BORDER GAMES

*Smita Ghosh**

Immigration prisons have become central to immigration law enforcement. Abolishing them is central to immigration reform. But abolition may have unexpected consequences, especially for the large—and growing—portion of asylum-seekers who are confined after a border arrest. Ending or limiting border detention may encourage the government to exclude asylum-seekers altogether.

This Article illustrates this dynamic using archival records. It investigates official responses to the arrival of Haitian and Cuban asylum-seekers in the 1980s, a founding moment in the history of immigrant detention. During these perceived crises, officials responded by detaining asylum-seekers, planting the seeds for today's system of mass immigrant incarceration. Officials also developed new ways to bar asylum-seekers from the country in the first place. These exclusionary tactics complemented the government's detention efforts: they were cheaper and more effective than detention. Even after the 1980s, detention and exclusion—the two faces of sovereignty—travel side-by-side. They are time-tested and deeply related ways to control immigration.

What should we take from this history? This Article explains why courts, lawmakers, and reformers must turn their attention to immigration enforcement on both sides of the border. In addition to abolishing immigration prisons, policymakers and reformers should attend to the understudied exclusionary policies that complement imprisonment. Considering detention and exclusion together makes clear that abolition is an important, but incomplete, solution.

TABLE OF CONTENTS

* Appellate Counsel, Constitutional Accountability Center. I thank the participants in the Columbia Law School's Legal History Workshop, the University of Pennsylvania's Legal History Writer's Bloc, and the Association of American Law Schools' Immigration Section's New Voices in Immigration Law panel for their attention to this work. I am also grateful to Sarah Barringer Gordon, Sean Hill, Mary Hoopes, Sophia Lee, Serena Mayeri, Allegra McLeod, Sherally Munshi, K-Sue Park, Andrew Schoenholtz, Justin Simard, and Robin West for their assistance. Special thanks to Bill Creech at the National Archives' D.C. office and the staff of the Schomburg Center for Research in Black Culture, as well as the Cromwell Foundation for their generous support of this archival research. And finally, all my gratitude to the editors of the *Michigan Journal of Law & Society* for their thorough and thoughtful commentary on this article.

INTRODUCTION

In the late 1970s and early 1980s, the federal government faced a new type of immigration crisis. In this era, Congress—citing human rights principles—provided every person who arrived in the country the right to apply for asylum protection. Previously, the government had admitted refugees based on foreign policy prerogatives, favoring those fleeing Communist countries. But by 1968, every arriving migrant had the right to avoid deportation by seeking asylum status. This rights regime coexisted uncomfortably with political reality. Policymakers were skeptical about migration from non-Communist countries, especially when the migrants were poor or people of color. When Haitians fled an oppressive dictatorship in the late 1970s, they exposed the asylum system's limits. Immigration officers insisted that the Haitians were economic migrants rather than refugees, relying on now-familiar language about misuse of the asylum system by unworthy outsiders. While the new refugee-rights regime gave Haitians the right to seek asylum, it also motivated government actors to discourage asylum-seekers from exercising this right.

Officials in two presidential administrations, one Democratic and one Republican, developed two strategies to deter Haitian migrants. First, they detained them, reversing decades of immigration practice. Then, when faced with legal and political challenges to detention, government officials

moved immigration policing outside of American territory to a place where the law did not apply. Specifically, the Reagan administration introduced a practice called "interdiction." Working in international waters, the Coast Guard intercepted boats of migrants heading to the United States before they could receive the immigration screening that they would be entitled to if they arrived on land. Interdiction provided the conceptual heritage for a new form of exclusion—expedited removal—which allowed arriving asylum-seekers to be removed without a full hearing at the border, transmitting the flexibility of interdiction to a new environment. These policies immediately reduced the growth of the country's rapidly-expanding detention system. They also complemented mandatory detention because they presented none of detention's legal and practical problems while promising the same deterrent effects.

By relying on incarceration and interdiction together, the Reagan administration engaged in what I call "border games." Immigration scholars explain that immigration policing involves moveable and conceptual borders rather than a dichotomous characterization of inside and outside, but legal borders nevertheless have stark significance.[1] When confining immigrants becomes difficult—for legal, financial, or political reasons—policymakers are motivated to move immigration policing offshore. Ever since the advent of the modern asylum system—which, paradoxically, compelled the government to enact harsher immigration control measures—border games have become key features of immigration policy.

The Reagan administration was the first to complement detention with exclusionary tactics, but it was hardly the last. Faced with unprecedented numbers of Central American asylum-seekers on the Southwest border in the summer of 2014, the Obama administration began a controversial policy of family detention. At the same time, it compelled the Mexican government to create a new border-enforcement program that, in the words of DHS Secretary Jeh Johnson, "interdict[ed] the flow of illegal migrants from Central America."[2] In 2018, the Trump administration detained record

1. *See, e.g.*, MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2014 ed.); NATALIA MOLINA, HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS (2014).

2. Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION & HUM. SEC. 190, 203 (2016) (describing the Programa Frontera Sur (Southern Border Program), and characterizing it as a result of a

numbers of non-citizens.[3] At the same time, it adopted the so-called "Migrant Protection Protocols" (MPP), which required Central American asylum-seekers to wait in Mexico while the U.S. government processed their claims.[4] Mexican border cities became "America's waiting room[s]."[5] The number of migrants in American detention centers fell, but only because migrants were now trapped in Mexico. On January 22, 2021, the same day that President Biden announced a 100-day moratorium on deportation and detention, the U.S. ambassador to Guatemala held a press conference with Guatemalan officials to reiterate that the "border remain[ed] closed" to asylum-seekers from Central America.[6]

Asylum advocates and organizers have confirmed the existence of border games. After the MPP, American legal-services organizations looked outside of the United States, representing clients in the Mexican asylum system.[7] At the policy level, asylum advocates sought to make change in

"combination of funding and technical support, as well as diplomatic and other pressures from the United States"); Press Release, Dep't Homeland Sec., Statement by Sec'y Johnson About the Situation Along the Southwest Border, (Sept. 8, 2014), http://www.dhs.gov/news/2014/09/08/statement-secretary-johnson-about-situation-alongsouthwest-border [https://perma.cc/A8FU-U6P3]; Paulina Villegas & Randal C. Archibold, *Mexico Makes Route Tougher for Migrants*, N.Y. TIMES (Sept. 21, 2014), https://www.nytimes.com/2014/09/22/world/americas/mexico-makes-route-tougher-for-migrants.html [https://perma.cc/C4WH-N8LL] ("[U]nder pressure from the United States . . . Mexico . . . has taken a rare step toward stemming the flow of migrants, sweeping [Central American migrants] off trains, setting up more roadway checkpoints and raiding hotels and flophouses where they congregate on their journey north.").

3. J. Rachel Reyes, *Immigration Detention: Recent Trends and Scholarship*, CTR. MIGRATION STUD. fig.2 (Mar. 26, 2018), https://cmsny.org/publications/virtualbrief-detention/ [https://perma.cc/KN55-UE87].

4. *The "Migrant Protection Protocols"*, AM. IMMIGR. COUNCIL (Jan. 7, 2022), https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols [https://perma.cc/EPY2-65U4].

5. Jorge Ramos, Opinion, *Trump: 'I'm Using Mexico'*, N.Y. TIMES (Oct. 7, 2019), https://www.nytimes.com/2019/10/07/opinion/trump-im-using-mexico.html [https://perma.cc/X6YT-YKKW] (adding that "[t]he country itself has become the wall. It has to change.").

6. Sandra Cuffe, *A Honduran Migrant Caravan Collides with the U.S. "Vertical Border" in Guatemala*, INTERCEPT (Feb. 2, 2021, 10:40 AM), https://theintercept.com/2021/02/02/honduran-migrant-caravan-vertical-border-guatemala/ [https://perma.cc/AV5S-4UQB].

7. *See, e.g.*, Stacy Caplow & Maryellen Fullerton, *Migrant 'Protection' Protocols: A Report from the Front Lines*, INSIGHTFUL IMMIGR. BLOG (Sept. 10, 2019), http://blog.cyrusmehta.com/2019/09/migrant-protection-protocol-a-report-from-the-front-lines.html [https://perma.cc/LC4S-ML2Z] (describing Al Otro Lado's work in Tijuana, Mexico); Lorelei Laird, *Strangers in a Strange Land: 'Metering' Makes Asylum Rights Meaningless*, ABA J. (July 24, 2019, 6:00 AM), https://www.abajournal.com/web/article/strangers-in-a-strange-land-human-rights-organizations-say-metering-of-asylum-seekers-makes-asylum-rights-meaningless [https://perma.cc/HRX2-SBMM] (quoting Human Rights First lawyer Robyn Barnard: "It was incumbent on us to get involved and help them, but this is just not sustainable for organizations to then be expected to cross an international border to get to their clients."); *HIAS in Mexico*, HEBREW IMMIGR. AID SOC'Y, https://www.hias.org/where/mexico [https://perma.cc/MQ4G-NKG8]

Mexico.[8] Organizers and watchdog groups—who have long described the rise of offshore detention and policing by officials from the United States, Australia, and the European Union—categorized both strategies as weapons in the "war on migrants."[9]

Despite the prominence of detention and exclusion, scholars sometimes ignore their complementary nature. The history of border games contains powerful lessons for contemporary literature about immigration abolition. César Cuauhtémoc García Hernández, for example, has proposed an immigration enforcement system "whereby deprivations of liberty are not simply unusual, but intolerable."[10] Others have amplified García Hernández's abolitionist agenda, building on grassroots efforts to end immigrant detention, abolish Immigration and Customs Enforcement (ICE), and "total[ly] overhaul immigration enforcement."[11]

(reporting that the Juarez, Mexico office began in 2019 and conducts know your rights presentations, screens U.S. asylum-seekers, and represents people who are seeking protection in Mexico).

8. *See, e.g.*, Letter from Al Otro Lado TJ AC et al., Civil Soc'y Orgs., to Andrés Manuel López Obrador, President of Mexico, Marcelo Ebrard Causabon, Sec'y Foreign Affs. & Olga Sanchez Cordero, Sec'y Interior, Civil Society Organizations Call on the Mexican Government to Reject Any Reinstatement of MPP (Aug. 24, 2021) [https://perma.cc/US4C-PYQ6]; *A New Way Forward: Strengthening the Protection Landscape in Mexico*, REFUGEES INT'L (Nov. 12, 2020), https://www.refugeesinternational.org/reports/2020/11/9/a-new-way-forward-strengthening-the-protection-landscape-in-mexico [https://perma.cc/9MFX-F6T5].

9. *E.g.*, *About the Campaign*, STOP THE WAR ON MIGRANTS, https://stopthewaronmigrants.noblogs.org/about-the-campaign/ [https://perma.cc/JFT8-CCUW]; Pueblo Sin Fronteras, FACEBOOK (Jan. 29, 2021), https://m.facebook.com/story.php?story_fbid=4355021887857812&id=214556975237678 [https://perma.cc/9QFJ-35EV]. For an overview of comprehensive approaches to detention and interdiction practices, see Michael Flynn, *How and Why Immigration Detention Crossed the Globe* (Glob. Det. Project, Paper No. 8, 2014).

10. César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 250 (2017). Building on the work of Allegra McLeod, Angela Y. Davis, and W.E.B. Du Bois, García Hernández contended that immigrant incarceration was a "project of racial subordination" rooted in the "same political trajectory as slavery, the death penalty, and mass incarceration" and stained with the same "moral taint" as those subordinating projects. *Id.* at 251, 275.

11. Julianne Hing, *What Does it Mean to Abolish Ice?*, NATION (Jul. 11, 2018), https://www.thenation.com/article/archive/mean-abolish-ice/ [https://perma.cc/P9ML-MZ9F]; *see also* Danielle Jefferis, *Immigration Detention and Abolition*, HARV. L. REV. BLOG (July 16, 2019), https://blog.harvardlawreview.org/immigration-detention-and-abolition/ [https://perma.cc/RCA5-HGRA]; Jennifer M. Chacón, *Privatized Immigration Enforcement,* 52 HARV. C.R.-C.L. L. REV. 1, 35 (2017) ("[A]bolitionist grounds seem to offer the stronger axis around which to frame a moral critique of both immigration detention and immigration imprisonment than do arguments about the illegitimacy of private detention."). For grassroots and political efforts, see, for example, *Why Freedom for Immigrants Believes in Abolishing Immigration Detention*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/why-abolition [https://perma.cc/NQ22-LMX9] (describing "the rise of immigrant prisons and jails throughout the world in the 1980s and the 1990s" and tracing it to "the formation of the private prison industry in the United States"); Alejandro Lazo, *Not in My Backyard: States Seek to Abolish ICE Detention Centers*, WALL ST. J. (Mar. 1, 2020, 12:35 PM), https://www.wsj.com/articles/not-in-my-backyard-

My research suggests that abolishing immigration detention can lead to efforts to export immigration enforcement outside of the country, where it is hidden from the public eye and far from the jurisdiction of American courts. In the 1980s, I show interdiction appealed to executive officials because it helped them avoid the legal, financial, and political difficulties of immigrant detention. In this way, interdiction and detention were mutually reinforcing. When one became difficult, the other filled the gap. Both addressed the same overall goal: deterring migrants from seeking asylum. This suggests that abolishing immigration prisons may redirect detention's coerciveness outside a country's territorial borders. This unlooked-for consequence should be part of the conversations surrounding abolition. Specifically, it should help us understand the impact of abolition on asylum-seekers, who, as explored in this Article's conclusion, face paradoxes similar to those caused by rights expansions in the criminal and humanitarian contexts.

Furthermore, focusing on the border-games phenomenon challenges the criminal-justice parallel that has been many immigration scholars' focus. These scholars describe immigration enforcement as yet another form of "governing through crime."[12] Policymakers can control immigration us-

states-seek-to-abolish-ice-detention-centers-11583084109 [https://perma.cc/W6GM-456H]; Chantal Da Silva, *These 2020 Presidential Candidates Say They Would End Migrant Detention If Elected*, NEWSWEEK (July 2, 2019, 12:59 PM), https://www.newsweek.com/2020-presidential-candidates-migrant-detention-end-1447145 [https://perma.cc/J3UM-YRTX] (quoting then-candidate Kirsten Gillibrand and the campaign of Bernie Sanders); Kevin Uhrmacher et al., *Where 2020 Candidates Stand on Immigration*, WASH. POST (Apr. 8, 2020), https://www.washingtonpost.com/graphics/politics/policy-2020/immigration/ [https://perma.cc/X7MG-ECG4] (reporting that all Democratic candidates sought to "eliminate or limit family detention" except for Biden, Harris, & Klobuchar, who had no response); Emily Kassie, *Detained: How the US Built the World's Largest Immigrant Detention System*, GUARDIAN (Sept. 24, 2019), https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump [https://perma.cc/ST7Z-AM6T] ("As the race for the 2020 presidential election heats up, Democratic candidates have clamored to decry Trump's immigration policies."); Michael Flynn, *The Hidden Costs of Human Rights: The Case of Immigration Detention* 11 (Glob. Det. Project, Working Paper No. 7, 2013) ("[M]igrant rights advocates arguably should consider de-emphasizing discourses that focus only on improving the situation of non-citizens in state custody and re-emphasizing the taboo against depriving anyone of his or her liberty without charge.").

12. Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 614, 618 (describing the growing population of immigration detainees and drawing on the concept of governing through crime, or the "recent trend to increasingly construe problems of regulation as problems of crime, and in doing so, makes available a whole host of tools and techniques of criminal punishment that would otherwise be inappropriate and unavailable." And describing a "changing landscape of immigration control" beginning in the 1970s and 1980s); *see also* César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. Davis L. Rev. 197, 201; Yolanda Vazquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093,

ing crime policy, to be sure. But they can also adopt policies that prevent migrants from entering the country at all. These policies, which Stephen Legomsky calls "interception programs," complement domestic options like detention, but they are absent from scholarly conversations about immigrant detention and its history.[13] Understanding the relationship between interception and detention underscores differences between immigration detention and its criminal counterpart. It is a unique sovereign project that relies on manipulating international borders. Immigrant detention is an outcome of carceral politics; but it is also outside of it, the consequence of an exclusionary impulse that is inherent in sovereignty and enhanced, paradoxically, by policies of inclusion.

In addition to expanding abolitionist scholarship, this Article builds on a longer history of immigrant detention. From the earliest days of immigration control, officials detained non-citizens while screening and processing them for arrival. As Adam Goodman notes in his history of deportation, shipping companies were required to pay for the detention and return trip of any traveler who was excluded upon entry, leading shipping companies to detain prospective immigrants or visitors in "sheds"[14] even aboard the boat itself, in what Goodman calls "floating detention facilities."[15] The government opened its own detention centers at the turn of the century—including Ellis Island in 1892 and Angel Island in 1910—and began confining migrants for screening and, occasionally, long-term incarceration for those they believed presented specific threats, including the "enemy aliens" of Japanese, German, or Italian origin who were detained in immigration facilities during WWII.[16]

1116 (2017) (tying crimmigration to the "tough on crime movement."); Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 52 (2010) (attributing detention to the need to "protect us from terror or crime.").

13. Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT'L J. REFUGEE L. 677, 677-78 (2006) (arguing that "asylum is under attack" by "non-entrée policies," and noting that some of those policies "physically prevent persons from reaching a country's territory [and] are usually described as 'interception' programs").

14. DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 19 (2012).

15. ADAM GOODMAN, DEPORTATION MACHINE: AMERICA'S LONG HISTORY OF EXPELLING IMMIGRANTS 76 (2020).

16. Anna Pegler-Gordon, *"New York has a Concentration Camp of its Own": Japanese Confinement on Ellis Island During World War II*, 20 J. ASIAN AM. STUD. 373, 379–82 (2017) (noting that for the duration of America's participation in the war, immigration authorities operated twenty-five facilities for "enemy aliens," imprisoning over 22,000 non-citizens, over 15,000 of whom were Japanese).

The second half of the twentieth century was marked by a decline and precipitous rise in immigrant confinement. In 1954, though, the government publicly committed to a policy of nondetention.[17] While immigration officials continued to confine migrants in certain circumstances (like when they deemed specific migrants to be a flight or security risk), they reported relatively little use of long-term detention throughout the 1960s and 1970s.[18] In the 1980s, the number of detainees in immigration-service custody began to rise, increasing from an average of 1,624 detainees per day in 1980 to 6,571 in 1990.[19] The average length of detention also increased from 2.4 to 22.9 days in the same period.[20]

These developments led scholars to describe the "rebirth" of the immigrant-detention system—in the words of criminologist Jonathan Simon—in the 1980s, alongside the emergence of the carceral state in the same era.[21] The new immigrant detention—geographically disparate, long-term, and privatized—took on many of criminal incarceration's characteristics,

17. CARL LINDSKOOG, DETAIN AND PUNISH: HATIAN REFUGEES AND THE RISE OF THE WORLD'S LARGEST IMMIGRANT DETENTION SYSTEM 2 (2018); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 46-47 (2019) (noting that the non-detention policy was "not a fluke but rather the result of deliberate policy choices"). I explore the Cold War motivations behind the policy in my dissertation. Smita Ghosh, The Worst Kind of Prison in the World (2020) (Ph.D. dissertation, University of Pennsylvania).

18. *See* LINDSKOOG, *supra* note 17, at 2. WILSHER, *supra* note 14, at 64 ("In 1955, of 200,000 arrivals at the port of New York, astonishingly only sixteen were detained.").

