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A First Amendment Law for Migrant Emancipation

Cover Page Footnote

George Butler Research Professor, Associate Professor of Law, University of Houston Law Center. Many thanks to the Georgia Law Review for convening this cutting-edge symposium. Special thanks to Paige Medley and Taylor Cressler for their tireless work to make the symposium a success. Thanks also to our faculty host, Jason Cade, and my fellow attendees. Events like this sustain and nurture the production of knowledge and the life of the mind.

A FIRST AMENDMENT LAW FOR MIGRANT EMANCIPATION

*Daniel I. Morales**

The First Amendment promises to change our world, but like any legal doctrine, its radical potential is stymied by the status quo bias of the legal system that administers it. For migrants, I urge here, this guarantor of free speech and expression does even less than it does for other subordinated groups. The formal and informal disabilities that migrants face in the public square—like the omnipresent threat of deportation—make existing First Amendment doctrine a weak and unreliable ally in the fight for migrants’ rights. It is possible to imagine another, emancipatory First Amendment law that might better facilitate the alteration of migrants’ relationship to our polity; but getting there would require jettisoning cherished elements of current doctrine, like the speech-action distinction and the law’s commitment to neutrality with respect to the social status of the speaker. Unless the doctrine commits to elevating the powerless over the powerful, free speech will always fall short of its potential to help to liberate the downtrodden of all stripes, especially migrants.

* George Butler Research Professor, Associate Professor of Law, University of Houston Law Center. Many thanks to the *Georgia Law Review* for convening this cutting-edge symposium. Special thanks to Paige Medley and Taylor Cressler for their tireless work to make the symposium a success. Thanks also to our faculty host, Jason Cade, and my fellow attendees. Events like this sustain and nurture the production of knowledge and the life of the mind.

American First Amendment law is notoriously permissive,¹ and we² like it that way. We tell ourselves all the sturm-und-drang it creates serves high-minded functions. Robert Post, for one, has emphasized the way the First Amendment protects our collective right to self-determination; he writes that the First Amendment must permit “all possible objectives, all possible versions of national identity, [to] be rendered problematic and open to inquiry.”³ As we know, the objectives that the First Amendment puts on the table are so extreme that we are even allowed to advocate for violent revolution.⁴ On January 6, 2021, we learned that we could not only

¹ See generally Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018) (noting the extreme views that the First Amendment protects full expression of); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1389–90 (2017) (explaining the transformation of modern First Amendment doctrine through a modern shift striking down limits on commercial speech and corporate political spending). While my framing takes a critical tone, the criticism is aimed not at the First Amendment’s radicalism, but at the unequal application of that radicalism across arguments and social groups. The costs of more restrictive speech norms for social change can be stark. See, e.g., Jenny Nordberg, *The Case that Killed #MeToo in Sweden*, N.Y. TIMES (Apr. 3, 2022), <https://www.nytimes.com/interactive/2022/03/15/opinion/cissi-wallin-fredrik-virtanen-metoo-sweden.html> (discussing how strict libel laws have led numerous #MeToo accusers in Sweden to be criminally punished because of more restrictive free speech standards).

² My use of “we” here intends to capture the dominant mode of discourse about the First Amendment. The discussion tends to be led by white men, and the most prominent dissenters from the prevailing mode of free-wheeling First Amendment norms, theories, and doctrine tend to be women and members of marginalized groups. See, e.g., CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 210–11 (1987) (showing how a feminist subject position reveals the violence that pornography, permitted under the First Amendment, creates against women). See generally Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989) (showing how free-wheeling free speech law fails to account for the perspective of victims of hate speech).

³ Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1119 (1993).

