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Immigration Detention and Dissent: The Role of the First Amendment on the Road to Abolition

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Cover Page Footnote

Professor of Clinical Law, New York University Law School. I express my gratitude to Jason Cade, Michael Kagan, and all the participants in the Georgia Law Review 2022 Symposium for their thoughtful feedback and to Michael Leonetti for his invaluable research assistance. I also thank Taylor Cressler and all the editors of the Georgia Law Review for their excellent editorial feedback.

IMMIGRATION DETENTION AND DISSENT: THE ROLE OF THE FIRST AMENDMENT ON THE ROAD TO ABOLITION

*Alina Das**

The movement to abolish slavery relied heavily on the exercise and protection of enslaved and formerly enslaved people's freedom of speech against robust efforts to suppress their messaging. The same is true in the context of the movement to abolish immigration detention. For decades, people in immigration detention, formerly detained people, and their allies have exercised their First Amendment rights to expose the conditions of their confinement and demand their freedom. In response to their protests and other forms of individual and collective expression, detained and formerly detained immigrants have faced suppression and retaliation, threatening not only their right to speak out but also the public's right to hear their grievances.

This Essay argues that the freedom of speech is a critical right in the movement to abolish immigration detention, drawing parallels to the exercise and suppression of abolitionist speech during the time of legalized chattel slavery. It explores historical examples of protests, hunger strikes, petitions, and grievances led by detained immigrants, and the impact of these efforts on the movement to abolish immigration detention. It describes how immigration jailers routinely suppress detained immigrants' speech, often through violent means, and critiques the federal government's attempts to justify this suppression in the name of safety and security. As abolitionists argued in the movement to end slavery, freedom of speech has the power to aid in the abolition of even the most entrenched systems of control.

* Professor of Clinical Law, New York University Law School. I express my gratitude to Jason Cade, Michael Kagan, and all the participants in the *Georgia Law Review* 2022 Symposium for their thoughtful feedback and to Michael Leonetti for his invaluable research assistance. I also thank Taylor Cressler and all the editors of the *Georgia Law Review* for their excellent editorial feedback.

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I. INTRODUCTION

“Slavery cannot tolerate free speech. Five years of its exercise would banish the auction block and break every chain in the South.” – Frederick Douglass¹

“[I]f the United States is to build a more just and humane immigration system, immigrants themselves must be able to speak up. We are the only ones who can be whistleblowers inside the detention system.” – Claudio Rojas²

On December 3, 1860, to mark the one-year anniversary of abolitionist John Brown’s burial, a group of people gathered at a public hall in Boston, Massachusetts, to discuss how slavery could be abolished.³ A mob violently disrupted the gathering, and the mayor ordered the meeting cancelled.⁴ Abolitionist Frederick Douglass condemned both the mob and the mayor for a betrayal of free speech. “No right was deemed by the fathers of the Government more sacred than the right of speech. It was in their eyes, as in the eyes of all thoughtful men, the great moral renovator of society and government,” Douglass explained.⁵ It is a right that belongs to all speakers and “does not depend upon where he was born or upon his color.”⁶ Suppression of speech is “a double wrong” because it attacks not only the right to speak but also the right to listen.⁷ Douglass believed that the truth about slavery had the power to bring about its demise; therefore, it came as no surprise to Douglass that the attack on abolitionist speech was led by “men who pride themselves

¹ Frederick Douglass, A Plea for Freedom of Speech in Boston (Dec. 9, 1860).

² Claudio Rojas, Opinion, *ICE Deported Me for Appearing in a Film*, DAILY BEAST (Apr. 19, 2021, 4:55 AM), <https://www.thedailybeast.com/ice-deported-me-for-appearing-in-a-film>.

³ See Frederick Douglass & Kurt T. Lash, *Frederick Douglass’s “Plea for Freedom of Speech in Boston,”* L. & LIBERTY (Aug. 21, 2019), <https://lawliberty.org/frederick-douglass-plea-for-freedom-of-speech-in-boston/> (providing context for Douglass’s speech); see also Adam Goodheart, Opinion, *Silencing the Fanatics*, N.Y. TIMES (Dec. 2, 2010, 9:00 PM), <https://opinionator.blogs.nytimes.com/2010/12/02/silencing-the-fanatics/> (describing the occasion for Douglass’s speech).

⁴ See Goodheart, *supra* note 3 (stating that those who disrupted the anniversary gathering had orders from Boston’s mayor).

⁵ Douglass, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

upon their respect for law and order.”⁸ “Theirs was the law of slavery.”⁹

Abolitionist demands eventually ushered in a new era in which slavery was delegalized, except as punishment for crime.¹⁰ As many scholars have written, the remnants of illegal and legal slavery survived and morphed into new systems of “law and order” in the United States that have relied heavily on imprisonment to target communities of color.¹¹ A new abolition movement focuses heavily on dismantling these carceral systems.¹² And once again, in the

⁸ *Id.*

⁹ *Id.*

¹⁰ Section One of the Thirteenth Amendment, ratified in 1865, states, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1. As many scholars have written, the exception permitting slavery and involuntary servitude as punishment for a crime has had lasting implications for the vestiges of slavery within the criminal legal system. See Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 933, 990 (2019) (arguing that the Thirteenth Amendment has “functionally preserved slavery as a means of persistent racial subjugation” and may have “exacerbated slavery’s spread into states that had previously abolished the practice” through their criminal legal systems); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1528–33 (2019) (comparing the current practice of forced prison labor with the post-slavery practice of convict leasing and arguing that both practices perpetuate aspects of chattel slavery under the Thirteenth Amendment’s punishment clause).

¹¹ See, e.g., Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7 (2019) (explaining that “today’s carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained”); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1581 (2019) (tracing “the institutional transitions and juridical-cultural translations of ‘involuntary servitude’ from the carceral Middle Passage and the rise of plantation chattel to Jim Crow and the emergence of post-1960s carceral domestic war,” as well as the rise of targeted carceral systems).