19. [OFF.] OF MGMT & BUDGET, EXEC. [OFF.] OF THE PRESIDENT, APPENDIX TO THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1982, at I-N14 (1979); *Dep'ts. Com., Just., State, Judiciary, & Related Agencies Appropriations for 1993, Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 102nd Cong. 22 (1992) (listing the number of detention days as 2,398,565 for 1990, which divided by 365 results in an average of 6,571 detentions/day for 1990).

For context, the Immigration and Naturalization Service reported detaining an average of 145 detainees per day in 1955, the year after announcing its reduced detention policy. IMMIGR. & NATURALIZATION SERV., ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE 13 (1956).

20. U.S. GOV'T ACCOUNTABILITY OFF., REPORT TO THE CHAIRMAN, SUBCOMM. ON INT'L L., IMMIGR., & REFUGEES, H. COMM. ON JUDICIARY, IMMIGRATION CONTROL: IMMIGRATION POLICIES AFFECT INS DETENTION EFFORTS 2 (1992); *DHS Immigration Detention*, MARSHALL PROJECT, available at https://github.com/themarshallproject/dhs_immigration_detention/blob/master/detention.csv (last visited May 23, 2022).

21. Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 577-78 (1998) (describing the "resurgence" of imprisonment generally, and immigrant detention specifically, and describing Miami's Krome detention center); HERNÁNDEZ, *supra* note 17, at 61 (describing the "resurgence of immigration prisons" in the 1980s, when "the same anti-drug hysteria that swept criminal policing took hold in immigration law").

creating what Anil Kalhan has called a "quasi-punitive system of immcarceration."[22]

Caribbean asylum-seekers were central to this story, as several recent studies have demonstrated. Historian Carl Lindskoog shows that immigrant detention returned with an "unprecedented Caribbean refugee crisis" in the 1980s that gave the government an opportunity to "experiment with detention as a tool of immigration enforcement," converging "the immigration and non-immigration wings of the carceral state."[23] Sociologists and geographers describe the "cauldron of anxiety" produced by Haitian asylum-seekers, whose presence triggered a "racialized Cold War politics" that motivated new forms of border control.[24] These studies build on a longer history of race and immigration law, wherein government actors used immigration law to regulate the borders of community membership.[25] They also tie immigrant-prison development to the dynamics that produced the

22. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010) ("If convergence more generally has given rise to a system of *crimmigration law*, as observers maintain, then perhaps excessive immigration detention practices have evolved into a quasi-punitive system of *immcarceration*."); César Cuauhtémoc & García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 354 (2012) (concluding that "it was inevitable for penal imprisonment trends to taint immigration law enforcement with raced and classed mass incarceration"); Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL'Y REV. 429, 431 (2011) ("The 'problem' of foreignness also extends beyond statistics to the wider marginalization and mistreatment of non-citizens, a practice forged during the 'war on drugs' in the disproportionate incarceration of African-Americans and Latinos. The non-citizen, we argue, is the next and newest 'enemy' in an American war on crime."); *Id.* at 442 (arguing that immigration imprisonment is "tinged with the complex legacies of American racism"). On the punitive nature of immigrant incarceration generally, see, for example, Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2142 (2017) ("Immigration detention has become one of the most egregious forms of mass incarceration in the United States."); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 152-53 (2012) (describing the "reliance on detention in the immigration context within institutions that closely resemble (and often coexist alongside) sites of criminal incarceration").

23. *See* LINDSKOOG, *supra* note 17, at 2-3, 8 (2018); Jana K. Lipman, "*The Fish Trusts the Water, and it is in the Water that it is Cooked": The Caribbean Origins of the Krome Detention Center*, 2013 RADICAL HIST. REV. 115, 117 (2013) (arguing that the treatment of Haitian asylum-seekers evidences a "*longue durée* of US militarism and colonialism in the Caribbean.").

24. JEFFREY KAHN, ISLANDS OF SOVEREIGNTY: HAITIAN MIGRATION AND THE BORDERS OF EMPIRE 15 (2019); JENNA M. LOYD & ALISON MOUNTZ, BOATS, BORDERS, AND BASES: RACE, THE COLD WAR, AND THE RISE OF MIGRATION DETENTION IN THE UNITED STATES 24 (2018) (describing the "racialized cold war politics").

25. *See, e.g.*, NGAI, *supra* note 1; MOLINA, *supra* note 1; KELLY LYTLE HERNÁNDEZ, MIGRA! A HISTORY OF THE U.S. BORDER PATROL (2010); ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA ch. 1 (2012).

racialized, American carceral state—including longstanding presumptions about the excludability and criminality of racial others.[26]

Building on this interdisciplinary scholarship, this Article demonstrates how a unique immigration crisis—steeped in racialized Cold War politics in which Haitian migrants were viewed as particularly undesirable—created a new approach to immigration governance that applied to migrants of all races. It also expands on previous studies' rich histories of resistance to immigrant detention.[27] By relying on new sources from federal archives, I show that the Carter and Reagan administrations faced resistance from political allies who resented the placement of detention facilities in their proverbial backyards. This type of resistance, alongside protests from immigrant advocates, created the border games dynamic, making detention diffidifficult and exclusion all the more attractive.

In Part I, I tell the detention story that animates this Article. I describe Haitian asylum-seekers' arrival in South Florida in the late 1970s, the government's efforts to exclude and detain them, and the activists who resisted these efforts. Many Haitian asylum-seekers successfully resisted deportation. Their victories, however, increased the government's resolve to use detention as a form of deterrence, inducing the Reagan administration to reverse decades of immigration practice by requiring the detention of all immigrants. This mandate, built to address a specific refugee crisis, laid the groundwork for today's detention system. Most significantly, Reagan's policy enabled the first use of private contractors for detention by the federal government, which later became a key market for the country's confinement industry.

Despite using private contractors, detention was expensive—in terms of funds, litigation, and political capital. Resistance to detention came not only from non-citizens and their advocates but also from opponents of immigration, who mobilized diverse areas of law to resist immigrant con-

26. LINDSKOOG, *supra* note 17, at 7-8 (citing scholarship on the "historical rise of racialized mass incarceration"); HERNÁNDEZ, *supra* note 17, 11 (describing the racialization of the "war on drugs"). For scholarship on race and criminality, *see, e.g.*, KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014).

27. LINDSKOOG, *supra* note 17, at 4 (noting that "resistance began at the very moment . . . [the government] started jailing Haitian asylum seekers," and often rested on the "action and leadership of detained people"); *see* KAHN, *supra* note 24, at 6 (focusing on the changes to detention wrought by advocates for Haitian asylum-seekers).

finement. In Part II, I explain the consequences of a broadly conceptualized resistance to detention. Specifically, as detention became difficult, executive branch lawyers seized on a new policy called maritime interdiction. These lawyers predicted—and the archives show—that there would be less resistance to interdiction than detention. Legally, the interdiction policy allowed the government to argue that U.S. laws did not apply on the high seas. Politically, it kept immigration enforcement far from constituents, advocates, and the press. Detention remained an important part of immigration enforcement—in part because of the private contractors and local politicians that profited from it. But interdiction helped policymakers rely less on domestic detention. Instead, they pioneered new efforts at extraterritorial exclusion, using interdiction as a model. Reagan's policy became a prototype for foreign and domestic policymakers in the decades to come. Indeed, in 1996, lawmakers institutionalized the border-games dynamic by passing laws that greatly expanded the detention and legal exclusion of asylum-seekers through a process called expedited removal.

In Part III, I review scholarship on immigration detention and abolition in light of this history. Just as policymakers have begun to reimagine public safety without prisons, immigration scholars now argue for immigration enforcement without detention. But early asylum policy provides a cautionary tale: when activism made detention difficult in the 1980s, the Reagan administration only redoubled its efforts to exclude asylum-seekers at the border or before their arrival. For asylum-seekers, abolishing immigrant confinement is an incomplete solution that, like the expansion of rights in the criminal context, could lead to unintended and counterproductive consequences.

I. THE REBIRTH OF IMMIGRATION DETENTION

Today's system of "immcarceration" grew from the experience of Caribbean asylum-seekers who arrived in the late 1970s and early 1980s. In this Part, I outline my historical contributions in more detail. First, I explain why federal officials saw the arriving Caribbean migrants as an immigration emergency that had to be controlled. Officials from the Carter and Reagan administrations saw immigration as a political and social problem

requiring a quick solution. Policymakers from each administration initially insisted on using immigration detention to control arriving immigrants and deter new ones from coming. For years, immigration detention had been statutorily permitted, but officials had not regularly exercised their power to confine, relying instead on a policy where they released migrants on bond or parole until their status was resolved. This changed in the early 1980s, indicating the centrality of border detention to the modern system of immigrant incarceration

In Sections I.A and I.B, I show how the Carter and Reagan administrations reversed decades of precedent by detaining incoming migrants. The administrations had their differences. The Carter administration initially embraced detention more selectively, as a solution for dealing with Haitian migrants or Mariel Cubans without sponsors. The Reagan administration, by contrast, adopted and publicized a detention mandate that applied to all asylum-seekers. Each administration's experience, however, illustrates this Article's central insight: detaining immigrants domestically was fraught with legal, political, and financial problems, which made offshore options all the more appealing.

A. An Immigration Crisis

On December 12, 1972, a fifty-six-foot sailboat landed at Pompano Beach, Florida, forty miles north of Miami.[28] Of the sixty-five Haitians on board, twelve were former political prisoners who had bribed a guard for release. One, Yvon Bruno, explained that he decided to leave when three of his cellmates in a Port Au Prince prison "were taken out and were never seen again." After that, he said, "we decided it was time to leave."[29] According to scholars, this was a new wave of Haitian asylum-seeking.[30] In the 1950s and 1960s, Haitians had sought refuge in American cities in response

28. *65 Haitian Refugees in Florida After Journey in Leaking Boat*, N.Y. TIMES, Dec. 13, 1972, at 4A (on file with the *Michigan Journal of Law & Society*). Sociologist Jeffrey Kahn notes that St. Sauver was the first incident of Haitian boat people, while Historian Carl Lindskoog describes the first "boatload" as arriving in September 1963 but acknowledges that a "new phase in Haitian migration to the United States," involving increasing boat travel, began in 1972. *See* KAHN, *supra* note 24, at 61; LINDSKOOG, *supra* note 17, at 9, 13.

29. N.Y. TIMES, *supra* note 28.

30. *See, e.g.*, KAHN, *supra* note 24; LINDSKOOG, *supra* note 17.

to François "Papa Doc" Duvalier's regime.[31] These asylum-seekers tended to be from the country's middle class or elite and could afford to travel to the United States by plane. Most of them overstayed their tourist visas and became members of the country's growing community of undocumented immigrants.[32] After Duvalier died in 1971, his son, Jean-Claude "Baby Doc" Duvalier, became Haiti's president for life. Jean-Claude Duvalier's regime perpetuated many of the violent and repressive tactics of his father's—including a violent, private police force called the Tonton Makout—and also exacerbated economic displacement and isolation.[33] Jean-Claude embarked on an economic plan to attract foreign investment and manufacturing by promising tax exemptions and a low-wage, nonunion workforce.[34] Duvalier's policies hobbled the country's primarily agricultural economy and did little to support those who suffered from economic dislocation.[35] In other words, asylum-seekers in the "Baby Doc" era fled a combination of state-sponsored poverty and terror.[36]

When Haitians arrived, State Department and INS officials classified them as illegal immigrants, a response grounded in the history of U.S.-Haitian relations. Both Duvaliers had manipulated the Cold War concerns of American officials, who regarded their regimes as necessary partners in the fight against Communism. American officials offered financial aid, which in the 1960s covered over one-third of Haiti's operating expenses; and, fearing chaos and "Castro-Communist penetration" if François Duva-

31. *Id.* at 14.

32. *Id.*; *see* KAHN, *supra* note 24, at 35 (describing an "Exile community" in New York that received a "benign" treatment from the INS, making them a "largely invisible population").

33. *See* Patrick Bellegarde-Smith, *Dynastic Dictatorship: The Duvalier Years, 1957-1986*, *in* HAITIAN HISTORY: NEW PERSPECTIVES 274-275, 280 (Alyssa Goldstein Sepinwall ed., 2012) (calling the Duvalier Regime(s) the "most brutal experienced by Haiti in two centuries of national life").

34. JONATHAN M. KATZ, THE BIG TRUCK THAT WENT BY: HOW THE WORLD CAME TO SAVE HAITI AND LEFT BEHIND A DISASTER 44 (2013); *see* MICHEL-ROLPH TROUILLOT, HAITI - STATE AGAINST NATION: THE ORIGINS AND LEGACY OF DUVALIERISM 200 (1990) (noting that "the economic basis of Jean-Claudisme was . . . a banal wager on the attraction that Haiti's cheap labor force represents for U.S. capital" and that this vision began in François Duvalier's regime).

35. Scholars make clear that this grew from a lack of tax revenue and widespread corruption. *See, e.g.*, KATZ, *supra* note 34, at 44-45.

36. Taxes were extracted from citizens, including "unofficial taxes" from Local Tonton Makouts. Taxes on consumer goods also increased, further burdening the peasantry and urban masses. TROUILLOT, *supra* note 34, at 212–214.

lier lost power, also provided military assistance to his regime.[37] "Papa Doc" Duvalier exploited this dynamic. In 1962, when the military needed his government's cooperation in a naval quarantine of Cuba, Duvalier conditioned his participation on the State Department providing $2.8 million for an international airport in Port Au Prince.[38] (The François Duvalier International Airport was completed in 1965.) When Jean-Claude Duvalier became president, he continued this relationship. In his inaugural speech, during which U.S. warships stood by to facilitate the smooth transition of power, he declared that the "United States will always find Haiti on its side against communism."[39] His economic development scheme was also funded by U.S. dollars. U.S. aid workers, investors, and journalists imagined that Haiti could become the "Taiwan of the Caribbean," a hub of cheap and duty-free manufacturing.[40] As money from American entities flowed in, Haiti remained an American partner.[41]

Because they were uninvited migrants seeking asylum from an American ally, the Haitians encountered a different type of treatment than prior refugee populations. Prior refugee admissions had been administered by what Aristide Zolberg calls "remote control"[42]—that is, determined by foreign policy prerogatives and generally involving determining a migrant's refugee eligibility before they arrived in America. In 1956, Eisenhower used this provision to admit Hungarian "freedom fighters" after a failed uprising against the Hungarian People's Republic. Other Presidents used the parole power—sometimes with Congressional approval and sometimes without—to admit refugees from Cuba, the Soviet Union, and "Indochina" (Laos, Cambodia, and Vietnam).[43] All of these admissions served a geopolitical

37. STEPHEN G. RABE, THE MOST DANGEROUS AREA IN THE WORLD: JOHN F. KENNEDY CONFRONTS COMMUNIST REVOLUTION IN LATIN AMERICA 49-50 (2013); BELLEGARDE-SMITH, *supra* note 29, at 224, 276.

38. RABE, *supra* note 37, at 51-52.

39. LAURENT DUBOIS, HAITI: THE AFTERSHOCKS OF HISTORY 350 (2012).

40. KATZ, *supra* note 34, at 44; Matthea Brandenburg, *Beyond Aid: The Flood of Rice in Haiti*, ACTON INST. POWERBLOG (Mar. 15, 2013), https://blog.acton.org/archives/51728-beyond-aid-the-flood-of-rice-in-haiti.html [https://perma.cc/V7J2-LJET] (attributing this statement to former U.S. Ambassador to Haiti, Ernest Preeg, as well).

41. *See, e.g.*, KATZ, *supra* note 34, at 45 (also reporting that, in the early 1980s, all of the baseballs used by Major League Baseball teams were made in Haiti); KAHN, *supra* note 24, at 41.

42. Aristide R. Zolberg, *Managing a World on the Move*, 36 POPULATION COUNCIL 222, 223 (2006).

43. U.S. GEN. ACCT. OFF., ID-79-20, THE INDOCHINESE EXODUS: A HUMANITARIAN DILEMMA: REPORT TO THE CONGRESS 48-49 (1979).

purpose for the government, and included intentional action on part of the U.S. government—what Gil Loescher & John Scanlan aptly call a "calculated kindness."[44]

The Haitian asylum-seekers did not fit the profile of these "remote control" refugees. First, they sought refuge from an ally that opposed Communism, rather than a Communist enemy. Further, the Haitians triggered specific—and racialized—concerns in many Miamians. As Alex Stepick, a Miami-based anthropologist explains, Miami residents saw Haitians as "uneducated, unskilled rural peasants who were likely to be disease-ridden."[45] Furthermore, in the late 1970s "a rumor of endemic tuberculosis among Haitians swept through South Florida."[46] Arriving Haitians had difficulty finding jobs in Miami, where the unemployment rate was already high, and most lived in poverty.[47]

In this environment, both the State Department and the INS insisted that the Haitians were "economic migrants," distinguishing the vast majority of Hatian migrants from legitimate refugees.[48] Immigration officials reinforced this position by encouraging Haitian migrants to leave the country. According to one asylum-seeker, an INS interpreter told him that "not even God could help us to stay in the United States."[49] Another reported that the INS officials intercepting them warned that they "would be jailed for five years if they choose to remain in the United States."[50] Another alleged that when she arrived in the United States, INS officials presented a volun-

44. GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT (1986).

45. ALEX STEPICK & NANCY FONER, PRIDE AGAINST PREJUDICE: HAITIANS IN THE UNITED STATES 112 (1998).

46. *Id.* at 34.

47. Carl Lindskoog, Refugees and Resistance: International Activism for Grassroots Democracy and Human Rights in New York, Miami, and Haiti, 1957 to 1994, at 110–13 (2013) (Ph.D. Dissertation, City University of New York) (on file with City University of New York).

48. *See* Letter from Bernard Soberman, Assistant Comm'r, Adjudications, to Reverend Ball (Nov. 7, 1979) [hereinafter Gollobin Papers] (on file with the *Michigan Journal of Law & Society*).

49. Letter from Int'l Hum. Rts. L. Grp., on behalf of Nat'l Council of Churches, to Chairman, Inter-Am. Comm'n H.R. (undated), Subject Files of Rudolph Giuliani [hereinafter SFRG] (on file with the *Michigan Journal of Law & Society*).

50. Letter from William A. Davis, Covington & Burling, to Leonel Castillo, Comm'r, Immigr. & Naturalization Serv. (Dec. 13, 1978) (on file with the *Michigan Journal of Law & Society*) ("recent arrivals . . . are being pressured and coerced into leaving this country," including being "informed by INS officials who intercepted them that they would be jailed for five years if they choose to remain in the United States"); Gollobin Papers, *supra* note 48.

tary departure form to her and asked her to sign it without translating it into Kreyol.[51]

Those who resisted this pressure assembled a network of religious and legal advocates intent on providing sanctuary. When the INS's Miami office encountered the first boat of Haitians on Pompano Beach, it sent the boat's sixty-five passengers to a Church World Service refugee program in the city. This facilitated the involvement of the National Council of Churches of Christ (NCC), a national organization with "liberal establishment clout" and a history of connections to radical organizations through anti-Vietnam protests.[52] The network also included Baptist ministers in Miami, as well as the "Haitian Fathers," a group of exiled Haitian priests in Brooklyn.[53] The Haitian Fathers were "steeped in liberation theology" and committed to grassroots organizing among the Haitian diaspora.[54] Soon, their religious advocacy community turned into a legal one, attracting civil rights lawyers, defense attorneys, and an emerging community of immigration-focused legal organizations.[55]

1. Legal and Political Challenges

Advocates for Haitian asylum-seekers took advantage of a rapidly expanding set of legal protections for asylum-seekers. Since 1950, Section 243(h) of the Immigration and Nationality Act (INA) allowed for suspended deportation when, "in the opinion of the Attorney General," the deportee would face persecution in the country they were to be deported to. Im-

51. Observation of Petitioners on the United States Memorandum of 1 February 1980, at 12-13, Int'l Hum. Rts. L. Grp. v. United States, Case 2338, Inter-Am. Comm'n H.R. (1980) (quoting affidavit of Louisans Innocent) (on file with the *Michigan Journal of Law & Society*).