⁴ Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 120–21 (1988) (explaining why, when the freedom of speech is reformulated as “freedom of communicative action,” the government cannot punish a person for using speech to advocate for a violent revolution without running afoul of the First Amendment); David C. Williams, *Civic Constitutionalism, the Second Amendment, and the Right of Revolution*, 79 IND. L.J. 379, 387 (2004) (noting that the Framers “imagined that the people could make a revolution only as a collective whole” when they drafted the Constitution).

speak revolution, but we could “coup-it-out” and call it speech in retrospect;⁵ at least we could call it speech if the “we” that did the coup-ing was composed of members of the right social group, was a part of the “right” hierarchy, and aligned with just the right institutions of power. The rebranding of the January 6 insurrection as First Amendment “speech,” as audacious as it was—and as unlikely as it was to survive judicial scrutiny—nonetheless exposed the radicalism of First Amendment *culture* and the underlying asymmetries of power and status that operate in the background of First Amendment doctrine, culture, and theory.

No matter the universal rhetoric of the First Amendment, the social, political, and legal status of the speaker—the “who” that speaks—has always limited and regulated what can be said, where it can be said, and, most importantly, the persuasive power of what is said. Women of color know this; indigenous people know this; white women know this; minoritized men know this; LGBTQ+ people know this; migrants and the undocumented know this. They know this because all of their voices are systematically discounted in the public square. On the rare occasions that such voices are valorized, the words spoken from non-white, non-male mouths have often been modulated to fit the normative framework set by the ideal free speaker.⁶ In settings quotidian and august, from the water cooler to the Senate Judiciary Committee hearing, *who* speaks (really the speaker’s subject position,⁷ as cultural theorists call it)

⁵ See Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack ‘Legitimate Political Discourse,’* N.Y. TIMES, (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html> (explaining the Republican National Committee’s resolution to censure GOP Representatives Liz Cheney and Adam Kinzinger for participating in the bipartisan House committee investigating the January 6 insurrection).

⁶ Christina Beltrán’s concept of multicultural whiteness helps to explain how non-whites can nonetheless participate in white supremacist ideologies and amplify white-supremacist messages. See Cristina Beltrán, *Opinion: To Understand Trump’s Support, We Must Think in Terms of Multiracial Whiteness,* WASH. POST (Jan. 15, 2021), <https://www.washingtonpost.com/opinions/2021/01/15/understand-trumps-support-we-must-think-terms-multiracial-whiteness/> (“Multiracial whiteness reflects an understanding of whiteness as a political color and not simply a racial identity . . .”).

⁷ See, e.g., MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* 5 (Vintage Books 1994) (1971) (explaining the positioned exchange between observer and observed as conceptual, the “subject and object, the spectator and the model, revers[ing] their roles to infinity,” with one’s role depending on their relation to the other).

determines what can be said and how what is said is taken in by those with power.

When it comes to the First Amendment “in the streets”—the speech that encompasses acts as much as words—the differences are perhaps starker and more impactful. Just last year, peaceable Black Lives Matter protestors routinely encountered militarized police responses, while armed white nationalists consistently garnered less surveillance and scrutiny and more corresponding freedom to march and message as they pleased.⁸ In retrospect, the Unite the Right Rally in Charlottesville, Virginia, was a kind of prelude to the January 6 Insurrection.⁹ Police resources in Charlottesville were not adequately mobilized because the speakers were high status—mostly white men—and viewed with less fear and more charity than their lower status fellow citizens. Much the same happened at the Capitol on January 6.¹⁰

These power differentials—seemingly ineluctable—tame the First Amendment’s revolutionary potential, or worse, as we’ve recently encountered, give that revolutionary potential a valence that is biased towards the maintenance of status quo hierarchies.¹¹ This is not to say that the First Amendment has no value for the downtrodden punching up; it is essential, and free speech does facilitate legal and social change that would be impossible without

⁸ See, e.g., Aaron Morrison, *Race Double Standard Clear in Rioters’ Capitol Insurrection*, AP (Jan. 7, 2021), <https://apnews.com/article/congress-storming-black-lives-matter-22983dc91d16bf949efbb60cdda4495d> (highlighting the different responses to Black Lives Matter protests and the Capitol insurrection and noting that the “key difference” was that one group was “overwhelmingly Black Americans and their allies,” while the other group was “overwhelmingly white Americans”).