¹² See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) (describing prison abolition as a “a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement”). The modern prison abolition movement coexists with many other abolitionist causes that seek “to dismantle a wide range of systems, institutions, and practices beyond criminal punishment (such as ‘the wage system, animal and earth exploitation, [and] racialized, gendered, and sexualized violence’) and forms of oppression beyond white supremacy (such as ‘patriarchy, capitalism, heteronormativity, ableism, colonialism,’ imperialism, and militarism).” Roberts, *supra* note 11, at 7 (quoting *Manifesto for Abolition, ABOLITION*, <https://abolitionjournal.org/frontpage> (last visited May 29, 2022)). The movement to abolish immigration detention, which is a carceral system relying on physical confinement, is best characterized as part of the prison abolition movement. See César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 275 (2017) (situating the abolition of immigration detention in the context of prison abolitionism).

name of “law and order,” the voices of people most directly impacted by these systems are suppressed.

These dynamics of abolitionist speech and suppression are unfolding within the movement to abolish the U.S. immigration detention system.¹³ The United States operates the largest immigration detention system in the world, detaining tens of thousands of immigrants in a series of roughly 200 immigration jails and prisons across the country on any given day.¹⁴ Immigrants in detention have spoken out and protested their confinement individually and collectively.¹⁵ Their voices have the power to change policy, just as the suppression of their voices has the power to hinder those changes.

Claudio Rojas, a husband and father who was detained in a Florida immigration jail, organized a hunger strike and worked closely with activists to share the stories of other detained people with elected officials so that they could advocate for their release.¹⁶

¹³ Many of the leading immigrant rights organizations have called for an end to all immigration detention. See, e.g., DET. WATCH NETWORK, *Ending Immigration Detention: Abolitionist Steps vs. Reformist Reforms* 1 (2022), https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022_0.pdf (arguing for complete abolition of immigration detention); AM. C.L. UNION, *ENDING ICE’S MASS DETENTION SYSTEM* 4 (2021), <https://www.aclu.org/other/ending-ices-mass-detention-system> (calling on the Biden Administration to announce a plan to phase out all immigration detention); Press Release, Hum. Rts. First, *Immigrant Rights Organizations Call on Biden to Stop Expansion of Surveillance and End the Immigration Detention System as a Whole* (Feb. 9, 2022), <https://www.humanrightsfirst.org/press-release/immigrant-rights-organizations-call-biden-stop-expansion-surveillance-and-end> (announcing a joint press release by Human Rights First, National Immigrant Justice Center, Black Alliance for Just Immigration, and other organizations demanding President Biden end all immigration detention). Scholars have also advocated for abolition of immigration detention. See, e.g., ALINA DAS, *NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS* 204 (2020) (“[R]eforms are just placeholders until we can achieve the real goal: the abolition of immigration imprisonment.”); García Hernández, *supra* note 12, at 297 (prescribing a path forward for immigration detention abolition); Peter L. Markowitz, *After ICE: A New Humane & Effective Immigration Enforcement Paradigm*, 55 *WAKE FOREST L. REV.* 89, 140–44 (2020) (arguing for the abolition of immigration detention and proposing non-carceral immigration enforcement strategies); Daniel Hatoum, *Abolition of Immigrant Family Detention: Tracing an Evolving Standard of Decency from Separation Through Imprisonment*, 47 *HOFSTRA L. REV.* 1229, 1266–77 (2019) (arguing for the abolition of immigrant family detention on constitutional “evolving standards of decency” grounds).

¹⁴ *Immigration Detention 101*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> (last visited May 31, 2022).

¹⁵ See *infra* Part II.

¹⁶ See First Amended Verified Complaint for Declaratory & Injunctive Relief & Petition for Writ of Habeas Corpus at 1–3, 12, 39, *Marcelo Rojas v. Moore*, No. 1:19-CV-20855, 2019 WL

In 2012, this collective activism made national headlines and led to a congressional investigation into conditions of U.S. immigration detention.¹⁷ But years later, when a documentary film about this activism premiered at the Sundance Film Festival, Rojas was abruptly re-detained and deported.¹⁸ Numerous organizations condemned his deportation and championed his return, citing the chilling effect that retaliatory deportation has on those who speak out about the conditions of their detention. Those organizations summarized the importance of immigrant speech and the deleterious consequences of its chilling in an amicus curiae brief supporting Rojas:

A core part of *amici*'s advocacy is amplifying the voices of immigrants, including noncitizens—by organizing public speeches, media interviews, and online campaigns in which immigrants tell their stories. . . . When the public and elected officials hear directly from those who have been marginalized, immigrant community members have the opportunity to contest

3340629 (S.D. Fla. Apr. 29, 2019) (outlining Rojas's biography and activism while in detention).

¹⁷ See Michael May, *Los Infiltradores*, AM. PROSPECT (June 21, 2013), <https://prospect.org/article/los-infiltradores> (“NIYA’s bold action drew attention to Broward and its low-priority detainees. In October 2012, 26 members of Congress sent a letter to ICE Director Morton demanding an investigation of Broward and a review of every detainee being held there.”); Aura Bogado, *Dreamers Fight Deportations*, NATION (Jan. 30, 2013), <https://www.thenation.com/article/archive/dreamers-fight-deportations/> (“Although Claudio’s case dragged on for months, he was eventually released after NIYA persuaded Florida Congressman Bill Nelson to support his case.”); *The One Thing You’re Not Supposed to Do*, THIS AM. LIFE (June 21, 2013), <https://www.thisamericanlife.org/498/transcript> (noting that Claudio and another activist moved door to door through the jail, interviewing around 600 detainees to determine who qualified to get out under the “Morton Memos” and searching for the most sympathetic cases they could find).

