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**IMMIGRATION DETENTION  
ABOLITION AND THE VIOLENCE OF  
DIGITAL CAGES**

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## Immigration Detention Abolition and the Violence of Digital Cages

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### ABSTRACT

The United States has a long history of pernicious immigration enforcement and surveillance. Today, in addition to more than 34,000 people held in immigration detention, Immigration and Customs Enforcement (“ICE”) shackles and surveils an astounding 376,000 people under its “Alternatives to Detention” program. The number of people subjected to this surveillance has grown dramatically in the last two decades, from just 1,339 in 2005. ICE’s rapidly expanding Alternatives to Detention program is marked by “digital cages,” consisting of GPS-outfitted ankle shackles and invasive phone and location tracking. Government officials and some immigrant advocates have categorized these digital cages as a humane “reform,” ostensibly an effort to decrease the number of people behind bars. This article challenges that framework, illuminating how, instead of moving us closer to justice and liberation - and towards abolition - digital cages disperse the violence of immigration enforcement and surveillance more broadly, and more insidiously, ensnaring hundreds of thousands more immigrants, families, and communities.

The increasing digitization of immigration enforcement and surveillance is part of a growing, and expansive, geography of violence. This article argues that if we want to take deportation abolition seriously, we must consider the impact of this growing surveillance. Building upon deportation abolition literature situating immigration detention as a form of violence, this article posits that rather than mitigate violence, digital cages create a “violence of invisibility” that is equally, if not more, dangerous. Digital cages, masquerading as a more palatable version of enforcement and surveillance, create devastating harms that are hidden in plain sight, while duping us into thinking of these measures as more humane. This article concludes by arguing that digital cages are a “reformist reform” that merely make more efficient the kind of oppressive and racialized violence that has long informed the United States’ immigration enforcement regime. If we truly seek an end to this violence, this article argues for abolition—not just of detention, but of the digital cages next in line to replace detention.

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<sup>1</sup> Clinical Associate Professor of Law, Boston University School of Law. Thank you to members of the 2021 NYU Clinical Law Review Writer’s Workshop and LatCrit 2021 for thoughtful feedback, as well as [*acknowledgements forthcoming*]. Thanks also goes to Boston University School of Law, and Dean Angela Onwuachi-Willig, for summer research grant support for this project. Finally, special thanks to research assistants Andrew du Bois de Vroylande, Raven Pitarra, Sabrina Geisler, and Catherine Kannam for their excellent work. All errors are my own.

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## Introduction

“Elizabeth” wore an ankle shackle that was heavy, painful, and humiliating.<sup>2</sup> Elizabeth had fled to the United States following the murder of her father by gang members, who later threatened her, too. Shortly after Elizabeth fled, her mother was also murdered by gang members, and she became the sole caretaker of her traumatized younger siblings, ages 5 and 12. She was just 22. Elizabeth was arrested and briefly detained by Immigration and Customs Enforcement (“ICE”) before being released and fitted with an ankle shackle. Elizabeth had to remember to charge the shackle each night, to be home when the service contractor stopped by for unannounced home visits, and to call at the scheduled time for phone check-ins. She also had to manage her younger siblings’ school, therapy and childcare, and her own work schedule, as she struggled to make ends meet. Once her shackle was removed, Elizabeth was required to download and install the SmartLINK app on her phone so that ICE could continue tracking her location. Once a week, at a predetermined time, Elizabeth was required to send a “selfie” through the SmartLINK app, so that ICE could confirm her location. She was constantly exhausted and anxious, knowing that ICE had full access to her telephone and that if her phone stopped working or failed to connect to the app, that she would be re-detained and separated from her already traumatized brother and sister.

The surveillance to which “Robert” was subjected brought him to tears. A businessman and political activist in his home country, he was detained and tortured for his pro-democracy efforts before fleeing to the United States. Terrified that a prospective employer or new acquaintance would see the bulky shackle on his ankle, Robert wore long pants all summer long, and rarely left the house. He hated being constantly monitored and he became depressed and embarrassed, longing for the shackle to be removed.<sup>3</sup> He confided in his attorneys that if he knew he would face the burden of an ankle shackle and accompanying surveillance, he would have opted to remain in detention. Though he and his attorneys pleaded with ICE to remove the shackle, the ICE officer responsible for his case always had to “check with a supervisor”—a supervisor who seemed to never exist or return phone calls. Robert recalls feeling “like I was a prisoner, inside another prison.”<sup>4</sup>

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<sup>2</sup> Elizabeth and Robert’s names and identifying details have been changed, but their stories are based on the real, amalgamated experiences of the author’s clients.

<sup>3</sup> Highlighting brief narratives of impacted noncitizens is intentional here; and serves as an effort to “explicitly center[ing] the concerns, knowledge and bodies of those who suffer violence that have been forgotten, hidden, or otherwise erased.” Caitlin Cahill & Rachel Pain, *Representing Slow Violence and Resistance: On Hiding and Seeing*, 18 ACME: INT’L J. FOR CRITICAL GEOGRAPHIES 1054-1065 (2019).

<sup>4</sup> “Robert”’s story was previously profiled by Coda Story, using a different pseudonym. Erica Hellerstein, *‘I Felt like I Was a Prisoner’: The Rapid Rise of US Immigration Authorities’ Electronic Surveillance Programs*, CODA STORY

Both Elizabeth and Robert lived with the constant psychological distress, fear and anxiety that if they—intentionally or not—violated the terms of their participation in ICE’s Alternatives to Detention (“ATD”) program, they could, and would, immediately be re-detained by ICE. That if they missed a phone check in, weren’t home when required to be, or forgot to send a photo of themselves or plug in and charge their shackle, that ICE might come to their home or place of work, and re-detain them in front of their family, friends, or co-workers.<sup>5</sup> Centering the “situated and embodied knowledge”<sup>6</sup> of impacted individuals like Elizabeth and Robert is a critical starting point if we are to begin to understand the significant impact of the violence wrought by ATD on immigrants, their families and their communities. This article argues that there is a violence in the ordinary and habituated nature of immigrant surveillance and takes aim at describing one form of this violence—a set of practices I name here, as “digital cages” - not dissimilar to the idea of “e-carceration” as described by other scholars.<sup>7</sup>

The immigration enforcement detention and surveillance regime—which includes the interlocking systems of market and government forces making up the detention system, as well as the enforcement, policing, and surveillance systems—has expanded dramatically in recent years. Detention beds, at 18,500 in 2005, are now at 34,000 in the annual ICE budget.<sup>8</sup> As of December 2022, more than 376,000 immigrants are under constant surveillance by ICE, through a panoply of electronic monitoring

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(May 26, 2022), <https://www.codastory.com/authoritarian-tech/alternatives-to-detention-immigration/> [<https://perma.cc/9FY5-MR59>].

<sup>5</sup> HUM. RTS. WATCH, DISMANTLING DETENTION: INTERNATIONAL ALTERNATIVES TO DETAINING IMMIGRANTS 4, 41-42 (2021), [https://www.hrw.org/sites/default/files/media\\_2021/11/global\\_altdetention1021\\_web.pdf](https://www.hrw.org/sites/default/files/media_2021/11/global_altdetention1021_web.pdf) [[perma.cc/J9J6-SCT9](https://perma.cc/J9J6-SCT9)]; Julie Pittman, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CALIF. L. REV. 587, 606 (2020).

<sup>6</sup> Caitlin Cahill & Rachel Pain, *Representing Slow Violence and Resistance: On Hiding and Seeing*, 18 ACME: AN INT’L J. FOR CRITICAL GEOGRAPHIES 1054, 1058 (2019) (citing Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUD. 575-99 (1988)).

<sup>7</sup> See Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 645 (2019) (“The concept of e-carceration seeks to encapsulate the outsourcing of aspects of prison into communities under the guise of carceral humanism: the repackaging or rebranding of corrections and correctional programming as caring and supportive, while still clinging to punitive culture”); Kate Weisburg, *Punitive Surveillance*, 108 VA. L. REV. 147, 173 (2022) (“[S]urveillance technology facilitates a type of incarceration that occurs outside of prison, further demonstrating that prison is no longer the “state’s only means of restricting liberty.”<sup>161</sup> The similarities between physical and digital incarceration have led some scholars to refer to punitive surveillance as a form of “e-carceration.”); Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1, 2 (2022) (“Electronic monitoring imposes pain, shame, arbitrary rules, and limitation of freedom on persons, causing many to experience it as punitive.”).

<sup>8</sup> ALISON SISKIN, CONG. RSCH. SERV., RL 32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 13 (2012), <https://irp.fas.org/crs/RL32369.pdf> [<https://perma.cc/QM7B-EJ2N>]; AM. IMMIGR. LAWS. ASS’N, IMMIGRATION DETENTION: AILA DOC. NO. 21031937 (July 15, 2022), <https://www.aila.org/advocacy-media/issues/all/featured-issue-immigration-detention> [<https://perma.cc/B775-33KE>].

systems, more than quadruple the number enrolled in the program when President Biden took office.<sup>9</sup> The average length of time a noncitizen spends subjected to this surveillance is 325.9 days, as of December 2022.<sup>10</sup> The company contracted to oversee the program has the capacity to increase that number even further—to up to 400,000 enrollees.<sup>11</sup> This electronic surveillance regime includes GPS monitoring through the use of ankle shackles,<sup>12</sup> facial recognition through the SmartLINK phone application, voice verification technology, home monitoring, required reporting to ICE offices, and ongoing surveillance. Alternatives to Detention suggests that, normally, individuals in these programs would be subject to ICE detention. Not only is it true that many noncitizens subjected to ATD would never have been detained in the first place, but in fact, the result of the proliferation of ATD has been the growth of *both* immigration surveillance and immigration detention.<sup>13</sup>

These so-called Alternatives to Detention have gained an enormous following in recent years. Conservative Democrats, advocacy groups and lawmakers have increasingly pushed for alternatives to immigration detention as a set of “reforms.”<sup>14</sup> I put “reforms” in quotes because, as I

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<sup>9</sup> U.S. Immigration & Customs Enforcement, *Detention Oversight: Detention Statistics*, last accessed July 21, 2022, <https://www.ice.gov/detain/detention-oversight#tab2>; *Over 180,000 Immigrants Now Monitored by ICE’s Alternatives to Detention Program*, TRAC IMMIGR.,

[https://trac.syr.edu/immigration/detentionstats/atd\\_pop\\_table.html](https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html) (last visited Jan. 12, 2022).

<sup>10</sup> *Over 180,000 Immigrants Now Monitored by ICE’s Alternatives to Detention Program*, TRAC IMMIGR., [https://trac.syr.edu/immigration/detentionstats/atd\\_pop\\_table.html](https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html) (last visited Jan. 12, 2022).

<sup>11</sup> Erica Hellerstein, *‘I Felt like I Was a Prisoner’: The Rapid Rise of US Immigration Authorities’ Electronic Surveillance Programs*, CODA STORY (May 26, 2022), <https://www.codastory.com/authoritarian-tech/alternatives-to-detention-immigration/> [https://perma.cc/9FY5-MR59].

<sup>12</sup> Here I use the term “shackles” instead of the traditional language of “bracelet” to more accurately reflect the experience of the wearer. In so doing, I acknowledge the historical ties between shackles and slavery. Others have made similar connections between immigration detention, labor, and slavery. See e.g., Anita Sinha, *Slavery by Another Name: ‘Voluntary’ Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. C.R. & C.L. 1 (2015).

<sup>13</sup> Angelika Albaladejo, *Despite Biden’s Promises, Immigrant Detention and Surveillance Grow*, CAPITAL & MAIN (Aug. 10, 2021), <https://capitalandmain.com/despite-bidens-promises-immigrant-detention-and-surveillance-grow>.

<sup>14</sup> See Jayapal, Booker, and Smith Reintroduce Dignity for Detained Immigrants Act, Pramila Jayapal Congresswoman for WA-07 (Mar. 25, 2021), <https://jayapal.house.gov/2021/03/25/dignity-for-detained-immigrants/> (“The bill urgently reforms the alarming injustices of a broken, for-profit immigration detention system by ending the use of private detention facilities altogether, repealing mandatory detention, stopping family detention, and prohibiting solitary confinement while also restoring due process and increasing oversight, accountability, and transparency measures”); Rafael Bernal, *Progressive Lawmakers Press DHS Chief on Immigration Detention*, THE HILL (Apr. 15, 2021), <https://thehill.com/latino/548515-progressive-lawmakers-press-dhs-chief-on-immigration-detention/>; see also Jason Fernandes, *Alternatives to Detention and the For-Profit Immigration System*, CTR. FOR AM. PROGRESS (June 9, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/06/09/433975/alternatives-detention-profit-immigration-system/> (“Alternatives to detention should prevent immigrants . . . from going through the physical and emotional tolls of incarceration.”); Philip E. Wolgin, *Incarcerating Entire Families Cannot Be the Solution to the Separation of Children*, CTR. FOR AM. PROGRESS (June 18, 2018), <https://www.americanprogress.org/issues/immigration/news/2018/06/20/452571/incarcerating-entire-families-cannot-solution-separation-children/>; *Position Paper: Alternatives to Detention*, AM. IMMIGR. LAW. ASS’N, <https://www.aila.org/File/DownloadEmbeddedFile/40553> (last visited Aug. 29, 2021) (“Detention deprives

explain below, while reforms are typically changes made in the spirit of improvement, in this case, I argue that advocates have advanced these “reforms” despite the significant harms they cause. Put another way, “[t]he notion of ‘reform’ implies that an institution has strayed from its core responsibilities ... but there is no ‘fixing’ something that works as intended.”<sup>15</sup>

Often, advocates have pushed for these changes for, ostensibly, humanitarian reasons. Of course, they’re not entirely wrong—immigration detention is dangerous,<sup>16</sup> and often deadly to those subject to it.<sup>17</sup> Proponents of ATD also argue that alternatives to detention have proven effective at ensuring compliance with immigration court hearing attendance, a justification consistently offered for immigration detention and surveillance.<sup>18</sup> But at what cost?

This article uses the term “digital cages” to describe the set of practices associated with ATD, including surveillance and monitoring by ICE, or the private companies with whom ICE contracts. In this paper, I use digital cages as a case study to theorize violence and alternatives to detention as part of the larger deportation abolition project to examine the interlocking systems of violence and social control, in order to forward immigrant justice and liberation. Deportation abolition, an emerging framework,<sup>19</sup> is

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individuals of their most fundamental right to liberty and for many immigrants and asylum-seekers, this extreme measure is often unnecessary.”); *The Real Alternatives to Detention*, AM. IMMIGR. LAW. ASS’N (June 18, 2019), <https://www.aila.org/infonet/the-real-alternatives-to-detention>.

<sup>15</sup> ANDREA J. RITCHIE & MARIAME KABA, NO MORE POLICE: A CASE FOR ABOLITION, 117 (2022).