⁹ See FACING HIST. & OURSELVES, *UNITE THE RIGHT RALLY IN CHARLOTTESVILLE TIMELINE*, https://www.facinghistory.org/sites/default/files/Unite_the_Right_Rally_in_Charlottesville_Timeline.pdf (outlining the timeline and substance of the events leading up to and following the Unite the Right Rally).

¹⁰ See, e.g., Rachel Carson & Samantha Schmidt, *Lafayette Square, Capitol Rallies Met Starkly Different Policing Response*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison/> (outlining the inadequate response to the Capitol insurrection).

¹¹ See Lakier, *supra* note 1, at 2153–54 (explaining how unequally distributed power stifles the “uninhibited, robust, and wide-open’ public debate the First Amendment is supposed to guarantee”).

it—including for migrants.¹² My point is rather that the First Amendment’s potential to facilitate social change is not what we claim it to be for *everyone*.¹³ Migrants are less “everyone”—less “us” as a legal matter—than anyone else in the polity, so migrants’ use of the First Amendment poses this general problem *in extremis*.

This piece takes up the question of what First Amendment law would need to look like in order to actually facilitate the *possibility* of migrant emancipation. By emancipation, I mean a revolution in the rights of migrants. I mean much more than amelioration of harms and more than just creating a safe space free from fear where immigrants, especially the undocumented, can advocate for the marginal betterment of their economic and social subordination. I am not discounting the necessity or importance of this front-line, back-breaking, ameliorative work—that work is essential.¹⁴ But, it is also work that protects just the most basic rights to speak that migrants should have. That is, if the First Amendment were to recognize a right that accrues to immigrants not to be deported in retaliation for the content of their speech, that would be an incredible and valuable legal accomplishment. It also would not be enough runway to facilitate the emancipation of immigrants that I am talking about here.

To explain, let me first define “emancipation.” As students of American history, the word “emancipation” has a specific and intended resonance to the emancipation of enslaved people during the Civil War.¹⁵ Emancipation of migrants would, analogously, mean nothing less than the eradication of their subordinate status as migrants within the body politic. The wages of migrant status

¹² See Mark Engler & Paul Engler, *Op-Ed: The Massive Immigrant-Rights Protests of 2006 Are Still Changing Politics*, L.A. TIMES (Mar. 4, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-0306-engler-immigration-protests-2006-20160306-story.html> (outlining the effects that immigrant-rights activism has had on American politics).

¹³ See, e.g., Leslie Kendrick, *Another First Amendment*, 118 COLUM. L. REV. 2095, 2095–97 (2018) (explaining that although the First Amendment has made way for social change, “free speech often seems to stand in tension with equality”).

¹⁴ See generally Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y.L. SCH. L. REV. 225 (2020).

¹⁵ The resonances of the Emancipation Proclamation are the ones I intend. See Abraham Lincoln, *The Emancipation Proclamation*, in SELECT STATUTES AND OTHER DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE UNITED STATES, 1861–1898, at 59–61 (William MacDonald ed., 1903).

include deportability, banishment, exclusion, family separation, and other forms of unfreedom that are not meted out to citizens.¹⁶ The abolition of the citizen/alien distinction¹⁷ is what I mean when I say migrant emancipation. This is radical, of course, though no more radical in theory than the right to overthrow the United States government—a right articulated not just by contemporary militiamen, but also defended in the law reviews.¹⁸ Indeed, migrant emancipation is a far *less radical* concept than the right to actually overthrow the government and the associated First Amendment protected right to advocate for violent revolution, since no actual material violence is involved in migrant emancipation. Indeed, emancipation of migrants entails the elimination of violence—in particular, the violent machinery of the deportation state, with its immigrant prisons, border patrols, and visa denials.¹⁹ A world where migrants are emancipated is a world where people who wish to move for peaceful reasons can do so. Where Syrians, or Palestinians, or Ukrainians, or Guatemalans, or Salvadoreans, or any person across the globe can move to the rich West if they want to, for whatever reason. That is emancipation because it is true individual freedom; it allows people to make the most of the one life they have, unfettered by the stunted horizons that may exist in the country of their birth.²⁰ Liberal migration is, in this way, the apotheosis of the norms that undergird liberal democracy.²¹ By

¹⁶ See HARSHA WALIA, BORDER AND RULE GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 2–3 (2021) (describing some of the legal restrictions faced by migrants).