¹⁸ See Tim Elfrink & Isaac Stanley-Becker, *He Stars in a New Film About Infiltrating an ICE Detention Center. Now ICE Has Locked Him Up Again*, WASH. POST (Mar. 4, 2019, 6:56 AM), <https://www.washingtonpost.com/nation/2019/03/04/he-stars-new-film-about-infiltrating-an-ice-detention-center-now-ice-has-locked-him-up-again/> (reporting that Rojas’s attorney believes ICE retaliatorily detained Rojas after *The Infiltrators* debuted); Monique O. Madan, *He Exposed Abuse at a Florida Immigrant Detention Center. Now He’s in Prison*, MIA. HERALD (Mar. 5, 2019, 7:56 AM), <https://www.miamiherald.com/news/local/immigration/article227043044.html> (describing Rojas’s arrest by ICE during his annual supervision check-in, including agents detaining him without allowing his attorneys to talk to him); Rojas, *supra* note 2 (“To justify the sudden deportation, ICE falsely accused me of ‘crimes.’ It was clear that the true motivation was to punish me for speaking out.”).

misconceptions about immigrants and bring a human face to the immigration debate. This allows immigrants to be viewed as people, not just statistics. . . . [R]etaliatory enforcement . . . places a severe chill on *amici*'s advocacy and on the willingness of immigrants to speak out on these important public issues. Limiting the public's ability to hear from people with first-hand experience of injustices imposed by the immigration laws and policies impoverishes the public discourse on immigration, diminishing the principle established at the founding of this country that "debate on public issues should be uninhibited, robust, and wide-open."¹⁹

The suppression of freedom of speech in immigration jails and prisons is a modern example of the kind of "double wrong" that Douglass condemned in the context of the movement to abolish slavery. Silencing people behind bars deprives them of a fundamental right while also robbing free people of their right to hear about experiences in immigration detention.²⁰ It is part of a broader pattern, as I have previously written, in which federal immigration officials have surveilled, fined, arrested, detained, and deported immigrant activists in retaliation for speaking out about the ills of U.S. immigration policy.²¹

This Essay examines the exercise and suppression of First Amendment rights in the context of the U.S. immigration detention system. By surfacing this history and drawing parallels to the exercise and suppression of abolitionist speech during the time of legalized chattel slavery, I hope to underscore the importance of protecting the voices of people challenging legalized constraints on liberty.²² In Part II, I describe the ways in which people in

¹⁹ Motion of 12 Immigrants' Rights Advocacy Organizations as *Amici Curiae* in Support of Appellant-Petitioner, Urging Reversal at 1–3, *Rojas v. Moore* No. 19-12438 (11th Cir. Feb. 4, 2020) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

²⁰ *Id.*

²¹ See Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y.L. SCH. L. REV. 225, 256 (2020) ("The spike in retaliation against immigrants and immigrant rights activists over the last several years has had a chilling effect on speech and organizing efforts by noncitizens and citizens alike, and has contributed to an expanding immigration enforcement apparatus.").

²² Many scholars have connected the legal systems that enforced chattel slavery—particularly the Fugitive Slave Acts—and the legal systems that enforce laws of exclusion

immigration jails and prisons have historically exercised their rights to freedom of speech. I explore historical examples of collective action, hunger strikes, protests, grievances, litigation led by detained immigrants, and the impact of these efforts on the movement to abolish immigration detention. In Part III, I describe how immigration jailers routinely suppress detained immigrants' speech, often through violent means. I explain and critique the federal government's attempts to justify this suppression in the name of safety and security. As abolitionists argued in the movement to end slavery, freedom of speech has the power to aid in the abolition of even the most entrenched systems of control.

II. THE EXERCISE OF FIRST AMENDMENT RIGHTS IN IMMIGRATION DETENTION

"We will continue our strike until we get results or until we die." — Gafoor Masoud, hunger striker²³

Resistance to slavery, like the resistance to carceral systems today, originated with those most directly impacted. Enslaved people rebelled against slavery in the United States for centuries,

and deportation today. See, e.g., Sandra L. Rierson, *Fugitive Slaves and Undocumented Immigrants: Testing the Boundaries of Our Federalism*, 74 U. MIA. L. REV. 598, 602 (2020) ("Like the Fugitive Slave Acts, efforts to increase enforcement of federal immigration laws have engendered conflict between federal and local governments."); Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 952 (2012) ("The similarities between current immigration policies and the Fugitive Slave Acts provide insight into current enforcement policies and how federal policies should not follow the same patterns that earlier failed to provide equal protection under the law."); James A. Kraehenbuehl, Comment, *Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law*, 78 U. CHI. L. REV. 1465, 1481 (2011) ("[T]he antebellum fugitive slave debate and the current immigration debate have several intriguing similarities that allow lessons learned from the former to inform the latter."); Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273, 287 (2009) ("[M]ore must be written about the importance of indentured servitude and other forms of bonded labor as antecedents to modern immigration law."). These scholars have encouraged others to make similar connections while acknowledging, as Professor Daniel Kanstroom has noted, that "the repugnant but consistent classification of fugitive slave cases as matters of property renders comparison with the deportation system difficult." DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 81 (2007).

²³ *22 Afghan Refugees Begin Hunger Strike*, N.Y. TIMES, Aug. 31, 1985 (§ 1), at 14 [hereinafter *Afghan Refugees*] (describing an August 1985 hunger strike by Afghan refugees in protest of their detention at Varick Street Detention Center).

both prior to and after the founding.²⁴ After years of rebellion in Saint Domingue, through which free and enslaved Black people overthrew French slaveholders and created the independent nation of Haiti in 1804, Black people and their abolitionist allies in the United States were further inspired to demonstrate against slavery.²⁵ Several states cracked down on both the movement of free Black people within the United States²⁶ and their freedom of speech and expression because slaveholding states viewed exposure to free Black people or abolitionist messaging as a potential incitement to revolt.²⁷

Undeterred, enslaved people spoke out about their conditions, and many formerly enslaved people became free speech champions. Douglass was not alone in his belief that the consistent exercise of free speech about slavery “would banish the auction block and break every chain in the South.”²⁸ Abolitionist William Brown wrote and publicly spoke extensively about his experience as a formerly enslaved person, arguing that proslavery influences could only be