<sup>16</sup> See e.g., *Widespread Sexual Assault*, Freedom for Immigrants, <https://www.freedomforimmigrants.org/sexual-assault> (last visited Aug. 15, 2021); Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> (“The federal government received more than 4,500 complaints in four years about the sexual abuse of immigrant children who were being held at government-funded detention facilities[.]”); Nora Ellmann, *Immigration Detention is Dangerous for Women’s Health and Rights*, CTR. FOR AM. PROGRESS (Oct. 21, 2019), <https://www.americanprogress.org/issues/women/reports/2019/10/21/475997/immigration-detention-dangerous-womens-health-rights/> (noting that “[i]n December 2018, there were 7,686 women in [ICE] custody” and “[b]etween January 2010 and September 2017, the OIG received 1,224 complaints of sexual abuse in DHS custody.”); Laura Wilson, *Violence Against Women and Girls in ICE Custody*, GLOBAL RIGHTS FOR WOMEN (Sept. 21, 2021), <https://globalrightsforwomen.org/featured/violence-against-women-and-girls-ice-custody/>.

<sup>17</sup> Alex Nowrasteh, *21 People Died in Immigration Detention in 2020*, CATO INST. (Oct. 22, 2020), <https://www.cato.org/blog/21-people-died-immigration-detention-2020> (“The FY2020 death rate in ICE immigration detention was 11.8 per 100,000 admissions, a 656 percent increase from FY2019 and just below the highest ever recorded in 2004.”); *Deaths at Adult Detention Centers*, AM. IMMIGR. LAW. ASS’N, <https://www.aila.org/infonet/deaths-at-adult-detention-centers> (last visited Aug. 29, 2021) (listing press releases issued by ICE since December of 2015 announcing deaths in adult immigration detention and discussing violations of medical standards as a notable role in many deaths of immigrants in detention).

<sup>18</sup> See Ruthie Epstein, *The Tried-And-True Alternatives to Detaining Immigrant Families*, ACLU (June 22, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/tried-and-true-alternatives-detaining> (“The Family Case Management Program had a 99 percent effectiveness rate — meaning almost every single person enrolled in the program showed up for all immigration appointments and court hearings.”).

<sup>19</sup> See e.g., Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. (2021); Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (2021); Angélica Cházaro, *Beyond Respectability: New Principles for Immigration Reform*, 52 HARV. J. ON LEGIS. 355 (2015); César Cuauhtémoc García Hernández,



“focused on ending policing, detention and deportation in the immigration legal system.”<sup>20</sup> Abolitionists argue that policing is inherently violent;<sup>21</sup> rather than solving harm, the carceral state merely “reacts to it.”<sup>22</sup> Whereas immigrant communities and advocates have often focused on reforms to the immigration legal system, deportation abolitionists ask not “how can we make what we have better?” but, what would it look like to imagine something entirely new?<sup>23</sup> Theirs, ours, is a project of both deconstruction and imagination.<sup>24</sup> What would it look like to create a system free from the oppressive and violent structures that have animated the immigration system until now? What if the carceral state became not a “more polite manager of inequality”<sup>25</sup> but a system *free of* inequality, oppression and structural violence? I suggest that if we hope to move toward such a system, we must critically evaluate changes to existing structures and systems to ensure that they move us closer to this goal, rather than exist as so-called “reformist reforms”<sup>26</sup> that serve only to make a violent regime more palatable.

This paper takes as a starting point that detention and deportation are kinds of “violence,”<sup>27</sup> as theorized by Angélica Cházaro and others.<sup>28</sup> The legal violence framework importantly acknowledges the violence inherent in—and essential to—the functioning of the current immigration legal regime.<sup>29</sup> It also underscores the role of the law in enabling and legitimizing this violence.<sup>30</sup> Violence has the power to shape “space and place”<sup>31</sup> and here I argue that violence can be theorized not only across time, but across space. That this violence is not only temporal, but geographic, and this matters insofar as we hope to end it. Indeed, we must

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*Abolishing Immigration Prisons*, 97 B.U. L. REV. 246 (2017); and ShiuMing Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants’ Rights Movement*, 68 UCLA L. REV. DISC. 70 (2020).

<sup>20</sup> Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. (2021).

<sup>21</sup> ANDREA J. RITCHIE & MARIAME KABA, *NO MORE POLICE: A CASE FOR ABOLITION*, 9 (2022) (“Policing is not broken, it is operating exactly as it was intended: dealing out daily violence to contain, control and criminalize.”).

<sup>22</sup> DERECKA PURNELL, *BECOMING ABOLITIONISTS* 10 (2021).

<sup>23</sup> Anna Hales, *Beyond Borders: How Principles of Prison Abolition Can Shape the Future of Immigration Reform*, 11 U.C. IRVINE L. REV. 1415 (2021).

<sup>24</sup> Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 461 (2018) (describing an abolitionist ethic as one that is both a “deconstructive and imaginative project.”).

<sup>25</sup> DERECKA PURNELL, *BECOMING ABOLITIONISTS* 5 (2021).

<sup>26</sup> See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. 90, 103-04 (2020).

<sup>27</sup> See e.g., Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (2021).

<sup>28</sup> See e.g., Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019) (discussing deportation, the constant fear of deportation, and family separation through the lens of “slow violence”); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017) (analyzing and criticizing the state sanctioned violence that results in immigration detention and deportation); Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. (2021).

<sup>29</sup> Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 LAW & POL’Y 265, 267-68 (2015).

<sup>30</sup> Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 LAW & POL’Y 265, 268 (2015).

<sup>31</sup> Simon Springer & Philippe Le Billon, *Violence and Space: An Introduction to the Geographies of Violence*, 52 POL. GEOGRAPHY 1, 1-2 (2016).

“illuminate the terror” of this violence, especially the “mundane and quotidian”<sup>32</sup> kinds of this violence if we truly want liberation and justice.

This paper argues that the increasing digitization of immigration enforcement and surveillance is part of a growing, and expansive, geography of violence and control. This violence is also, importantly, racialized. Black immigrants are disproportionately more likely to be detained, and if they are released on bond, their bonds are likely to be higher.<sup>33</sup> Black immigrants are also more likely to be shackled through ICE’s so-called “alternatives to detention” program.<sup>34</sup>

This landscape of digital enforcement and surveillance creates a “violence of invisibility,” a term first used by G. Chezia Carraway in 1991, in an article about violence against women of color. G. Chezia Carraway writes that naming and describing “nontraditional” forms of violence can help “battle the psychological violence of invisibility.”<sup>35</sup> In this article, I build on that framing to show how the “violence of invisibility” may be theorized for immigration detention and surveillance. I also show how naming this violence can add to the growing conversation around immigration abolition. I suggest that if we take that possibility seriously, then the violence of electronic monitoring and surveillance must end.

Visibility is “always a question of [who has] the power to see.”<sup>36</sup> Indeed, when we talk about what violence is or is not visible, we are necessarily asking *from whose perspective*.<sup>37</sup> Those who are subjected to the violence can see it clearly—and relentlessly. In some ways, seeing detained immigrants in cages, as depicted in popular media<sup>38</sup>, makes this violence

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<sup>32</sup> SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN THE NINETEENTH-CENTURY AMERICA* 4 (Oxford Univ. Press 1997).

<sup>33</sup> Tosca Giustini et al., *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles*, 3 ONLINE PUBL’N 23 (2021), <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1002&context=faculty-online-pubs> [https://perma.cc/VSP7-PQDP].

<sup>34</sup> Tosca Giustini et al., *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles*, 3 ONLINE PUBL’N 23-24 (2021), <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1002&context=faculty-online-pubs> [https://perma.cc/VSP7-PQDP].

<sup>35</sup> G. Chezia Carraway, *Violence Against Women of Color*, 43 STAN. L. REV. 1301, 1305 (1991).

<sup>36</sup> Caitlin Cahill & Rachel Pain, *Representing Slow Violence and Resistance: On Hiding and Seeing*, 18 ACME: AN INT’L J. FOR CRITICAL GEOGRAPHIES 1054, 1062 (2019) (citing Donna Haraway, *The Persistence of Vision*, in THE VISUAL CULTURE READER 677, 680 (2nd ed. 2002) (“vision is always a question of the power to see—and perhaps of the violence implicit in our visualizing practices.”)).

<sup>37</sup> Caitlin Cahill & Rachel Pain, *Representing Slow Violence and Resistance: On Hiding and Seeing*, 18 ACME: AN INT’L J. FOR CRITICAL GEOGRAPHIES 1054, 1056 (2019); *Id.* (citing George Yancy & Judith Butler, *What’s Wrong with ‘All Lives Matter’?*, N.Y. TIMES (Jan. 12, 2015, 9:00 PM), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/> [https://perma.cc/YN2V-LMMP]).

<sup>38</sup> Camila Domonoske & Richard Gonzales, *What we Know: Family Separation and ‘Zero Tolerance’ at the Border*, NPR (June 19, 2018, 2:17 PM), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> [https://perma.cc/5T8Q-XS9D]; Nick Miroff, *‘Kids in Cages’: It’s True that Obama Built the Cages at the Border. But Trump’s ‘Zero Tolerance’ Immigration Policy Had No Precedent*, WASH. POST (Oct. 23, 2020), [https://www.washingtonpost.com/immigration/kids-in-cages-debate-trump-obama/2020/10/23/8ff96f3c-1532-11eb-82af-864652063d61\\_story.html](https://www.washingtonpost.com/immigration/kids-in-cages-debate-trump-obama/2020/10/23/8ff96f3c-1532-11eb-82af-864652063d61_story.html) [perma.cc/4UJA-PH5A]; Rosie Perper, *Side-By-Side Photos Show*

visible to the broader public.<sup>39</sup> But when cages become digitized, when immigrants are effectively caged in their own homes and within their communities, their invisibility to the public grows more insidious—enabling this violence to spread while “hidden in plain sight”<sup>40</sup> and simultaneously justifying it as “more humane.”<sup>41</sup> This is not to suggest that when noncitizens are detained in jails, detention centers and prisons that they, or their detention, are always particularly *visible*. Immigration detention is commonly carried out far from public view, in rural communities, distant from lawyers and other resources, and intentionally hidden.<sup>42</sup> Rather, what I suggest here, is that the harms of release on ankle shackles and being subjected to constant electronic monitoring and surveillance still constitute violence, despite assumptions that their impact is presumed to be less. Not only that, but the shift toward increased surveillance and monitoring means that violence is rendered on a much larger scale, with hundreds of thousands of more people ensnared.<sup>43</sup> Moreover, noncitizens are expected to be grateful for their good fortune at not being detained in a traditional setting. Unlike their peers, family and community members who may be stuck in immigration detention, they have the blessing of “freedom.” But what if that “freedom” comes at the cost of a less visible violence, harm, and suffering? The harms that

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*Migrant Children Locked up in Cages Under Both Trump and Obama*, BUS. INSIDER (June 20, 2018, 9:35 PM), <https://www.businessinsider.com/photos-migrant-children-policy-under-trump-obama-2018-6> [<https://perma.cc/93EK-LX2N>].

<sup>39</sup> See e.g., Nomaan Merchant, *Immigrant Kids Seen Held in Fenced Cages at Border Facility*, AP (June 18, 2018), [https://apnews.com/article/north-america-us-news-ap-top-news-border-patrols-immigration-6e04c6ee01dd46669eddba9d3333f6d5https://www.washingtonpost.com/immigration/kids-in-cages-debate-trump-obama/2020/10/23/8ff96f3c-1532-11eb-82af-864652063d61\\_story.html](https://apnews.com/article/north-america-us-news-ap-top-news-border-patrols-immigration-6e04c6ee01dd46669eddba9d3333f6d5https://www.washingtonpost.com/immigration/kids-in-cages-debate-trump-obama/2020/10/23/8ff96f3c-1532-11eb-82af-864652063d61_story.html) [perma.cc/4UJA-PH5A]; see also Simon Moya-Smith, *Trump's Immigration Policy is Caging Indigenous Children*, July 28, 2019), <https://www.nbcnews.com/think/opinion/trump-s-immigration-policy-caging-indigenous-children-america-native-people-ncna1035451>.

<sup>40</sup> Caitlin Cahill & Rachel Pain, *Representing Slow Violence and Resistance: On Hiding and Seeing*, 18 ACME: AN INT’L J. FOR CRITICAL GEOGRAPHIES 1054, 1059 (2019) (“Instead of invisibility, our authors consider whether perhaps slow violence might be ‘hidden in plain sight’”) (quoting Michael C. Dawson, *Hidden in Plain Sight: A Note on Legitimation Crises and the Racial Order*, 3 CRITICAL HIST. STUD. 143, 143-161 (Dawson 2016)).

<sup>41</sup> *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, ACLU [https://www.aclu.org/sites/default/files/assets/aclu\\_atd\\_fact\\_sheet\\_final\\_v.2.pdf](https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf) (last visited Aug. 30, 2021) (“Alternatives to detention[], including release on recognizance, community support, or bond, as well as formal monitoring programs, are effective, more humane, and far less costly than institutional detention.”); see also Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022) (“[P]unitive surveillance erodes constitutional rights in ways that are consistent with incarceration, even if to a lesser degree. And while each restriction ‘may appear de minimis,’ taken together they present an expansive constellation of constitutional harms.”).

<sup>42</sup> See Ingrid Eagly and Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 UNIV. OF PA. L. REV. 1, 8 (2015) (showing that “Immigrants with court hearings in large cities had representation rates more than four times greater than those with hearings in small cities or rural locations”); see also Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held In Rural Areas Where Deportation Risks Soar*, NPR (Aug. 15, 2019), <https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks>.

<sup>43</sup> As of July 2022, 22,886 noncitizens are in ICE Detention, while over 296,000 are in an ICE ATD program. See *Immigration Detention Quick Facts*, TRAC IMMIGR., <https://trac.syr.edu/immigration/quickfacts/> [perma.cc/6CZQ-KAJV] (last visited Aug. 11, 2022); *ICE Detention Statistics: ATD FY 22 and Detention FY22*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/detain/detention-management> (last visited Aug. 11, 2022).

electronic monitoring and surveillance inflict are easily camouflaged by and from those with more power and decision making.

In Part One of this paper, I examine “digital cages” - the ever expanding web of monitoring and surveillance that marks so-called “Alternatives to Immigration Detention” - as a case study. Here, I discuss how advocates have often pushed for an expansion of alternatives to detention, supposedly as an effort to curtail immigration detention.<sup>44</sup> I show how such discourse—often deemed “progressive” as, on its face, it purports to move away from the growing carceral system—in fact renders the violence of detention and enforcement less visible to many, and therefore more dangerous. Though those not directly impacted can observe or interact with the individuals affected—they are living, and working, in our communities—we are often unaware of what they experience in ATD. When we can’t see this violence, it is normalized and less likely to be challenged: the “normalized quiet of unseen power.”<sup>45</sup> In this section I specifically highlight the significant physical and psychological harms suffered by those subjected to ankle shackles and immigration monitoring and surveillance.