¹⁷ For a nuanced discussion of the citizen/alien line, see LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 4–5 (2006).

¹⁸ See Williams, *supra* note 4, at 386–87 (arguing that some view the Second Amendment as ensuring the American people can resist the government through armed force if the government becomes corrupt).

¹⁹ For a polemical framing of the violence of border exclusion, see WALIA, *supra* note 16, at 19–37.

²⁰ Cf. Daniel I. Morales, *Undocumented Migrants as New (and Peaceful) American Revolutionaries*, 12 DUKE J. CONST. L. & PUB. POL’Y 135 (2016) (arguing that American democracy should evolve in a way that better supports the migrant population, likening the current struggle to that which sparked the American Revolution); AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 4 (2009) (exploring “the moral problem of unburdened intergenerational transmission of citizenship”).

²¹ See JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS 28–72 (2010) (arguing that true liberalism demands rights of free movement for all persons).

contrast, incitement or commission of revolutionary violence within a liberal democracy is a symptom of democracy's incipient failure.²²

Now that I have clarified what I mean by migrant emancipation, I can elaborate how First Amendment law would need to be modified to open the *possibility*—closed under current law—for the fulfillment of migrant emancipation. One key shift would be modifying who has standing to speak and what physical spaces and places they are permitted to speak from. We need to hear from the excluded—that is, the people we do not permit to enter our borders—the people who “remain in Mexico”²³; the people “waiting in line”; and the people who lost the “diversity lottery,” or just the lottery of birth.²⁴ We do not hear from these people because they are physically outside our borders and metaphysically outside our circle of concern. They rate lower than the undocumented in this respect—even with the retaliatory potential of the deportation state and current doctrine—because they are fully outside of the frame of democratic debate.

To the extent that we do “hear” the excluded, we do so most powerfully through encounters with their bodies. The desiccated²⁵

²² Following the violent insurrection of January 6, 2021, and the active part played by former President Donald Trump, many analysts have noted a severe decay of our democratic institutions. *See, e.g.*, Sheri Berman, *Solutions for Democratic Decay*, DISSENT MAG. (Summer 2021), <https://www.dissentmagazine.org/article/solutions-for-democratic-decay> (“[P]erhaps the most consequential case of democratic decay today is in the United States, one of the oldest and most powerful democracies in the world.”).

²³ *See* Camilo Montoya-Galvez, *U.S. Expands “Remain in Mexico” Policy to Busiest Border Sector for Migrant Arrivals*, CBS NEWS (Jan. 21, 2022), <https://www.cbsnews.com/news/immigration-remain-in-mexico-policy-expand/> (explaining the expansion of “a Trump-era program that requires migrants to await their asylum hearings in Mexico”).

²⁴ *See* SHACHAR, *supra* note 20, at 4 (“[T]he bulk of the world’s population acquires citizenship on the basis of transmission at birth based on parentage or territorial location at time of birth.”).

²⁵ *See, e.g.*, Sarah Betancourt, *Forty-Three Bodies Found in Arizona Borderland Amid Brutal Heat*, GUARDIAN (July 12, 2021), <https://www.theguardian.com/us-news/2021/jul/12/us-immigration-bodies-heat-arizona> (reporting on the deaths of several dozen immigrants in the Arizona desert); Daniel Gonzalez, *Border Crossers, and the Desert That Claims Them*, USA TODAY: THE WALL, <https://www.usatoday.com/story/immigration-mexico-border-deaths-organ-pipe-cactus/608910001/> (last visited Apr. 3, 2022) (noting that since 2001, at least 2,832 deceased migrants have been found in southern Arizona); James Dobbins, Miriam Jordan & J. David Goodman, *Tractor-Trailer Used by Smugglers Was ‘Death Trap’ for Migrants Inside*, N.Y. TIMES (Jun. 28, 2022),