²⁴ See Erin Blakemore, *How Two Centuries of Slave Revolts Shaped American History*, NAT'L GEOGRAPHIC (Nov. 8, 2019), <https://www.nationalgeographic.com/history/article/two-centuries-slave-rebellions-shaped-american-history> (“Between the 17th and 19th centuries, enslaved Africans and African Americans in British North America and the United States staged hundreds of revolts.”); see also William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1089–113 (2021) (detailing enslaved persons’ views on the First Amendment, their manifestations of protected speech, and the legal regime that restricted their free speech for the purpose of preventing rebellions); Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 73–75 (1990) (identifying pre-Civil War antislavery protest and rebellion as the foundation of modern civil disobedience in the United States); Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J.F. 685, 692–93 (2018) (describing pre-Civil War rebellion by enslaved people and the slave codes that restricted freedom of assembly).

²⁵ DAS, *supra* note 13, at 40.

²⁶ See *id.* (“After a massive revolt of enslaved people in Saint-Domingue birthed the nation of Haiti in 1804, several states passed legislation to prohibit the entry of free Black people for fear that they would radicalize enslaved Black people or lead similar revolts.” (citation omitted)); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1869–70 (1993) (discussing state laws prohibiting the entry of Black people following the Haitian revolution).

²⁷ See Carter, *supra* note 24, at 1110–12 (describing how fear of potential insurrection and revolt led to suppression of abolitionist speech); Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1385 (2009) (“In the South, state laws banned expression that would tend to make free blacks or slaves ‘discontent.’ The ban applied to virtually all anti-slavery expression addressed to white voters. It was enforced by searches and seizures for anti-slavery books and pamphlets and cruel punishments.” (footnotes omitted)).

²⁸ Douglass, *supra* note 1.

diminished “by the promulgation of truth, and the cultivation of a correct public sentiment at home and abroad.”²⁹ The famous orations of formerly enslaved abolitionists like Douglass, Brown, Sojourner Truth, and others, along with the written narratives and memoirs of enslaved people, shaped the slavery debate.³⁰ Abolitionist organizations took up the cause of immediate emancipation, holding rallies and townhalls and circulating leaflets and petitions, all to lobby for antislavery policies.³¹ Free Black and White abolitionists began to recognize that the institution of slavery depended on their silence.³² As Professor William Carter has explained, “enslaved persons and abolitionists thought unfettered freedom of speech to be essential in combatting domestic and international propaganda by those seeking to preserve slavery.”³³

Similar patterns can be seen in the resistance to immigration detention. The United States has long used immigration detention

²⁹ Carter, *supra* note 24, at 1108 (quoting WILLIAM W. BROWN, *THE NARRATIVE OF WILLIAM W. BROWN, AN AMERICAN SLAVE*, at iv (London, Gilpin 1849), <https://docsouth.unc.edu/fpn/brownw/brown.html> [<https://perma.cc/27C6-2K59>]).

³⁰ See, e.g., Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 316 (1996) (examining the massive influence of just one of Sojourner Truth’s speeches); Katherine Hessler, *Early Efforts to Suppress Protest: Unwanted Abolitionist Speech*, 7 B.U. PUB. INT. L.J. 185, 193, 203–04, 203 n.98 (1998) (explaining that “[w]ith the inclusion of black abolitionists, the critique of slavery became more thorough and detailed” and discussing the influence of abolitionist orators and writers); MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 2–3 (2016) (describing the centrality of resistance, oration, and international advocacy by enslaved and formally enslaved persons in shaping the tactics of abolition); BEN MCNITT, *A HOUSE DIVIDED: SLAVERY AND AMERICAN POLITICS FROM THE CONSTITUTION TO THE CIVIL WAR* 241–85 (2021) (demonstrating how formally enslaved persons such as David Walker and Frederick Douglass, and their seminal publications, were foundational and influential in the abolitionist movement).

³¹ See Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 800 (1995) (describing how abolitionists “engaged in a mass mailing (sending abolition literature south), conducted a petition campaign (sending massive petitions to Congress to abolish slavery in the District of Columbia), held public meetings, and organized new antislavery societies”).

³² Hessler, *supra* note 30, at 194 (“[A]s the abolitionist movement grew, and the response from the public and the government strengthened against them, abolitionists also noted that the maintenance of slavery required the silence, suppression, and complicity of free citizens. The continuation of the institution of slavery required abolitionists and others uninvolved with slavery to suffer the tyranny that the system inflicted on its opponents. Thus, abolitionists, in addition to fighting for the rights of the slaves, had to begin to fight for their own liberty and right to speak against slavery.” (footnotes omitted)).

³³ Carter, *supra* note 24, at 1107 (footnote omitted).

as a tool of social control against immigrants.³⁴ As discussed below, immigrants have resisted and spoken out about their detention across decades of federal experimentation with immigration imprisonment—from federal camps along the border, to converted military bases, private prisons, and county jails. Their grievances have focused on the fact, length, and conditions of confinement, with freedom as a primary demand. Their words and expressive conduct³⁵ have inspired allies outside of detention to speak out in favor of the abolition of immigration detention and, in some cases, have encouraged government officials and legislators to close detention centers and end detention contracts.

A. THE HISTORY OF RESISTANCE IN U.S. IMMIGRATION JAILS AND PRISONS

Throughout the history of U.S. immigration detention, immigrants have resisted their confinement.³⁶ In 1910, federal immigration officials opened a detention center on Angel Island to operationalize the Chinese Exclusion Act, over the protests of Chinese community leaders on the West Coast.³⁷ Detained immigrants carved hundreds of poems in the walls of Angel Island to condemn their isolation, using the “traditional medium of self-expression and protest used by scholars in China for centuries.”³⁸

³⁴ See DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 7–13 (2012) (discussing the legal origins of immigration detention); KANSTROOM, *supra* note 22, at 55–63 (describing how immigration law and policies have been used as tools of social control as early as the founding); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS 27–35 (2019) (describing the origins of detention with the opening of Ellis Island and Angel Island on the United States’s east and west coasts).

