil detention system."[62] Other reforms at ICE and the Department of Homeland Security included replacing workplace immigration raids with audits of employers' immigrant employment records, the shuttering of the Hutto family detention center (and converting it to a women's detainee facility), a retooling of the fugitive operations program targeting persons with

existing deportation orders, and instituting comprehensive reviews of deportation orders to prioritize so-called violent criminal offenders.

The Obama administration drew from the long-term practices of surrogate and diffused detention enforcement in two ways: first, it distributed immense discretionary powers from the cabinet level to field officers for the detention and deportation of noncitizens or for granting relief; second, it broadly expanded the use of local partners in immigration enforcement. For example, the Department of Homeland Security under Obama deferred deportations for young immigrants who arrived without authorization as children, recognized same-sex partnerships as potential rationales for fighting deportation, and reformed the use of immigrant detainers in local jails, permitting release from jail or prison instead of uniformly initiating further detention and deportation proceedings. In other words, detention reform, with support from advocates, carefully singled out "sympathetic" detainee populations, articulating their "innocence" or exceptional vulnerabilities or merits in relation to the costliness of their detention. The execution of such discretionary relief, however, reflected old practices of uniform criminalization and zero tolerance. For example, a report from the American Immigration Lawyers Association and the American Immigration Council concluded, "The overwhelming conclusion is that most ICE offices have not changed their practices since the issuance of these new directives." "This is a classic example of leadership saying one thing and the rank and file doing another," said Gregory Chen of the AILA.[63]

In addition the diffusion of discretionary relief in the execution of detention and deportation from the president downward was accompanied by dramatic expansions in Bush-era enforcement initiatives leading to record-breaking detention and deportation statistics in each of Obama's years in office. In particular a trio of programs—the Criminal Alien Program, 287(g) Memoranda of Understanding, and Secure Communities—utilizes partnerships with local jails, police, and sheriffs' departments and has resulted in the detention and removal of over 400,000 noncitizens annually.[64] Although ICE chief Morton pledged to prioritize "serious criminal offenders," ICE has been criticized for establishing enforcement quotas in internal documents that pressure ICE officers to pursue the low-hanging fruit in a "surge" in enforcement efforts. ICE's labor union spokesperson, Chris Cane, stated, "For ICE leadership, it's not about keeping the community safe. It's about chasing this 400,000 number." These numerical goals increase the need for detention space not only because of the volume of deportation cases but because deporting

criminal aliens takes on average forty-five days, instead of eleven for so-called noncriminals, which creates a shortage of detention beds and the need for expanding capacity.[65]

Criminals-first priorities guided by discretionary powers have been largely condemned as smokescreens, as majorities of detainees and deportees have included persons unconvicted or unindicted for crimes and many others who are deported for minor, nonviolent offenses. These policies placed criminality and innocence in stark relief, with the government claiming removal of the worst of the worst and advocates articulating the voices of innocent victims of the deportation regime. In other words, the prevailing solutions of the Obama reforms reinforce serious limitations for detainee advocates who often rely on the continued articulations of innocence—and thus the criminality of others—in the ongoing context of obscured detention practices. For instance, the Mexican columnist Carlos Puig lamented the return of "thousands of convicted murders, sex offenders and drug dealers being sent back to their countries or origin,"[66] reinforcing the commonly held belief, based largely on stated U.S. enforcement priorities, that deportees are indeed dangerous. Puig leaves unchallenged the basic claims and legitimacy of U.S. enforcement policy, more or less telling the United States, *You keep them*. Trolling local jails for deportable migrants and deputizing local law enforcement signal the devolution of detention operations. Immigrant criminality and the legitimacy of immigration enforcement practices are reinforced, moving immigrants into a far more flexible and unrestrained system of punishment and incarceration.

Summary

Third-party surrogate jailers have been institutionalized by the United States, compartmentalizing detention in remote and obscure entities, dodging accountability, and making collective resistance more difficult. As Angela Davis suggests, "the prison industrial complex is much more than the sum of all jails and prisons in this country. It is a set of symbiotic relationships among correctional communities, transnational corporations, media conglomerates, guards' unions, and legislative and court agendas."[67] To understand the labyrinthine U.S. immigrant detention regime, one must look at the use of surrogate partners involved in this federal authority, whether they extend national borders outward or intensify detention and deportation in the interior of the country. Further, the export of U.S. immigration policies and legal structures to our North American neighbors, allies, former colonial territo-

ries, and current military outposts requires a broader, more global purview to understand historically the global reach of U.S. imperial power and the contemporary detention authority. It's important to reiterate that immigrant detainees and enemy combatants captured in the U.S. global war on terror are two different populations with vastly different desires and designs vis-à-vis the United States. Less different, however, are the spatial and legal patterns in their incarceration, enforcement priorities and racist criminalization, and the context of national security that envelops both sets of detainees. Detention at home and abroad in a global security context is invigorated by the regime's flexibility and obscurity. The diffused and surrogate system of detention produces a pliable, biased, productive, and deeply advantageous state power over immigrants and foreigners. In short, security of the nation comes at the expense of the security of migrants and foreigners abroad. For both groups of detainees the diffused and remote systems of detention compromise physical safety and legal recourse. The intensified migration-security nexus makes aliens' and outsiders' presumed criminality more visible, while the structurally obscure system of incarceration disappears the detainee from public view.