and drowned²⁶ corpses that litter the borders of the rich West tell us in the most concrete possible terms about the violence we are enacting with immigrant exclusion. It is no accident that these potent messages are the ones that the U.S. government has sought to bar from public consumption with its persecution of several volunteers from the advocacy group “No More Deaths.”²⁷ It is no accident that European governments have criminalized rescue by sea²⁸ or migrant smuggling by those who do so out of humanitarian concern.²⁹ The corpses that “No More Deaths” memorializes and publicizes, and the living, breathing humans whose thirst this group quenches, are the most potent messages from the excluded that reach our shores. These bodies testify to the grotesque, spectacular, and needless violence of immigration law. For want of enough visas—pieces of paper, slips granting permission—peaceable humans die.

<https://www.nytimes.com/2022/06/28/us/migrants-dead-san-antonio-texas.html> (documenting the deaths in San Antonio, Texas of 51 migrants in a trailer used to smuggle them).

²⁶ See, e.g., Karl Ritter, *1,600 Migrants Lost at Sea in Mediterranean This Year*, AP (Nov. 25, 2021), <https://apnews.com/article/immigration-africa-migration-united-nations-mediterranean-sea-0b8f0524756564850045123e6e617717> (detailing United Nations estimates on migrant drownings). The Missing Migrants Project counts 23,701 migrants that have died crossing the Mediterranean Sea to Europe since 2014. Missing Migrants Project, *Migration Within the Mediterranean*, INT’L ORG. FOR MIGRATION, <https://missingmigrants.iom.int/region/mediterranean> (last visited Apr. 3, 2022).

²⁷ See Jason A. Cade, “*Water is Life!*” (and *Speech!*): *Death, Dissent, and Democracy in the Borderlands*, 96 IND. L.J. 261, 275–77 (2020) (detailing the prosecutions of “No More Deaths” volunteers, including the recent felony prosecution of Scott Warren for providing humanitarian aid to migrants crossing the border).

²⁸ See Shalini Bhargava Ray, *The Law of Rescue*, 108 CALIF. L. REV. 619, 674 (2020) (arguing that recent policy changes demonstrate European Union nations’ resistance to NGO migrant rescues); see also Press Release, Off. of the High Comm’r of Hum. Rts., Italy: UN Experts Condemn Criminalisation of Migrant Rescues and Threats to the Independence of Judiciary (July 18, 2019), <https://www.ohchr.org/en/press-releases/2019/07/italy-un-experts-condemn-criminalisation-migrant-rescues-and-threats> (discussing human rights criticisms of Italy’s emergency decrees “imposing fines on vessels for every person rescued at sea and transferred to Italian territory”).

²⁹ Benjamin Boudou, *The Solidarity Offense in France: Egalité, Fraternité, Solidarité!*, VERFBLOG (Jul. 6, 2018), https://pure.mpg.de/rest/items/item_2618522/component/file_3221385/content (“On July 6 2018, the French Constitutional Council ruled that the commonly called ‘*delit de solidarité*’ or ‘solidarity offense’ which criminalizes any person who facilitates the irregular entry or stay of a foreigner in France is partially unconstitutional.”).

A First Amendment law for migrant emancipation would not only protect those who expose, honor, and give voice to these bodies, but it would demand a legal regime where messages like these would not require the ultimate sacrifice; where the message that the immigration regime is violent and wasteful could be spoken *without* the cost of human life. An *ameliorative* First Amendment law, by contrast, would bar the prosecution of the volunteers like Scott Warren of No More Deaths for saving these lives and telling these stories.³⁰ It would also protect the immigrants who speak out about the dangers that this migration route poses—at least those who live to tell the tale. But a First Amendment law that could facilitate the possibility of migrant *emancipation* would do much more.