³⁵ In this piece, I take a broad view of the types of speech protected by the First Amendment—including many forms of protest and resistance that arguably fall within Supreme Court jurisprudence protecting expressive conduct. For a detailed exposition of the contours of expressive conduct in the context of immigrant rights, see Jason A. Cade, “*Water Is Life!*” (and *Speech!*): *Death, Dissent, and Democracy in the Borderlands*, 96 IND. L.J. 261, 277–290 (2020) (discussing and applying Supreme Court precedent on expressive conduct to humanitarian aid for migrants).

³⁶ For purposes of this section, I list some prominent examples of protests within immigration jails and prisons. This list of examples is meant to be illustrative but not exhaustive.

³⁷ ERIKA LEE & JUDY YUNG, ANGEL ISLAND: IMMIGRANT GATEWAY TO AMERICA 10–14 (2012).

³⁸ *Id.* at 103–105.

Another early example is the El Centro Immigration Detention Center in southern California, which federal officials opened in 1945 using the repurposed resources of a World War II-era internment camp to hold primarily Mexican immigrants at the U.S.–Mexico border.³⁹ As Jessica Ordaz chronicles, conditions were stark from the beginning; federal immigration officials shaved the heads of immigrants processed into the center, ostensibly for health reasons, and forced them to provide unpaid labor at the camp and in neighboring homes, farms, and construction sites throughout Imperial County.⁴⁰ In response, individuals detained in El Centro engaged in what Ordaz calls “transnational migrant politics”: a “set of strategies and solidarities used by migrant prisoners to resist state power.”⁴¹ They led protests against their conditions and resisted forced labor, and some even escaped from the center.⁴² Twenty-one people escaped in the first four years of its operation.⁴³

Immigration detention camps like Angel Island and El Centro were once relatively rare, but the landscape of immigration detention began to change in the 1970s and 1980s.⁴⁴ In response to Haitian and Cuban asylum seekers arriving in larger numbers along the Florida coast, federal immigration officials started relying more heavily on detention to facilitate exclusion and deportation.⁴⁵ In order to meet the demand for detention space, federal immigration officials utilized a sprawling network of prisons and jails, which were often converted from military bases, warehouses,

³⁹ See JESSICA ORDAZ, *THE SHADOW OF EL CENTRO: A HISTORY OF MIGRANT INCARCERATION AND SOLIDARITY* 2–3, 12, 17 (2021) (describing the history of the El Centro facility and an example of the abuses there).

⁴⁰ See *id.* at 3, 34 (documenting the forced labor and head shaving practices at El Centro).

⁴¹ *Id.* at 4.

⁴² See *id.* at 3–4 (describing El Centro detainees’ methods of resistance).

⁴³ *Id.* at 39.

⁴⁴ See DAS, *supra* note 13, at 120–22 (discussing the resurgence of detention in the 1970s, 1980s, and 1990s).

⁴⁵ See *id.* at 66–68 (describing federal immigration officials’ punitive response to the arrival of Haitian and Cuban asylum seekers); see also CARL LINDSKOOG, *DETAIN AND PUNISH: HAITIAN REFUGEES AND THE RISE OF THE WORLD’S LARGEST IMMIGRATION DETENTION SYSTEM* 13–35 (2018) (detailing the resurgence of immigration detention in response to an influx of Haitian asylum seekers in the 1970s).

and other institutionalized structures.⁴⁶ Unsurprisingly, the fast ramp up led to overcrowding and deplorable conditions.⁴⁷

The people subjected to these laws—asylum seekers and other immigrants deemed undesirable for racist, xenophobic, and geopolitical reasons—were sometimes pushed to the point of resistance, thus exposing the cruelty of the system to the broader public. In 1980, for example, the Immigration and Naturalization Service (INS) began converting a former Cold War missile base bordering the Everglades in Florida into an immigration prison for Haitians fleeing the Duvalier regime.⁴⁸ Krome had the capacity to hold no more than 775 people, but the INS had chosen to detain more than 1,000 Haitian asylum seekers within the converted base.⁴⁹ In 1981, hundreds of Haitians at Krome began a protest.⁵⁰ According to INS officials, some began to throw rocks, and approximately fifty people managed to escape through a hole in the barbed wire fence.⁵¹ The INS sent in their officers and used private contractors to quell the demonstration with tear gas and apprehend those who had escaped.⁵² When asked about the cause of the protest, an INS spokesperson stated, “Principally, they wanted to be released and I don’t blame them. Such demonstrations and escapes have happened before, and we are doing our best to ease overcrowding.”⁵³ Rather than releasing asylum seekers, however, the INS had been transferring asylum seekers to another detention

⁴⁶ See *infra* notes 48, 54, 71.

⁴⁷ See George Volsky, *Haitians Flee Amid Protest at Holding Center in Miami*, N.Y. Times, Sept. 4, 1981 (§ A), at 6 (noting Haitian detainees had complained of overcrowding and a lack of food).

⁴⁸ See Ken Silverstein, *Shock Corridor: The First Inside Report from an ICE Mental Health Facility*, NEW REPUBLIC (Aug. 19, 2019), <https://newrepublic.com/article/154616/immigration-customs-enforcement-krome-miami-mental-health-facility-investigation> (“Krome was founded in the 1960s as a Cold War military base designed to protect the nation against the threat posed by Fidel Castro’s Cuba. Beginning in 1980, the U.S. government began transitioning it to hold immigration detainees.”); Volsky, *supra* note 47 (describing a protest by detained Haitian immigrants that escalated into a mass escape attempt); Lawrence Mahoney, *Dead End on Krome Avenue for the Haitians, There is No Ellis Island. Their Road to Freedom Ends in the Everglades*, S. FLA. SUN SENTINEL (Jan. 12, 1986), <https://www.sun-sentinel.com/news/fl-xpm-1986-01-12-8601030563-story.html> (noting that INS officials did not characterize Haitian President Duvalier as a totalitarian leader).