52. KAHN, *supra* note 24, at 64.

53. *Id.* at 62-65. ("[T]he Haitian Fathers . . . were former teachers at the elite Port-au-Prince school, Petit Séminaire Collège Saint Martial. Accused of plotting against the regime of Papa Doc and exiled in 1969, they eventually settled in New York in the early 1970s."); Letter from Jacques Mompremier, Dir., Haitian Refugee Info. Ctr. (Nov. 27, 1974) (the HRIC was later renamed the "Haitian Refugee Center") (describing the "funds, clothing, and other assistance from numerous Protestant churches, including the National Council of Churches, as well as from Catholic Church [sic], from community organizations and from individuals.") (on file with the *Michigan Journal of Law & Society*).

54. Nina Glick Schiller, *Foreword*, *in* GEOGRAPHIES OF THE HAITIAN DIASPORA xxv (2011).

55. KAHN, *supra* note 24, at 65-66; Leila Kawar, *Legal Mobilization on the Terrain of the State: Creating a Field of Immigrant Rights Lawyering in France and the United States*, 36 L. & SOC. INQUIRY 354, 364–65 (2011) (describing the growth of immigrant advocacy groups funded by prominent foundations).

migrant advocates had long invoked this provision in deportation cases, articulating a "right to refuge" for non-citizens.[56] By the 1970s, developments in international law added to asylum-seekers' range of protections. In 1968, after prompting from President Johnson, two-thirds of the Senate ratified the 1967 Protocol Relating to the Status of Refugees.[57]

Congress and the President likely saw the Protocol's ratification as a symbolic action. President Johnson thought it would help broadcast the administration's commitment to international law with little opposition in Congress or actual obligations. Indeed, the Protocol only obliged the government not to return (or "refouler") any migrant to a country where they would face persecution, which the government had already done in Section 243(h).[58] The administration was so sure nothing would change that one government representative told a Senator it was "absolutely clear" that the Protocol would not, as the Senator feared, "require the United States to admit new categories or numbers of aliens."[59]

Nevertheless, the Protocol eventually resulted in small but useful changes to INS regulations. After a high-profile and ill-fated attempt by the

---

56. For a thorough discussion of the 1950 provision and its updating into Sec. 243(h) of the McCarran-Walter Act, see Yael Schacher, Exceptions to Exclusion: A Prehistory of Asylum in the United States, 1880-1980 (2016) (Ph.D. dissertation, Harvard University) (on file with the *Michigan Journal of Law & Society*).

57. Protocol Relating to the Statute of Refugees, *signed* Jan. 21, 1967, 19 U.S.T. 6223 (entered into force Oct. 4, 1967), T.I.A.S. No. 6577, 606 U.N.T.S. 267. Article 1 of the Protocol incorporates by reference the 1951 Geneva Convention Relating to the Status of Refugees, which had accorded protection to "[a]ny person who, . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it," but the 1967 Protocol removed the limiting language "as a result of events occurring before 1 January 1951."

58. Rebecca Hamlin & Philip E. Wolgin, *Symbolic Politics and Policy Feedback:* The United Nations Protocol Relating to the Status of Refugees *and American Refugee Policy in the Cold War*, 46 INT'L MIGRATION REV. 586, 597-98 (2012) (noting that the "transactional costs for the Johnson Administration to pass the Protocol then appeared low, with strong domestic support and a need to pass some type of human rights legislation.").

59. Kan Kam Lin v. Rinaldi, 361 F. Supp. 177, 185 n.2, 187 n.7 (D.N.J. 1973), *aff'd sub nom.* Yu Fung Cheng v. Rinaldi, 493 F.2d 1229 (3d Cir. 1974), citing this "colloquy" of Senators concerning the Protocol:

> SENATOR SPARKMAN. I want to make certain of this: Is it absolutely clear that nothing in this protocol, first, requires the United States to admit new categories or numbers of aliens?
>
> MR. DAWSON. That is absolutely clear.

INS to return a Lithuanian sailor to his Soviet ship, members of Congress pressured the INS to operationalize the Protocol they had signed only two years earlier.[60] The INS produced a set of regulations that gave arriving migrants the right to make an "application for asylum" before a District Director.[61]

These regulations gave advocates for Haitian asylum-seekers another way to challenge the government's efforts. By 1975, lawyers from the National Emergency Civil Liberties Committee had filed three federal challenges concerning the government's treatment of Haitian asylum-seekers.[62] They charged that Haitians deserved "hearings before an immigration judge," decried the procedural inadequacy of the government's fact-finding procedures, and urged their rights had been violated under the Refugee Convention.[63] In and out of court, advocates referenced the "spirit" of the Protocol to support the Haitian's asylum claims.[64] As these lawsuits proceeded, immigration officials took steps to deter future migration. In July 1978, the State Department and INS instituted a series of practices—what advocates called the "Haitian Program"—to deter further arrivals. Immigration judges held 10 to 100 mass deportation proceedings per day, seeking to deport thousands of Haitians virtually *en masse*.[65]

---

60. Hamlin & Wolgin, *supra* note 53, at 603 n.30 (noting that "the episode resonated with the public so much that it was recounted in a 1978 made for-TV movie starring Alan Arkin as Simas Kudirka [the Lithuanian sailor] . . . which won two Emmys and was nominated for a third."). For a history of Operations Instructions by INS and the State Department, see Pierre v. United States, 547 F.2d 1281, 1284-85 (5th Cir. 1977).

61. Sannon v. United States, 427 F. Supp. 1270, 1274 (S.D. Fla. 1977) (citing 8 C.F.R. Part 108), *vacated and remanded sub nom* (mem.) Jean-Baptiste v. United States, 566 F.2d 104 (5th Cir. 1978).

62. *See, e.g.*, Writ of Habeas Corpus Petition, Jean-Baptiste v. United States, No. 75-2124 (S.D. Fla. 1975) (confirming the consolidation of habeas corpus petitions in *Sannon*) (on file with the *Michigan Journal of Law & Society*); *Pierre*, 547 F.2d at 1282 (describing petitioners as "147 Haitian nationals"). In *Pierre*, Bierman's firm challenged the Operating Instructions but used the Due Process Clause, Equal Protection Clause, and Administrative Procedure Act, rather than the Protocol. KAHN, *supra* note 24, at 289.

63. *See, e.g.*, Letter from David Hunter, Deputy Gen. Sec'y, Nat'l Council of the Churches of Christ, to Carol Laine, Assistant Sec'y Pub. Affs., State Dep't (July 24, 1974) (describing Haitians in exclusion and deportation proceedings) (on file with the *Michigan Journal of Law & Society*); *Sannon*, 427 F. Supp. 1270; Writ of Habeas Corpus Petition, *supra* note 62; *Pierre*, 547 F.2d at 1284-85.

64. Letter from William A. Davis, Att'y, Covington & Burling, to Leonel Castillo, Comm'r, Immigr. & Naturalization Serv. 10 (Dec. 13, 1978) (on file with the *Michigan Journal of Law & Society*).

65. Davis Letter, *supra* note 50, at 1 (adding also that, before July 1978, the rate had been ten cases per week); LINDSKOOG, *supra* note 17, at 26–27; *see also* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1032 (11th Cir. 1982) ("The results of the accelerated program adopted by INS are revealing. None of the over 4,000 Haitians processed during this program were granted asylum.").

2. The Mariel Boatlift

As advocates for Haitian asylum-seekers prepared a lawsuit against the Haitian Program, they were soon confounded by the so-called Mariel boatlift. Between April and October of 1980, over 100,000 Cubans came to the United States from Cuba's Mariel Harbor. The boatlift marked a change in the politics surrounding Cuban asylum-seekers, representing, in the words of María Cristina García, the first time since the start of the Cold War that the "government denied refugee status to individuals emigrating from a communist state."[66] Part of this dynamic grew from a popular legend that these migrants had been released from Cuban prisons by Fidel Castro to aggravate the U.S. government.[67] Perhaps as a result of this press, the government approached the Mariel Cubans with a mixture of skepticism and welcome–a hybridization of "remote control" refugees and uninvited asylum-seekers.[68] Nevertheless, as boats from Mariel harbor continued to arrive, the Carter administration concluded that it would not be able to deport all of the Cuban newcomers,[69] especially because Cuba would likely refuse to accept them.[70]

66. MARÍA CRISTINA GARCÍA, HAVANA USA: CUBAN EXILES AND CUBAN AMERICANS IN SOUTH FLORIDA, 1959-1994, ch. 2 (1996); *see also* STEPHEN PORTER, BENEVOLENT EMPIRE U.S. POWER, HUMANITARIANISM, AND THE WORLD'S DISPOSSESSED 186 (2017).

67. *See* GARCÍA, *supra* note 66, at 65; MARK S. HAMM, THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE 52 (1995) ("The collective imagination of the . . . U.S. press inspired the belief that a number of Mariel Cubans were 'dangerous' people that could not be trusted."); Brian Hufker & Gray Cavender, *From Freedom Flotilla to America's Burden: The Social Construction of the Mariel Immigrants*, 31 SOCIO. Q. 321 (1990) (While criminals, homosexuals, and mental patients "constituted less than 5% of the immigrants," the "attention focused on that small group eventually stigmatized the entire population").

68. *See, e.g.*, Jana K. Lipman, *A Refugee Camp in America: Fort Chaffee and Vietnamese and Cuban Refugees, 1975-1982*, 33 J. AM. ETHNIC HIST. 57 (2014); DAVID W. ENGSTROM, PRESIDENTIAL DECISION MAKING ADRIFT: THE CARTER ADMINISTRATION AND THE MARIEL BOATLIFT 141 (1997) (reporting that FEMA was named to provide "coordination and logistical support" on April 27, 1980, and that President Carter declared an emergency in south Florida on May 5, giving FEMA "the legal authority to coordinate the activities of other agencies and, more important, release[] its considerable discretionary funding"). In July of 1980, the Carter administration convened the Cuban-Haitian Taskforce to replace FEMA in coordinating the processing of Cuban and Haitian refugees for new arrivals. *See* LINDSKOOG, *supra* note 17, at 45 (noting that the CHTF reported to the U.S. Coordinator for Refugee Affairs in the State Department).

69. Engstrom, *supra* note 68, at 139 ("Carter administration officials realized that once the Cubans had arrived, the vast majority would end up staying in the United States permanently.").

70. MARIO ANTONIO RIVERA, DECISION AND STRUCTURE: U.S. REFUGEE POLICY IN THE MARIEL CRISIS 11 (1991).

The administration needed a place to screen or "process" incoming Cubans.[71] Federal officials converted Miami's Orange Bowl stadium into an "ad hoc refugee shelter."[72] In July 1980, when officials were forced by the start of football season to move Cuban detainees again, they converted another facility—a decommissioned missile site in the Everglades that became known as "Camp Krome."[73] Federal officials used the Krome property, alongside an Arkansas detention center called Fort Chaffee, to house Mariel Cubans in the summer of 1980.[74]

The detention experiences of many Mariel Cubans, who were quickly released on parole, paralleled those of other refugee populations who had been admitted via remote control. These populations often needed to be detained for screening and connected to voluntary agencies that received federal money to give them services.[75] For example, historian Jana Lipman explains that the U.S. government detained Vietnamese refugees in a variety of military properties around the country in the course of resettling them in the United States. This included bases, most prominently on the U.S. territory of Guam and Fort Chaffee in Arkansas, which held roughly 24,000.[76] This is not to say that asylum-seekers were always welcome; the refugee processing center at Fort Chaffee triggered a protest from a retired

71. DEP'T OF ARMY, TASK FORCE RESETTLEMENT OPERATION AFTER ACTION REPORT II-II-D-1 (1982), https://apps.dtic.mil/sti/pdfs/ADA121197.pdf [https://perma.cc/L6J5-A7VD] (noting that "the basic procedure to out-process a refugee was a simple, yet, time-consuming process" and describing screens from INS, the FBI/CIA (in certain cases), the Public Health Service, and coordination with Voluntary Agencies to sponsor the parolee).

72. LINDSKOOG, *supra* note 17, at 35 (reporting that the centers were in Elgin Air Force Base in Florida, Ft. Chaffee in Arkansas, Ft. Indiantown Gap in Pennsylvania, and Ft. McCoy in Wisconsin); Lawrence Mahoney, *Dead End on Krome Avenue for the Haitians, there is no Ellis Island. Their Road to Freedom Ends in the Everglades*, S. FLA. SUN SENTINEL (Jan. 12, 1986, 12:00 AM), https://www.sun-sentinel.com/news/fl-xpm-1986-01-12-8601030563-story.html [https://perma.cc/AW6R-ZWV6] (remembering that after the boatlift, "tent cities were erected under I-95 and in the Orange Bowl, and the old rocket bases, including several in South Broward, were swarming with Cuban men, women and children"); Marlise Simons, *For 750 Cuban Refugees, United States Is a Tent City Under the Expressway*, WASH. POST (Sept. 22, 1980), https://www.washingtonpost.com/archive/politics/1980/09/22/for-750-cuban-refugees-united-states-is-a-tent-city-under-the-expressway/4835cb0a-de8f-4be3-92d2-843bdcb50ea0/ [https://perma.cc/F4LF-67KS] ("They were locked behind American military fences in June and enclosed by the bleachers of the Orange Bowl stadium in July. They were moved to the olive-green tents under the highway because the football season began.").

73. Jana K. Lipman, "*The Fish Trusts the Water, and it is in the Water That it is Cooked": The Caribbean Origins of the Krome Detention Center*, 2013 RADICAL HIS. REV., Winter 2013, at 115, 116–17.

74. Id. at 120.

75. PORTER, *supra* note 66, at 158, 186, 193. As Porter makes clear, temporary detention was involved in the processing of Hungarian refugees and participants in the Refugee Relief Program.

76. Lipman, *supra* note 68, at 62.

Marine who, wearing a white robe and Ku Klux Klan hood, warned that the Cubans would "come in here and get welfare, gonna get a free ride for everything."[77] But while these facilities were unwelcoming, they served a different purpose. Their goal was to enable the detainees' entry into the country, rather than to force them to leave.[78] (Indeed, as Lipman has shown in her study of Vietnamese migrants on Guam, U.S. officials were most concerned by detainees who wanted to return to Vietnam.)[79]

For advocates, the Mariel Cubans helped to expose the capriciousness of detaining Haitians. Despite the use of Camp Krome, most Cubans—except for several thousand who the administration deemed to have "criminal pasts"—were released in the care of family members or sponsors in the community.[80] This helped Haitian advocates hone their argument about unequal treatment.[81] The NCC organized marches, hunger strikes, and letter-writing campaigns to promote the charge that the Carter administration

77. *Id.* at 72; *see also* William K. Stevens, *Arkansas Fort Receives First of Thousands of Cubans*, N.Y. TIMES (May 10, 1980), https://www.nytimes.com/1980/05/10/archives/arkansas-fort-receives-first-of-thousands-of-cubans-the.html [https://perma.cc/8TZ8-TXRN] (quoting the hooded man, and identifying him as "Mac McCarty").

78. Lipman, *supra* note 68, at 60.

79. *See* Jana K. Lipman, *"Give us a Ship": The Vietnamese Repatriate Movement on Guam, 1975*, 64 AM. Q. 1, 13 (2012).

80. MARK DOW, AMERICAN GULAG INSIDE U.S. IMMIGRATION PRISONS 8-9 (2004) ("[A]lthough thousands of Cubans would end up in long-term detention, most Cubans who made it to U.S. shores were welcomed as political refugees since they were fleeing a regime opposed by the federal government.").

81. In addition to helping advocates illustrate discrimination, the Mariel Cubans changed the course of litigation for Haitians by advancing case law on the right to be free from detention. Although most Mariel Cubans had been released by the Summer of 1980, 2,000 remained in custody because the government determined that they had "criminal history . . . serious enough to warrant continued detention." Palma v. Verdeyen, 676 F.2d 100, 101 (4th Cir. 1982). These migrants also filed habeas corpus petitions, and several succeeded in arguing that the INA required parole hearings and prevented "indefinite" detention. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1389-90 (10th Cir. 1981) (stating that detention is permissive only for a reasonable period of time); Soroa-Gonzalez v. Civiletti, 515 F. Supp. 1049, 1058-59 (N.D. Ga. 1981) (finding INS abused its discretion in denying parole to Cuban refugees who committed no serious crime); Fernandez-Roque v. Smith, 91 F.R.D. 239 (N.D. Ga. 1981) (ordering release of class of 226 detained Cubans on parole unless the government could show that a particular alien was a threat to national security or the public interest, or that the alien was likely to abscond). *But see* Palma v. Verdeyen 676 F.2d at 104 (holding indefinite detention of excludable Mariel Cuban is permissible). For the use of these cases by Haitian advocates, see, for example, Motion for Custody Release or Bond 1, *In re* Robert, A26 006 769 Immigr. & Naturalization Serv. Fed. Corr. Inst. (1981); Motion for Parole Pending Appeal 1, *In re* Mesadieu, A26 006 780, Immigr. & Naturalization Serv. Fed. Corr. Inst. (1982) (citing *Fernandez v. Wilkerson*, 505 F. Supp 787, 791 (D. Kan. 1980)); Memorandum from Peter Schey, Nat'l Ctr. Immigr. Rts., to Philip Boneta et al., Att'ys. (Nov. 23, 1981) (alerting them to "a few extra citations" including an order in *Villena v. INS* and *Fernandez-Roque v. Smith*) (on file with the *Michigan Journal of Law & Society*).

was engaging in discrimination against Haitians.[82] Newspapers began taking note of a policy that the editorial board of the New York Times characterized as utilizing "political" and "racial" distinctions.[83]

The advocates' charges of bias also found an audience in the courts. On July 2, 1980, only three months after the start of the Mariel Boatlift, Judge James King of the Southern District of Florida issued a preliminary ruling in *Haitian Refugee Center v. Civiletti*, enjoining the program of mass deportation known as the "Haitian Program." King ordered that the over 4,000 asylum-seekers whose claims were processed in mass hearings should "not be deported until they are given a fair chance to present their claims for political asylum." The INS's efforts to deport Haitians were, he added, "offensive to every notion of constitutional due process and equal protection."[84]

3. Detention Under Carter

As Carter administration officials faced legal challenges to the Haitian program, they also learned that detaining incoming migrants, even for short-term processing, would be especially difficult. Nowhere was this clearer than at Fort Chaffee. Just a month after they arrived, approximately two hundred Cubans escaped Fort Chaffee and several hundred more destroyed base property.[85] Local police and Arkansas state troopers had provided security, but they were stretched thin, leading then-governor Bill Clinton to write to President Carter asking for increased military support

82. Alex Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 L. & CONTEMP. PROBS. 163, 187 ("Haitian advocates were quick to advance charges of discriminatory treatment. Marches were staged in Miami, New York, Washington, and other cities . . . .").