Part Two of this paper describes the current, and evolving, landscape of immigrant enforcement, surveillance, data collection, and the larger digital cage of immigration enforcement. This part details the ways in which this expansive enforcement and surveillance regime is (1) multimodal; (2) rapidly changing; and (3) enmeshed in the larger criminal and corporate carceral systems.

In Part Three, I situate this paper within a deportation abolitionist framework.<sup>46</sup> Within this framework, I theorize the contours of the “violence of invisibility,” understanding electronic monitoring and digital cages as part of the larger prison industrial complex, which deportation abolitionists seek to dismantle. In the context of immigration enforcement and surveillance, the “violence of invisibility” refers to the specific, insidious violence rendered by a system of enforcement invisible to those with power. The invisibility itself is violent because it purports to provide something of value to those it regulates—namely, freedom from physical incarceration—when in fact, it does not. Instead, this violence harms and disempowers people by making them feel like they don’t know their own experience. The insidiousness of this lie exacerbates the violence—the physical and mental pain and humiliation of both the ankle shackle, and the unrelenting monitoring and surveillance, which forever carries the risk of (re)detention. I situate the “violence of invisibility” amidst other modes and methods of violence, including “spectacular violence” and slow violence.

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<sup>44</sup> In recent years, immigrant advocates have been clear that they see alternatives to detention as focused on case management, and many advocates have decried the increasing use of ankle monitors.

<sup>45</sup> Edward W. Said, *The Public Role of Writers and Intellectuals*, 273 NATION 27, 31 (2001).

<sup>46</sup> Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. (2021); Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (2021).

Finally, in light of the “violence of invisibility” inherent in immigration enforcement reform efforts, this article asks how the violence of these digital cages manifests in the immigration enforcement and surveillance space, and what we can do to resist, disrupt, and ultimately, end it. Like other scholars before me<sup>47</sup>, I close by calling for detention and deportation abolition<sup>48</sup>—an end to detention, deportation and immigrant surveillance. Increased measures for procedural justice and related reforms are popular—but they presume that detention and deportation must continue. In doing so, they often encourage more resources to be diverted to the immigration enforcement system, thereby growing state violence and reducing resources that can truly support community health and safety.<sup>49</sup> Using a framework developed by scholars and movement organizers, I argue that deportation abolition is the only remedy that can sufficiently alleviate the violence of invisibility wrought on immigrant communities by alternatives to detention.

### Part I: Digital Cages

In this Part, I look at one specific example of “violence” in the rapidly growing immigration surveillance space: digital cages. Here, I discuss how many moderates, liberals and even progressives have pushed for an expansion of alternatives to detention, specifically ankle shackles, as an effort to curtail immigration detention while ensuring compliance with court attendance, an oft-stated justification for civil immigration detention. I show how such discourse—often deemed “progressive” as, on its face, it diverges from the physical building of more jails and detention centers—is profoundly harmful. Indeed, this kind of surveillance and monitoring expansion renders the violence of detention and enforcement less visible to those not impacted, and therefore more dangerous. These shifts toward surveillance “rather than detention” are, to use the term coined by philosopher André Gorz and made popular by abolitionist Ruth Wilson Gilmore, “reformist reforms.”<sup>50</sup> That is, rather than work toward the end of immigration detention, these changes neither reduce the scale nor scope

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<sup>47</sup> See e.g., ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (Seven Stories Press 2003); RUTH WILSON GILMORE, *CHANGE EVERYTHING: RACIAL CAPITALISM AND THE CASE FOR ABOLITION* (Haymarket Books forthcoming 2022); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (1st ed., Univ. Cal. Press 2007); MARIAME KABA, *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* (Haymarket Books 2021); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); Hlass, *Lawyering from a Deportation Abolition Ethic*, *supra* note 11.

<sup>48</sup> As defined by Angélica Cházaro as including detention and deportation.

<sup>49</sup> Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <http://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> “Central to abolitionist work are the many fights for non-reformist reforms — those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”

<sup>50</sup> See RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 242 (2007); see also ANDRÉ GORZ, *STRATEGY FOR LABOR: A RADICAL PROPOSAL* 7 (1967).

of the immigration carceral state and instead, and more insidiously, work to legitimize and expand it.<sup>51</sup>

In the early aughts, community supervision programs for noncitizens in removal proceedings were periodically piloted,<sup>52</sup> but the first official Alternatives to Detention (“ATD”) program did not begin until 2004. How did we get here?

For nearly twenty years, moderate, liberal and progressive advocates have made humanitarian, legal, and financial arguments for alternatives to detention.<sup>53</sup> In particular, the American Immigration Lawyers Association (AILA), a national association of more than 15,000 attorneys and law professors who practice and teach immigration law, who advocate for positive change to the immigration legal system, and have significant influence, have pushed for alternatives to detention at least since 2008.<sup>54</sup> They are not alone - the American Immigration Council (AIC), and other advocacy groups, have also advocated for alternatives. In fact, the first ATD was a small pilot “community supervision” program, driven by the Vera Institute of Justice, an organization “fighting to end mass incarceration.”<sup>55</sup> Between 1997 and 2000, Vera’s community supervision program showed a ninety percent court attendance compliance rate for those facing deportation in New York City.<sup>56</sup>

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<sup>51</sup> ANDREA J. RITCHIE & MARIAME KABA, NO MORE POLICE: A CASE FOR ABOLITION, 122 (2022) (“Reliance on technology, just like rules, keeps our focus on individual practices, rather than on underlying systems that enable them. It makes room for one form of domination and control to morph into another form or practice.”).

<sup>52</sup> See e.g., CATHOLIC LEGAL IMMIGRATION NETWORK, INC., THE NEEDLESS DETENTION OF IMMIGRANTS 27-28 (2000), <https://cmsny.org/publications/at-risk-immigrant-4/> (describing community-based supervision program for Mariel Cubans).

<sup>53</sup> Amer. Immigr. Lawyers Ass’n, *AILA Position Paper: Alternatives to Detention* (Jul. 2008); ICE has also consistently pushed for this expanded enforcement and surveillance capability. See “*Strengthening Interior Enforcement: Deportation and Related Issues*”: Joint Hearing Before the Subcomm. on Immigr., Border Sec. & Citizenship & the Subcomm. on Terrorism, Tech. and Homeland Sec. Before the S. Comm. on the Judiciary, 109th Cong. 2-3 (2005) (statement of Victor Cerda, Acting Director of Detention and Removal Operations, U.S. Immigration and Customs Enforcement), <https://www.judiciary.senate.gov/imo/media/doc/Cerda%20Testimony%20041405.pdf> [perma.cc/5FVS-REPB]; See *Crossing the Border: Immigrants in Detention and Victims of Trafficking Part I and II: Hearing Before the Subcomm. on Border, Mar., and Glob. Counterterrorism of the H. Comm. on Homeland Sec.* 110th Cong. 91 (2007) (Statement of Victor Cerda, Partner, Siff & Cerda LLP), <https://www.congress.gov/110/chrg/CHRG-110hhrg35275/CHRG-110hhrg35275.pdf>.

<sup>54</sup> *Id.*; to be fair, there were also prescient advocates who took a more cautious approach, see e.g., *Crossing the Border: Immigrants in Detention and Victims of Trafficking Part I and II: Hearing Before the Subcomm. on Border, Mar., and Glob. Counterterrorism of the H. Comm. on Homeland Sec.* 110th Cong. 33 (2007) (statement of Michelle Brane, Director, Detention and Asylum Program, Women’s Commission for Refugee Women and Children) (“Some government initiated programs labeled as “alternatives to detention” may in fact be “alternative forms of detention.” This is the case if they impose undue restrictions on an individual’s liberty, even if the individual is not physically held in a prison or prison-like setting.”)

<sup>55</sup> *About Us*, VERA, <https://www.vera.org/who-we-are/about-us> [perma.cc/98LC-QMT7] (last visited Aug. 11, 2022).

<sup>56</sup> VERA, COMMUNITY SUPERVISION PROVES DETENTION IS UNNECESSARY TO ENSURE APPEARANCE AT IMMIGRATION HEARINGS 1-2 (2020), <https://www.vera.org/downloads/publications/appearance-assistance-program-factsheet.pdf> [perma.cc/6YZF-XH7G].

From a humanitarian perspective, immigration detention is harmful and dangerous. Substandard medical and mental health care,<sup>57</sup> unconsented to medical treatment,<sup>58</sup> physical and sexual abuse<sup>59</sup> and death are well documented inside of U.S. immigration detention centers. Since April 2018, at least 35 individuals have died in ICE custody, including deaths by suicide, COVID-19 and other medical causes.<sup>60</sup> Of course, these harms are not confined to the detainees themselves. The devastating ripple effects of immigration detention are well documented, including detrimental impacts on the children<sup>61</sup> and families of those detained, and on household and community stability.<sup>62</sup> Individual, family, and community health and safety all suffer as a result of immigration detention, and humanitarian arguments against immigration detention are robust and well documented. Moreover, as many have argued, there are legal grounds for challenging immigration detention and, by extension, for proposing alternatives to this detention.<sup>63</sup>

From a financial perspective, immigration detention is extremely costly, and many have argued that these costs justify the pursuit of alternatives. The United States has long spent a disproportionate amount of money on immigration enforcement, including detention, as compared to, for example, all other criminal law enforcement.<sup>64</sup> DHS's budget for fiscal year 2017 estimated an average rate of \$126.46 per day for adult detention beds, and an average rate of \$161.36 per day for family detention beds. In

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<sup>57</sup> See HUMAN RIGHTS WATCH AND ACLU, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION (Jun. 2018).

<sup>58</sup> See e.g., Caitlin Dickerson, Seth Freed Wessler and Miriam Jordan, *Immigrants Say They Were Pressured Into Unneeded Surgeries*, N.Y. TIMES (Sep. 29, 2020), <https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html>

<sup>59</sup> See e.g., Lomi Kriel, *ICE Guards "Systematically" Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, PROPUBLICA (Aug. 2020), <https://www.propublica.org/article/ice-guards-systematically-sexually-assault-detainees-in-an-el-paso-detention-center-lawyers-say>.

<sup>60</sup> Sophie Terp et al., *Deaths in Immigration and Customs Enforcement (ICE) detention: FY 2018–2020*, 8(1) AIMS PUB. HEALTH 81 (Jan. 2021).

<sup>61</sup> Luis H. Zayas & Laurie Cook Heffron, *Disrupting Young Lives: How Detention and Deportation Affect US-born Children of Immigrants*, AM. PSYCHOL. ASS'N (Nov. 2016), <http://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation.aspx>.

<sup>62</sup> See e.g., Alison Ly et al., *Immigration Detention in the United States: Identifying Alternatives That Comply With Human Rights and Advance Public Health*, 111 AM. J. OF PUB. HEALTH 1497 (Aug. 2021); Altaf Saadi et al., *Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, 22 HEALTH AND HUM. RTS. J. 187 (Jun. 2020); Martha von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCH. 382 (2018); Caitlin Patler, *The Economic Impacts of Long-Term Immigration Detention in Southern California*, UCLA INST. FOR RSCH. ON LAB. AND EMP. (2015).

<sup>63</sup> See Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141 (2017); “[f]ailure to consider alternatives to detention other than posting a bond, as well as failure to take an individual’s ability to pay into account when setting a bond, disproportionately results in the detention of indigent persons.”; failure to consider less harsh alternatives to immigration detention may result in the imposition of restrictions or conditions that are excessive and disproportionate in relation to the government’s purpose of preventing flight and danger.”

<sup>64</sup> Press Release, Migration Policy Inst., U.S. Spends More on Immigration Enforcement than on FBI, DEA, Secret Service & All Other Federal Criminal Law Enforcement Agencies Combined (Jan. 7, 2013), <http://www.migrationpolicy.org/news/us-spends-more-immigration-enforcement-fbi-dea-secret-service-all-other-federal-criminal-law>.

total, the estimated cost of all detention beds amounted to over \$1.4 billion in fiscal year 2017.<sup>65</sup> DHS's budget for fiscal year 2022 estimated an average rate of approximately \$142.44 per day for adult detention beds; in addition, the budget projects a \$271.1M cost for family beds. In total, the estimated cost of all detention beds amounted to approximately \$1.8 billion for fiscal year 2022. By comparison, electronic monitoring is far more affordable. In 2021, a new ATD pilot program was reported to cost just \$4.43 per day to monitor an adult, or about \$38.47 per family per day.<sup>66</sup>

For these reasons, advocates and policy makers have historically pushed for alternatives to immigration detention - especially for families and those convicted of "nonviolent" crimes. Starting in 2004, the "Intensive Supervision Appearance Program" or ISAP I, began operation in ten cities<sup>67</sup> through a contract with a GEO Group subsidiary, B.I. Incorporated.<sup>68</sup> According to government reports, ISAP I, and its predecessors, provide "a supervised alternative to detention using technology and case management." Through the ISAP program, B.I. Incorporated "provides electronic monitoring services . . . either through use of an ankle bracelet that enables Global Positioning System (GPS) monitoring or voice recognition software for telephonic reporting."<sup>69</sup>

Another iteration of Alternatives to Detention is the Family Case Management Program ("FCMP") operated briefly under the Obama Administration. From January 2016 through June 2017, FCMP operated as an alternative to family detention, primarily for asylum seeking families at the US-Mexico border.<sup>70</sup> FCMP was funded by ICE and "operated on the principle that individuals who receive case management support with their immigration case, as well as support in accessing other services that they may need, will understand and comply with their case requirements, whether the outcome of their case is positive or negative."<sup>71</sup> The program enrolled 952 heads of households with 1,211 children, for a total of 2,163 individuals in five metropolitan areas around the country. The results, at least from a government compliance standpoint, were impressive, resulting in more than 99% appearance rates at ICE check-in appointments

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<sup>65</sup> U.S. DEP'T OF HOMELAND SEC. (DHS), BUDGET-IN-BRIEF: FISCAL YEAR 2017 38 (2017), <https://perma.cc/DY3R4N8Q>.

<sup>66</sup> See Sandra Sanchez, *DHS Rolls Out New Alternatives to Detention Pilot Program with Expanded Migrant Services*, BORDERREPORT (Aug. 17, 2021), <https://www.borderreport.com/hot-topics/immigration/dhs-rolls-out-new-alternatives-to-detention-pilot-program-with-expanded-migrant-services/>.

<sup>67</sup> U.S. DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GENERAL, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED) 3 (2015), [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-22\\_Feb15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf).

<sup>68</sup> *The GEO Group Announces Five-Year Contract With U.S. Immigration and Customs Enforcement for Intensive Supervision and Appearance Program (ISAP)*, NASDAQ (Mar. 24, 2020), <https://www.nasdaq.com/press-release/the-geo-group-announces-five-year-contract-with-u.s.-immigration-and-customs>.