⁴⁹ Volsky, *supra* note 47.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

center in Puerto Rico and were negotiating with state officials in Montana to send other asylum seekers to an abandoned Air Force base there.⁵⁴ Some believed that the threat of transfer may have sparked the demonstration.⁵⁵ While unsuccessful in securing their immediate release, the protests by Haitian refugees brought attention to the cruel circumstances of their captivity, and decades of litigation and legislative advocacy followed.⁵⁶

Similar circumstances led to demonstrations across the country in the 1980s as federal immigration officials began to rely more heavily on detention.⁵⁷ In 1983, a delegation of the Interfaith Task Force on Central America witnessed asylum seekers in El Centro engaging in a hunger strike to protest discrimination, brutality by guards, lack of access to phones and attorneys, and exposure to temperatures over 100 degrees.⁵⁸ The protestors gave a banner written in fruit punch and blood to the visiting observers that said “*En el nombre de Dios. HELP US!*”.⁵⁹ In the Port Isabel Detention Center in Texas, detained immigrants similarly held protests, hunger strikes, and collective actions in the late 1980s, protesting inhumane conditions and abusive treatment.⁶⁰ Immigrants in Varick Street Detention Center in New York City, including Afghan asylum seekers in 1985 and Cuban asylum seekers in 1986, engaged in hunger strikes to protest their detention.⁶¹ Speaking to the press, one of the Afghan refugee leaders, Gafoor Masoud, stated: “We will continue our strike until we get results or until we die.”⁶²

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See, e.g., LINDSKOOG, *supra* note 45, at 27–29 (discussing legislative advocacy efforts stemming from “outrage among the refugees and their allies” and explaining that “[a]s important as activism was in building the political opposition to the Haitian Program, the most effective form of resistance occurred in the courtroom”).

⁵⁷ For an in-depth exploration of resistance to immigration detention in the 1980s during the Reagan Administration, see *generally* KRISTINA SHULL, DETENTION EMPIRE: REAGAN’S WAR ON IMMIGRANTS AND THE SEEDS OF RESISTANCE (2022).

⁵⁸ ORDAZ, *supra* note 39, at 77.

⁵⁹ *Id.* at 77–78.

⁶⁰ See Jennifer Cullison, *Valley of Caged Immigrants: Punishment, Protest, and the Rise of the Port Isabel Detention Center*, 33 TABULA RASA 1, 25–29 (2020) (describing hunger strikes and other collective action by immigrants from 1987 to 1990).

⁶¹ See *Afghan Refugees*, *supra* note 23; see also Marvine Howe, *Detained Cubans Fast a 9th Day*, N.Y. TIMES, Sept. 17, 1986 (§ B), at 10 (describing a hunger strike by fifty Cuban refugees at Varick Street Detention Center).

⁶² *Afghan Refugees*, *supra* note 23.

Many of the larger protests drew widespread attention. In 1985, as many as three hundred men in El Centro, many of whom were Salvadoran, engaged in a mass hunger and labor strike.⁶³ They refused to eat, work, or enter the barracks until government officials took action in response to their complaints, which included overcrowding, unsanitary conditions, and physical and psychological abuse inflicted by guards.⁶⁴ The strike ended after a week when fifty to sixty guards in riot gear forcibly moved the strikers indoors.⁶⁵ In 1987, protests by hundreds of Cuban immigrants—many of whom had been held for years—led to full scale uprisings at federal prisons in Oakdale, Louisiana and Atlanta, Georgia.⁶⁶ Overcrowding in terrible accommodations, suicides and murders, prolonged lockdowns and isolation, and the constant threat of return to Cuba were intolerable.⁶⁷ As a result of the uprisings, the protesters were able to secure “a moratorium on deportations, the right to parole hearings and a large measure of public attention, which had largely eluded them in more than five years of court battles.”⁶⁸

Over the years, federal immigration officials began to rely more heavily on private prison corporations and county jails to detain immigrants in exchange for lucrative contracts.⁶⁹ These contract jails and prisons became targets of resistance and protest as well. In 1994, for example, the INS awarded a contract to Esmor Service

⁶³ See ORDAZ, *supra* note 39, at 65 (describing the building momentum of the strike).

⁶⁴ *Id.*

⁶⁵ *Id.* at 65, 84–85 (describing the guards’ response to the hunger strike).

⁶⁶ See Robert Pear, *Behind the Prison Riots: Precautions Not Taken*, N.Y. TIMES, Dec. 6, 1987 (§ 1), at 1 (describing the uprisings and hostage situations that resulted from federal officials “overlook[ing] early signs of trouble and fail[ing] to take precautions that might have avoided the riots by rebellious Cuban inmates at Federal prisons in Oakdale, La., and Atlanta”).

⁶⁷ See Marshall Ingwerson, *Pressure Boils in Cuban Camps. Afraid to Return Home but Unwanted in US, Cuban Detainees Are Stuck in a Frustrating Legal Limbo*, CHRISTIAN SCI. MONITOR (Nov. 24, 1987), <https://www.csmonitor.com/1987/1124/acuba.html> (noting frustration and fear over deportations to Cuba, where many of those deported were then imprisoned); Pear, *supra* note 66 (“The Oakdale prison held 1,039 inmates, or 81 percent more than the number for which it was designed. The Atlanta prison held 1,591, or 47 percent more than its supposed capacity.”).

⁶⁸ Pear, *supra* note 66.

⁶⁹ See, e.g., *INS Detainees Trash Private Prison*, PRISON LEGAL NEWS (Sept. 15, 1995), <https://www.prisonlegalnews.org/news/1995/sep/15/ins-detainees-trash-private-prison/> (noting that Esmor, a publicly-traded company, runs four correctional centers and six detention centers, with projected earnings of \$36 million in 1995).