83. *Giving Refuge and Taking It*, N.Y. TIMES, Apr. 16, 1980, at A26; Andrew F. Brimmer, *The Haitian Exception*, WASH. POST, May 8, 1980, at A19 (on file with the *Michigan Journal of Law & Society*) ("[O]ur policy has acquired a patina of racism . . . ."). Eventually, when the administration—and later Congress— granted Mariel Cubans who arrived before June 1980 temporary permission to remain in the United States, it included Haitians as well, seeking to insulate itself against charges of bias. ENGSTROM, *supra* note 68, at 139 (noting that the "Carter administration . . . justified its decision . . . as a temporary measure while it considered a long-term solution to the status of the Cubans," and explaining the inclusion of Haitians as a result of allegations of discrimination); *see also Why Treat Haitians as Second-Class Refugees?*, NEWSDAY (Apr. 16, 1980) (cited *in* Stepick, *supra* note 82, at 187).

84. Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 451 (S.D. Fla. 1980) ("The plaintiffs are part of the first substantial flight of *black* refugees from a repressive regime to this country. All of the plaintiffs are black. In contrast, for example, only a relatively small percent of the Cuban refugees who have fled to this country are black.").

85. Lipman, *supra* note 62, at 73.

and assurances that the administration would not send more Cubans to Fort Chaffee.[86] When Carter eventually did decide to send more Cubans to the location, his relationship with Clinton, a political supporter, quickly frayed. "You're fucking me," Clinton told one of Carter's closest advisors. "How could you do this to me? I busted my ass for Carter."[87] In November 1980, Clinton lost the governor's race to Republican Frank White, whose campaign's unofficial slogan, "car tags and Cubans," highlighted the political significance of Fort Chaffee.[88] After taking office, White was quick to remind Reagan that immigrant detention was "seriously damaging my political credibility and future."[89]

While Carter and his team managed relationships with locals at Fort Chaffee, they also began experiencing opposition to detention in Miami. Throughout 1980, INS employees continued to house incoming Haitians and Cubans at "Camp Krome" in Miami. The conditions in the former army barracks were dire: it was overcrowded and infested with mosquitoes and snakes.[90] Larry Mahoney, public affairs officer with the State Department's Cuban-Haitian Task Force from 1980-1981, described his first visit to the facility:

> I saw women sleeping under blankets so soiled and threadbare I mistook them for the contents of vacuum-cleaner bags; guards so indifferent to suffering that they snickered at the helpless; sanitary facilities so squalid they turned your stomach. Above all, there was the crippling boredom. The people just slept and ate, ate and slept

86. Warren Brown, *Army and National Guard Patrol Chaffee Refugee Center*, WASH. POST (June 3, 1980), https://www.washingtonpost.com/archive/politics/1980/06/03/army-and-national-guard-patrol-chaffee-refugee-center/c53733b5-587b-42c0-b666-d3f8bbb4ec1e/ [https://perma.cc/N7FU-BWA6].

87. NANCY GIBBS & MICHAEL DUFFY, THE PRESIDENTS CLUB: INSIDE THE WORLD'S MOST EXCLUSIVE FRATERNITY 433 (2012) (adding "[y]ou guys are gonna' get me beat. I've done everything I could for you guys. This is ridiculous. Carter's too chicken-shit about it to tell me directly!").

88. Alexander Maxwell Stephens, "I Hope They Don't Come to Plains": Race and the Detention of Mariel Cubans, 1980-81, at 106 (2016) (Unpublished Master's Thesis, University of Georgia), https://getd.libs.uga.edu/pdfs/stephens_alexander_m_201605_ma.pdf [https://perma.cc/TQN8-FJ7V] (explaining that White used the slogan "to remind voters that Clinton raised the fee for license plate tags and failed to stop the Carter administration from using Chaffee as a consolidation site for people from Mariel" and "even ran an attack ad against Clinton with images of 'rioting' Cubans").

89. *See* Letter from Frank White, Governor, Ark., to Edward Schmults, Deputy Att'y Gen. (Aug. 27, 1981) ("I cannot over-emphasize the need for movement toward closing Fort Chaffee this week. You are seriously damaging my political credibility and future.") (on file with *Michigan Journal of Law & Society*).

90. LINDSKOOG, *supra* note 17, at 43.

> . . . In the end, I found I could no longer cover for the indignities my government countenanced, and quit in frustration.[91]

Mahoney was not the only government official to register disapproval. As one historian notes, "public health officials led the charge against the miserable conditions and issued numerous warnings" to federal officials about Krome's conditions, urging the federal government to shut down the facility.[92]

On September 10, 1980, Florida's Department of Health ordered the government to close Camp Krome, citing public health violations.[93] The challenge from Florida's health department made detention difficult. To comply with Florida's orders, Carter's Cuban-Haitian Task Force, a collection of federal officials authorized to deal with the migration crisis, took control of the facility. It began transferring migrants from Krome to federal prisons, local jails, and even a Miami hotel that was, in the words of the Associate Attorney General, "only minimally secure."[94] Meanwhile, the Task Force invested $5 million to upgrade a portion of Camp Krome, allowing it to evolve, in Jana Lipman's words, "from a makeshift refugee camp into a more permanent facility designed to discipline and to hold unwanted refugees."[95] By 1981, federal officials had replaced Camp Krome's canvas circus tents with what Lipman describes as a "concoction of barbed wire and concrete blocks."[96] This facility, too, would soon be overcrowded with Haitian migrants.[97]

As Carter's Task Force pursued a detention facility in Puerto Rico, legal challenges continued to make detention difficult. In September of 1980, Carter administration officials announced their intention to move as

---

91. Larry Mahoney, *Inside Krome*, MIA. HERALD TROPIC 1 (Jan. 10, 1982), https://static1.squarespace.com/static/5dcc53718acfe64aa99fbf5a/t/5ddaa3e1a46d122f382a0485/1574609899424/TROPIC%2C+1982+Jan+10.pdf [https://perma.cc/BW3E-KLQG].

92. Lipman, *supra* note 73, at 125.

93. *Id.*

94. Memorandum from Frederick M. Bohen, Deputy Undersecretary, Dep't Health Hum. Serv., to Eugene Eidenberg, Special Assistant to the President for Intergovernmental Affs. (Dec. 6, 1980) ("From a low of 198 Haitians under detention in South Florida on November 17th, 1980, the numbers have built steadily to the 597 . . . .") (on file with the *Michigan Journal of Law & Society*).

95. Lipman, *supra* note 73, at 126-127.

96. Mary Thornton, *Haitian Refugee Dilemma*, WASH. POST, Oct. 19, 1981, at A1 (on file with *Michigan Journal of Law & Society*).

97. U.S. GEN. ACCT. OFF, GAO/GCD-83-68, DETENTION POLICIES AFFECTING HAITIAN NATIONALS 18 (1983).

many as 4,500 Haitians to Fort Allen, a decommissioned military base on the southern coast of Puerto Rico.[98] Local opponents of the Fort Allen plan, including two candidates for governor, quickly filed suit against the federal government, alleging the plan violated environmental laws and created a public-health hazard due to the presence of malaria-bearing mosquitoes near Fort Allen.[99] The plaintiffs succeeded in their environmental law claims. "The real issue before this Court," District Judge Torruella wrote, "is whether the Federal Government can cure violations of law in Florida, by engaging in similar action in Puerto Rico." For Torruella, who handed down his decision one month before the 1980 presidential election, the answer was no.[100] Government lawyers appealed the decision after Reagan took office, but it still stymied their detention efforts. To succeed in the lawsuit on appeal, the Reagan administration agreed to permanent limits on Fort Allen's population.[101]

Behind the scenes, government officials worried about future immigration efforts.[102] In a memo to Eugene Eidenberg, President Carter's Deputy Secretary, one government lawyer remarked that "it is unclear whether we are helpless as against all Haitian entrants—past, present and future—or only those party to the lawsuit."[103] In another memo, the official worried about the effect of future lawsuits on detention:

98. Lipman, *supra* note 73, at 127.

99. Robert M. Press, *Puerto Rico: 'Political' Way Station for Unsettled Cubans and Haitians?*, CHRISTIAN SCI. MONITOR (Oct. 24, 1980), https://www.csmonitor.com/1980/1024/102450.html [https://perma.cc/NW4W-QAVD].

100. Colon v. Carter, 507 F. Supp. 1026, 1032 (D.P.R. 1980). The case returned to the District Court after it was overturned on appeal. Colon v. Carter, 633 F.2d 964 (1st Cir. 1980). In the meantime, to expedite the relocation effort and overturn the original district court opinion, the Carter administration passed the Refugee Education and Assistance Act of 1980. Pub. L. No. 96-422, 94 Stat. 1799. Section 501(c)(3) of the Act exempted the furnishing of refugee assistance from EIS requirement. But the district court held that the government was still required to comply with section 102(2)(E) of NEPA and several other acts. Puerto Rico v. Muskie, 507 F. Supp. 1035, 1064 (D.P.R. 1981).

101. Marquez-Colon v. Reagan, 668 F.2d 611, 614 (1st Cir. 1981) ("The federal government's agreement to limit the number of Fort Allen residents to 1500 and to dispose of the waste generated at the Fort elsewhere than at Juana Diaz . . . .").

102. Judge King did not enjoin detention but did include a critical description of Haitian detention in his order granting the preliminary injunction. *Haitian Refugee Ctr.*, 503 F. Supp. at 518 ("INS has long detained newly arrived aliens, but never uniformly. . . . When Mario Noto held his session in Miami with local officials, criteria were discussed, and detention was still 'an open question.' That open question closed with the same finality as the jailhouse doors behind the Haitians. No other group has been so uniformly treated.") (internal citations omitted).

103. Memorandum to Eidenberg, *supra* note 86.

> [T]here is some risk of a court invalidating these actions and procedures and thereby increasing the difficulty of maintaining order at the camps. Another possibility is that a court could curtail the present plenary power of INS to detain illegal aliens. . . . Up to now this power has not been scrutinized by the courts as to its outer limits of its breadth nor the manner of its use. An adverse decision could make future control of aliens arriving by boat from Caribbean countries even more difficult.[104]

Haitian asylum-seekers and their advocates were making headway, it seemed. By the end of the Carter administration, the government seemed to understand that its ability to detain and exclude asylum-seekers rested on fragile legal ground.

B. *The Reagan Administration*

Immigration officials in the Reagan administration continued Carter's efforts to detain arriving asylum-seekers. Just like in the Carter administration, legal challenges made detention a precarious project. To accommodate these challenges, administration officials transferred detained migrants to far-flung locations, giving immigration detention a geographically disparate character that also characterized criminal detention in the period. They also pursued partnerships with institutions that had expertise in incarceration, working with the Bureau of Prisons and private contractors to build long-term detention sites. Each of these steps further institutionalized the practice of immigration detention, creating constituencies that were invested in detention's future. At the same time, though, detention remained politically, legally, and financially difficult. While immigrant detention was permanent, it was also fraught, motivating officials to pursue exclusion.

104. Memorandum from Paul R. Michel, Assoc. Deputy Att'y Gen., to Victor Palmieri, U.S. Coordinator, Refugee Affs. (Aug. 4, 1980) (on file with the *Michigan Journal of Law & Society*).

1. Reagan's Detention Mandate

When Reagan took office in January of 1981, officials estimated that between 600 and 1,000 Haitians were arriving in south Florida each month.[105] Furthermore, the administration felt that immigration was a growing concern for Reagan's constituents. In a memo to the President, the Attorney General explained "polls show 91% of Americans favor an 'all-out effort' to stop illegal immigration," and opined that a "great country should be able to enforce its borders."[106]

The Reagan administration implemented a variety of immigration initiatives to improve control over the "major problem" of immigration. On March 6, 1981, Reagan convened the cabinet-level Task Force on Immigration and Refugee Policy and named Attorney General William French Smith as chair.[107] As Congress considered long-term immigration reform, the Task Force recommended several policies to "deal[ing] with some of the most urgent aspects" of the [immigration] problem."[108]

Among the reforms that the Task Force proposed was a new policy of "mandatory detention." The Task Force envisioned a confinement requirement for any migrant who arrived without a visa. The Task Force argued that mandatory detention would deter future asylum-seekers and avoid a future crisis like the one in south Florida.[109] Task Force members knew that the policy would disproportionately impact Haitian asylum-seekers, given that most migrants arriving without visas came from Haiti. By extension, the officials also knew that the detention policy "could create an appearance of 'concentration camps' filled largely by blacks," as they noted in a report for President Reagan; nevertheless, they recommended this approach.[110]

---

105. Jo Thomas, *Bahamas, Once a Haven, is Land of Fear for Haitians*, N.Y. TIMES, Jan. 23, 1981, at A2 (quoting "immigration service officials") (on file with the *Michigan Journal of Law & Society*).

106. Memorandum from William French Smith, Att'y Gen., to Ronald Reagan, President, Report of the Task Force on Immigration and Refugee Policy (June 26, 1981) (on file with the *Michigan Journal of Law & Society*).

107. *Id.* at 1; U.S. DEP'T OF JUST., FACT SHEET: IMMIGRATION 2 (1982) (on file with the *Michigan Journal of Law & Society*).

108. *Id.* at 1-2.

109. Immigration service officials began applying the policy in May 1981. LINDSKOOG, *supra* note 17, at 74; U.S. GEN. ACCT. OFF., *supra* note 97, at 15.

110. Memorandum from William French Smith, *supra* note 106, at 8.

Eager to depoliticize their use of detention, administration officials were careful to portray it as a congressional command. Before Congress, Smith described the policy as strict enforcement of a "detention mandate" in immigration law.[111] The department pointed to a component of the INA stating that arriving migrants who are not "clearly and beyond doubt entitled to land *shall* be detained for further inquiry."[112] This provision had been on the books since 1952, but the Immigration Service had rarely detained aliens since then.[113] If immigration officials questioned the validity of an arriving immigrant's visa, they would release the migrant on parole or bond until the issue was resolved. Similarly, an immigrant who challenged his or her deportation in court would usually be released until the resolution of legal proceedings.[114] Still, throughout the decade, Reagan administration officials insisted on a statutory basis for the mandatory-detention policy.[115]

---

111. *Detention of Aliens in Bureau of Prison Facilities: Hearing Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 97th Cong. 233 (1982) (referencing Section 235(b) of the Act, 8 U.S.C. § 1225(b), which provides that "Every alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer").

112. *Id.*

113. 8 U.S.C. § 1182(d)(5) (1952) ("The Attorney General may, in his discretion, parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States . . . .").

114. Ann S. Petluck, *New Detention Policy of the Immigration and Naturalization Service*, 32 INTERPRETER RELEASES 110-11 (1955); *see also* Maurice A. Roberts, *Some Thoughts on the Wanton Detention of Aliens*, 5 GEO. IMMIGR. L.J. 225, 229 (1991) ("Absent some special considerations indicating that the alien was a security risk or a poor bail risk, practically all aliens arrested in deportation proceedings continued to be released on bond or their own recognizance."); Charles Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A. J. 34, 35 ("In 1954, INS policies changed considerably . . . The detention problems of the past no longer are significant in deportation cases."). The Supreme Court agreed. When reviewing a related policy a few years later, Justice Clark, writing for the majority, noted that the Service's avoidance of physical detention reflected the "humane qualities of an enlightened civilization." Leng May Ma v. Barber, 357 U.S. 185, 190 (1958) ("Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. . . . Certainly this policy reflects the humane qualities of an enlightened civilization.") (internal citations omitted).

115. *See, e.g.*, *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigr., Refugees, & Int'l L. of the H. Comm. on the Judiciary*, 101st Cong. 21 (1989) ("In May 1981, administrative steps were taken to ensure that existing laws were firmly and fairly enforced. The [INA] authorizes that undocumented and otherwise excludable aliens attempting to come into the United States be detained until a hearing decides whether they legally can enter. This provision was more actively enforced after 1980.") (statement of James L. Buck, Deputy Comm'r, Immigr. & Naturalization Serv.); Memorandum from William French Smith, Att'y Gen., to Alan Nelson, Comm'r, Immigr. & Naturalization Serv., on Haitian Detention and Hearings (June 11, 1982) (on file with the *Michigan Journal of Law & Society*); *Haitian Detention and Interdiction*, *supra* note 115, at 21 ("In May 1981, administrative steps were taken to ensure that existing laws were firmly and fairly enforced.").

According to Associate Attorney General Giuliani, "the policy of detention and speedy retainn [sic] of aliens was necessary to achieve deterrence . . . ."[116] Underlying the rhetoric of deterrence was, as always, the idea that detaining migrants would force them to self-deport. "Anytime a Haitian being detained wants to walk out the front door, he can do it," Smith told the *New York Times*.[117] When INS Commissioner Alan Nelson told Congress that Haitian asylum-seekers had left the country on their own accord, he put the matter in certain terms: "so far," he said, "the detention process is working."[118]

2. More Challenges

Like the Carter administration, the Reagan White House faced swift challenges to its detention policy. In July of 1981, Florida and its governor, Bob Graham, sued the federal government over conditions at the Krome detention facility. Just like the Puerto Ricans opposed to Fort Allen, Governor Graham argued that the detention camp, even with the improvements made by the Cuban-Haitian Task Force, violated environmental laws and presented a public-health hazard to his constituents.[119] Florida's case was assigned to District Judge James Eaton.[120] As government officials prepared for the injunction hearing, they knew that Krome's overcrowding—its population had reached a high of 1,530 a few months before—could cost them the case.[121] It was "imperative," one lawyer concluded, to

116. Memorandum from Robert W. Kastenmeier, Congressman, to Members, Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary 227-28 (June 21, 1982) (referencing a Sept. 14, 1981 memorandum from Assoc. Att'y Gen. Giuliani) (on file with the *Michigan Journal of Law & Society*).

117. Associated Press, *Reagan Aid Defends Detention of Haitians*, N.Y. TIMES, Dec. 16, 1981, at A23 (on file with the *Michigan Journal of Law & Society*).

118. *Central American Asylum-seekers, Hearing before H. Subcomm. on Immigr., Refugees, & Int'l L.* 66 (March 9, 1989) (statement of Alan Nelson, Comm'r, Immigr. & Naturalization Serv.).

119. Memorandum from Carol E. Dinkins, Assistant Att'y Gen., to Rudolph W. Giuliani, Assoc. Att'y Gen., RE Krome North Litigation 3 (Sept. 14, 1981) (discussing Graham v. Smith, 81-1497-CIV-JE (S.D.Fla.)) (on file with the *Michigan Journal of Law & Society*).

120. Memorandum from Carol E. Dinkins, Assistant Att'y Gen., to Rudolph W. Giuliani, Assoc. Att'y Gen. 1 (Aug. 27, 1981) (reporting that a hearing on the motion would occur on Sept. 3 and that plaintiffs sought to depose Doris Meissner, Acting INS Commissioner) (on file with the *Michigan Journal of Law & Society*).