<sup>69</sup> U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION, *supra* note 160, at 4.

<sup>70</sup> Katharina Obser, *The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, WOMEN'S REFUGEE COMM'N at 4, 5 (Jun. 2019).

<sup>71</sup> *Id.* at 1.



and immigration court hearings.<sup>72</sup> The services provided through the FCMP were managed by a private company, GEO Care, Inc., a subsidiary of The Geo Group, which operates numerous prisons and detention centers worldwide.<sup>73</sup> Notably, GEO Group has been the subject of numerous civil and criminal lawsuits over poor conditions, deaths in custody and failure to properly pay its employees.<sup>74</sup> While the program may be considered a success from the point of view of those whose primary concern is court attendance, the program was run by a private prison corporation, in concert with ICE - and any violation of the program resulted in detention. The Trump Administration discontinued FCMP in June 2017.<sup>75</sup>

The ATD program has grown substantially in the last fifteen years. Between 2006 and 2021, ICE's budget for the program increased from \$28 million to \$440 million.<sup>76</sup> Today there are more than 296,000 people enrolled in ATD, and yet the program stands to expand further. More than 27,000 persons were detained by ICE as of July 2021,<sup>77</sup> a number that is (still) appallingly high. But President Biden's ATD program would capture more than five times the number of persons presently in detention - we should be deeply concerned about the conditions they face in ATD, the impediments to their real freedom, and the threat of "reform" that looks very close to a different kind of incarceration. Rather than provide a true alternative to detention, ATD appears to simply broaden DHS's reach, scope and capacity, ensnaring many more people under its watch than would otherwise be the case. This watch, of course, includes the prospective threat of detention and subsequent deportation for any violation, however minor.<sup>78</sup>

#### A. Behavioral Interventions Incorporated and ISAP

As Mary Holper describes in her article, it was a white paper by Peter Shuck in 1997 suggesting that released noncitizens would flee that opened the door to supervised release as an "alternative to detention". Shuck proposed as an alternative the idea of ankle monitors and a contract with a

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<sup>72</sup> *Id.*

<sup>73</sup> Audrey Singer, Cong. Rsch. Serv., R45804, *Immigration: Alternatives to Detention (ATD) Programs* (2019).

<sup>74</sup> Hannah Rappleye & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2017), <https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291> (noting that GEO Group is the private contractor that operates immigrant detention facilities where deaths have occurred); Christopher Zoukis, *Lawsuit by Washington AG Against GEO Group for Wage Violations Proceeds, Granted Class-Action Status*, PRISON LEGAL NEWS (Dec. 2018), <https://www.prisonlegalnews.org/news/2018/dec/5/lawsuit-washington-ag-against-geo-group-wage-violations-proceeds-granted-class-action-status/>; ACLU Colorado, *Cashing in On Cruelty: Stories of Death, Abuse, and Neglect at the GEO Immigration Detention Facility in Aurora* (2019), [https://aclu-co.org/wp-content/uploads/2019/09/ACLU\\_CO\\_Cashing\\_In\\_On\\_Cruelty\\_09-17-19.pdf](https://aclu-co.org/wp-content/uploads/2019/09/ACLU_CO_Cashing_In_On_Cruelty_09-17-19.pdf).

<sup>75</sup> See Obser, *supra* note 113, at 1.

<sup>76</sup> ALY PANJWANI, ICE DIGITAL PRISONS: THE EXPANSION OF MASS SURVEILLANCE AS ICE'S ALTERNATIVE TO DETENTION 2 (JUST FUTURES LAW & MIJENTE 2021), <https://www.flipsnack.com/JustFutures/ice-digital-prisons-1u8w3fnd1j/full-view.html>.

<sup>77</sup> *Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/detain/detention-management> (last visited Aug. 30, 2021).

<sup>78</sup> See Julie Pittman, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CAL. L. REV. 587, 606 (2020).

private company to administer them.<sup>79</sup> DHS took Shuck’s advice to heart. DHS soon contracted with Behavioral Interventions (B.I.) Incorporated, a company that purports to deliver “innovative products and services that offer an alternative to incarceration for community corrections agencies supervising parolees, probationers, or pretrial defendants.”<sup>80</sup> But there is no doubt that B.I. Incorporated is heavily invested in the continuing carceral system—it is a wholly owned subsidiary of the GEO Group.<sup>81</sup>

Today, “digital cages” are operated by B.I. Incorporated, which operates the third iteration of the ISAP Program or “ISAP III”, a multifaceted surveillance regime that includes (1) orientation and enrollment; (2) home visits; (3) office visits; (4) court tracking; and (5) ongoing surveillance.<sup>82</sup>

In the first phase of ISAP, participants complete forms with biographic, immigration, family and criminal history and are assigned monitoring devices. The device—typically a GPS ankle shackle—is then “attached and activated.”<sup>83</sup> B.I. employees determine the particular “service” plan to which a participant will be subjected—“service plans” can include defining geographic boundaries of travel, taking photographs for facial recognition or voice memos for voice recognition. Participants are also issued a photo identification card. Insidiously, for many program participants, this is the only U.S. government identification they have, or will have, during the course of their immigration proceedings.

Another core component of ISAP is home visits. Home visits by ICE officers are not scheduled in advance and are unannounced.<sup>84</sup> Once in the home, ICE officers have wide latitude to look for “evidence of possible flight risk” and to note any “criminal activity” in the home or neighborhood.<sup>85</sup> There appears to be no constraints on the officer’s ability to investigate non-participants who may also reside in the home or general vicinity.

Office visits are also routine. Unlike home visits however, office visits are scheduled and provide the ICE officer yet an additional opportunity to evaluate the participant’s program compliance and collect biographic information.<sup>86</sup> At office visits, ICE officers are also directed to take note of changes to a participant’s appearance including, but not limited to,

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<sup>79</sup> Peter H. Schuck, *INS Detention and Removal: A “White Paper,”* 11 GEO. IMMIGR. L. J. 667, 673 (1997).

<sup>80</sup> *About Us*, BEHAVIORAL INTERVENTIONS, <https://bi.com/about-us/> (last visited Aug. 27, 2021).

<sup>81</sup> Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.* 6(2) J. on Migration and Hum. Sec. 145, 146 (2018). As Gilman and Romero explain, “they [private prison companies] set up the management of migration as requiring a correctional approach from beginning to end, which allows them to promote detention as a centerpiece and other corrections products as necessary supplemental tools.” *Id.* at 151.

<sup>82</sup> Contract, BI Incorporated & Immigration and Customs Enforcement, ISAP III, Order for Supplies or Services 2-11 (Sept. 8, 2014), <https://www.ice.gov/doclib/foia/contracts/biIncorporatedHSCEDM14D00004.pdf>.

<sup>83</sup> *Id.* at 51; see Panjwani, *supra* note 72, at 6.

<sup>84</sup> Panjwani, *supra* note 72, at 3.

<sup>85</sup> *Id.*

<sup>86</sup> See *id.*

tattoos, scars, and facial hair.<sup>87</sup> Such directives provide wide discretion for uninformed assumptions, bias and racial profiling.<sup>88</sup>

Court tracking is a hallmark of the ISAP Program. Indeed, one of the primary objectives of ISAP, as articulated by its advocates, is ensuring that noncitizens in removal proceedings attend their court hearings. Compliance with court hearing attendance is often cited in defense of ATD programs like ISAP.<sup>89</sup> At the same time, failure to attend a court hearing while enrolled in ISAP will almost certainly mean that the participant will be terminated from the ISAP program, an in absentia order of removal will be issued, and the noncitizen will be re-arrested and detained by ICE in order to facilitate deportation.<sup>90</sup>

Of course, a noncitizen's failure to appear in court often correlates to roadblocks outside her control including failure to receive proper notice, lack of counsel, language, financial and geographic barriers, and trauma.<sup>91</sup> Moreover, if released from detention, noncitizens must then interact with, and report to, three separate entities who do not communicate well with one another: (1) ISAP; (2) ICE; and (3) the immigration court. These systems, purportedly intended to promote court attendance and facilitate an immigration legal process, often do much to undermine that very process through multiple sets of confusing rules and expectations. Expecting noncitizens to navigate this "maze of hyper-technical statutes and regulations that engender waste, delay, and confusion" is comical; the system lays traps for noncitizens, the consequences of which are detention and deportation. The "violence" of this kind of bureaucratic banality is outside the scope of this article, but well worth noting. In short, the high stakes of constant monitoring and surveillance cannot be understated.

Enrollment, home visits, office visits and court tracking all exist against the backdrop of unrelenting surveillance. So long as the ISAP participant is wearing her GPS ankle shackle, she is constantly being watched and monitored by ICE. The transmitter on the shackle shares the participant's coordinates "at least once every four hours" and in many cases, "once every three minutes."<sup>92</sup> A "continuous reporting" function can also

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<sup>87</sup> *Id.*

<sup>88</sup> See Hlass & Prandini, *supra* note 61, at 2.

<sup>89</sup> See e.g., *The Real Alternatives to Detention*, Doc. No. 17071103, AM. IMMIGR. LAW. ASS'N (June 2019), <https://www.aila.org/infonet/the-real-alternatives-to-detention> (citing BI, Inc., ISAP III Annual Report, Calendar Year 2017, [https://www.annualreports.com/HostedData/AnnualReportArchive/t/NYSE\\_GEO\\_2017.pdf](https://www.annualreports.com/HostedData/AnnualReportArchive/t/NYSE_GEO_2017.pdf) (showing that data from Contract Year 2017 from BI, Inc.,5 showed a 99.27% appearance rate at immigration court hearings and a 91.5% appearance rate at final hearings for those enrolled in its programming that includes some case management)).

<sup>90</sup> *Know Your Rights: ISAP Check-In*, IMMIGR. LEGAL CTR. (Oct. 19, 2018), <https://www.immigrantlc.org/resource/know-your-rights-isap-check-in/>.

<sup>91</sup> AMERICAN IMMIGRATION COUNCIL, IMMIGRANTS AND FAMILIES APPEAR IN COURT: SETTING THE RECORD STRAIGHT 3-4 (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants\\_and\\_families\\_appear\\_in\\_court\\_setting\\_the\\_record\\_straight.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf).

<sup>92</sup> Panjwani, *supra* note 72, at 3.

provide real time updates every thirty seconds, on demand.<sup>93</sup> In short, the participant's movements are tracked, her whereabouts are known and should she stray from the geographic boundaries imposed, or remove or damage her shackle, re-detention can be swift.

### B. The Physical and Psychological Harm of Digital Cages

As the earlier stories of Elizabeth and Robert suggest, the physical and emotional toll of shackling, monitoring and surveillance are profound. Shackling and constant surveillance impact the daily life of participants, their families and their communities, in multiple and devastating ways.

In the first of its kind report on the harms associated with ISAP and ankle shackles, "Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles," Cardozo Law summarizes the results of surveys of approximately 150 immigrants subject to shackling, data from immigration legal service providers related to nearly 1,000 cases, and qualitative interviews with immigrants subject to shackling.<sup>94</sup> The report documents devastating physical and psychological harms, as well as restrictions on physical movement that lead to significant financial loss.

Most startling, ninety percent of survey participants reported that they suffered physical harm due to shackling.<sup>95</sup> Nearly three quarters of participants described leg, foot or ankle aches, pains, and cramps, while more than half described excessive heat and/or numbness resulting from the ankle shackle.<sup>96</sup> One in five surveyed individuals experienced electric shocks from the ankle shackle.<sup>97</sup> Other physical harm included cuts, bleeding and scarring.<sup>98</sup>

Nearly three quarters of participants reported that the impact of the ankle shackle on their mental health was "severe" or "very severe".<sup>99</sup> Eighty percent of participants reported that the ankle shackle resulted in anxiety, while nearly three quarters of participants described depression and sleeplessness.<sup>100</sup> For many participants, the social stigma associated with the ankle shackle was overwhelming, while many asylum seekers and trauma survivors also reported that the shackle itself was quite triggering.<sup>101</sup> Other reported impacts of the shackle included social isolation and suicidal thoughts.<sup>102</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> See Tosca Giustini et al., *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles*, BENJAMIN N. CARDOZO S. OF L. KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC (Jul. 2021).

<sup>95</sup> *Id.* at 12.

<sup>96</sup> *Id.* at 13.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 14.

<sup>100</sup> *Id.* at 15.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 16-18.

In addition, shackling did not have an impact only on the wearer. The ripple effects of shackling were also well documented, including significant financial hardship, loss of employment, and creating obstacles to those who were caretakers for family or community members.<sup>103</sup> In addition to the damaging physical and psychological impact on families and communities, GPS data from shackling has also been used to carry out large scale raids and other enforcement efforts.<sup>104</sup>

With ICE also expanding its use of SmartLINK, the No Tech for ICE campaign has documented the devastating impact of the mobile app on immigrants and their communities.<sup>105</sup> Through first person accounts, the “Tracked and Trapped” report highlights the “deep anxiety” faced by those subjected to SmartLINK surveillance. Noncitizens describe feeling “a constant sense of being watched”, being “controlled” and “on a leash.”<sup>106</sup> They worry that when the app doesn’t work as it should, they will be punished and re-detained. Participants describe losing out on job opportunities and living with high, and near constant, levels of stress and fear.<sup>107</sup>

## Part II: The Immigrant Surveillance and Enforcement Landscape

Part II of this paper describes the current landscape of immigrant enforcement and surveillance. Surveillance has become a hallmark of living in the 21st century; “surveillance culture” pervades our everyday existence. Surveillance has been theorized by Foucault and Bentham as a mechanism for discipline and social control.<sup>108</sup> More broadly, surveillance is “the focused, systematic, and routine attention to personal details for the purposes of influence, management, protection or direction.”<sup>109</sup>

The vast immigration surveillance system is marked by several distinctive characteristics. After describing the historic context in which the immigrant surveillance and enforcement regime has emerged, I turn to unpacking these characteristics. First, I describe the multimodal nature of this immigrant surveillance and enforcement landscape. Next, I describe how this landscape has rapidly changed and expanded, particularly over

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<sup>103</sup> *Id.* at 19-20.

<sup>104</sup> Jeff Amy, *Documents: Plant Owners Willfully Used Ineligible Workers*, AP (Aug. 9, 2019), <https://apnews.com/article/tx-state-wire-united-states-il-state-wire-fl-state-wire-ia-state-wire-711d52e4bccd41bc894907a9e1645d09> (noting that “[f]ederal investigators behind the biggest immigration raid in a decade relied on confidential informants inside the plants in addition to data from the monitoring bracelets to help make their case” for the search warrant).

<sup>105</sup> ALY PANJWANI & HANNAH LUCAL, JUST FUTURES L. ET AL., TRAPPED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 4 (2022), [https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped\\_final.pdf](https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped_final.pdf) [perma.cc/73N2-RNWQ].