What would that mean? In practice it would mean significant restraints on state enforcement action and an affirmative requirement to dial back the ferocity of the border enforcement regime. It would also mean that the First Amendment would bar certain strategies and logics from being deployed to enforce border law against peaceful migrants. For example, the reason No More Deaths exists is because of a policy choice. A few decades ago, the U.S. government undertook a strategy to make border crossing more physically dangerous by moving migratory pathways away from urban centers—which were fortified with soldiers or fencing—and towards more dangerous desert routes.³¹ A First Amendment law for migrant emancipation would prohibit this strategy because it unnecessarily chills socially important speech—the act of undocumented migration itself.³² The protection of this message involves regulating the kind, and nature, of enforcement power that

³⁰ See Cade, *supra* note 27, at 285 (describing the No More Deaths volunteers who are targeted for providing water to migrants and attempting to honor the bodies of those migrants who perished in crossing the border).

³¹ See Daniel I. Morales, *In Democracy's Shadow: Fences, Raids and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 53 (2009) (“The most tangible and devastating damage the fence has wrought is the more than doubling of the annual rate of migrant deaths . . . as migration pathways shifted from relatively safe urban areas to more dangerous rural terrain.”).

³² See Daniel I. Morales, *“Illegal” Migration Is Speech*, 92 IND. L.J. 735, 736 (2017) (theorizing “illegal” migration as “an act that speaks”).

the government can bring to bear on *conduct*³³—the act of crossing a border without permission, or “illegally” migrating. But how can we conceptualize “illegal” migration as protected speech that we cannot overly chill or tax? I refer you to my introductory framing. A First Amendment law that enables migrant emancipation will need to interrogate the speech/act distinction because doing so will attend to the power differentials between speakers, accounting in a principled way for their differences in subject position.³⁴

For example, the First Amendment, to fulfill its duties to white male citizens, may simply require the protection of speech qua speech. Why? The social status of white male citizens ensures that what they say will be heard—not simply dismissed. Their voices are heard at the ballot box, where they are overrepresented because of the malapportionment of the Senate.³⁵ Members of this group still dominate every institution—government, media, higher education, police, the military.³⁶ I do not mean this as an indictment of white men or their voices; all persons must be heard if we are to build a functional multiracial democracy together, but these are simply the facts of life in a country where that dominance is an inheritance. We must confront that inheritance with clear eyes and account for it in law, especially law that forms the bedrock for democratic debate. Such an analysis would show that speech qua speech on its own is enough to ensure that the perspective of this group of citizens is meaningfully accounted for in public discourse.

By contrast, the subject position of excluded immigrants could not be further removed from that of white male citizens. People who

³³ See John Fee, *The Freedom of Speech-Conduct*, 109 KY. L.J. 81, 82 (2020) (recognizing the fear that First Amendment scholars have traditionally had in conceptualizing expressive conduct as speech because doing so would invite “chaos”).

³⁴ Attention to subject position threatens the concept of First Amendment neutrality between speakers, but my point is that the First Amendment was never neutral because it exists within a social, legal, and economic hierarchy. See Lakier, *supra* note 1, at 2121 (theorizing a First Amendment law that works at anti-subordination).

³⁵ See JENNIFER E. MANNING, CONG. RSCH. SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE (2022), <https://crsreports.congress.gov/product/pdf/R/R46705> (laying out the demographics of the 117th Congress).

³⁶ Alexandra Villarreal, *White Male Minority Rule Pervades Politics Across the US, Research Shows*, GUARDIAN (May 26, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/may/26/white-male-minority-rule-us-politics-research> (stating that white men comprise 30% of the U.S. population but 62% of officeholders).

are not here and not citizens are *supposed* to be ignored under the Westphalian system of international law. Their voices are not *supposed* to count even though their exclusion—the denial of the opportunity to immigrate—affects *them* far more than it affects “us.” It follows then, that mere talk by the excluded—especially outside our borders seeking entry—will not be “heard”; it will not register effectively in the political and policymaking calculus. Only by entering the country “illegally,” building relationships, tilling soil (literally and metaphorically), and not being a problem, and then advocating for their rights, will the excluded be heard in the immigration debate.³⁷ Continued undocumented presence in large enough numbers does itself produce “speech” and evidence against the necessity of initial exclusion of the undocumented people present in our borders. That millions have been present in the United States without incident despite their “illegal” status tells us that that status is not valid or necessary—that the undocumented ought to be emancipated.³⁸ We could not receive that message in a form that was politically digestible and potentially transformative any other way, certainly not just by having the right to talk about cosmopolitanism or open borders in college and law school seminars. Without presence, much of the work of the ameliorative First Amendment law for migrants would not be possible either. Migrants cannot speak out against the overcriminalization of migration or retaliatory effects that they are not present to endure. All of these reasons ground the justification for treating acts like migrating in violation of the law as First Amendment speech.