121. U.S. GEN. ACCT. OFF, *supra* note 97, at 18 (describing the population of July 1981); Memorandum from Carol E. Dinkins, *supra* note 119, at 1 ("It is our firm belief, however, that we will be

"take immediate action to find other locations to detain the incoming aliens."[122]

The legal challenge forced the administration to seek other detention locations, which only nationalized the immigrant-confinement dilemma. Responding to Governor Graham's lawsuit, federal officials scrambled to reduce Krome's population. In July 1981, the Bureau of Prisons moved 286 Haitian refugees from Krome to a variety of federal prisons throughout the country.[123] Newspapers reported on the bizarre geography of Haitian detention. A reporter for the *Washington Post* wrote about the transfer of Haitian women to a BOP facility in Alderson, West Virginia. "[I]n the lea of West Virginia's rolling hills," she noted, "the novel sound of French Creole patter rolls through 'Unit 26,' the double-story, college-type dormitory where the Haitian women sleep several to a room in bunk beds and fight off the boredom of enforced confinement."[124]

Locating detention centers was politically challenging. Task Force correspondence makes clear that "local political and/or legal obstructions" were of constant concern.[125] Task Force members were aware of opposition from Florida politicians, who complained that they "bear the burden," in Senator Paula Hawkins' words, of the government's immigration policy.[126] Everywhere, there was "community opposition."[127] Most sites presented

---

enjoined if we have to go to court with population figures substantially in excess of 1,000 and no plan as to which [we] can testify for reducing the population.").

122. *Id.* The motivation for this sense of urgency was political as well as legal. *See* Memorandum from Carol E. Dinkins, Assistant Att'y Gen., to Rudolph W. Giuliani, Assoc. Att'y Gen. 2 (Feb. 18, 1982) (discussing *Graham*, No. 81-1497-CIV-JE) ("our only recourse would be to ask the President to issue an Executive Order exempting Krome from state and local pollution laws. This is a politically unattractive option . . . .").

123. Letter from Rudolph Giuliani, Assoc. Att'y Gen., to Larry Hawkins, Congressman (July 31, 1981) (on file with the *Michigan Journal of Law & Society*) ("286 persons from Krome North were transferred to four facilities in three states . . . .").

124. Caryle Murphy, *In Prison Without a Trial*, WASH. POST (May 3, 1982), https://www.washingtonpost.com/archive/politics/1982/05/03/in-prison-without-a-trial/add16848-e793-43c2-aeaa-e32d65959ee7/ [https://perma.cc/R4G7-4UYK].

125. *See* Letter from William French Smith, Att'y Gen., to David A. Stockman, Dir., Off. Mgmt. & Budget (Sept. 16, 1981) (on file with the *Michigan Journal of Law & Society*) (describing "the local political and/or legal obstructions [the United States government] face[s] in Puerto Rico, Florida, and Arkansas," to justify the need for a permanent space).

126. 127 CONG. REC. S12732 (daily ed. June 17, 1981) (statement of Sen. Hawkins); *see also* Memorandum from William French Smith, *supra* note 106, at 6 (adding "Senator Hawkins is placed in a difficult situation.").

127. Letter from William French Smith, *supra* note 125, at 3 (noting that a number of alternative detention facilities had been "proposed but rejected due to strong community opposition").

"political problems," because they were located in "[R]epublican congressional districts—districts where there are critical swing votes, or good friends who would feel 'stabbed in the back.'"[128]

In addition to protests from local politicians, detained asylum-seekers contributed to the political costliness of detention. Detainees planned uprisings, executed hunger strikes, and wrote letters of protest.[129] As historian Carl Lindskoog shows, "resistance began at the very moment when U.S. officials started jailing Haitian asylum-seekers . . . ."[130] This had an impact on policymakers. For example, Renee Szybala, Special Assistant to the Attorney General, wrote to the Commissioner of Immigration that "the mental health situation" at Krome was "extremely serious."[131]

Those who didn't personally interact with detention centers might have heard about them from refugees themselves. In 1982, the *New York Times* published a letter that Haitians detained at Fort Allen had written to the Immigration Service:

> Our situation is pitiful. We have been locked up behind barbed wire from Miami to Puerto Rico. The days are always the same for us. We don't know what the date is. Sometimes we are hungry and cannot eat. . . . Why are you letting us suffer this way, America?

128. LOYD & MOUNTZ, *supra* note 24, at 69 (citing Letter from Kate Moore, Special Assistant to the Chief of Staff, to Frank Hodsoll, Deputy Chief of Staff (Jul. 28, 1981)); *see also* Memorandum from Craig L. Fuller, Presidential Assistant Cabinet Affs., to Ronald Reagan, President, Report of the President's Task Force on Immigration and Refugee Policy/CM 62 (July 1, 1981) ("If you decide in principle to approve a detention policy, it is recommended you ask the Attorney General to lead an effort (including DOD, Interior and GSA) to review all Federal facilities with a view to identifying sites of least political and operational costs (emphasis on political).") (on file with the *Michigan Journal of Law & Society*); Letter from Frank White, *supra* note 89 ("I cannot over-emphasize the need for movement towards closing fort Chaffee this week. You are seriously damaging my political credibility and future.").

129. LINDSKOOG, *supra* note 17, at 72 (noting that "resistance among Haitian prisoners was spreading," and describing hunger strikes, escape attempts, and suicides); HAMM, *supra* note 67, at 30-41 (describing rebellions of imprisoned Mariel Cubans).

130. LINDSKOOG, *supra* note 17, at 4.

131. Letter from Renee Szybala, Special Assistant to the Att'y Gen., to Alan Nelson, Stan Morris & David Hiller (April 5, 1982) (attaching Memorandum RE Mental Health Conditions at Fort Allen and Krome North (Mar. 29, 1982)) (*on file with the Michigan Journal of Law & Society*); *see also* Memorandum from Renee Szybala, Special Assistant to the Att'y Gen., to Sandy Stevens (Dec. 14, 1981) (attaching an article concerning Fort Allen and noting "[s]ome of the statements in the attached are disturbing") (on file with the *Michigan Journal of Law & Society*).

> . . . . Haven't you thought we were humans, that we had a heart to suffer with and a soul that could be wounded?[132]

These and other pleas registered even in an administration that may have appeared heartless, making clear the urgency of the detention issue.

3. Institutionalizing Detention

Detention's legal and political difficulties did not stop the Reagan administration from detaining migrants. In fact, it only made Reagan's detention system more permanent by creating institutionalized interests that benefitted from others' confinement. The persistent legal and political challenges to detention made clear that immigration detention needed to be professionally administered to withstand attack. Reagan's Task Force continued Carter's charge to find a permanent detention space. As this Section will show, the administration partnered with the Bureau of Prisons and, eventually, private contractors.

Throughout 1980, members of Carter's Cuban/Haitian Task Force had been searching for "available, federally owned properties for possible use in housing aliens that might arrive in large numbers."[133] In April 1981, the Reagan administration took up the same charge.[134] Reagan's Task Force on Immigration and Refugee Policy surveyed locations for potential detention facilities.[135] Federal officials toured an Air Force base in Chicopee, Massachusetts, and a naval engineering center in Lakehurst, New Jersey.

---

132. *Haitians: We'll Kill Ourselves*, N.Y. TIMES, Nov. 29, 1981, at E19 ("Now we cannot stand it anymore. It is too much. If we have not been freed by the end of November, a good number of us are going to commit suicide.") (on file with the *Michigan Journal of Law & Society*).

133. Letter from David Crossland, Gen. Counsel, to David Hiller, Special Assistant to the Att'y Gen., re: Report as to Status of Space for Detention and Prior Surveys (May 19, 1981) ("In early December 1980, the Cuban/Haitian Task Force, which assumed responsibility for site selection from FEMA, coordinated the last intensive review of available locations and further reduced the previous list to five locations. At that point INS as well as other interested agencies were invited to participate in making a final selection of the most suitable site(s) . . . .") (on file with the *Michigan Journal of Law & Society*).

134. *See, e.g.*, DEP'T OF JUST., *supra* note 107.

135. Memorandum from Kevin D. Rooney, Assistant Att'y Gen. for Admin., to the Assoc. Att'y Gen., Alien Detention Options (Mar. 18, 1982) (on file with the *Michigan Journal of Law & Society*) (referencing a "Task Force designated to prepare an analysis of various alien detention options"); *see also* U.S. DEP'T OF JUST., ISSUE PAPER: DETENTION OPTIONS 16 (2d rev. 1982) (on file with the *Michigan Journal of Law & Society*).

These tours prompted letters from local congresspeople concerned about the resulting "demand on the community."[136] Eventually, members of the Task Force analyzed more than fifteen potential locations, including abandoned colleges, veterans' hospitals, and unused public lands.[137]

In addition to seeking surplus properties, the administration began a partnership with the Bureau of Prisons (BOP), an ironic embodiment of the growing entanglement between criminal and immigration law. Department of Justice officials advocated for this alliance: one wrote that the BOP would have the professional expertise to avoid INS mismanagement, which had led to "disgrace[s]" like Camp Krome.[138] Administrators acknowledged the intangible dangers that could result from putting asylum-seekers awaiting trial under the purview of a punitive department. In a 1982 memo, the Task Force articulated these fears. They worried that cooperation with the BOP could create an "aura of penal treatment" and generate "negative responses from advocate groups and foreign governments."[139] In other words, transferring leadership of immigration detention to the BOP forced federal officials to acknowledge what legal scholars have so long suggested: that immigration detention—theoretically a civil endeavor—has a certain penal character.[140]

Despite their concerns with BOP's "penal" approach, federal officials eventually partnered with the agency to detain immigrants for long periods. This had an immediate effect on the Krome detention facility. With the BOP's help, immigration officers upgraded the facility to include the amenities of a professional prison.[141] In 1984, INS officials remodeled the

136. Letter from Silvio O. Conte, Congressman, to William French Smith, Att'y Gen. (Oct. 26, 1981) (on file with the *Michigan Journal of Law & Society*); Letter from Jerry Huckaby, Congressman, to William French Smith, Att'y Gen. (Dec. 2, 1981) ("I am writing to make you aware that no one in the Town of Pollock wants this holding center located there.").

137. Undated Memorandum from the Files of Associate Att'y Gen. Giuliani, Immigration Detention Policy 2 (on file with the *Michigan Journal of Law & Society*); Memorandum from Kevin D. Rooney, *supra* note 135, at 18; *see also* Letter from Rudolph Giuliani, Assoc. Att'y Gen., to Edwin L. Harper, Assistant to the President for Pol'y Dev. 1 (May 5, 1982) (writing to Harper in his "capacity as Chairman of the newly established Property Review Board" and requesting "that the Federal Prison System be given the same preference favoring discount transfers that is accorded to . . . local systems under the Board's policies.") (on file with the *Michigan Journal of Law & Society*).

138. Memorandum from Renee Szybala, Special Assistant to the Att'y Gen., to Rudolph W. Giuliani, Assoc. Att'y Gen. 1 (Mar. 26, 1982) (on file with the *Michigan Journal of Law & Society*).

139. Memorandum from Kevin D. Rooney, *supra* note 135, at 13, 15.

140. *See, e.g.*, Kalhan, *supra* note 22, at 49 ("Immigration detention . . . evolve[ed] for many detainees into a quasi-punitive regime far out of alignment with immigration custody's permissible purposes.").

141. *See* Lipman, *supra* note 68, at 134-35.

Krome facility, creating basketball courts, a library, and a new kitchen. A behavioral scientist had helped with the BOP renovation. As he told the *Miami Herald*, he aspired to create a "homey feel" and "sense of pride" among the detainees.[142]

In addition to partnering with the BOP, immigration administrators collaborated with private contractors to pursue the detention policy—the federal government's first use of private prisons. Indeed, the use of private immigration prisons reveals that immigration detention was not only analogous to mass incarceration but an integral component of its success. Immigration detention provided important business for the country's nascent private-prison industry. Private prison facilities had emerged in the 1970s and 1980s when local politicians were eager to cut taxes and, at the same time, manage rapidly growing prison populations.[143]

The growth of the Correctional Corporation of America (CCA) exemplifies the importance of immigration detention to the private-prison movement. Thomas Beasley, a forty-one-year-old entrepreneur and volunteer with Tennessee's Republican Party, started the CCA in 1983 with funding from local investors and promising to offer the government effective detention at fifteen to twenty-five percent less than the per-prisoner cost of publicly run alternatives.[144] The CCA hired several corrections experts, including the retired chairman of the U.S. Parole Commission and the former Commissioner of Corrections of Arkansas.[145] Initially, the company sought to privatize Tennessee's prison system. When this effort was unsuccessful, the company took advantage of the "emerging market in immigrant detention," and pursued a contract with the INS.[146] In March

142. Liz Balmaseda, *'New' Krome a Sign of Growth in Alien Detention*, MIA. HERALD, Mar. 12, 1985, at 4D (on file with the *Michigan Journal of Law & Society*); *see also* Memorandum from J.F. Salgado, Assoc. Comm'r Enforcement, to Renee Szybala, Special Assistant to the Att'y Gen., Response to U.S. Marshals Special Operations Group Report Recommendations for the Krome Service Processing Center (Apr. 19, 1982) (on file with the *Michigan Journal of Law & Society*) ("A well-rounded recreational program has been developed [in Krome] . . . Recreational shelters, basketball, volleyball, softball courts and soccer fields have been constructed. . . . A program schedule is posted weekly which includes both recreational and educational activities." the federal correctional institute "which is located fifteen miles from Krome has agreed to supply a twenty man riot squad").

143. Douglas C. McDonald, *Private Penal Institutions*, 16 CRIME & JUST., 1992, at 392; *see also* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 64 (2015).

144. Kevin Krajick, *Prisons for Profit: The Private Alternative,* STATE LEGISLATURE, April 1984, at 10.

145. *Id.*

146. *See* GOTTSCHALK, *supra* note 143, at 66.

1984, the CCA opened its first-ever facility, a 300-bed immigration-detention center in Houston, Texas.[147]

In the eyes of federal officials, privatization was particularly suited to immigration detention for several reasons. First, immigration detention was theoretically short-term and low-security, more like "decent 'warehousing' or holding space," one reporter said, than a full-fledged prison.[148] Second, the INS's history of contracting with local jails for small numbers of beds might have made the INS more comfortable with the privatization process. Finally, the fluctuations inherent in immigrant detention—resulting from changes in both immigration trends and immigration policy—made private contractors particularly appealing. "Rather than build our own institution for something that might be a temporary phenomenon," an executive official explained, the Immigration Service experimented with privatization.[149] As a spokesperson for the BOP put it in 1985, the mandatory-detention policy was an "immediate need which the private sector offered to fill."[150]

The INS's use of private facilities represented the first federal foray into a budding privatization movement. As the INS increased its cooperation with the Federal Bureau of Prisons, the Bureau experimented with privatization as well.[151] In March of 1985, the Bureau engaged a private contractor to manage a 575-bed prison for migrants.[152] One reporter noted that this facility represented the "biggest private lockup so far."[153] Later that year, the Bureau began to contract with private firms for nonimmigrant detainees. By 1987, there were 3,000 federal inmates in private facilities; by 1996, there were more than 85,000.[154] In this way, the privatization of

147. Douglas C. McDonald, *Private Penal Institutions*, 16 CRIME & JUST. 361, 382 (1992).

148. Joan Mullen, *Corrections and the Private Sector, in* NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN BRIEF 3 (Oct. 1984).

149. Krajick, *supra* note 144, at 11.

150. *Id.*

151. *See, e.g.*, Mullen, *supra* note 148, at 3 ("The most active new market for confinement service contracting has clearly emerged at the Federal level in response to growing demands for housing illegal alien populations.").

152. Krajick, *supra* note 144, at 10 ("The contractor is Palo Duro Private Detention Services, a corrections consulting firm based in Amarillo, Texas. The company has leased an unused U.S. air base near Mineral Wells, Texas, and expects to open for business this spring. The government will allow them to charge up to $45 a day per prisoner.").

153. *Id.*

154. DOUGLAS MCDONALD, ELIZABETH FOURNIER, MALCOLM RUSSELL-EINHORN, & STEPHEN CRAWFORD, PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 97 (1998).

immigration prisons changed federal prison policy more broadly, becoming, in the words of one scholar, the "seedbed for the contemporary imprisonment industry in the United States . . . ."[155]

By 1989, the INS had contracted for five privately-owned-and-operated detention centers.[156] Private partners developed vested interests in the immigrant-confinement system. Some local officials began perceiving immigration prisons as "recession-proof" industries, reversing early NIMBY-ist trends.[157] Detention became the government's presumptive—and profitable—approach to non-citizens. The nascent detention scheme, built to address a specific refugee crisis, would become an important component in the nation's future fight against the so-called "criminal alien." Interdiction became a powerful counterpart to this detention system, offering many benefits that detention could not address. Nevertheless, the institutional dynamics described above ensured that migrant detention would not be eradicated, even when interdiction was successful.

II. BORDER GAMES: FROM DETENTION TO EXCLUSION

As I have argued, detaining migrants was politically, financially, and legally difficult. In this environment, the Reagan administration used Carter-era proposals to embrace maritime interdiction. In fact, administration records show that officials conceived of and hastily constructed the interdiction policy despite concerns about its legality. Although White House lawyers had their doubts, they realized that interdiction would incur few of the legal and political challenges that detention posed. While it never stopped detaining migrants, the administration seemed aware that interdiction

155. *Id.* at 5 (immigration detention "provided the seedbed for the contemporary private imprisonment industry in the United States"). Private partnerships were inherent in the government's "contingency planning" efforts as well. Any contingency detention plan that did not involve a preexisting government facility, like the one in Oakdale, would also require private contracting. The government relied on private companies in Puerto Rico for provisions of food, recreation, and security services.

156. McDonald, *supra* note 154, at 382.

157. While politicians in Fort Smith, AR, and El Reno, OK, rejected immigrant confinement options, local politicians from Oakdale, LA led the way by campaigning heavily for local detention. Sam LaSpeda, *Center for Aliens Town's Salvation?*, USA TODAY, Feb. 17, 1983 (on file with the *Michigan Journal of Law & Society*); LOYD & MOUNTZ, *supra* note 24, at 99–100 (describing Oakdale's lobbying effort and quoting the Oakdale mayor: "Rather than saying 'hey, we don't want it,' as most places had done," he explained, "the more we looked into it, the more obvious the economic advantages").

could achieve the same goals as its detention policy but with much less resistance.

As Section II.A explains, Reagan's interdiction policy is one of many strategies that developed nations adopt to deter asylum-seekers from exercising their rights. After Reagan's policy, other developed states—Australia, Canada, and the European Union—adopted extraterritorial initiatives, including offshore detention, extraterritorial visa controls, and maritime interdiction, using ominous names like "Fortress Europe" and the "Pacific Solution."[158] After describing Reagan's policy and its resonance for human rights scholars, Section II.A explains the development of Guantánamo Bay as a migrant detention center—an episode that has been subsumed in the popular imagination by the base's later use as a military prison.

While human-rights scholars rightly focus on America's maritime interdiction program, few have examined its history. Section II.B returns to the records at the heart of this Article to show how government lawyers in the Reagan administration developed the interdiction policy to complement its use of detention. This history suggests that interdiction and detention are linked components of a set of border games that administrations use to deter asylum-seekers and control migration.