<sup>106</sup> ALY PANJWANI & HANNAH LUCAL, JUST FUTURES L. ET AL., TRAPPED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 8, 33 (2022).

<sup>107</sup> ALY PANJWANI & HANNAH LUCAL, JUST FUTURES L. ET AL., TRAPPED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 17, 33 (2022).

<sup>108</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (1975).

<sup>109</sup> DAVID LYON, *SURVEILLANCE STUDIES: AN OVERVIEW* 14 (2007).

the last few years. Finally, I note the ways in which this system is marked by the deliberate intertwining of the criminal legal system and corporate carceral ties.

### A. Historic Context

Immigration detention has been a fixture of the United States immigration legal system for more than two hundred years,<sup>110</sup> and a great deal has been written about this history.<sup>111</sup> But detention as the default has not always been the norm, and release from immigration custody on parole or bond has long been a possibility. Immigration detention began in earnest in 1892, with Ellis Island being the first dedicated detention facility in the United States. Even then, release on bond was available to noncitizens due to lack of bedspace and unsanitary conditions.<sup>112</sup>

In 1893, Congress passed the first law requiring the detention of any person not entitled to admission. At their discretion, immigration officers would release some, mostly white, immigrants on bond.<sup>113</sup> Thereafter, in 1952, Congress passed the Immigration & Nationality Act<sup>114</sup> which allowed for authorities to use their discretion to grant noncitizens release from detention on bond, based on community ties and pending a final determination of removability. This, combined with the end of the era of Chinese Exclusion,<sup>115</sup> led to a decline in the systematic use of immigration detention. Though immigration detention was still used as a tool of racial control, including through the targeted detentions and deportations of Mexicans in the 1950s and Haitians in the 1970s.<sup>116</sup> On a larger scale, detention continued to be used relatively infrequently until the 1980s, when detention became the presumption, rather than the exception.<sup>117</sup> Through a combination of domestic policy targeting people of color for drug and property crimes,<sup>118</sup> stepped up policing and immigration

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<sup>110</sup> DAN KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 6-8 (2007).

<sup>111</sup> DAN KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019); ALINA DAS, *NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS* (2020); DANIEL WILSHER, *IMMIGRATION DETENTION LAW, HISTORY, POLITICS* (Cambridge Univ. Press 2011); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 490-494 (2007); Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 1-68 (2018).

<sup>112</sup> See DANIEL WILSHER, *IMMIGRATION DETENTION: LAW, HISTORY, POLITICS* 11-19 (Cambridge Univ. Press 2011).

<sup>113</sup> Immigration Act of 1893, ch. 206, §5, 27 Stat. 569, 570 (1893); *Detention Timeline: A Short History of Immigration Detention*, FREEDOM FOR IMMIGRANTS (2018), <https://www.freedomforimmigrants.org/detention-timeline> [perma.cc/7PL3-MCQU].

<sup>114</sup> Immigration and Nationality Act of 1952, Pub. L. No. 414, §242(a), 66 Stat. 208, 208-09.

<sup>115</sup> Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

<sup>116</sup> See *Detention Timeline: A Short History of Immigration Detention*, FREEDOM FOR IMMIGRANTS (2018), <https://www.freedomforimmigrants.org/detention-timeline> [perma.cc/7PL3-MCQU].

<sup>117</sup> See 8 C.F.R. §§ 212.5(a)2(ii), 242.24; see also Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 81-84 (2016) (discussing the presumption of release and the burden shift resulting from amendments to the INA, the Anti-Drug Abuse Act of 1988, and case law).

<sup>118</sup> Welfare Reform Act, Pub. L. No. 104-93, 110 Stat. 2105, 2180-81 (1996); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1273-79.

enforcement<sup>119</sup> and expanding federal grounds of deportation,<sup>120</sup> the detention population has skyrocketed in the last forty years. By 2017, detention numbers reached a record high of more than 40,000 persons, in ICE detention, on any given day.<sup>121</sup> While today those numbers hover around 22,886,<sup>122</sup> more noncitizens are caught up in the ever-expanding dragnet of immigration enforcement and surveillance than ever before.

### B. Multimodal nature of surveillance and enforcement

Alongside a growing carceral state has been the rise of enforcement technology and surveillance. The immigration enforcement regime is multimodal, dynamic, expansive, opaque, and inextricably linked to the criminal legal system. So called “big data policing”<sup>123</sup> and big data surveillance as tools in the enforcement toolbox are growing more popular in both the immigration and criminal context. Enforcement regimes are increasingly influenced by—and expanded by—evolving technologies that capture greater numbers of people in their digital nets. This article builds on the work of immigration law scholars who have begun to document this growth. Anil Kalhan has documented the prolific expansion of technology in the field of immigration enforcement.<sup>124</sup> In the seven years since that article was published, technology and digital surveillance have grown increasingly integral to—and integrated into—routine immigration enforcement. Most recently, Eunice Lee has carefully charted the present-day landscape of immigration surveillance and new technologies.<sup>125</sup> Despite some literature describing its structure and scope, the immigration surveillance regime is also notably opaque. As Hannah Bloch-Webha has explained in the criminal space, “new surveillance technology tends to operate in opaque and unaccountable ways, augmenting police power while remaining free of meaningful oversight.”<sup>126</sup> So too in the immigration context where rapidly expanding surveillance technology is both hidden and unaccounted for. This is notable for several reasons, but importantly, immigration has long been held to be “civil.”<sup>127</sup> In 1893, the Court held that “deportation is not a

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<sup>119</sup> CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 10-12, 58-62 (2019).

<sup>120</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009.

<sup>121</sup> See *Detention Timeline: A Short History of Immigration Detention*, FREEDOM FOR IMMIGRANTS (2018), <https://www.freedomforimmigrants.org/detention-timeline> [perma.cc/7PL3-MCQU]; U.S. IMMIGR. & CUSTOMS ENF’T, *FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 10-11* (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> [perma.cc/GL5T-FU3F].

<sup>122</sup> *ICE Detention Statistics: Detention FY22*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/detain/detention-management> (last visited July 21, 2022).

<sup>123</sup> See ANDREW G. FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* (2017).

<sup>124</sup> See e.g., Kalhan, *Immigration Surveillance*, *supra* note 15.

<sup>125</sup> See Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 614-28 (2021).

<sup>126</sup> Hannah Bloch-Webha, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 919 (2021).

<sup>127</sup> Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007).

punishment”<sup>128</sup> and this axiom has informed more than one hundred years of jurisprudence and policy making since then.<sup>129</sup> As many scholars have documented, the notion that “immigration is civil” has yielded a kind of asymmetric incorporation: the harsh enforcement and harsh penalties of the criminal legal system, without any of the attendant procedural safeguards. On the other hand, a debate about whether deportation is civil or criminal can also be limiting in terms of what seems possible. Put another way, “if deportation is a punishment, more process is due, and if it is not, the current lack of protection for those facing deportation suffices.”<sup>130</sup>

While alternatives to detention and accompanying ankle shackles surveil and monitor noncitizens in ways most relevant to this article, there is an entire regime of additional mechanisms that more subtly—and perhaps more perniciously—surveil immigrant communities.<sup>131</sup>

Lee groups these expanding technologies into four broad categories: (1) facial recognition and other biometric scanning; (2) automated license plate readers and surveillance drones; (3) surveillance by social media; and (4) additional data mining and analytics.<sup>132</sup> I will briefly describe each of these in turn.

### **Facial recognition and other biometric scanning**

Anil Kalhan details the intricacies of facial recognition and biometric scanning, specifically through DHS’s use of the Automated Biometric Identification System (“IDENT”).<sup>133</sup> In 2017, IDENT was replaced with the Homeland Advanced Recognition Technology System (“HART”), a six billion dollar, military-grade technology database.<sup>134</sup> In addition to being a clearinghouse for fingerprints, driver’s license information and passport photos, the HART database will include “facial recognition; iris scanning technology; DNA collection; and ‘additional biometric modalities,’ such as scars, tattoos, and palm prints”<sup>135</sup> of both adults and

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<sup>128</sup> Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

<sup>129</sup> Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (“For more than a century, however, the courts have uniformly insisted that deportation is not punishment and that, therefore, the criminal procedural safeguards do not apply.”); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. (2022) (“Immigrants are increasingly subject to the burdens of criminal law (for example, when deported as a consequence of a criminal conviction), but they receive none of its benefits (because criminal procedural protections, such as *Miranda* warnings, jury trials, and the right to appointed counsel, do not apply in immigration proceedings”).

<sup>130</sup> Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. 1040, 1071 (2021).

<sup>131</sup> The breadth and depth of ICE’s immigration surveillance regime is startling. Indeed, between 2008 and 2021, ICE spent \$2.8 billion on their new surveillance initiatives. NINA WANG ET AL., *AMERICAN DRAGNET: DATA-DRIVEN DEPORTATION IN THE 21ST CENTURY 2* (2022), <https://americandragnet.org/finding1>.

<sup>132</sup> *Id.* at 619-28.

<sup>133</sup> Kalhan, *Immigration Surveillance*, *supra* note 15, at 30-32, 40-43, 54.

<sup>134</sup> JUST FUTURES L. ET AL., *HART ATTACK: HOW DHS’S MASSIVE BIOMETRICS DATABASE WILL SUPERCHARGE SURVEILLANCE AND THREATEN RIGHTS 1-8*, 20 (2022), <https://justfutureslaw.org/wp-content/uploads/2022/05/HART-Attack.pdf> [perma.cc/4AQ7-W2WH].

<sup>135</sup> Lee, *supra* note 46, at 620.



juveniles.<sup>136</sup> At least 500 million identities can be stored in HART<sup>137</sup> and in addition to DHS, the Department of Defense, the FBI and state and local police will have access to the data collected and stored in HART.<sup>138</sup>

HART exemplifies DHS’s “limitless and brazen”<sup>139</sup> appetite for data.<sup>140</sup> HART will dramatically expand DHS’ surveillance scope and capacity and has the potential to weaponize information essential to our everyday lives in ways that will be “especially pernicious for already heavily-surveilled and overpoliced Black and brown communities.”<sup>141</sup>

Facial recognition and surveillance through the SmartLINK phone application has grown increasingly popular, especially in recent years. SmartLINK is a smart phone technology that uses biometric information, including facial comparison and recognition, to monitor, track and surveil people in immigration removal proceedings.<sup>142</sup> Today, SmartLINK is ICE’s “monitoring technology of choice.”<sup>143</sup> Between June 2019 and April 2022, the number of people on SmartLINK in ISAP increased from 12% to 76%.<sup>144</sup> In some ICE offices, enrollment in SmartLINK has exploded by increases of almost 1000%.<sup>145</sup>

#### **Automated license plate readers and surveillance drones**

As early as 2011, DHS began investigating the use of digital license plate readers - cameras that photograph license plates and store data about those plates, their information and location.<sup>146</sup> Since then, DHS has spent tens

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<sup>136</sup> JUST FUTURES L. ET AL., HART ATTACK: HOW DHS’S MASSIVE BIOMETRICS DATABASE WILL SUPERCHARGE SURVEILLANCE AND THREATEN RIGHTS 4,10 (2022), <https://justfutureslaw.org/wp-content/uploads/2022/05/HART-Attack.pdf> [perma.cc/4AQ7-W2WH].

<sup>137</sup> Glyn Moody, *DHS Expanding National Biometrics Database To Hold Details on over 500 Million People, Including Many US Citizens*, PRIV. NEWS ONLINE (Oct. 31, 2017), <https://www.privateinternetaccess.com/blog/dhs-expanding-national-biometrics-database-hold-details-500-million-people-including-many-us-citizens/>.

<sup>138</sup> *Id.*

<sup>139</sup> Lee, *supra* note 46, at 621.

<sup>140</sup> *See also* Collection and Use of Biometrics by U.S. Citizenship and Immigration Services, 85 Fed. Reg. 56338 (proposed Sept. 11, 2020). This rule would have allowed DHS to capture almost anything from anyone - including DNA results, voice prints, and iris scans from adults and children of any age. USCIS later withdrew the proposed rule. Collection and Use of Biometrics by U.S. Citizenship and Immigration Services; Withdrawal 86 Fed. Reg. 24750 (May 10, 2021).

<sup>141</sup> JUST FUTURES L. ET AL., HART ATTACK: HOW DHS’S MASSIVE BIOMETRICS DATABASE WILL SUPERCHARGE SURVEILLANCE AND THREATEN RIGHTS 2 (2022), <https://justfutureslaw.org/wp-content/uploads/2022/05/HART-Attack.pdf> [perma.cc/4AQ7-W2WH].

<sup>142</sup> Sofia Mejias-Pascoe, *ICE Uses Cellphones to Track Thousands in San Diego, Imperial Counties*, INEWSOURCE (May 23, 2022), <https://inewssource.org/2022/05/23/immigrants-under-smartphone-surveillance/> [perma.cc/J359-4TEW].

<sup>143</sup> ALY PANJWANI & HANNAH LUCAL, JUST FUTURES L. ET AL., TRACKED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 5 (2022), [https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped\\_final.pdf](https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped_final.pdf) [perma.cc/73N2-RNWQ].

<sup>144</sup> ALY PANJWANI & HANNAH LUCAL, JUST FUTURES L. ET AL., TRACKED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 5 (2022).

<sup>145</sup> ALY PANJWANI & HANNAH LUCAL, JUST FUTURES L. ET AL., TRACKED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 5 (2022).

<sup>146</sup> *See* ACLU, YOU ARE BEING TRACKED: HOW LICENSE PLATE READERS ARE BEING USED TO RECORD AMERICANS’ MOVEMENTS 27 (2013) (*citing* Internal e-mail, ICE National Bulk Cash Smuggling Center, Public

of millions of dollars on this technology and surveillance. License plate readers used by DHS are both overt and covert, including readers mounted to CBP vehicles. DHS uses drones not just to surveil the border, but within the interior of the United States and at times in partnership with other law enforcement agencies to surveil rallies, marches and protests.<sup>147</sup>

### Surveillance by social media

In addition, for more than a decade,<sup>148</sup> DHS has increasingly used social media to surveil and monitor noncitizens.<sup>149</sup> DHS surveils the social media accounts of visa applicants, any noncitizen applying for an immigration benefit and CBP has begun asking travelers to share their social media handles.<sup>150</sup> Under the Trump administration these processes—known as “extreme vetting”—expanded and reified.<sup>151</sup> Stored in a database ominously known as the FALCON Search and Analysis System (“FALCON”),<sup>152</sup> these social media photos, posts, “friend lists” and other data have been used as reasons to deny visas to intending immigrants, to deny bail to detained noncitizens, and as a basis for deportation.<sup>153</sup>

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Records Responses (Sept. 13, 2011), [http://www.aclu.org/files/FilesPDFs/ALPR/federal/ICE/16147-16228%20r\\_Pages%20from%20Bulk%20Cash%20Combined-1.pdf](http://www.aclu.org/files/FilesPDFs/ALPR/federal/ICE/16147-16228%20r_Pages%20from%20Bulk%20Cash%20Combined-1.pdf)).