Any confrontation, resolution, or abolition of detention at home or abroad will have to contend with the mutually constitutive migration-security nexus and its principal characteristic, obscurity. That is, existing efforts at accountability in this remote system of incarceration are structured in the very obscurity of the overall system and reflect the diffused spatiality of the detention regime. In seeking the innocence or targeted relief of particularly sympathetic detainees, the larger castigatory system remains immune to the piecemeal relief of existing detainee advocacy. A chief concern, then, is not only the international application or adoption of U.S. detention practices but the transposition and implementation of racial fears often at the foundation of U.S. immigration policies. Detention, when founded in racial xenophobia and executed with little opposition because of the legal vulnerabilities of noncitizens, will serve to cement racialized constructions of criminality, enemy behavior, or terrorist activity in the global arena. Additionally surrogate detention, as witnessed in the war on terror, does not just flow from the nation outward. Because the war on terror distorts the meaning of national security, it also has a dramatic effect on the constitution of domestic detention practices, bringing global imperatives and legal strategies home. As Jeanne Theoharis writes in her article "Guantánamo at Home," "Guantánamo is a particular way of seeing the Constitution, of constructing the landscape as a murky terrain of lurking enemies where courts become part of the bulwark against

such dangers, where rights have limits and where international standards must be weighed against national security."[68] Migrants and foreigners in detention are bound to a legal system with vast extralegal methods and accepted practices that are amplified in the securitization context. Contradictory in every way, immigrant detention is morally bankrupt yet profitable, is meant to securitize the nation through the insecurity of others, and is bound by inflexible rules and consolidated authorities, yet immigrant detention is robust in its flexibility and obscurity as an enforcement mechanism.

NOTES

1. Parenti notes a parallel form of "legal cross-fertilization" along the U.S.-Mexico border in the early 1990s, when Border Patrol agents were "empowered" to perform the duties of Drug Enforcement and Customs agents, and "a de facto form" of merging enforcements when the Border Patrol works jointly with local police. Parenti writes, "Thus, when a joint INS-police patrol makes contact with a 'subject,' the police officers and Border Patrol agents can simply pass the person back and forth, from the enforcer of state criminal codes to the enforcer of federal immigration and contraband laws" (*Lockdown America*, 145).

2. Faist, "*Extension du domaine de la lutte*," 7–8.

3. Kanstroom, *Deportation Nation*, 22.

4. Neuman, *Strangers to the Constitution*, 19.

5. Hernández, "Undue Process."

6. Simanski and Sapp, "Immigration Enforcement Actions," 3–5.

7. Karen De Young, "CIA Has Quit Operating Secret Jails, Chief Says," *Washington Post*, April 10, 2009.

8. A Somali detainee, for example, was incarcerated aboard a U.S. Navy ship for two months as recently as 2011. See Ken Dilanian, "Terrorism Suspect Secretly Held for Two Months," *Los Angeles Times*, July 6, 2011.

9. De Young, "CIA Has Quit Operating Secret Jails, Chief Says."

10. Agamben, *State of Exception*, 2–4.

11. Hernández, "Undue Process."

12. Mueller, *Overblown*, 3.

13. For a critical discussion of how the spectacle of torture at Abu Ghraib obscures "the naturalized landscape" and "unspectacular" punishment of persons in U.S. prisons, see Rodríguez, "(Non)Scenes of Captivity."

14. Lahav, "The Rise of Nonstate Actors in Migration Regulation in the United States and Europe," 216, 217.

15. T. F. Schmucker, letter to the Commissioner-General of Immigration, "Recommending certain alterations of the detention station at El Paso," National Archives I, "Subject Correspondence 1906–1932," Box 45, Entry 9, Folder 51646/1-C, part 1; Swing, *Annual Report of the Immigration and Naturalization Service*, 35–36.

16. Parenti, *Lockdown America*, 141.

17. Nina Bernstein, "Officials Hid Truth of Immigrant Deaths in Jail," *New York Times*, January 9, 2010, accessed May 16, 2010, http://www.nytimes.com/2010/01/10/us/10detain.html?ref=incustodydeaths&_r=0.