Building on this insight, Section II.C proposes that expedited removal—a form of "fast-track" deportation, or "shadow removal," that leaves many exclusion decisions essentially unreviewable—is another form of exclusion born of policymakers' desire to avoid detention. In two 1996 acts—the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—lawmakers mandated the detention of a wide variety of non-

158. Thomas Gammeltoft-Hansen & James C. Hathaway, Non-Refoulement *in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235, 241 (2015); Daniel Ghezelbash, *Lessons in Exclusion: Interdiction and Extraterritorial Processing of Asylum-seekers in the United States and Australia*, *in* EXPLORING THE BOUNDARIES OF REFUGEE LAW 90, 113 (Jean-Pierre Gauci, Mariagiulia Giuffré & Evangelia (Lilian) Tsourdi eds., 2015) (describing "the sharing, collecting and dissemination of migration information" in extraterritorial asylum processing); Itamar Mann, *The Haiti Paradigm, Twenty Years After*, HUMAN. J. BLOG (June 10, 2014), http://humanityjournal.org/blog/the-haiti-paradigm-twenty-years-after/ [https://perma.cc/22QT-KC57]; Susan Kneebone, *The Pacific Plan: The Provision of Effective Protection*, 18 INT'L J. REFUGEE L. 696, 696-97 (2006) (describing the "Pacific Strategy,"—the "Australian model of extraterritorial processing," and noting that it "was directly modeled upon the USA Caribbean Plan's interdiction policy").

citizens, including those who were subject to expedited removal.[159] By doing this, Congress expanded and institutionalized the Executive's border games, highlighting the limits of decarceration for asylum-seekers.

A. *Interdiction Policies*

As human rights scholar Thomas Gammeltoft-Hansen has noted, "the last decades have seen a number of policy developments to extend migration control well beyond the borders of the state."[160] Other scholars of international law use different labels to describe the same dynamic. James Hathaway writes about "non-entrée policies" that seek to "keep most refugees from accessing their jurisdiction [and] assert[ing] their entitlement to the benefits of refugee law."[161] Moria Paz calls these efforts "border walls," wherein "being outside the wall means being beyond the state's human rights-based responsibility."[162] Geographer Alison Mountz describes "archipelago[es] of exclusion," in which nations use external border policing and subnational island jurisdictions to "shrink spaces of asylum" and reduce asylum-seekers' access to territory-based rights.[163]

President Reagan's use of maritime interdiction in the Caribbean is the paradigmatic example of an externalized migration control.[164] Under

159. Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement,* 96 WASH. L. REV. 337 (2018); Daniel Kanstroom, *Deportation in the Shadows of Due Process: The Dangerous Implications of* DHS v. Thuraissigiam, 50 SW. L. REV. 342 (2021); *see* Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 302, 110 Stat. 3009 (1996).

160. THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL 2 (2011).

161. Gammeltoft-Hansen & Hathaway, *supra* note 158, at 241; *see also* James Hathaway, *The Emerging Politics of* Non-Entrée, 91 REFUGEES 40, 41 (1995); Gammeltoft-Hansen, *supra* note 160, at 15 ("Intercepting asylum-seekers and irregular migrants before they reach their destination has thus become a particularly popular strategy for states looking both to reduce the numbers of asylum-seekers and to avoid the trouble and costs associated with returning those rejected."); Frelick et al., *supra* note 2, at 192 (describing a "worrisome parallel development, however, has been the development by those states of a toolbox for preventing migrants, including asylum-seekers, from reaching their territories and triggering the states' international obligations").

162. Moria Paz, *The Law of Walls*, 28 EUR. J. INT'L L. 601, 601 (2017).

163. Alison Mountz, *The Enforcement Archipelago: Detention, Haunting, and Asylum on Islands*, 30 POL. GEOGRAPHY 118, 120 (2011).

164. DAVID SCOTT FITZGERALD, REFUGE BEYOND REACH: HOW RICH DEMOCRACIES REPEL ASYLUM-SEEKERS 71 (2019) (calling the United States' interdiction policy the "oldest [ongoing] extraterritorial interdiction, processing, and detention regime in the world") (alteration in original); Kira Williams & Alison Mountz, *Between Enforcement and Precarity: Externalization and Migrant Deaths at*

Reagan's plan, Coast Guard officers were authorized to stop boats in the strait between Haiti and the Bahamas and, if they suspected that the boat carried illegal immigrants, "return" the boat to the country "from which it came."[165] Government officials had intercepted boats in territorial waters to search for drugs for several decades, but this new policy was different, because it involved returning people to another country.[166]

Reagan's executive order made provisions for refugee law, but these provisions limited asylum-seekers' rights in practice. Article 33 of the United Nations Convention Relating to the Status of Refugees provides that no signatory shall return a refugee "to the frontiers of territories where his life or freedom would be threatened" on account of his race, religion, or other protected characteristic.[167] To facially comply with this prohibition against return—or "refoulment" in the Protocol Relating to the Status of Refugees—Reagan's executive order gestured towards protecting Haitians with legitimate claims of persecution.[168] Initial INS guidance only required that officials on Coast Guard boats be "constantly watchful for any indication [that] persons on board . . . may qualify as refugees."[169] As one INS official remembered, the examiners on the Coast Guard vessels "had no instruction, they had no training, they just had whatever they felt at the moment . . . ."[170] What resulted was, in the words of legal sociologist Jeffrey Kahn, "de facto devolution of decision-making authority to peripheral bureau-

Sea, 56 INT'L MIGRATION 74, 75 (2018) (adding that the "modern period of externalization can be traced back to US interceptions of Haitian and Cuban migrants in the Caribbean in the early 1980s").

165. Exec. Order No. 12,324, 3 C.F.R., 1981 (1981), *reprinted in* 8 U.S.C. § 1182 (Supp. V. 1981).

166. SCOTT H. DECKER & MARGARET TOWNSEND CHAPMAN, DRUG SMUGGLERS ON DRUG SMUGGLING: LESSONS FROM THE INSIDE ch. 2 (2008); Memorandum re: Budget Strategy for Att'y Gen.'s Immigr. Task Force for Pol'y 3 (Sept. 2, 1981) (noting the Coast Guard's existing "drug and fisheries enforcement missions").

167. Convention Relating to the Status of Refugees, art. 33.1, Jul. 28, 1951, 189 U.N.T.S. 137. The United States has acceded to the 1967 United Nations Protocol Relating to the Status of Refugees, which includes this provision. *See* Jan. 31, 1967, 19 U.S.T. 6223; *see also* 8 U.S.C. § 1231(b)(3)(A) (incorporating this provision).

168. Exec. Order No. 12,324, *supra* note 165, at § 3 (directing the Attorney General to "take whatever steps are necessary to ensure . . . the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland"). INS guidelines provided that: "If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged." Haitian Refugee Ctr. v. Baker, 953 F.2d 1498, 1502 (11th Cir. 1992).

169. KAHN, *supra* note 24, at 171 (citing Memorandum from Doris M. Meissner, Acting Comm'r, Immigr. & Naturalization Serv., to all INS employees assigned to duties related to interdiction at sea, INS Role in and Guidelines of Interdiction at Sea (Oct. 6, 1981)).

170. *Id.* at 173.

crats."[171] The "bleak" conditions on Coast Guard cutters also contributed to the INS's "virtual monopoly" over the procedure.[172] Between 1981 and 1990, 22,940 Haitians were interdicted at sea, and only eleven were determined by the INS to be entitled to asylum.[173]

Every president since Reagan has used maritime interdiction to address Caribbean migration.[174] In 1991, a military coup in Haiti overthrew President Jean-Bertrand Aristide and, afterward, targeted hundreds of political opponents for torture, detention, and violence.[175] Thousands of Haitians left for the United States, prompting George H.W. Bush's administration to make interdiction more efficient by eliminating the cursory refugee screening in a 1992 Executive Order.[176] According to Bush, the prohibition against nonrefoulement did not "extend to persons located outside the territory of the United States."[177] The U.S. Supreme Court agreed with this assessment in *Sale v. Haitian Centers Council*, the most notable legal challenge to interdiction.[178] "Although the human crisis is compelling," Justice Stevens wrote for the majority, "there is no solution to be found in a judicial remedy."[179]

Many countries relied on *Sale*'s rationale to adopt their own versions of interdiction. Other developed states—Australia, Canada, and the European Union—have adopted extraterritorial initiatives, including offshore detention, extraterritorial visa controls, and maritime interdiction.[180] And some

171. *Id.* at 172.

172. *Id.* at 183 (also describing the "bleak" conditions on Coast Guard cutters that contributed to the INS's "virtual monopoly" over the procedure).

173. RUTH ELLEN WASEM, CONG. RSCH. SERV., RS21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS 4 (2005), https://trac.syr.edu/immigration/library/P960.pdf [https://perma.cc/4NCD-MVZ3].

174. AZADEH DASTYARI, UNITED STATES MIGRANT INTERDICTION AND THE DETENTION OF REFUGEES IN GUANTÁNAMO BAY 3 (2015). For interdiction records relating to the Trump and Biden administrations, *see, e.g.*, UNITED STATES COAST GUARD ANNUAL PERFORMANCE REPORT: FISCAL YEAR 2019 (2019); UNITED STATES COAST GUARD ANNUAL PERFORMANCE REPORT: FISCAL YEAR 2020 (2020).

175. Legomsky, *supra* note 13, at 680 (noting that the resumption of Haitian migration after a "sudden drop in boat traffic upon the election of Aristide . . . strongly suggested, as refugee advocates had argued but as the US government had strenuously denied, that the main impetus for the outflow was political persecution rather than economics").

176. *Id.*

177. *See* Proclamation No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992).

178. 509 U.S. 155 (1993).

179. *Id.* at 188 (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987)).

180. Gammeltoft-Hansen & Hathaway, *supra* note 151, at 241; *see also* Daniel Ghezelbash, *supra* note 158 (describing information sharing in extraterritorial asylum processing); Mann, *supra* note 158; Kneebone, *supra* note 158.

judicial bodies explicitly cited *Sale* to approve of these programs.[181] As Andrew Brouwer and Judith Kumin note, *Sale* has augmented the United States' laudable position as the "leader in maritime interception."[182]

B. *Reagan's Interdiction Policy*

Reagan's use of interdiction has become paradigmatic in studies of non-entrée policies. It inspired other countries to adopt extraterritorial efforts to exclude asylum-seekers. It also led to the Coast Guard's use of Guantánamo for migrant confinement, which continues to this day. Reagan's administrative records make clear that interdiction was a key complement to its mandatory detention policy. Interdiction would reduce the legal and political challenges to immigration enforcement by moving the enforcement just outside of the country's borders. Some government lawyers argued that the Task Force's proposal was "unprecedented" and doubted its legality. Nevertheless, proponents of interdiction prevailed. After the policy was implemented, government officials were frank about its efficacy and made clear that it had reduced the burden on the country's fragile detention system.

Reagan's Task Force imagined a two-pronged solution to the Caribbean refugee crisis: detention and interdiction would occur in tandem.[183] Indeed, as Reagan's Attorney General explained, "the success of the administration's detention policy" rested on additional measures that would reduce the population of Caribbean asylum-seekers.[184] These measures—namely, interdiction—would present a deterrent effect and keep the detention population to manageable numbers. Besides, it was a bargain. The Task Force noted that a limited interdiction policy would cost about $10 million per year instead of the $30–60 million it estimated as the cost of

181. Regina v. Immigr. Officer at Prague Airport [2004] UKHL 55, [2004] 1 AC (HL) 49 (appeal taken from Eng. and Wales); *Minister Immig. & Multicultural Affs. v. Ibrahim* (2000) 204 CLR 1 (Austl.) (explicitly citing the U.S. Supreme Court). *But see* 27765/09 Eur. Ct. HR (2012).

182. Andrew Brouwer & Judith Kumin, *Interception and Asylum: When Migration Control and Human Rights Collide*, 21 REFUGE 6, 12 (2003).

183. Letter from William French Smith, *supra* note 125, at 2.

184. Smith's detention proposal "assumes quick passage of legislation to reform cumbersome and lengthy exclusion and asylum procedures . . . a long term INS facility for 2,000 [migrants]; and a program of limited interdiction at sea to effect some immediate deterrence of the Haitian flow." *Id.*

running an immigration detention center. Additionally, the "welfare and resettlement costs" that the government would save—presumably because it would admit fewer Caribbean migrants as refugees—would "offset" the costs of interdiction.[185]

Interdiction had considerable political benefits as well. The Task Force indicated that it demonstrated "commitment to enforcement without risking the cons incidental to extended detention, and thus help diffuse the current political situation in Florida."[186] Additionally, executive officials indicated that interdiction did not present the detention policy's political problems. Indeed, several months before the administration implemented the detention policy, an aide wrote in a note to President Reagan that the Task Force "all agree[d]" on the interdiction policy, but remained divided on detention because of the absence of politically appropriate locations.[187]

When Reagan's immigration Task Force recommended an interdiction program, it relied on legal theories that President Carter's Department of Justice developed to address the Mariel Boatlift. The Coast Guard began to police the seas for immigrants during the boatlift, seeking to prosecute the boat owners who brought Cubans into the country. When Haitian boat migration increased later that year, the administration explored the possibility of using the Coast Guard to send Haitian asylum-seekers back to Haiti. Although Carter's Department of Justice did not authorize a Haitian interdiction program, its reasoning would create the legal architecture for the interdiction program Reagan authorized one year later.

The Carter administration did not interdict boats arriving from Mariel. As one scholar surmises, the administration likely believed "the Cuban community in Miami would have gone crazy" if federal officials intercepted Mariel Cubans and sent them back to Cuba.[188] Instead, the administration attempted to target the owners of the boats that brought escaping Cubans to South Florida by using antismuggling provisions in immigration law.[189]

185. Memorandum from William French Smith, *supra* note 106.

186. *Id.* at 7 (adding that "liberals, blacks and church and human rights groups would strongly oppose" interdiction).

187. Memorandum from Craig L. Fuller, *supra* note 128.

188. ENGSTROM, *supra* note 63, at 74, 83 (adding that Carter was especially concerned about the upcoming Florida primary).

189. *Id.* at 111. The Reagan administration stood ready to adopt the same approach in the face of another boatlift. *See, e.g.*, Draft Memorandum from Annelise G. Anderson, Off. Mgmt. & Budget, to

By September, the Coast Guard had instituted a "picket" to stop boats in the waters around South Florida that were headed toward Mariel.[190] If a visual inspection of these boats yielded probable cause that the boat owners intended to smuggle Cuban asylum-seekers in violation of the immigration laws, the Coast Guard could seize the boat and contact authorities for further questioning.[191]

While ordering the Coast Guard to seek out alleged smugglers, the administration considered applying the same strategy to Haitians. On September 17, 1980, a White House memo noted that the Coast Guard had intercepted "a large freighter containing approximately 250 Haitian nationals . . . a few miles off the coast of the Florida Keys." The White House had "inquired concerning whether there is any legal impediment to placing these Haitians on a serviced vessel and sent back to Haiti."[192] The answer to this question was yes, but that rested only on the fact that the Haitians had been intercepted on territorial waters, which extended for three miles from the coastline.[193] This meant that "the 'right' of an alien to avail himself of the exclusion process created by Congress attaches . . ."[194] The Department of Justice, however, concluded that immigration law "would not prohibit the interception and return of Haitians" outside of American territorial waters.[195] By moving farther from American shores, the government could avoid its obligation to formally process Haitian asylum claims.

---

unknown recipient, Immigration and Refugees: Management Issues (Aug. 6, 1981) (on file with the *Michigan Journal of Law & Society*).

190. Memorandum from Paul R. Michel, Assoc. Deputy Att'y Gen., to David Aaron, Deputy Assistant to the President for Nat'l Sec. Affs., Possible Institution of a Checkpoint on U.S. Route 1 to Impede Boats Bound for Mariel 3 (Sept. 3, 1980) (on file with the *Michigan Journal of Law & Society*) (considering the "institution of a checkpoint" along Route 1 and referring to "the Coast Guard picket," adding "similar questioning has been conducted by the Coast Guard of boats already in the water and heading southward towards Mariel").

191. *Id.* at 1 (referring to an investigation of whether the boat owner sought to "illegally land undocumented aliens").

192. Memorandum from Unknown Sender to the White House 1 (date unknown) (on file with the *Michigan Journal of Law & Society*).

193. Memorandum from Mark Richard, Deputy Assistant Att'y Gen. Crim. Div., to Paul R. Michel, Assoc. Deputy Att'y Gen., The Legal Ability of the Government to Intercept Haitian Vessels Bound for the United States and to Return the Visaless Aliens to Haiti 1 (Oct. 7, 1980) (on file with the *Michigan Journal of Law & Society*).

194. *Id.* at 5.

195. *Id.* at 6 (noting that Haiti would have to consent to the process, and adding that "there is also more likelihood that the courts would find that they have jurisdiction over activities in those areas than with respect to activities on the high seas").

The Department of Justice continued to explore the legal foundations for interdiction after Reagan took office in January 1981. It initially conceived of the interdiction policy as a way for the executive branch to enforce immigration law. In January 1981, the Criminal Division wrote an analysis of a policy in which the Coast Guard would interdict arriving Haitians outside territorial waters. The program would be lawful, the Criminal Division concluded, to fulfill the "legislative purpose of 8 U.S.C. §1323," which imposed punishments on people who unlawfully brought aliens into the United States—the same antismuggling provision that President Carter had sought to use against participants in the Mariel Boatlift.[196]

Antismuggling provisions justified interdiction, but they also made the program legally vulnerable. As lawyers began to review the program, they noted the legal argument's weaknesses. Larry Simms, an attorney in the DOJ's Office of Legal Counsel (OLC), prepared a memo about the president's interdiction authority using the criminal division's initial analysis.[197] Simms was cautious about the interdiction plan. Interdiction could not be based on the antismuggling laws, he argued, because Congress had already imposed fines for smugglers. These fines were a "clear[] statement" of how Congress "wished to punish smugglers."[198] Furthermore, Simms noted, "the primary purpose of [Section 1323] is to punish the smugglers, not the aliens," and "the forcible return of the aliens to Haiti would not appear to fulfill the section's purpose."[199] An interdiction program based on Section 1323 would run around Congress's immigration plans.[200]

Instead, Simms advanced an argument based on the president's inherent authority to regulate immigration and foreign affairs. Simms concluded that Congress had provided "sufficient flexibility" in immigration statutes to authorize interdiction because it had granted the president the power to

196. Memorandum from William French Smith, Att'y Gen., to Ronald Reagan, President, Alternative Facilities—Fort Chaffee and Alien Populations 2 (July 6, 1981) (on file with the *Michigan Journal of Law & Society*) (referencing an earlier memorandum from the Criminal Division—Memorandum from Mark Richard, Deputy Assistant Att'y Gen., Crim. Div. to Paul R. Michel, Assoc. Deputy Att'y Gen. (January 22, 1981)).

197. Memorandum from Larry L. Simms, Acting Assistant Att'y Gen., Off. of Legal Counsel, to William French Smith, Att'y Gen., Authority to Return Undocumented Haitian Aliens to Haiti After Interdiction of Haitian Vessels on the High Seas 2 (Apr. 10, 1981) (on file with the *Michigan Journal of Law & Society*).