<sup>147</sup> See *Science and Technology: Counter-Unmanned Aircraft Systems*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/science-and-technology/unmanned-aerial-systems> (last visited Aug. 27, 2021) [<https://perma.cc/QS7LH3PN>]; Ryan Pickrell, *Customs and Border Protection Flew a Predator B Drone Over Minneapolis as Protests Rocked the City*, BUS. INSIDER (May 29, 2020, 6:29 PM), <https://www.businessinsider.com/cbp-flew-a-predator-b-drone-over-minneapolis-amid-protests-2020-5>.

<sup>148</sup> See Sophia Cope & Adam Schwartz, *DHS Should Stop the Social Media Surveillance of Immigrants*, ELEC. FRONTIER FOUND. (Oct. 3, 2017), <https://www.eff.org/deeplinks/2017/10/dhsshould-stop-social-media-surveillance-immigrants> [<https://perma.cc/5WXD-W7N2>] (“DHS began monitoring social media at least as early as 2010.”).

<sup>149</sup> See e.g., Margaret Hu, *The Ironic Privacy Act*, 96 WASH. U. L. REV. 1267 (2019) (discussing DHS’s increased use of social media surveillance in light of the Privacy Act of 1974 and how federal agencies’ social media surveillance programs are largely unregulated).

<sup>150</sup> U.S. DEP’T OF HOMELAND SEC., INSTRUCTION NO. 110-01-001, PRIVACY POLICY FOR OPERATIONAL USE OF SOCIAL MEDIA 3 (2012), [https://www.dhs.gov/sites/default/files/publications/Instruction\\_110-01-001\\_Privacy\\_Policy\\_for\\_Operational\\_Use\\_of\\_Social\\_Media\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Instruction_110-01-001_Privacy_Policy_for_Operational_Use_of_Social_Media_0.pdf) [<https://perma.cc/F29X-YFTD>]; Tony Romm, *U.S. Government Begins Asking Foreign Travelers About Social Media*, POLITICO (Dec. 22, 2016, 5:23 PM), <https://www.politico.com/story/2016/12/foreign-travelers-social-media232930> [<https://perma.cc/776G-D9VJ>].

<sup>151</sup> See e.g., Notice of Modified Privacy Act System of Records, 82 Fed. Reg. 43,556 (Sept. 18, 2017).

<sup>152</sup> See SOPHIA DENUYL, RAYA KOREH, RACHEL LEVINSON-WALDMAN & FAIZA PATEL, SOCIAL MEDIA MONITORING: HOW THE DEPARTMENT OF HOMELAND SECURITY USES DIGITAL DATA IN THE NAME OF NATIONAL SECURITY 11 (Brennan Ctr. for Just. 2019), [https://www.brennancenter.org/sites/default/files/publications/2019\\_DHSSocialMediaMonitoring\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/2019_DHSSocialMediaMonitoring_FINAL.pdf) [<https://perma.cc/F7HF-UA23>].

<sup>153</sup> See e.g., LAILA L. HLASS & RACHEL PRANDINI, DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING YOUTH AS GANG MEMBERS (Immigr. Legal Res. Ctr. 2018), [https://www.ilrc.org/sites/default/files/resources/deport\\_by\\_any\\_means\\_nec-20180521.pdf](https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf); Jillian Blake, *Information on Social Media Can Get Immigration Deported or Denied Entry*, NOLO, <https://www.nolo.com/legal-encyclopedia/information-on-social-media-can-get-immigrants-deported-or-denied-entry.html> (last visited Aug. 30, 2021); Ariel Bogle, *A Facebook Post Can Change Your Life: Documents Reveal How Social Media is Used by Immigration Officials*, ABC (June 28, 2020), <https://www.abc.net.au/news/science/2020-06-29/home-affairs-protection-visa-use-of-facebook-social-media/12391620>; Rikke Andreassen, *Social Media Surveillance, LGBTQ Refugees and Asylum: How Migration Authorities Use Social Media Profiles to Determine Refugees as ‘Genuine’ for ‘Fraudulent,’* 26 FIRST MONDAY (2021) (analyzing the role of social media content in adjudication of asylum claims in Europe).

### **Additional data mining and analytics**

DHS's reach is vast and the use of additional data mining continues to expand. As Lee notes, "ICE owns over 900 unique databases and manages over 10 billion biographic records."<sup>154</sup> Not only does ICE own its own databases, but it has tremendous access to state, local and federal data through "fusion centers": joint multi-jurisdictional information centers that combine data from various sources and disciplines.<sup>155</sup> According to the DHS OIG, fusion centers "house federal, state, and local law enforcement and intelligence resources to provide useful sources of law enforcement and threat information, facilitate information sharing across jurisdictions and functions, and establish a conduit among federal, state, and local agencies."<sup>156</sup> Put more concretely, fusion centers allow DHS access to vast amounts of data through the click of a mouse. Moreover, DHS has recently joined hands with private industry, including Pen-Link and West Publishing, providing additional tools and means for both access and sharing of an alarming amount of personal information including data on utilities, credit cards, and personal health information.<sup>157</sup>

### C. Crim-Imm and the Corporate Carceral State

The intersections between the immigration and criminal legal systems in the United States—so-called "crim-imm"—are long standing and well documented. César Cuauhtémoc García Hernández and others<sup>158</sup> have noted the ways in which these systems have informed, and advanced, one another. Those changes have been most dramatic - and devastating - over the last forty years. Between 1986 and 1994, Congress passed eight laws and resolutions that stemmed from the "growing desire to fight drugs" and ultimately "set the legislative groundwork for the expansive immigration detention apparatus that exists today...".<sup>159</sup> Included in these laws were expanded definitions for the kinds of criminal offenses that result in mandatory immigration detention and nearly mandatory deportation, even for long time green card holders.<sup>160</sup> The result was striking: following implementation of these laws, between 1996 and 1998, the number of immigrants in detention nearly doubled, increasing from 8,500 to

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<sup>154</sup> Lee, *supra* note 46, at 624 (citing Jennifer Lynch, *HART: Homeland Security's Massive New Database Will Include Face Recognition, DNA, and Peoples' "Non-Obvious Relationships,"* ELEC. FRONTIER FOUND. (June 7, 2018), <https://www.eff.org/deeplinks/2018/06/hart-homeland-securitys-massive-new-database-will-include-face-recognition-dna-and> [<https://perma.cc/QG6D-CXNU>]).

<sup>155</sup> See U.S. DEP'T OF HOMELAND SEC., OFF. OF INSPECTOR GENERAL, *DHS' ROLE IN STATE AND LOCAL FUSION CENTERS IS EVOLVING* 3 (2008).

<sup>156</sup> *Id.* at 4.

<sup>157</sup> See Denuyl et al., *supra* note 60, at 23; THOMSON REUTERS CLEAR, *THE SMARTER WAY TO GET YOUR INVESTIGATIVE FACTS STRAIGHTS* 2, 4-6 (2015), <https://www.thomsonreuters.com/content/dam/openweb/documents/pdf/legal/fact-sheet/clear-brochure.pdf> [<https://perma.cc/HWQ2-MT6F>].

<sup>158</sup> See e.g., Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963 (2016).

<sup>159</sup> César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1361 (2014).

<sup>160</sup> Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1273-79; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4469-73.

16,000.<sup>161</sup> The increasing criminalization of both drugs and poverty fueled the increasing criminalization of immigrants. Deportations also exploded, jumping from just 24,592 in 1986, prior to the aforementioned laws' implementation, to 174,813 in 1998.<sup>162</sup>

Criminal and immigration law enforcement feed each other both people, and money. One aspect of these systems that is particularly insidious is that they are both marked by privatization and corporate control.<sup>163</sup> And the growth of people in criminal legal custody and immigration custody has been consistent—between 2000 and 2016 the number of people housed in private prisons increased five times faster than the total prison population.<sup>164</sup> Over a similar timeframe, the proportion of people detained in private immigration facilities increased by 442 percent.<sup>165</sup> Why is this privatization worth noting? Privatized incarceration leads to even less accountability, less transparency, less oversight and greater impunity.<sup>166</sup>

As of September 2021, 79 percent of people detained each day in ICE custody are detained in private detention facilities.<sup>167</sup> This didn't happen overnight. In 1983, the world's first private prison company Corrections Corporation of America (CCA) was formed. Shortly thereafter, CCA, since renamed to CoreCivic, entered into its first federal government contract for an immigration detention facility in Texas. The following

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<sup>161</sup> *Analysis of Immigration Detention Policies*, ACLU <https://www.aclu.org/other/analysis-immigration-detention-policies> [<https://perma.cc/L8MX-WY4D>] (last visited July 22, 2022).

<sup>162</sup> *Yearbook of Immigration Statistics: Yearbook 2019, Table 39* U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/yearbook/2019/table39> [[perma.cc/9XCN-B2LH](https://perma.cc/9XCN-B2LH)] (last visited July 22, 2022).

<sup>163</sup> Jason Fernandes, *Alternatives to Detention and the For-Profit Immigration System*, CTR. FOR AM. PROGRESS (June 9, 2017), <https://www.americanprogress.org/article/alternatives-detention-profit-immigration-system/> [[perma.cc/8YT5-XZ9B](https://perma.cc/8YT5-XZ9B)].

<sup>164</sup> KARA GOTSCH & VINAY BASTI, THE SENT'G PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 5 (2018), <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/> [[perma.cc/EQ92-GDSR](https://perma.cc/EQ92-GDSR)].

<sup>165</sup> KARA GOTSCH & VINAY BASTI, THE SENT'G PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 5 (2018), <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/> [[perma.cc/EQ92-GDSR](https://perma.cc/EQ92-GDSR)].

<sup>166</sup> See *Prison Conditions*, EQUAL JUSTICE INITIATIVE (last visited Jan. 11, 2023), <https://eji.org/issues/prison-conditions/> (“The federal government is increasingly relying on private, profit-based immigration detention facilities . . . Many run notoriously dangerous facilities with horrific conditions that operate far outside federal oversight.”); Lauren-Brooke Eisen, *Private Prisons Lock Up Thousands of Americans With Almost No Oversight*, THE BRENNAN CENTER FOR JUSTICE (Nov. 8, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/private-prisons-lock-thousands-americans-almost-no-oversight> (“America’s for-profit prison industry controls 126,000 Americans’ lives. It’s a \$5 billion sector — one that encompasses the operation of 65% of the nation’s immigration detention beds. And at the same time, it is largely opaque, often unaccountable to the public or the government.”); Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 168 (2022) (“Because punitive surveillance is generally controlled by these third parties, there is a general lack of transparency.”).

<sup>167</sup> Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU 2 (Oct. 5, 2021), [https://www.aclu.org/sites/default/files/field\\_document/2021.10.07\\_private\\_prisons\\_and\\_ice\\_detention\\_blog-factsheet\\_003.pdf](https://www.aclu.org/sites/default/files/field_document/2021.10.07_private_prisons_and_ice_detention_blog-factsheet_003.pdf) [<https://perma.cc/85TK-6K3H>].

year, in 1984, GEO Group, formerly The Wackenhut Corporation, was formed.<sup>168</sup>

Today, contracts for ICE detention made up more than a quarter of total revenue for both CoreCivic and the GEO Group.<sup>169</sup> In 2019, 29 percent of CoreCivic’s revenue came from ICE detention contracts, at a total of \$574 million. In 2020, 28 percent of CoreCivic’s revenue came from ICE detention contracts, at a total of \$533 million.<sup>170</sup> Twenty-eight percent of GEO’s revenue came from ICE detention contracts in both 2019 and 2020, at a total of \$708 million in 2019 and \$662 million in 2020.<sup>171</sup>

GEO Group has expanded its immigration enforcement services beyond the prison walls. BI, a company first established in 1978 to monitor cattle,<sup>172</sup> was acquired by GEO Group in 2011. Beginning in 2004 with ISAP, ICE’s first iteration of ATD, BI, and its parent company GEO Group have run an expanding immigrant surveillance regime.<sup>173</sup> In 2020, the company signed a new five-year contract with ICE for nearly \$2.2 billion dollars, to run electronic surveillance on noncitizens.<sup>174</sup> Of course, if noncitizens violate the conditions of electronic surveillance, they are immediately subject to detention—often in a GEO Group, or other privately run, facility.<sup>175</sup>

As with incarceration, the immigration system’s shift toward monitoring and electronic surveillance has taken cues from the criminal legal system. With prisons and jails past capacity from decades of mass incarceration, electronic monitoring was also touted as an effective solution in the criminal enforcement space. But as with electronic monitoring in the

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<sup>168</sup> *Detention Timeline: A Short History of Immigration Detention*, FREEDOM FOR IMMIGRANTS (2018), <https://www.freedomforimmigrants.org/detention-timeline> [perma.cc/7PL3-MCQU].

<sup>169</sup> Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU 3 (Oct. 5, 2021), [https://www.aclu.org/sites/default/files/field\\_document/2021.10.07\\_private\\_prisons\\_and\\_ice\\_detention\\_blog-factsheet\\_003.pdf](https://www.aclu.org/sites/default/files/field_document/2021.10.07_private_prisons_and_ice_detention_blog-factsheet_003.pdf) [https://perma.cc/85TK-6K3H].

<sup>170</sup> CORECIVIC, INC., ANNUAL REPORT (FORM 10-K) 14 (February 2021), <http://ir.corecivic.com/node/21411/html>.

<sup>171</sup> THE GEO GROUP, INC., ANNUAL REPORT (FORM 10-K) 31 (February 2021), <https://seekingalpha.com/filings/pdf/14711618>.

<sup>172</sup> The private prison industry has continued to treat people in detention like animals. See Garet Bleir, “*They’re Treated like Animals*”, INTERCONTINENTAL CRY (Oct. 22, 2019), <https://intercontinentalcry.org/theyre-treated-like-animals-the-us-government-is-abusing-asylum-seekers-including-indigenous-migrants-but-people-are-fighting-back/> [perma.cc/8TKL-6FCH].

<sup>173</sup> *The Geo Group Announces Five-Year Contract with U.S. Immigration and Customs Enforcement for Intensive Supervision and Appearance Program (ISAP)*, BUS. WIRE (Mar. 24, 2020), <https://www.businesswire.com/news/home/20200324005145/en/The-GEO-Group-Announces-Five-Year-Contract-With-U.S.-Immigration-and-Customs-Enforcement-for-Intensive-Supervision-and-Appearance-Program-ISAP> [perma.cc/HTW9-NCAM].

<sup>174</sup> *Intensive Supervision Appearance Program (ISAP) IV Support Services*, GOVTRIBE <https://govtribe.com/opportunity/federal-contract-opportunity/intensive-supervision-appearance-program-isap-iv-support-services-70cder19r00000002> [perma.cc/PA2M-6FC9] (last updated Mar. 5, 2019).