A First Amendment law that embraces migrant emancipation must account for these facts in designing a set of political and legal conditions that can facilitate the possibility—not the guarantee (that would be choosing sides in an open debate)—that free movement can persuade the American polity of its viability as a legal regime. A First Amendment law that is just ameliorative, that simply prevents retaliatory deportation for speaking, cannot put

³⁷ See Morales, *supra* note 32, at 763–67 (describing how the presence of undocumented immigrants can produce speech).

³⁸ *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US> (last visited Aug. 26, 2022) (estimating an unauthorized population of around 11,047,000 people).

into circulation the speech, and, more importantly, the action that can open the potential for migrant emancipation.

Because the subject position of the undocumented encounters so many disabilities, much persuasion about the viability or necessity of migrant emancipation must happen by proxy. This symposium is an example of such proxy speech. The people gathered here are insiders of high status and with some public standing, publicizing the plight of the undocumented or immigrants and articulating and theorizing how their plight and their treatment at the hands of the state violates what we believe to be the best, most fulsome version of our cherished First Amendment norms.

The essential value of proxy speech in this context is why laws that criminalize giving advice to immigrants that might encourage their presence in the United States outside the law, prevent them from being caught up in the ICE Dagnet, or that criminalize “harboring” undocumented people, are so debilitating to the cause of migrant emancipation.³⁹ All of these laws work together to chill or discourage speech by proxy that lays the groundwork for migrant emancipation.⁴⁰ Consider the judge in Boston who was prosecuted for instructing a defense attorney to tell her client to go out the back door because ICE was there.⁴¹ That a judicial officer can properly be barred from speech that would deter law enforcement from apprehending a known legal violator would seem to pose no First Amendment problem, but my framework of migrant emancipation helps us see how we might conceptualize a problem in this context. We might say that the judge had the right to speak in furtherance of helping the migrant avoid detention for the same reasons that the First Amendment ought to prevent DHS from moving illegal

³⁹ See Daniel I. Morales, *The First Amendment and Soliciting Crimes of Migration*, TAKE CARE (Nov. 2, 2017), <https://takecareblog.com/blog/the-first-amendment-and-soliciting-crimes-of-migration> (describing the scope of federal power at the intersection of immigration and criminal law). See generally Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. Rev. 1533, 1534 (2017) (suggesting tools to decriminalize expressive conduct).

⁴⁰ See Cade, *supra* note 27, at 301–02 (describing how the government’s permit scheme and aggressive arrests serve to chill activist expression under the First Amendment because it “chills the activists’ critique of border policy as expressed through humanitarian conduct in this particular context”).

⁴¹ Liam Stack, *Judge Is Charged with Helping Immigrant Escape ICE at Courthouse*, N.Y. TIMES (Apr. 25, 2019) <https://www.nytimes.com/2019/04/25/us/judge-shelley-joseph-indicted.html>.

immigration pathways to dangerous areas: the only way the question of migrant emancipation can be effectively posed in the political system is if those excluded from immigration are physically present in the United States to question it. Immigration law enforcement that is too punitive or that makes crossing into the United States too dangerous would be prohibited under a First Amendment for Migrant Emancipation. A judge who aids the evasion of overly punitive enforcement intended to intimidate the undocumented or the deportable from exercising their rights is speech in service of migrant emancipation and ought to be protected. Likewise, laws that prohibit such speech—especially with criminal sanctions—ought to be struck down on First Amendment grounds.

My entire formulation probably strikes First Amendment people as just plain wrong on any number of levels. The speech/conduct distinction is, despite some muddling over the years, a relative bedrock of First Amendment doctrine and theory.⁴² The ability of the United States to criminalize conduct is extremely broad—especially in the immigration context—and so speech in furtherance of evasion of immigration enforcement looks pretty far afield from the core of First Amendment speech. But this intuition of wrongness, of category error or poor doctrinal fit, is something I want to lean into because it is extraordinarily revealing.