198. *Id.*

199. *Id.*

200. *Id.*

restrict the entry of aliens "detrimental to the interests of the United States" in an emergency.[201] This statutory argument could be bolstered, Simms continued, by the conclusion that the president had an "inherent executive authority"—stemming from his power to control foreign relations—to protect the nation from illegal immigration. Despite this argument, Simms concluded that interdiction was risky and noted that he was "unable to find any precedent for such an operation."[202]

The OLC and the Attorney General were committed to the idea of interdiction and did not want to seek Congressional approval.[203] In August 1981, the DOJ circulated an opinion written by Theodore Olson, Assistant Attorney General of the OLC, that used Simms's reasoning to argue that a Haitian interdiction agreement would be constitutional without legislative approval. When they reviewed OLC's proposal, lawyers from Reagan's White House Counsel's office noted that it omitted all the legal uncertainty surrounding the president's power to issue the program and was "a piece resembling more a party brief than an objective legal analysis."[204]

---

201. *Id*. at 3.

202. *Id.* at 1 (citing *United States* ex rel. *Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950) and stating "the outcome of a legal challenge to such a program of interdiction without additional legislation is at best uncertain").

203. Memorandum from Richard A. Hauser, Deputy Couns. to the President, to Fred F. Fielding, Couns. to the President, Interdiction of Haitian Vessels (Aug. 17, 1981) (on file with the *Michigan Journal of Law & Society*) ("In this regard, Kate [Moore] admitted that the President had approved the operation in the context of obtaining new statutory authority. She also stated that to her knowledge the President had not approved the current concept, but that the Attorney General had publicly stated that interdiction could lawfully be accomplished under existing authority."); Memorandum from J. Michael Luttig, White House Couns. Off., to Fred F. Fielding, Couns. to the President, Interdiction of Haitian Vessels (Aug. 17, 1981) (on file with the *Michigan Journal of Law & Society*). ("At this juncture, whether the President has the requisite authority to affect the interdiction of Haitian vessels is not of as much concern as whether he has been fully apprised of the precise nature of the legal authority upon which he would rely were he to authorize the interdiction."). Administration representatives proposed the idea at a legislative session in July 1981. While the Florida delegation registered strong support, it was never approved. *See Oversight on the Legal Status of the Cubans and Haitians Who Have Entered the United States and the Policies and Procedures Which Should Be Adopted in Order to Handle Future Mass Asylum Cases and Crises: Hearing Before the Subcomm. on Immigr. and Refugee Pol'y of the S. Comm. on the Judiciary*, 97th Cong. 17 (1981) (statement of Doris M. Meissner, Acting Comm'r, Immigr. & Naturalization Serv.); *id.* at 25 (statement of David Hiller, Special Assistant to the Att'y Gen.) (requesting authorization for interdiction but also noting that "we believe there is authority for an interdiction program, for example, with regard to Haitian migration, to be undertaken in the near future").

204. Memorandum from J. Michael Luttig, *supra* note 203, at 4. *See also* Memorandum from Richard A. Hauser, *supra* note 203, at 2 (noting that Olson's memo "was drawn directly, and verbatim in many instances, from that July 2 memorandum, but that virtually all discussion and authority which questioned the President's authority had been omitted").

The White House Counsel's office, in addition to other agencies, expressed skepticism about the interdiction plan. White House lawyer J. Michael Luttig pointed out that immigration was a "[c]ongressional concern" where the president's implied authority should be weak. Luttig also took issue with the idea that Haitian migration was an emergency:

> [T]he claim that the immigrations are 'massive' in number is made in the context of a discussion of the President's inherent Constitutional power to act to protect the Nation in times of emergency. Absent emergency conditions, citing the authority in support of an implied power to interdict Haitian vessels is at least misleading, and at worst, somewhat intellectually dishonest.[205]

In critique, he added that "OLC should have mentioned, but did not, that an argument for the implied authority of the President to act is weakest where Congress has consistently asserted its undisputed authority (as it has with immigration matters)."[206] In addition to the president's lawyers' rejection, the State Department voiced concerns that "our enforcing of Haitian emigration laws will put us in conflict with our own opposition to Russia's emigration restrictions and could jeopardize the country's reputation among South Asian 'boat people.'"[207]

Despite these objections, the administration adopted the interdiction program. The official version of the OLC's memo was released on August 11, 1981, setting in stone the program's legal authority. Later that month, the president authorized the U.S. Ambassador to Haiti to make the required agreements with the Haitian government. In September, Reagan issued a proclamation suspending entry of "undocumented aliens from the

205. Memorandum from J. Michael Luttig, *supra* note 203.

206. *Id.*

207. Memorandum from Kate Moore, Special Assistant to the Chief of Staff, to Frank Hodsoll, Deputy Chief of Staff, Re: Project Status Report (Aug. 18, 1981) (describing, under "Interdiction," the reaction of the Human Rights Section of the Legal Adviser's Office). The Department of Justice also registered concerns with interdiction. In a memo for the president, the Attorney General noted that "[i]nterdiction could result in an ugly incident with Haitians jumping overboard or otherwise being injured or killed and the Coast Guard getting the blame. . . . It could set an international precedent for turning away 'boat people.' Even with authorizing legislation, the Coast Guard might be sued for abridging rights of potential asylees." Memorandum from William French Smith, *supra* note 106.

high seas" and an executive order using his statutory and inherent authority to approve the interdiction of Haitian vessels by the Coast Guard.[208]

In the coming years, the interdiction program became accepted as providing legal sanction for Haitian exclusion. Even after some members of Congress registered their disapproval, the administration concluded that its legal footing was strong enough without Congressional approval. Consequently, it decided not to include legislation supporting interdiction in its 1982 legislative agenda.[209] Legal challenges to the policy also failed. In *Haitian Refugee Center, Inc. v. Gracey*,[210] plaintiffs challenged the interdiction policy as a violation of the rights of interdicted Haitians under the Refugee Act and the Protocol Relating to the Status of Refugees. The District Court dismissed the complaint, finding that the Protocol was not self-executing and that the obligations of the Refugee Act did not "exist until an alien comes within the United States." The court also affirmed the interdiction order by reiterating the president's power over immigration law, including Simms's tenuous legal argument that the president had the "inherent authority to act to protect the United States from harmful illegal immigration." In one sentence, Judge Charles Richey also affirmed what may have been the underlying rationale of the administration in creating the interdiction policy: "because the [government's] statutory obligations do not exist until an alien comes within the United States, plainly the Executive can avoid those obligations by interdicting the Haitians on the high seas."[211] On appeal, Judge Robert Bork upheld the decision on the ground that the plaintiffs did not have standing to sue.[212]

Although administrators doubted the legality of the interdiction policy initially, they did not experience the volume of legal challenges that they did with each detention-related decision. Interdiction was also politically

208. KAHN, *supra* note 21, at 169-71; Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, Haiti - U.S., Sept. 23, 1981, 20 I.L.M. 1198-202.

209. CABINET COUNCIL ON LEGAL POL'Y, IMMIGRATION AND REFUGEE POLICY 20 (1982) (on file with the *Michigan Journal of Law & Society*) (recommending that the president not seek legislative approval for interdiction, adding "[t]he present interdiction program is controversial" and that pursuing such legislation could be "distract[ing]").

210. 600 F. Supp. 1396 (D.D.C. 1985).

211. *Id.* at 1400, 1404.

212. Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 811-12 (D.C. Cir. 1987). Future iterations of the Interdiction policy would be upheld in later cases. *See* Haitian Refugee Ctr., Inc. v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993).

efficient. The Reagan administration did not have to seek approval from Congress for the interdiction policy because it funded the initial interdiction program by reallocating resources from the Coast Guard's budget.[213] In 1982, 152 Haitians were interdicted and returned to Haiti. By 1984, the government returned over 4,000 Haitians—more than the regular capacity of the new immigrant detention facility that it built in Louisiana—through the interdiction program.[214]

Interdiction also led the government toward off-shore detention for asylum-seekers, underscoring the relatedness of confinement and legal exclusion. In 1991, after a surge in the number of asylum-seekers from Haiti, the Coast Guard began to use Guantánamo Bay to screen Haitian and Cuban asylum-seekers who were encountered during interdiction efforts.[215] Furthermore, authorities incarcerated almost 300 Haitian refugees at Guantánamo who had passed the screening—those determined to have a "credible fear" of persecution—because they had tested positive for HIV, leading to what one scholar calls a "carceral quarantine."[216] This history of Guantánamo—subsumed in the popular imagination by the base's later use as a military prison—has helped scholars understand immigration detention as an imperial project, anchored in the government's access to territory on which rights are not guaranteed.[217] Furthermore, it underscores the relatedness of on- and off-shore exclusion efforts. The detention of asylum-seekers on Guantánamo exemplifies the government's impulse to merge confinement with legal exclusion. To legal scholars, Guantánamo is a "legal black hole," a "grey area," and an "interstitial imperial site" where "domestically unthinkable configurations of sovereign will" could be realized.[218] Immi-

213. Memorandum from Kate Moore, Special Assistant to the Chief of Staff, to Dave Gergen, Dir. Commc'ns, and Larry Speakes, Press Sec'y, Interdiction Proclamation and Executive Order 1 (Sept. 29, 1981) (on file with the *Michigan Journal of Law & Society*).

214. Marc Fisher, *Influx of Haitians Puzzles U.S. Officials Calm*, MIA. HERALD, Dec. 31, 1984, at 1A (on file with the *Michigan Journal of Law & Society*).

215. A. NAOMI PAIK, RIGHTLESSNESS: TESTIMONY AND REDRESS IN U.S. PRISON CAMPS SINCE WORLD WAR II, at 95 (2018).

216. *Id.* at 96, 104, 113.

217. LOYD & MOUNTZ, *supra* note 24, at 215.

218. KAHN, *supra* note 21, at 250 ("'legal black hole'"); *Id.* at 12 ("interstitial imperial site[]" and "domestically unthinkable configurations of sovereign will"); Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 EUR. J. INT'L L. 347 (2018); Simon Reid-Henry, Exceptional Sovereignty?, *Guantánamo Bay and the Re-colonial Present*, 39 ANTIPODE 627, 628 (2007) (describing a "grey area").

grant confinement always involved some element of legal exclusion, as interdiction was itself a "legal black hole."

How were detention and interdiction related? If interdiction eliminated detention's difficulties with the same deterrent effect, as I have argued, we should expect detention numbers to fall as interdiction grew. In reality, both practices became more prominent in the years after Reagan's interdiction proposal. Members of the administration remained committed to some form of detention while they pursued interdiction. They credited both practices for reducing the "flow" of Haitians to Florida. Furthermore, detention remained necessary because the federal government was never completely successful in its efforts at exclusion. While maritime interdiction dramatically changed Caribbean migration (indeed, by making it more dangerous), it did not prevent migrants from arriving. There was always a need for more detention.

Nevertheless, interdiction persisted in the government's institutional memory as the most efficient form of exclusion and deterrence. As Doris Meissner, who became Commissioner of the Immigration and Naturalization Service after Alan Nelson, explained in 1989: it wasn't "detention of Haitians that cut the flow; it was the interdiction program that cut the flow," especially since many detained Haitians had been released because "of lawsuits over procedural defects in the due process available to the detainees . . . ."[219] And, as Figure 1 shows, although both detention and interdiction varied throughout the decade, the number of migrants encountered in interdiction efforts increased at higher rates than detention ever did. The interdiction program proved more flexible and more effective as a form of migration control.

219. *Central American Asylum-Seekers: Hearing Before the Subcomm. on Immigr., Refugees, & Int'l Law of the H. Comm. on the Judiciary*, 101st Cong., 1st Sess. 262-63 (1989).

FIGURE 1: DETENTION AND INTERDICTION, 1979–93[220]

	Detention		Interdiction	
	Detainees/Day	Increase	Interdictions/Year	Increase
1979	2,371		—	—
1980[221]	1,620	-31.7%	—	—
1981	2,659	64.1%	—	—
1982	2,868	7.9%	171	—
1983	2,972	3.6%	566	277.%
1984	3,380	13.7%	1,808	219.4%
1985	4,045	19.7%	4,074	125.3%
1986	3,938	-2.6%	3,725	-8.6%
1987	3,472	-11.8%	2,991	-19.7%
1988	3,844	10.7%	4,600	53.8%
1989	6,438	67.5%	5,863	27.5%
1990	6,571	2.1%	2,836	-51.6%
1991	6,049	-7.9%	4,990	76.0%
1992	5,928	-2.0%	40,627	720.0%
1993	4,642	-21.7%	10,584	-74.2%

C. *From Interdiction to Other Forms of Exclusion*

In the years after Reagan's detention and interdiction policy, Congress institutionalized the Executive's border games into law. As they considered interdiction proposals, Reagan administration officials also evaluated efforts that would reduce the amount of time that would relegate exclusion and

220. This chart describes the impact of the interdiction policy, which applied only to asylum-seekers coming on boats from Haiti (although it had been expanded to Cubans by 1993). The detention numbers reflect detentions of all types of migrants, so they understate the impact of the interdiction policy on limiting the need for detention of migrants from the Caribbean. Information relating to interdictions /year begins in 1982 and is available at *USCG Migrant Interdiction Statistics*, U.S. COAST GUARD, https://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0532.xls (last visited May 31, 2022). Detention numbers are collected by the Marshall Project from appendices to Appropriations for Departments of State, Just., Com., Judiciary, and Related Agencies. MARSHALL PROJECT, *supra* note 20.

221. Detention numbers dropped in 1980, likely due to the Southern District of Florida's decision in *Haitian Refugee Ctr. v. Civiletti*, *supra* note 84, as well as the use of parole for migrants who arrived from Haiti or Cuba before June 19, 1980.

asylum decisions involving arriving immigrants at the border to the agency's enforcement arm, once again sidelining judicial review. These types of proposals—often called "summary exclusion" and, eventually, "expedited removal"—grew, like interdiction, from the administration's desire to avoid the political costs of detention. At the same time, they would impact arriving migrants from areas beyond the Caribbean, further cementing the "border games" born of the migration crises of the 1980s.

As they pursued immigration reform, Reagan administration officials sought to reduce immigrant detention by streamlining the asylum-hearing process, which was, according to Attorney General Smith, "subject to lengthy delays."[222] In the administration's ideal scenario, asylum-seekers would have no right to judicial review—by federal judges or the Bureau of Immigration Appeals—of the decisions of the asylum corps, meaning that the asylum decision could be rendered quickly.[223] Alongside summary exclusion, the administration pushed for other limits to judicial review of asylum cases, including shortening the window for filing appeals, precluding class-action cases, and ensuring that an individual's deportation would not be stayed during the course of an appeal.[224]

---

222. Letter from William French Smith, *supra* note 125. Draft Memorandum from William French Smith, Att'y Gen., to Ronald Reagan, President, Alternative Facilities – Fort Chaffee and Alien Populations 3 (Jul. 6, 1981) (on file with the *Michigan Journal of Law & Society*). The administration proposed this in 1981, but made no legislative headway. *See How Do We Determine Who Is Entitled to Asylum in the United States and Who Is Not?: Hearing Before the Subcomm. on Immigr. & Refugee Pol'y, S. Comm. on the Judiciary*, 97th Cong. 4 (Oct. 14, 1981) (statement of Dorris Meissner, Acting Comm'r, Immigr. & Naturalization Serv.).

223. *Id.* at 4 (calling the recommendation "summary exclusion"). Draft Letter from Robert A. McConnell, Assistant Att'y Gen., Off. Legis. Affs., to Speaker of H.R. 2 (undated) (on file with the *Michigan Journal of Law & Society*); Memorandum from David Hiller, Special Assistant to the Att'y Gen, to William French Smith, Att'y Gen., RE Simpson-Mazzoli Bill (Mar. 23, 1982) (on file with the *Michigan Journal of Law & Soc'y*) (attaching a side by side comparison of S. 2222 and the changes in it which the administration favors, explaining that the administration favored non-adversarial review "where the claimant may be assisted by counsel. Asylum decisions are reviewable by the new U.S. Immigration Board on the basis of a summary record. No judicial review, except non-statutory habeas corpus").

224. Memorandum from Lawrence Lippe, Chief, Gen. Litig. and Legal Advice Section Crim. Div., to Roger Pauley, Dir., Off. of Legis. Crim. Div., Draft Revision of H.R. 6514, 97th Cong., 2d Sess., to Permit and Restrict Judicial Review of Asylum Determinations 1 (Sept. 3, 1982) (on file with the *Michigan Journal of Law & Society*) (responding to request for "draft language to permit limited judicial review of the asylum and exclusion determinations envisioned under the pending Simpson-Mazzoli bill"). Some government attorneys even welcomed Congress's efforts to provide for judicial review of asylum cases because these review mechanisms could be used to argue that habeas corpus could not be used to challenge asylum decisions. *Id.* at 1 ("[B]y providing a statutory mechanism for seeking judicial review of asylum decisions within a 30 day period after the final administrative ruling, we have a respectable

Between the early Reagan years and 1996, Congress's attitude toward these proposals changed dramatically. In the early 1980s, summary exclusion faced an uphill battle, especially in the Democratic House. By the mid-1990s, though, an "asylum crisis" had taken hold of legislators, many of whom now championed summary exclusion.[225] Fueled by a growing rhetoric of criminality and fear of terrorism, as well as a rapid increase in the number of asylum applications and resulting increase in processing time, this "crisis" captivated reporters and lawmakers, who feared, in the words of then-Representative Chuck Schumer (D-NY), that the nation had "virtually an open border for anyone who can buy a plane ticket and is smart enough to figure out how to beat the system . . . ."[226]

In addition to the threat of asylum abuse, summary exclusion proposals had been legitimized by opponents of immigrant detention. In the early 1980s, both the Executive and Congress embraced the idea that procedural reform could lead to a substantive reduction in detention. The Reagan administration defended its use of long-term detention by blaming procedural delays in asylum processing.[227] When they criticized detention, members of Congress adopted a similar presumption—that speedy processing would reduce confinement. In 1982, for example, the House Judiciary Committee introduced "speedy hearing" provisions to the Immigration Reform and Control Act of 1982, seeking to "obviate the possibility that aliens awaiting asylum determinations might be subject to lengthy detention."[228] Even the

argument that habeas review of an asylum denial is never available, regardless of whether habeas review is available concerning an alien's excludability per se.").

225. PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 68 (2000) (describing Congressional hearings on an "asylum crisis"); *see* Smita Ghosh & Mary Hoopes, *Learning to Detain Asylum Seekers and the Growth of Mass Immigration Detention in the United States*, 46 J.L. & SOC. INQUIRY 993, 1008-10 (2021).

226. *Immigr. & Naturalization Serv., General Operations & Fiscal 1993 Budget: Hearing Before the Subcomm. on Int'l L., Immigr. and Refugees of the H. Comm. on the Judiciary*, 102d Cong. 33 (1992) (Statement of Charles E. Schumer, Congressman). For a discussion of the source of these backlogs and their relationship to the rising discourse of criminality, see Ghosh & Hoopes, *supra* note 225, at 1007–10.

227. For an example of the Reagan administration's tactics, see *United States as a Country of Mass First Asylum: Hearing Before Subcomm. on Immigr. and Refugee Pol'y of the S. Comm. on the Judiciary*, 97th Cong. 14 (1981); *Dep'ts. Com., Just., State, Judiciary, & Related Agencies Appropriations for 1982 Pt. 11: Hearing before H. Comm. on Appropriations*, 97th Cong. 42 (1981) (noting this time that more efficient case processing would "have the effect of strengthening enforcement since it will reduce overall detention time, making more resources available to detain more people").