Corporation to detain immigrants and asylum seekers near Newark Airport in New Jersey.⁷⁰ Esmor converted an industrial warehouse in Elizabeth, New Jersey, into cramped dormitories.⁷¹ INS agents, speaking anonymously, described the detention center as a “disaster waiting to happen” and acknowledged that people were often held for months at a facility designed for much shorter term use.⁷² After a year of complaints of physical abuse, racial slurs, shackling, lack of fresh air, and inedible food, immigrants led an uprising in 1995, overturning furniture and barricading themselves in the facility until local police used flashbang grenades and batons to end the protest.⁷³ Esmor ultimately lost its detention contract, and a group of detained people successfully sued Esmor for its abusive conditions.⁷⁴ Rather than permanently close the facility, however, the INS allowed Esmor to sell the contract to the Corrections Corporation of America (now known as CoreCivic) to take over its operation, leading to additional protests and hunger strikes over the years.⁷⁵

Detention began to skyrocket following the passage of harsh mandatory detention laws, bringing more unrest.⁷⁶ With detention becoming a more permanent feature of immigration enforcement, some prison operators embraced retaliation as a tool of control. For

⁷⁰ See *id.* (reporting that Esmor “ha[d] a five-year, \$54 million contract to operate the facility”); Matthew Purdy & Celia W. Duggar, *Legacy of Immigrants’ Uprising: New Jail Operator, Little Change*, N.Y. TIMES, July 7, 1996 (§ 1), at 1 (documenting Esmor’s relationship to the INS with respect to the New Jersey facility).

⁷¹ See David Stout, *Detention Jail Called Worse than Prison*, N.Y. TIMES, June 19, 1995 (§ B), at 5 (“[The dorm] had 28 people. The toilets were near the dining tables. There was no privacy.”).

⁷² Richard Pérez-Peña, *Illegal Aliens Overrun a Jail in New Jersey*, N.Y. TIMES, June 19, 1995 (§ A), at 1.

⁷³ See *id.* (“In the 11 months it has been open, the detention center, which is run by Esmor Correctional Services . . . has gained a reputation among immigrants and their advocates as one of the worst of its kind in the nation.”).

⁷⁴ See Purdy & Duggar, *supra* note 70 (describing the events leading up to the change of control of the New Jersey facility); *Jama v. Esmor Corr. Servs.*, 577 F.3d 169, 171 (3d Cir. 2009) (outlining the success of detained plaintiffs in the district court).

⁷⁵ See Mirta Ojito, *Demanding Parole, Immigrants Held in Queens Stage Protest*, N.Y. TIMES, Oct. 6, 1998 (§ B), at 5 (describing a protest in Elizabeth Detention Center occurring days before a protest in a private prison in Queens); Purdy & Duggar, *supra* note 70 (“Esmor sold the rights . . . for \$6.2 million to the Corrections Corporation of America . . .”).

⁷⁶ See DAS, *supra* note 13, at 72–73 (discussing legislation mandating detention); Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343, 345–54 (David A. Martin & Peter H. Schuck eds., 2005) (detailing the history behind mandatory detention legislation).

example, immigrants organized several protests and hunger strikes in a prison operated by the Wackenhut Corrections Corporation (now part of The GEO Group) in Queens, New York, including a group of over 100 out of the 194 people detained in Wackenhut who conducted a hunger strike to protest the length of their imprisonment and abuse by guards in 1999.⁷⁷ As Mark Dow describes, both INS officials and Wackenhut employees retaliated against the hunger strikers by “confiscating juice and water, putting participants in solitary confinement, transferring protest leaders to other facilities, and threatening to force detainees to sign deportation agreements,” all practices that were regularly reported by hunger strikers at detention centers around the country at the time.⁷⁸

When INS was subsumed into the U.S. Immigration and Customs Enforcement (ICE), retaliation against protestors continued. Greater coordination between protesters inside and advocates outside immigration jails and prisons, however, helped amplify detained people’s voices. In 2009, a group of immigrants detained at the South Louisiana Correctional Center, a private immigration prison, engaged in a series of hunger strikes and reported on the retaliation against their actions as human rights monitors with the New Orleans Workers’ Center for Racial Justice.⁷⁹ Many of the leaders of the hunger strikes were placed in solitary confinement.⁸⁰ Jose Salazar, who presented the results of

⁷⁷ See MARK DOW, “*Keeping Quiet Means Deny*”: A Hunger Strike in Queens, in AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 110, 111–13 (2004) (describing an asylum seeker from Uganda who, after being detained for seventeen months, “joined the hunger strike with other detainees frustrated by a seemingly interminable legal process and by a limbo status made worse by the expedient relationship between the INS and its private contractor”); see also Ojito, *supra* note 75 (describing a similar hunger strike the previous year).

⁷⁸ DOW, *supra* note 77, at 114.

⁷⁹ See generally NEW ORLEANS WORKERS’ CTR. FOR RACIAL JUST., MONITORING REPORTS ON RETALIATION AGAINST DETAINEE HUMAN RIGHTS MONITORS AT THE SOUTH LOUISIANA CORRECTIONAL CENTER, BASILE, LOUISIANA (2009) [hereinafter MONITORING REPORTS], <https://drive.google.com/drive/folders/1pBQNXFen7ujHis1EZ117GJKLxbAkpSUL> (on file with author) (compiling firsthand accounts of detainee human rights monitors); see also Desiree Evans, *Immigrant Detainees Hunger Strike over Conditions in La. Detention Facility*, FACING S. (Aug. 3, 2009), <https://www.facingsouth.org/2009/08/immigrant-detainees-hunger-strike-over-conditions-in-la-detention-facility.html> (detailing a series of hunger strikes over inhumane conditions by immigrants detained at the South Louisiana Correctional Center).