<sup>175</sup> Julie Pittman, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CALIF. L. REV. 587, 606 (2020); Dario McCarty, *Private Prison Industry Shifts Focus to Immigrant Detention Centers, Funding Immigration Hawks*, OPEN SECRETS (June 21, 2022), <https://www.opensecrets.org/news/2022/06/private-prison-industry-shifts-focus-to-immigrant-detention-centers-funding-immigration-hawks/> [https://perma.cc/8LUE-XV7A].

immigration space, in the criminal space, electronic monitoring has meant (1) a dramatic increase in the number of people surveilled and (2) very few rights for those under surveillance.<sup>176</sup> In short, this dramatic expansion of surveillance and monitoring have become yet another tech savvy “enactment of structural racism, and another method of criminalizing and policing poverty – rather than addressing its social roots.”<sup>177</sup> Put another way, the dramatic and swift expansion of immigration surveillance can be seen as another form of what Shoshana Zuboff calls “surveillance capitalism” – a way to capture and commodify the private human experience of living and translate it into data that the state, private companies, and law enforcement can wield.

### Part III: Deportation Abolition and The Violence of Invisibility

In part animated by the “Abolish the Police” movement, immigrant organizers, advocates and scholars have increasingly called for the abolition of ICE, and of detention and deportation.<sup>178</sup> Angélica Cházaro was among the first immigration scholars to question the common sense notion of the deportation regime, and to advance the idea of abolition as a reasonable goal.<sup>179</sup> Cházaro and others<sup>180</sup> have interrogated both the legitimacy and inevitability of deportation, arguing instead for new thinking about what may be possible if we don’t take deportation’s existence for granted.<sup>181</sup> Cházaro also argues that violence is “at the heart of” deportation, and goes on to illustrate the violence inherent in each stage of the process.<sup>182</sup> In proposing abolition as an attainable goal, Cházaro

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<sup>176</sup> See James Kilgore, *The Spread of Electronic Monitoring: No Quick Fix for Mass Incarceration*, PRISON LEGAL NEWS (Apr. 9, 2015), <https://www.prisonlegalnews.org/news/2015/apr/9/spread-electronic-monitoring-no-quick-fix-mass-incarceration/> [perma.cc/GU35-JBQF] (describing electronic monitoring in the criminal space as a “deprivation of liberty by technological means” and noting that those subjected to electronic monitoring are completely at the “whim of their [parole] agent.”); A ANDREA J. RITCHIE & MARIAME KABA, NO MORE POLICE: A CASE FOR ABOLITION, 124 (2022) (“Technological ‘fixes’ are not only ineffective, they also operate at cross-purposes to efforts to divest from systems of surveillance, policing, and punishment.”).

<sup>177</sup> James Kilgore, *The Spread of Electronic Monitoring: No Quick Fix for Mass Incarceration*, PRISON LEGAL NEWS (Apr. 9, 2015), <https://www.prisonlegalnews.org/news/2015/apr/9/spread-electronic-monitoring-no-quick-fix-mass-incarceration/> [perma.cc/GU35-JBQF].

<sup>178</sup> MIJENTE, AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA (2018); ALY PANJWANI & HANNAH LUCAL, JUST FUTURES L. ET AL., TRACKED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 4-5 (2022), [https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped\\_final.pdf](https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped_final.pdf) [perma.cc/73N2-RNWX]; César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 246 (2017).

<sup>179</sup> See Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (2021); see also Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781 (2020) (noting that despite calls to “abolish the police,” legal scholarship continued to focus on ways to reform police practices; Akbar asserts that we must look toward an “abolitionist horizon” and engage in imaginative discussions of what abolition could hold).

<sup>180</sup> Hlass, *Lawyering from a Deportation Abolition Ethic*; César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 246 (2017); and ShiuMing Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants’ Rights Movement*, 68 UCLA L. REV. DISC. 70 (2020).

<sup>181</sup> See Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (2021).

<sup>182</sup> See Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (2021); see also, e.g., Complaint, African Communities Together et al., Complaint Regarding ICE’s Use of The WRAP as a Restraint Device (Oct. 13, 2021) (on file with author) (providing an example of this form of violence in ICE’s use of a full-body restraint device on

problematizes the notion that deportation must persist in order to maintain social control over noncitizen populations, ensure community safety and protect U.S. sovereignty—oft cited justifications for the current enforcement regime.<sup>183</sup> Cházaro and advocates and activists from Mijente, Critical Resistance, and Detention Watch Network have created blueprints for evaluating whether particular changes are simply “reformist reforms” or, in fact, real steps toward abolition. Their framework can be summarized as asking whether the action (1) reduces the scale and scope of immigration enforcement; (2) chips away at the current system without creating new harms; (3) helps some people at the expense of others; and (4) provides relief to people who could be or are currently detained or surveilled.

Rather than reforms to a rotten system, Cházaro invites future scholarship that works, instead, toward deportation’s demise, and a future where abolition is possible. This article responds, in part, to that invitation.

Deportation is violence, and one growing facet of the immigration system are so-called alternatives to detention, and in particular, ankle shackles and digital cages. In this article, I explain why it is imperative to name this particular strand of the deportation regime, to categorize the specific kind of violence that the detention and deportation regime produces and to articulate why it is especially dangerous. This is especially timely today. As calls to lessen the use of immigration detention mount, the Biden Administration is increasingly pushing for—and achieving—an expansion of “alternatives to detention.” Once noncitizens might have been released from custody and thus somewhat released from the eyes and ears of immigration enforcement.<sup>184</sup> Now, release from detention can mean ankle shackles and a robust system of monitoring and surveillance by ICE and ICE subcontractors. Through this alternative enforcement regime, noncitizens are effectively caged in their own homes and communities, rather than in jails and detention centers. As use of ankle shackles and accompanying monitoring and surveillance grows dramatically, immigration enforcement becomes less publicly visible. Because noncitizens are inside digital cages—ankle shackles they cover with long pants, phone calls monitored behind closed doors, and home visits that happen in the early morning before the workday begins—their plight, and the attendant, and often devastating, harms, are largely hidden from public view.

### A. Theorizing Violence

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noncitizens that inflicts physical and psychological pain on noncitizens in a way that violates constitutional and treaty-based protections).

<sup>183</sup> See Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (2021).

<sup>184</sup> Noncitizens released from detention typically remain in removal proceedings, with expectations to appear for Immigration Court hearings. However, unless formally enrolled in ATD programming, these released noncitizens are not subject to monitoring, surveillance or related reporting.

What is violence? In concrete terms, it is behavior involving physical force intended to hurt, damage, or kill someone or something.<sup>185</sup> More theoretically and most relevant in this context, I consider violence in the Arendt sense as the capacity to act in concert for a public-political purpose through coercion - rather than consent.<sup>186</sup>

Legal violence is “multi-faceted and multi-sited force—interpersonal and institutional, social, economic and political, physical, sexual, emotional and psychological—violence is endemic, and intimately interwoven with other sorts of relations.”<sup>187</sup> We encounter “the ignominious expression of violence in virtually every facet of our everyday existence.”<sup>188</sup> Systemic violence permeates the legal system; in fact, in many cases, the law “generates” violence.<sup>189</sup> And, as Arendt reminds us, violence “needs implements” — that is, the tools to carry it out.<sup>190</sup> Alternatives to Detention—and the technology that accompanies, enables and perpetuates it—are these implements.<sup>191</sup>

This section begins by describing the different kinds of violence and how they have been theorized. One of those forms of violence, I suggest, is a kind of “violence of invisibility.” I explain how this violence manifests in the immigration surveillance space, and why it matters. The paradigm of the “violence of invisibility” builds on the theoretical framing done by others in discussing different forms, modes and methods of “violence.”

These scholars have been resolute in their efforts “to make visible what often goes unseen and unsaid, to reckon with the endings that are not over.”<sup>192</sup> In so doing, they challenge “the ways that the normal and banal are mobilized to obscure violence, terror, and death.”<sup>193</sup> That violence, terror and even death, are what I hope to illuminate in naming the violence of a largely invisible surveillance regime that patrols, polices and cages noncitizens.

Many authors have written of the speed of violence, and its impact on marginalized people and places. Rob Nixon has written of “spectacular violence” — that is, violence that is “immediately sensational, and

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<sup>185</sup> See *Violence*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/violence> (last visited Jan. 11, 2023).

<sup>186</sup> See *Hannah Arendt*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/arendt/> (Fall 2022 ed.).

<sup>187</sup> Rachel Pain & Lynn Staeheli, *Introduction: Intimacy-Geopolitics and Violence*, 46 *AREA* 344, 344 (2014).

<sup>188</sup> Philippe Le Billon & Simon Springer, *Violence and Space: An Introduction to the Geographies of Violence*, 52 *POL. GEOGRAPHY* 1 (2016).

<sup>189</sup> Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 *LAW & POL’Y*

<sup>190</sup> “Violence, we must remember, does not depend on numbers or opinion but on implements.” Arendt 1969, p. 53

<sup>191</sup> See Robert M. Cover, *Violence and the Word*, 95 *YALE L. J.* 1601, 1629 (1986) (“Between the idea and the reality of common meaning falls the shadow of the violence of law, itself.”)

<sup>192</sup> Stephen Dillon, *Possessed by Death: The Neoliberal-Carceral State, Black Feminism, and the Afterlife of Slavery*, 112 *RADICAL HISTORY REVIEW* 113, 116 (2012).

<sup>193</sup> *Id.*



[provides an] instantly hypervisible image.”<sup>194</sup> In the context of immigration enforcement, “spectacular” violence might include images of children in cages near the border<sup>195</sup> or children being ripped from their parents by ICE officers at the height of the family separation crisis.<sup>196</sup> By contrast, “slow violence” is “incremental and accretive”<sup>197</sup> In the immigration context, it might include the violence of long queues to obtain a family sponsored visa, or the violence of a behemoth and intractable bureaucracy that adjudicates immigration benefits.<sup>198</sup>

Stephen Lee has written of temporal violence, “slow death” and “slow violence” more deeply in the context of immigration. Lee notes that the concept of slow death is one that allows us to see the “widespread suffering that deserves condemnation but evades meaningful detection.” Lee explains that slow death “helps us see what is ignored and muted. Rather than ‘[f]alling bodies, burning towers, exploding heads, avalanches, volcanoes, and tsunamis,’ slow violence captures ‘[s]tories of toxic buildup, massing greenhouse gasses, and accelerated species loss due to ravaged habitats’—harms which are also ‘cataclysmic, but . . . in which casualties are postponed, often for generations.’”<sup>199</sup> Lee argues convincingly that “slow death offers a paradigm that helps identify unspectacular and therefore hard-to-notice acts of family separation such as those that occur within the context of immigration admissions, enforcement, adjustment, and transnational banking” and that the slow death paradigm can help us understand, and push back against, the normalization of immigration suffering.<sup>200</sup>

In the criminal legal system, scholars have noted the “slow violence” of modern day policing.<sup>201</sup> Kramer and Remster explain how slow violence is attritional and unseen.<sup>202</sup> That the slow violence of policing is not just the physical violence inflicted on those stopped, arrested and detained by

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<sup>194</sup> ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 13 (Harv. Univ. Press 2011).

<sup>195</sup> See *supra* note 12 and accompanying text.

<sup>196</sup> See Michael Garcia Bochenek, *US: Family Separation Harming Children, Families: 5-Year-Olds Held Without Adult Caregivers*, HUM. RTS WATCH (July 11, 2019), <https://www.hrw.org/news/2019/07/11/us-family-separation-harming-children-families#>; Steve Almond, *We Are Ripping Young Children From Their Mother's Arms. This Is Who We've Become*, WBUR (May 30, 2018), <https://www.wbur.org/cognoscenti/2018/05/30/ice-trump-administration-forced-separation-steve-almond>.

<sup>197</sup> ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2 (Harv. Univ. Press 2011).

<sup>198</sup> For example, an asylee who wants to reunite with her spouse or child abroad must wait, on average, more than one year; the average wait time for an asylee to get her green card is more than three years; <https://egov.uscis.gov/processing-times/>. An unmarried child of a US Citizen who wishes to immigrate from Mexico must wait an astonishing twenty three years. <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-january-2022.html>. Outside the scope of this paper are the ways in which bureaucracy “makes possible, facilitate[s], and perhaps even causes the thoughtless use of public power,” both because bureaucracy insulates those who make policy from witnessing the impact of that policy, and because bureaucracy diffuses responsibility. See Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1453–54 (1983).

<sup>199</sup> Lee, *supra* note X, at 2328 (quoting Nixon, *supra* note 26, at 13).

<sup>200</sup> Lee, *supra* note X, at 2384.

<sup>201</sup> See Rory Kramer & Brianna Remster, *The Slow Violence of Contemporary Policing*, 5 ANN. REV. OF CRIMINOLOGY 43, 44-45 (2022).

<sup>202</sup> *Id.* at 44.

police, but the broader impact on that individual's family and community.<sup>203</sup> Understanding slow violence—in contrast to fast, or spectacular violence—also helps us focus on how society normalizes and reifies social inequity *through* this violence.<sup>204</sup>

Importantly, Jenna Marie Christian and Lorraine Dowler have complicated the binary of slow and spectacular violence,<sup>205</sup> noting that feminist scholars have long theorized different kinds of violence not only in consideration of their pace, but through the lens of “gendered and raced epistemologies that privilege the public, the rapid, the hot, and the spectacular.”<sup>206</sup> Christian and Dowler argue for a dismantling of the binary, “calling for us to see the political and geopolitical dimensions of the not so extraordinary—spaces and rhythms of life that are too often ignored.”<sup>207</sup>

Why does naming this violence matter? Understanding and theorizing different forms of violence is important because violence is rooted in complex histories of colonialism, slavery, racism and other inequitable structures.<sup>208</sup> To name this violence matters because it erodes its reification and reproduction; it brings this violence out into the light, gives it meaning and opens the door to dismantling it. So too in the immigration space.

#### B. The “Violence of Invisibility”

Spectacular violence and slow violence are both temporal, measured by their speed over time. By contrast, the “violence of invisibility” is geographic. Black feminist scholars have long noted that “the very pervasiveness of violence can lead to its invisibility.”<sup>209</sup> Framing certain immigration enforcement practices within the paradigm of the “violence of invisibility” is useful because it surfaces the lie in these practices, collectively known as “alternatives to detention.” Surfacing this lie reveals the violence in offering an alternative that, in fact, still surveils, still cages, still monitors and still ostracizes and stigmatizes.

There is additional value in naming and describing the “violence of invisibility.” Spectacular violence in particular is a problem of excess -

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<sup>203</sup> *Id.* at 44-45, 50-52.

<sup>204</sup> See Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1, 7 (2022) (Starting in the 1980s, there was a shift in policy, resulting in the use of immigration detention as the norm instead of the exception.”).