228. H.R. REP. No. 97-890, pt. 1, at 53 (1982); *see also Immigr. Reform and Control Act: Hearing Before S. Subcomm. on Immigr. & Refugee Pol'y of the S. Comm. on the Judiciary*, 98th Cong. 12 (1983)

Editorial Board of the *New York Times* adopted this framework, recommending a "streamlined" hearing procedure in an editorial decrying the detention of Haitians.[229] In the mid-1990s, when the summary-exclusion proposals were revived after the so-called "asylum crisis," it represented the convergence of two very different legislative concerns, one about reducing detention and another about preventing asylum abuse.

Eventually, the summary exclusion scheme would ensure the quick processing *and* likely detention of individuals with asylum claims. In 1996, lawmakers finally enshrined summary exclusion into law, creating a program called "expedited removal" in which certain arriving migrants could be deported without a hearing or right to appeal.[230] To bypass the expedited removal process and make an asylum claim before an immigration judge, non-citizens had to demonstrate a "credible fear of persecution" to immigration officials. (Perhaps highlighting the relationship between expedited removal and interdiction, the "credible fear" standard had been previously used by officers implementing the interdiction program.)[231] Additionally, the 1996 law required that individuals in the expedited removal process would be detained during the proceedings, leading to a "sharp increase" in the detention of asylum-seekers as future administrations expanded the use of expedited removal.[232]

(statement of Paula Hawkins, Senator); Schrag, *supra* note 225, at 30–31. Opponents of detention—like Reps. Mazzoli and Fish—felt that speedy processing would reduce Haitian detention. Press Release, Representatives Romano L. Mazzoli & Hamilton B. Fish, Jr. (June 16, 1982), *in Detention of Aliens in Bureau of Prison Facilities*, *supra* note 111, at 248 ("Representatives Mazzoli and Fish, sponsors along with Senator Alan K. Simpson of Wyoming, of major immigration reform legislation presently before Congress, have been pushing for quick decisions on the asylum claims of the Haitians, and all other such pending claims, so that applicants will either be allowed to stay in the United States as refugees or returned to their home countries.").

229. *The Department of Detention*, N.Y. TIMES, Jan. 5, 1982, at A14 (on file with the *Michigan Journal of Law & Society*).

230. 8 U.S.C. § 1225(b)(1)(B)(ii).

231. Over the years, officials had struggled to give meaning to this standard, which involved "internal consistency," "detail," "plausibility," and "demeanor." Memorandum from Gregg Beyer, Head of Asylum, Asylum Branch, Immigr. & Naturalization Serv., to John W. Cummings, Acting Assistant Comm'r, Central Off. Refugee and Asylum Processing, Credible Fear of Return: Assessing Credibility (Jan. 28, 1992), *in* KAHN, *supra* note 24, at 293.

232. Eleanor Acer & Olga Byrne, *How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources*, 5 J. MIGRATION HUM. SEC. 356, 370 (2017).

III. REVISITING ABOLITIONISM

In recent years, scholars of immigration detention have explained that it is rooted in the same political dynamics that produced mass incarceration: discriminatory policing, racial subordination, "profit-seeking" by private detention companies, the war on drugs, racism, and classism.[233] This important insight is surely true, but it obscures the international dynamics that produced immigrant confinement and elides the relationship between incarceration and exclusion. This relationship is central to conversations about abolishing immigration prisons, expanding those conversations to focus on asylum-seekers and the perverse consequences of the expansion of legal rights.

Historians, political scientists, and criminologists, in addition to legal scholars, have begun examining the rise of American imprisonment in the 1970s and 1980s.[234] These scholars explain how the "same anti-drug hysteria that swept criminal policing took hold in immigration law," rendering Haitian asylum-seekers and Cubans from Mariel Harbor into perceived threats.[235] The Reagan administration, facing intense political pressure and seeking to deter future migration crises, adopted a mandatory detention policy for asylum-seekers in 1981. In later years, the Legislative and Executive branches collaborated to "push . . . more people into detention, including immigration detention."[236] In the Anti-Drug Abuse Act of 1986, for example, Congress authorized immigration officials to seek a "detainer" for anyone arrested for a controlled-substances offense and believed to be in the United States without permission.[237] After this, state and local offenses led to immigration custody, fueling the growth of immigrant detention. And

233. *See supra* note 12 and accompanying text.

234. *See, e.g.* GOTTSCHALK, *supra* note 143, at 218 (describing the morphing of immigration agencies into a "mini bureau of prisons"); *see also supra* note 11.

235. Hernández, *supra* note 10, at 61–63 (describing "sensational media depictions of migrant involvement in criminal activity," focused on Cubans, Haitians, and Jamaicans).

236. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 U.C.L.A. L. REV. 1346, 1361 (2014).

237. Hernández, *supra* note 10, at 67 (citing Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207, § 1751 (1986) (amending Immigr. & Nat'y Act § 287, 8 U.S.C. § 1357)); *see also* Hernández, *supra* note 236, at 1364 ("Though it had been using detainers before 1986, these IRCA and ADAA provisions gave the INS a basis from which it could adopt regulations facilitating . . . its 'generally unbound detainer practice.'") (internal citations omitted); Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody,"* MICH. J.L. REFORM 879, 893 (2015) ("The modern mandatory detention regime was thus born with the passage of the ADAA.").

in 1996, Congress mandated detention for a wide variety of individuals, including those in expedited removal proceedings, thus institutionalizing the detention scheme even further.[238]

This history serves an important purpose. Framing immigrant detention as contingent on political trends helps scholars suggest that real reform is possible. If immigration enforcement is a "machine," entrenched in a cruel and racist past, it should be changed, reformed, or abolished. Indeed, taking a cue from the movement to end mass incarceration, many scholars propose abolishing immigration detention, aligning with a growing set of politicians and mainstream immigration advocates who have voiced their opposition to immigrant detention, criminalization, and enforcement.[239] César Cuauhtémoc García Hernández, for example, has drawn on prison abolitionism to call for the abolition of immigration detention.[240] For Hernández, immigration imprisonment is too "entwined" with its "immoral root[s]" to be reformed.[241]

Others have echoed this call. Congressional Democrats and many of the 2020 Democratic presidential candidates sought to limit or eliminate family detention, promote alternatives to detention, and improve conditions in detention centers.[242] In 2019, a spate of financial companies pledged to end the use of private prison contractors.[243] These reformers see

238. 8 U.S.C. § 1225(b)(B)(iii-iv); *see also* HERNÁNDEZ, *supra* note 17, at 68–69.

239. *See, e.g.,* Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 94 (2014) ("Civil detention that functions like criminal punishment is constitutionally questionable . . . ."); Marouf, *supra* note 22, at 2191 ("Rethinking the use of immigration detention through the lenses of due process, equal protection, excessive bail, disability rights, and basic human rights principles would save both money and lives."); Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor:* Hernandez v. Sessions, 21 CUNY L. REV. 69, 82–83 (2017) (arguing that the Excessive Bail Clause should apply in immigration cases).

240. Hernández, *supra* note 10. Some scholars propose that detention can only be reformed by addressing the criminal/immigration convergence at its core. *See, e.g.*, Flynn, *supra* note 9; Kalhan, *supra* note 22, at 58 (calling for "reconsideration of immigration control policies premised upon convergence with criminal enforcement . . . ."); Stumpf, *supra* note 239, at 61 (2014) (describing a "precarious distinction between immigration and criminal confinement," and arguing that DHS's authority to detain extends only to detention "in furtherance of goals that were collateral to immigration control").

241. Hernández, *supra* note 10, at 262.

242. Schaul, Shcerer & Uhrmacher, *supra* note 11; Kassie, *supra* note 11; Tara Golshan, *The 2020 Democratic Immigration Debate, Explained*, VOX (Jul. 29, 2019, 9:30 AM), https://www.vox.com/2019/7/29/6741801/2020-democrat-presidential-immigration-debate [https://perma.cc/29GC-URLC] (reporting that "[a]lmost all the candidates support alternatives to detention facilities, including electronic monitoring and social work monitoring").

243. Mia Armstrong, *Here's Why Abolishing Private Prisons Isn't a Silver Bullet*, MARSHALL PROJECT (Sept. 12, 2019, 8:53 PM), https://www.themarshallproject.org/2019/09/12/here-s-why-

detention—in the immigrant *and* criminal systems—as "inhumane," inconsistent with "our values," "unacceptable[,] and un-American."[244]

This Article's history qualifies campaigns to reform or abolish immigration prisons. As I suggest, when detention becomes difficult, policy-makers turn to policies of non-entrée, blocking asylum-seekers from accessing the territory in the first place. Abolition is always an incomplete solution—as scholars have made clear, it must be accompanied by substantial social change—and that is especially true in the realm of immigration law, where the government possesses the vastest border-making powers.[245] In the immigration context, abolishing immigration prisons is essential, but it leaves some fundamental questions about the country's relationship with noncitizens in the rest of the world unanswered, including those who work in the country or seek asylum at its shores.

A. *Abolition and Asylum-Seekers*

Abolition's limits are especially clear when one focuses on border detention and asylum-seekers. Arriving migrants make up a large and growing part of what Anil Kalhan calls "immcarceration," and they are often detained even after alleging a "credible fear" of persecution.[246] While crimmigration law invokes the treatment of long-term residents with criminal records, its core features—using enforcement tactics that blend features of traditional criminal law with some aspects of traditional immigration law—affect asylum-seekers as well.[247] As this Article shows, detention policies do not only affect immigrants with criminal records but arriving migrants, in-

abolishing-private-prisons-isn-t-a-silver-bullet [https://perma.cc/CXC8-H67L] (reporting that private prisons are a "favorite culprit" for democratic candidates for president, as well as financial organizations like JP Morgan Chase, Wells Fargo, and Bank of America).

244. Da Silva, *supra* note 9 (quoting then-candidate Kirsten Gillibrand and the campaign of Bernie Sanders); Elizabeth Warren, *Ending Private Prisons and Exploitation for Profit,* MEDIUM (June 21, 2019), https://medium.com/@teamwarren/ending-private-prisons-and-exploitation-for-profit-cb6dea67e913 [https://perma.cc/J4KX-VYAU].

245. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172 (2015) (noting that abolition requires "addressing what are essentially social, economic, and political problems"); *see also* ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 94 (2005).

246. Kalhan, *supra* note 22, at 43, 45

247. Hernández, *supra* note 8, at 212.

cluding asylum-seekers, who are scarred by the same rhetoric of criminality and dangerousness.

Furthermore, this history suggests the importance of territorial borders, even in an area of law where the government has broad border-making powers. Immigration scholars have explained that immigration policing involves varied and changeable borders rather than a dichotomous characterization of inside and outside. The definition of entry, for example, allowed the government to treat individuals who had been in the country for years as outsiders.[248] Nevertheless, this Article's history shows that territorial borders have stark significance. While immigration officials had broad powers over Haitian asylum-seekers, who had, in fact, legally not "entered" the country, policymakers still recognized the impact of territory. For executive officials, moving immigrant policing to murky international waters represented a form of immigration control that even incarceration could not provide. Challenging the government's detention power only made that control more paramount.

B. *Border Games and Backlash*

Finally, this history allows us to retell the story of border games as a story of unintended consequences. By understanding detention, interdiction, and legal exclusion together, I hope to emphasize the immigration story as one of the unintended consequences of rights expansion. Scholars of criminal law describe an unexpected or "uneasy" relationship between procedural interventions and substantive severity. William Stuntz, for example, argues that in the 1970s and 1980s, legislators reacted to judicial expansions of procedural protections by expanding the scope of criminal liability, increasing punishments, and underfunding criminal-justice efforts.[249] For these scholars, procedural and substantive rights cause re-

248. *See, e.g.*, Zainab A. Cheema, *A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After* Boumediene, 87 FORDHAM L. REV. 289 (2018).

249. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice,* 107 YALE L.J. 1, 4 (1997).

trenchment or "backlash" in other branches of government, "nullifying" the "counter-majoritarian" decisions that favor politically unpopular groups.[250]

In the immigration context, Jeffrey Kahn and A. Naomi Paik report a similar tendency on the part of executive officials to use extraterritorial enforcement and detention to avoid judicial decisions and, more broadly, the ascension of rights within the territory.[251] Kahn and Paik build on scholarship explaining the rise of non-entrée policies like interdiction in the mid-twentieth century. There are, to be sure, earlier antecedents to these policies. In 1939, the Coast Guard surrounded the *St. Louis*, a German ship, as it approached the Port of Miami, effectively returning the Jewish asylum-seekers on board to Nazi persecution in Europe.[252] But many argue that modern interdiction efforts grew from the international-refugee treaties of the post-WWII era.[253] After WWII, the Refugee Convention and its 1967 Protocol established rights for refugees, most importantly the right to non-refoulement.[254] Scholars argue that nations used non-entrée policies to avoid these obligations, seeking to circumvent these international legal instruments without formally disavowing them.[255]

---

250. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 210–15 (2002) (describing the response to the Warren Court's "counter-majoritarian" criminal procedure decisions); Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 891 (2013) (describing the "agency-costs narrative" of criminal procedure decisions, in which procedural advantages for the defense were "offset, via plea bargaining, . . . [and] prosecutors over-charge or legislatures adopt mandatory minimum sentences"). For studies of backlash generally, see, for example, Christopher Schmidt, *Beyond Backlash: Conservatism and the Civil Rights Movement*, 56 AM. J. LEGAL HIST. 179 (2016) (describing histories of backlash to civil rights victories among white Americans).

251. *See generally* KAHN, *supra* note 24; PAIK, *supra* note 215.

252. FITZGERALD, *supra* note 157, at 22-25 (adding that "[t]he states that became the Allies did not simply fail to act to open their gates to Jewish refugees. With popular support, governments actively worked to prevent Jews from reaching their territories."). While Reagan's policy is often cited as the first modern example of interdiction, there are also examples of the U.S. government's earlier interdiction programs, including, for example, the interdiction of slave ships after Congress banned the slave trade in 1818. *See generally* Gabriel J. Chin & Paul Finkelman, *Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation*, 54 U.C. DAVIS L. REV. 2215 (2021).

253. *See, e.g.*, ITAMAR MANN, HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW 22, 24 (2016) (noting that "transnational governance associates human rights with a network that cooperates in a partially disaggregated fashion across borders").

254. *Id.* at 28.

255. Hathaway & Gammeltoft-Hansen, *supra* note 158, at 27 (adding that "the non-refoulement principle is reactive in the sense that it presupposes some kind of contact between the state and the asylum-seeker"); Eric A. Ormsby, *The Refugee Crisis As Civil Liberties Crisis*, 117 COLUM. L. REV. 1191, 1192 (2017) ("[S]tates have a perverse incentive to prevent the initial entry into their territory of potential asylum-seekers in order to avoid having to face legal obligations towards refugees."); Paz, *supra* note 162, at 7 ("Because courts and quasi-judicial bodies attach access to territorial presence, every time that

These scholars build on the unintended consequences of humanitarianism, human rights, and immigrant treatment. In Miriam Ticktin's *Casualties of Care*, for example, French officials' putatively apolitical effort to expand immigration rights to certain populations only legitimized the harsh treatment of other undocumented migrants, elevating the "legitimate" claims of migrants with illness or violence-related claims to recognition while delegitimizing the pain of entrenched poverty or global inequality.[256] The resulting "politics of care" ultimately "displace[d] possibilities for larger forms of collective change" among non-citizens, creating political limits for certain groups while offering mercy for some.[257]

The border-games dynamic is, then, a perverse consequence of rights expansion. As asylum-seekers gained more rights in the 1970s and 1980s, lawmakers responded to this perceived expansion by championing detention and exclusion. When the proverbial "welcome mat" expanded to offer rights to a broader group of potential refugees—rather than political allies admitted by "remote control"—policymakers pursued new ways to exclude and detain those with refugee claims. Furthermore, increased asylum-seeking created the perception that the asylum system was overly generous—indeed, during the "asylum crisis" of the 1990s, legislators described a "sick" asylum system plagued by rampant abuse enabled by "laboriously extensive due process"[258]—legitimizing calls for detention and exclusion. Efforts to streamline judicial processes, which were once thought to reduce the need for long-term detention, were seen as goals in and of themselves, divorced from their de-carceral roots. This led Congress to create a system of "expedited removal" and border detention for arriving asylum-seekers, enshrining their physical detention and legal exclusion.

---

they enforce human rights, despite their emphasis on universality, they re-consecrate the centrality of territory. And so, more human rights also means more exclusion."); FITZGERALD, *supra* note 164, at 57 ("Rights of territorial personhood and the territorialized right of non-refoulement increase incentives for states to practice remote control. These controls have quickly become taken for granted."). FitzGerald also emphasizes other developments, including the rise of "transnational advocacy networks," the development of travel technologies, and the "decreased foreign policy utility of asylum" after the Cold War that led to the development of what he calls "remote control policies" in the 1980s. *Id.* at 41, 57.

256. MIRIAM TICKTIN, CASUALTIES OF CARE: IMMIGRATION AND THE POLITICS OF HUMANITARIANISM IN FRANCE 24 (2011).

257. *Id.* at 3–4.

258. Ghosh & Hoopes, *supra* note 225, at 1009.

CONCLUSION

Long-term immigration detention developed in the early 1980s, when the country's interest in sanctuary clashed with a politically and racially charged immigration crisis. Despite their justification as emergency or "contingency" spaces, these detention centers took on many aspects of what scholars have called "prison America," the "carceral state," or even a "prison Empire."[259] To pursue immigration detention, federal administrators sought surplus properties, enlisted criminal agencies, and collaborated with private contractors.

But mass incarceration is only half the story. As they insisted on detaining incoming migrants, officials also responded to the perceived emergency by experimenting with interdiction. In the eyes of federal officials, the interdiction option achieved all the deterrent and symbolic benefits of mass imprisonment, but with fewer legal and administrative hurdles. For this reason, detention and interdiction were two sides of the same coin. Expedited removal—a form of immigrant exclusion that grew from interdiction—exemplifies the interrelationship between detention and exclusion, because individuals in expedited removal have limited access to jurisdiction and are presumptively detained. While interdiction and expedited removal never eliminated the need for long-term detention, they curtailed the growth of the confinement system.

As this Article has demonstrated, abolishing border detention will not necessarily improve the country's treatment of arriving migrants, many of whom seek asylum. Indeed, abolition could make treatment of migrants much worse by provoking the adoption of exclusionary policies like interdiction and expedited removal. Alongside abolition, asylum-seekers need measures that hold governments accountable for exclusionary policies and supervise immigration enforcement on both sides of the border.

Indeed, understanding detention and policies like interdiction and expedited removal together underscores what is at stake when policymakers face immigration emergencies. Perhaps it is better to think of both endeavors as part of the same impulse. We can call it a criminalization of move-

259. *See, e.g.*, GOTTSCHALK, *supra* note 143, MURAKAWA, *supra* note 26; ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE (2010).

ment, or, borrowing from Michael Flynn of the Global Detention Project, the "securitisation of migration."[260] Whatever the name, this political development has only gained traction in recent years. While politicians have united across political divisions to embrace criminal-justice reform, a long-overdue reckoning with the last three decades of mass incarceration, they have not yet coalesced around reforming our treatment of migrants, either at home or at sea. Our immigration system grew from the domestic dynamics that produced mass incarceration, but it seems that it will not end in the same way. The next immigration crisis—be it a "caravan," a "surge," or a fleet of boats from the Caribbean—may lead to new forms of enforcement on both sides of the border.

260. Michael Flynn, *An Introduction to Data Construction on Immigration-related Detention* (Glob. Det. Project Working Paper No. 14, 2011).