First, it shows how our broader culture overclaims the First Amendment. The doctrinal foundations of First Amendment protection hamper not just the speech of those excluded by immigration law, but many others that speak from subject positions that are relatively unprivileged. The structure of corporate power in the United States cannot adequately be attacked by labor, for example, because of stringent unionization requirements and the fact that wildcat strikes and other labor actions are forbidden or too costly for individuals to implement⁴³—not to mention *Citizens United*, which amplified corporate power still more by prohibiting

⁴² See generally Fred Schauer, *On the Distinction between Speech and Action* 65 EMORY L.J. 427 (2016).

⁴³ See generally Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161 (2018) (describing how the Supreme Court has “weaponized” the First Amendment to counter regulation of several issues, to the benefit of the wealthy in our capitalist society).

the regulation of corporate speech.⁴⁴ A First Amendment law for migrant emancipation is *also* a First Amendment law that would give more “speech” protection to conduct that seeks to challenge labor conditions. Viewing the collective withholding of labor as a form of protected speech—rather than a special case that requires the blessing of the labor regulatory regime—challenges the speech/action distinction in much the same way as I have articulated in the migration context.

There is also no question that such a radical change to First Amendment doctrine would significantly shift the balance between labor and capital and open new possibilities for social reorganization in the United States. But the labor example also shows how the policing of the speech/action distinction puts hard limits on how far the United States can stray from the status quo. It exposes that the First Amendment is not really as “radical” in the United States as we think it is. It does allow us to talk about just about anything, but change usually requires far more than just talk, so the First Amendment is not quite the facilitator of social change that we may wish or claim it to be.

Here, First Amendment scholars might suggest that I am making a category mistake, confusing speech with civil disobedience. The First Amendment should not be broadened to encompass actual legal violations, even if justifiable on political theory or moral grounds, because we have civil disobedience to fulfill that role. Civil disobedience is, deliberately, a separate category of thinking about how legal change happens.⁴⁵ But then, the First Amendment does cover some civil disobedience, right? Before James Joyce’s *Ulysses* was high art, publishing it violated obscenity laws.⁴⁶ Indeed, as a formal matter, the First Amendment

⁴⁴ *Id.* at 2163 (noting the Supreme Court’s use of First Amendment doctrine to “vindicate corporate campaign spending” in *Citizens United v. FEC*, 558 U.S. 310 (2009)).

⁴⁵ See ERIN R. PINEDA, *SEEING LIKE AN ACTIVIST: CIVIL DISOBEDIENCE AND THE CIVIL RIGHTS MOVEMENT 1–21* (2021) (challenging the myth that civil disobedience requires similar legitimization of the law that activists displayed in the Civil Rights Movement of the 1960s).

⁴⁶ See Simon Stern, *Ulysses*, *FIRST AMEND. ENCYCLOPEDIA*, <https://www.mtsu.edu/first-amendment/article/821/ulysses> (last visited Aug. 22, 2022).

depends on civil disobedience—the breaking of laws—to articulate the boundaries of free expression doctrine.⁴⁷

I understand the desire to have administrable distinctions and coherent doctrines, but much of the time these distinctions end up being biased towards status quo understandings of just where lines like this should be drawn.

Migrants are less than “us” citizens as a legal matter, and that fact troubles First Amendment doctrine; it exposes its limits and suggests that we claim too much for it. Another First Amendment is possible, and the suggestion that migrants ought to have full access to it exposes a longing in legal scholarship and activism for a First Amendment that permits more than just talk—that actually enables emancipatory revolutionary change. As in so many cases, by looking to the margins of an issue we emerge with new perspectives and broader hopes. May scholars and activists continue to demand the First Amendment migrants deserve, rather than settle for the one we have.

⁴⁷ See Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 67 n.5 (1990) (noting that courts sometimes refer to First Amendment test cases as civil disobedience).