<sup>205</sup> Often seen as “slow” violence versus “spectacular” violence, but as Christian and Dowler explain, the binary - which they seek to disrupt - could also be framed as, “personal and political, hot and banal, violence and peace, and intimacy and war.” Jenna Marie Christian & Lorraine Dowler, *Slow and Fast Violence: A Feminist Critique Binaries*, 18 ACME: INT’L J. FOR CRITICAL GEOGRAPHIES 1066, 1067 (2019).

<sup>206</sup> *Id.* at 1066.

<sup>207</sup> *Id.* at 1069.

<sup>208</sup> Rory Kramer & Brianna Remster, *The Slow Violence of Contemporary Policing*, 5 ANN. REV. CRIMINOLOGY 43, 45 (2022).

<sup>209</sup> Patricia Hill Collins, *It’s All in the Family: Intersections of Gender, Race, and Nation*, 13(3) HYPATIA 62, 66 (1998).

“spectacle as the route to empathy means the atrocities itemized need to happen more often or get worse, to become more atrocious each round in hopes of being registered.”<sup>210</sup> As Mariame Kaba has explained, only highlighting “the spectacle” leaves us having to ratchet up the level of suffering in order to attract even a modicum of empathy. When violence is invisible, when we lead those subjected to it to believe that it is not happening, the lie is even more insidious, and the danger it can sow is more catastrophic. Indeed, “[t]o make someone invisible is [itself] an act of violence.”<sup>211</sup> When noncitizens are released from custody and placed in so-called ATD programs, we lead them to believe that what is happening to them is a benefit, a blessing, a better option. When in fact, they continue to suffer.

As noted earlier, the term “violence of invisibility” is mentioned, as far as I can determine, for the first time in a 1991 article about violence against women of color.<sup>212</sup> Other works describe “invisible violence” or “legal violence” particularly as they relate to domestic violence, sex work and immigration law.<sup>213</sup> Legal violence—or sanctioned, legalized or social suffering—is also distinct from “the violence of invisibility” as the former describes the ways in which our state and federal laws enable or perpetuate harm, while the latter is about not what is legal, but what is visible.<sup>214</sup> Though its legality, and the credibility it gets from being state sanctioned, may make it both harder to undo, and more harmful.

In part because legal literature has given little attention to this framework, this article relies on the scholarship of political geographers who are useful guides in theorizing the “violence of invisibility” because they can help us understand how space, place and time shape violence.<sup>215</sup>

Put another way, the field of political geography can help us understand violence as not just an expression of power, and not just as a result or an outcome. Violence, rather, can be described as a “processual and unfolding moment,”<sup>216</sup> that occurs over time. But also, an event that occurs across

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<sup>210</sup> Kaba, *supra* note X, at 85.

<sup>211</sup> Noell K Bridgen, *A Visible Geography of Invisible Journeys: Central American Migration and the Politics of Survival*, 4 INT’L. J. MIGR. & BORDER STUD. 71 (2018) (quoting Christine M. Kovic & Francisco Arguelles, *The Violence of Security: Central American Migrants Crossing Mexico’s Southern Border*, 2 ANTHROPOLOGY NOW 87, 94 (2010) (noting the paradox that “members of marginalised groups are also hyper-visible; that is, in being defined as outsiders, they stand out and are perceived as being out of place”); see also Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 158 (2022).

<sup>212</sup> G. Chezia Carraway, *Violence Against Women of Color*, 43 STAN. L. REV. 1301, 1305 (1991).

<sup>213</sup> See e.g., Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39 (2017) (noting that it’s critical to name invisible violence not only to help survivors heal from trauma but also because of the value of acknowledging invisible violence against black women for mainstream women’s movements and groups); Cecilia Menjivar & Leisy J. Abrego, *Legal Violence: Immigration; Law and the Lives of Central American Immigrants*, 117 AM. J. SOCIO. 1380, 1386 (2012).

<sup>214</sup> See e.g., Cecilia Menjivar & Leisy J. Abrego, *Legal Violence: Immigration; Law and the Lives of Central American Immigrants*, 117 AM. J. SOCIO. 1380 (2012).

<sup>215</sup> See Springer & Billon, *supra* note 22, at 2.

<sup>216</sup> See Springer & Billon, *supra* note 22, at 2.

*space*; an event or series of events that do not exist only “through [their] location-based implications.”<sup>217</sup>

Political geographers can help us see the unjust uses of human power; “the normalized quiet of unseen power”<sup>218</sup> and the violence wrought through what is not visible, except—and *especially*—to those experiencing it. The largely invisible suffering experienced by noncitizen communities in ATD is exactly the kind of harm “whose ordinariness *is* [its] violence.”<sup>219</sup>

#### Part IV: The Violence Wrought by Digital Cages Demands Abolition

So-called alternatives to detention, including ankle shackles and the broader menu of surveillance and tracking programs, are violent in the ways that they are invisible to those with power and those not subjected to their constant surveillance and monitoring.<sup>220</sup> They are violent because they have become “ordinary” and mundane. Ankle shackles and related surveillance perform the lie that the enforcement regime known as “Alternatives to Detention” is different, more benign, and gentler. Violence in this way is “incremental and accretive, its calamitous repercussions playing out across a range of temporal scales.”<sup>221</sup> As explained above, this slow creep of surveillance and its attendant harms is devastating to those it impacts.

And there is significant harm in the failure to recognize the legitimate suffering that this kind of monitoring and surveillance creates.<sup>222</sup> Ankle shackles and constant monitoring and surveillance cause this harm, while simultaneously expanding the breadth of immigration enforcement and surveillance, thereby generating greater harm, and dispersing it more broadly.

The violence of detention, deportation and now, alternatives to detention, is well documented here and elsewhere. Insofar as we hope to both move away from this violence and closer to justice, what would that require?

Too often, those of us who seek justice ask, “what do we have now, and how can we make it better?”<sup>223</sup> Instead, Kaba and other abolitionists

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<sup>217</sup> James Tyner & Joshua Inwood, *Violence as Fetish Geography, Marxism, Dialectics*, 38 PROGRESS IN HUMAN GEOGRAPHY 771 (2014)

<sup>218</sup> Edward W. Said, *The Public Role of Writers and Intellectuals*, 273(8) NATION 27, 31 (2001).

<sup>219</sup> Chloe Ahmann, ‘*It’s exhausting to create an event out of nothing*’: *Slow Violence and the Manipulation of Time*, 33 CULTURAL ANTHROPOLOGY 33, 142 (2018); *see also* NANCY SCHEPER-HUGHES DEATH WITHOUT WEeping: THE VIOLENCE OF EVERYDAY LIFE IN BRAZIL (Berkeley: Univ. of California Press 1992) (describing “everyday violence”).

<sup>220</sup> *See* Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 158 (2022) (“the imposition of punitive surveillance is all but invisible”).

<sup>221</sup> ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* (Harvard Univ. Press 2011).

<sup>222</sup> *See e.g.*, Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

<sup>223</sup> MARIAME KABA, *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 3 (2021).

encourage us to ask, “what can we imagine for ourselves and the world?” Put another way, how can we address or repair harm in ways that do not rely on the same kinds of structural oppression and violence that got us here? What world would we dream up, if we could?

Using a framework created by abolitionists and movement workers, this section will work through a series of questions to evaluate whether and how the violence of ATD and ankle shackles is the kind of “reformist reform” that perpetuates a deeply violent system, or, instead, works toward its demise. I use this framework intentionally. Too often those of us who write about justice do so alone or with each other, rather than in conversation with those impacted. By taking cues directly from abolitionist scholars and movement organizers, I seek to bring my scholarship more into dialogue with those doing the important work of moving us closer to liberation and justice.

The abolitionist framework I employ is modeled on the work of Angélica Cházaro, Mijente, Detention Watch Network and Marbre Stahly-Butts and Amna A. Akbar.<sup>224</sup> The foregoing inquiry proceeds through a series of four questions, designed to ensure that rather than inadvertently creating or replicating new systems of violence, we dismantle and replace them.<sup>225</sup>

To begin, we ask whether ankle shackles and ATD reduce the scale and scope of immigration enforcement? In short, no. In fact, ATD vastly increases the number of persons subject to the monitoring and surveillance of ICE and its subcontractors. In addition to the 40,000 people in detention, ATD, at present, ensnares over 376,000 more. All of these individuals are subject to constant monitoring and surveillance, as are others with whom they reside.<sup>226</sup> If a noncitizen with an ICE administered ankle shackle fails to comply with the terms of their “release”, they can be immediately detained by ICE. ATD, rather than offer a step toward abolition, expands the scale and scope of detention enforcement exponentially.

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<sup>224</sup> See Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (2021); MIJENTE, AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA (2018); ALY PANJWANI & HANNAH LUCAL, JUST FUTURES L. ET AL., TRACKED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS 4-5 (2022), [https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped\\_final.pdf](https://notechforice.com/wp-content/uploads/2022/05/TrackedTrapped_final.pdf) [perma.cc/73N2-RNWQ]; DETENTION WATCH NETWORK, *Ending Immigration Detention: Abolitionist Steps vs. Reformist Reforms*, [https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms\\_DWN\\_2022.pdf](https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022.pdf) (2022); Marbre Stahly-Butts & Amna A. Akbar, *Reform for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544 (2022).

<sup>225</sup> See Marbre Stahly-Butts & Amna A. Akbar, *Reform for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1552 (2022) (emphasizing the importance of what Stahly-Butts and Akbar might refer to as true “radical reform”).

<sup>226</sup> Nina Bernstein, *Hunts for ‘Fugitive Aliens’ Lead to Collateral Arrests*, N.Y. TIMES (July 23, 2007), <https://www.nytimes.com/2007/07/23/nyregion/23operation.html> [perma.cc/NL2G-MMZZ]; Maha Ahmed, *ICE’s Latest Raids Swept up More Than 500 Whose Only Crime Was Being in the United States*, MOTHER JONES (Aug. 2, 2017), <https://www.motherjones.com/politics/2017/08/ices-latest-raids-swept-up-more-than-500-whose-only-crime-was-being-in-the-united-states/>; Nick Miroff, *Deportations Slow Under Trump Despite Increase in Arrests by ICE*, WASH. POST (Sept. 28, 2017), [https://www.washingtonpost.com/world/national-security/deportations-fall-under-trump-despite-increase-in-arrests-by-ice/2017/09/28/1648d4ee-a3ba-11e7-8c37-e1d99ad6aa22\\_story.html](https://www.washingtonpost.com/world/national-security/deportations-fall-under-trump-despite-increase-in-arrests-by-ice/2017/09/28/1648d4ee-a3ba-11e7-8c37-e1d99ad6aa22_story.html) [perma.cc/DE8V-U9R9]; Michael Barbaro, *‘The Daily’: A Day with I.C.E.*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/podcasts/the-daily/the-daily-a-day-with-ice.html> [perma.cc/X5LX-QFBP].

Do ankle shackles and ATD chip away at the current system without creating new harms? No. ATD presumes the need for an immigration carceral system that incorporates technology to surveil and monitor large numbers of noncitizens. ATD grows the national budget, and political appetite, for immigration enforcement, and in fact diversifies the menu of more politically palatable options available to enforce US immigration law. In so doing, ATD creates new, and more disparate—and insidiously invisible—harms. The violence of immigration enforcement is now extended in breadth and scope, under the guise of reform.

Do ankle shackles and ATD help some people at the expense of others? That is, do we sacrifice the wellbeing, safety and freedom of some, for the benefit of others. Most certainly yes. To be eligible for ISAP III, participants must be 18 years of age or older and at some stage of their removal proceedings.<sup>227</sup> Statistics show that 90% of participants in ISAP III have not been convicted of a crime.<sup>228</sup> During a similar time period, ICE statistics reveal that about 90% of those detained *had* been convicted of a crime or had criminal charges pending.<sup>229</sup> ISAP III clearly preferences for enrollment those noncitizens who have not had any interaction with the criminal legal system. What’s more, individuals whose citizenship is recorded as Mexico and the Northern Triangle make up 88% of those enrolled in Alternatives to Detention.<sup>230</sup> While the same group, over a similar time period, makes up only 52% of those detained, suggesting a preference for detention for those who are not from Mexico and the Northern Triangle.<sup>231</sup>

And finally, do ankle shackles and ATD provide relief to people who could be or are currently detained or surveilled? No. ICE itself concedes—seemingly proudly—that ATD programs “should not be considered... a substitute for detention.”<sup>232</sup> Instead, according to DHS, “these programs have enhanced ICE’s ability to monitor more intensively a subset of foreign nationals released into communities.”<sup>233</sup> ICE’s ISAP III goal—casting a wider net, ensnaring more individuals and families—will achieve far greater and more pervasive violence than detention alone. ATD does not provide relief for people who could be or are currently detained or surveilled. Rather, these programs expand and entrench surveillance, reify systems of enforcement while dangerously advertising themselves as something more benign.

ICE’s Alternatives to Detention program is a “reformist reform” that relies on the same oppressive and violent structures as traditional immigration

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<sup>227</sup> See Singer, *supra* note 116.

<sup>228</sup> *Id.* at 9 fig. 3.

<sup>229</sup> *ERO FY 2020*, DEP’T OF HOMELAND SEC., UNITED STATES IMMIGRATIONS AND CUSTOMS ENFORCEMENT (Oct. 29, 2021), <https://www.ice.gov/features/ERO-2020>.

<sup>230</sup> See Singer, *supra* note 116 at 9 fig. 2.

<sup>231</sup> *Immigration and Customs Enforcement Detention: ICE Data Snapshots up to July 2019*, TRAC IMMIGRATION (last visited Feb. 1, 2022), <https://trac.syr.edu/phptools/immigration/detention/>.

<sup>232</sup> See Singer, *supra* note 116.

<sup>233</sup> *Id.*

detention that result in significant physical and mental harm to noncitizens, their families and their communities. ATD “improves” or makes more efficient a system built on punishment, banishment and social control. By explicitly naming this kind of violence—this violence of invisibility—we can take aim at ending it.

## **Conclusion**

Michelle Alexander says of digital enforcement, “[m]any of the current reform efforts contain the seeds of the next generation of racial and social control, a system of ‘e-carceration’ that may prove more dangerous and more difficult to challenge than the one we hope to leave behind.”<sup>234</sup> What if, instead of improving upon an inherently violent system by offering more “benign” and efficient alternatives, we sought to end it? Digital cages cannot provide a panacea when they come packaged as part of a violent and oppressive enforcement regime. The rate at which ICE has expanded its menu of digital enforcement offerings is staggering. Instead of reducing harm and violence, digital cages have expanded the breadth and depth of ICE’s enforcement reach. If we are serious about abolition, we must end not only the brick-and-mortar carceral state, but the digital cages that seek to replace it.

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<sup>234</sup> Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8. 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html>.