18. Alisa Solomon, "Detainees Equal Dollars," *Village Voice*, August 14–20, 2002, 46.

19. Lee, *At America's Gates*, 124; Hernández, "The Crimes and Consequences of Illegal Immigration," 441.

20. Spencer S. Hsu, "Immigration Raid Jars a Small Town," *Washington Post*, May, 18, 2008, accessed August 9, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2008/05/17/AR2008051702474.html.

21. Spencer S. Hsu and Sylvia Moreno, "Border Policy's Success Strains Resources," *Washington Post*, February 2, 2007; Kirk Semple, "Plan to Upgrade New Jersey Jail into Model for Immigrant Detention Centers," *New York Times*, January 27, 2011, accessed August 9, 2011, http://www.nytimes.com/2011/01/28/nyregion/28detain.html?pagewanted=all; Welch, *Detained*, 90.

22. Stephanie Chen, "Larger Inmate Population Is Boon to Private Prisons, *Wall Street Journal*, November 19, 2008, accessed July 25, 2010, http://online.wsj.com/article/SB122705334657739263.html?mod=todays_us_page_one.

23. Anna Gorman, "Immigration Detention Center Considered," *Los Angeles Times*, February 3, 2009.

24. Howard Fischer, "Napolitano Vetoes Include Mexico Prison for Mexicans," *Arizona Daily Star* (Tucson), May 3, 2005, accessed January 4, 2015, http://www.freerepublic.com/focus/f-news/1395788/posts.

25. Kevin Yamamura, "Schwarzenegger: Send Illegal Immigrant Inmates to Mexico," *Sacramento Bee*, January 25, 2010, accessed July 21, 2010, http://www.sacbee.com/static/weblogs/capitolalertlatest/2010/01/schwarzenegger-143.html.

26. Tom Barry, "Privatizing Homeland Security," Border Lines, October 28, 2009, accessed January 4, 2015, http://borderlinesblog.blogspot.com/2009/10/privatizing-homeland-security.html.

27. Lahav, "The Rise of Nonstate Actors in Migration Regulation in the United States and Europe," 228–29.

28. Nina Bernstein, "City of Immigrants Fills Jail Cells with Its Own," *New York Times*, December 27, 2008.

29. Maruskin, "Voices from Around the Country Call for INS Detention Reform," 32. The Chinese to which the *Patriot-News* article refers are the captured migrants who were smuggled aboard the ill-fated *Golden Venture* that ran aground at New York Harbor in 1993.

30. Anna Gorman, "Cities and Counties Rely on U.S. Immigrant Detention Fees," *Los Angeles Times*, March 17, 2009. In the Bay Area, in the absence of a dedicated immigrant detention facility, Santa Clara County began housing detainees in 2003. Its chief of corrections, Edward Flores, states, "It was a strategy to help us financially. . . . We have become very reliant on this revenue."

31. Gilmore, *Golden Gulag*, 106.

32. I thank Dylan Rodríguez for clarifying this critical point.

33. Chen, "Larger Inmate Population Is Boon to Private Prisons."

34. Nina Bernstein, "Few Details on Immigrants Who Died in Custody," *New York Times*, May 5, 2008, accessed January 2, 2013, http://www.nytimes.com/2008/05/05/nyregion/05detain.html?fta=y.

35. Andrew Becker, "Rebranding at ICE Meant to Soften Immigration Enforcement Agency's Image," *Washington Post*, June 17, 2010.

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41. Nina Bernstein, "U.S. to Overhaul Detention Policy for Immigrants," *New York Times*, August 6, 2009.

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45. Farmer, *Pathologies of Power*, 66.

46. Shah, *Contagious Divides*.

47. Schneider et al., "Human Cargo."

48. Mitchell, "The Costs of State Power," 88. See also Wilch, "Delegation Brings Hope," 6.

49. Hiemstra, "The U.S. and Ecuador," 20, 21–22.

50. Flynn, "¿Dónde Está La Frontera?" See also Tom Barry, "Pushing Our Borders Out," IRC Americas Program Policy Brief, Hispanic Vista, February 17, 2005, accessed January 12, 2015, http://www.hispanicvista.com/hvc/Opinion/Guest_Columns/022805barry.htm.

51. Mohar and Alcaraz, "U.S. Border Controls," 146.

52. James C. McKinley, "Despite Crackdown, Migrants Stream into South Mexico," *New York Times*, January 28, 2007.

53. Hernández, "The Crimes and Consequences of Illegal Immigration," 442.

54. Flynn, "¿Dónde Está La Frontera?"

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68. Jeanne Theoharis, "Guantánamo at Home," *Nation*, April 20, 2009, 16–21.