⁸⁰ Human rights monitor Edgar Nelson Bojorge Alcantara recounted, “I am now in solitary confinement, because I tried to bring attention to the humiliation and abuse that we are facing in ICE’s detention system.” MONITORING REPORTS, *supra* note 79, at 3. Oleg Semenov,

his findings of human rights abuses to jail guards and was sent to solitary confinement, explained, “I know that the jail staff put me in the hole as retaliation because I wanted people on the outside to know the horrible conditions that we suffer through here. . . . What I and the other detainees are saying is the truth, and the truth cannot be hidden.”⁸¹ The New Orleans Workers’ Center for Racial Justice published their human rights reporting.⁸²

At times, outside activism encouraged inside activism. In 2014, for example, 1,200 people began a hunger strike in Northwest Detention Center (NWDC), a large private immigration prison operated by The GEO Group in Tacoma, Washington.⁸³ Inspired by antideportation protests outside the prison, detained people decided to strike to demand release on bond, better food, lower commissary prices, and better pay for their work in the facility.⁸⁴ Some of the leaders of the strike faced solitary confinement, and some strikers were deported.⁸⁵ But many others were released, commissary prices dropped, elected officials visited the prison, and immigrant advocacy organizations sued on the strikers’ behalf.⁸⁶ La Resistencia (formerly called the NWDC Resistance) worked with strike leaders to publicize their demands, connect them to media, and publish the *Hunger Strikers Handbook* to commemorate the strike and share lessons learned.⁸⁷

Similar examples of coordinated protesting began occurring with more frequency. In 2015, Desis Rising Up and Moving (DRUM) supported hundreds of immigrants, many of whom were South Asian asylum seekers, in coordinated hunger strikes on the eve of Thanksgiving in Etowah Detention Center in Alabama and the

another human rights monitor, explained, “I was locked up in solitary confinement after meeting with a representative of the Workers’ Center for the first time. . . . I’m in solitary confinement now because they don’t want to deal with my questions. They interrogated me about whether I was helping plan another hunger strike.” *Id.* at 15.

⁸¹ *Id.* at 8.

⁸² *See generally id.*

⁸³ *See* NW. DET. CTR. RESISTANCE, A HUNGER STRIKERS HANDBOOK 20 (2017), <https://issuu.com/muybarra/docs/hungerstrikershandbook-eng> (describing the Tacoma prison).

⁸⁴ *See id.* at 19 (describing the motivations for hunger strikes).

⁸⁵ *See id.* at 30 (describing punitive measures taken in response to the strikes).

⁸⁶ *See id.* at 29 (describing positive responses to the hunger strike).

⁸⁷ *See generally id.*

Theo Lacy and Otay Mesay Detention Centers in California.⁸⁸ DRUM shared their demands under the social media hashtag #FreedomGiving, which increased attention to other hunger strikes in immigration detention across the United States and helped secure release for some of the asylum seekers.⁸⁹ In 2020 and 2021, immigrant rights organizers elevated the demands of hunger strikers in Bergen County Jail, Essex County Correctional Facility, and Hudson County Correctional Facility in New Jersey in a series of sustained protests.⁹⁰

These examples reflect only a small subset of resistance within immigration jails and prisons. A Freedom of Information Act lawsuit by the American Civil Liberties Union revealed evidence of hunger strikes by “at least 1,378 people from 74 countries across 62 immigration detention centers in 24 states” between 2013 and 2017.⁹¹ Freedom for Immigrants, a nonprofit organization that operates a free hotline for people in detention, documented “at least 1,600 people on hunger strike at 20 detention facilities between May

⁸⁸ See Samantha Michaels, *Here’s Why Hundreds of Immigrants in Detention Have Gone on Hunger Strike*, MOTHER JONES (Dec. 3, 2015), <https://www.motherjones.com/politics/2015/12/why-are-hundreds-detained-immigrants-going-hunger-strike/> (describing the Thanksgiving strike and reasons for it); Jennifer Chowdhury, *South Asian Detainees Launch #FreedomGiving Hunger Strikes on Thanksgiving*, NBC NEWS (Dec. 1, 2015, 3:39 PM), <https://www.nbcnews.com/news/asian-america/south-asian-detainees-launch-freedomgiving-hunger-strikes-thanksgiving-n472191> (illustrating the spread of the #FreedomGiving strike).

⁸⁹ See Chowdhury, *supra* note 88 (describing the social media campaign associated with the strike); Michaels, *supra* note 88 (noting the release of some of the asylum seekers).

⁹⁰ See Dara Lind, *ICE Detainee Says Migrants Are Going on a Hunger Strike for Soap*, PROPUBLICA (Mar. 23, 2020, 5:57 PM), <https://www.propublica.org/article/ice-detainee-says-migrants-are-going-on-a-hunger-strike-for-soap> (noting that hunger strikes over inadequate COVID-19 protection measures were occurring in at least three New Jersey ICE detention facilities); Matt Katz, *ICE Hunger Strikes Spread to Another New Jersey Jail*, GOTHAMIST (Jan. 5, 2021), <https://gothamist.com/news/ice-hunger-strikes-spread-another-new-jersey-jail> (noting that dozens of detained individuals in three county jails in New Jersey had started hunger strikes since November 2020); Melanie Anzidei, David M. Zimmer & Hannan Adely, *Police, Protesters Clash near Bergen County Jail as ICE Detainees Continue Hunger Strike*, NORTHJERSEY.COM (Dec. 13, 2020, 11:10 AM), <https://www.northjersey.com/story/news/bergen/hackensack/2020/12/12/police-protesters-clash-near-bergen-county-jail/6523581002/> (describing two hunger strikes in 2020 at Bergen County Jail and Essex County Correctional Facility in New Jersey).

⁹¹ AM. CIV. LIBERTIES UNION & PHYSICIANS FOR HUM. RTS., BEHIND CLOSED DOORS: ABUSE AND RETALIATION AGAINST HUNGER STRIKERS IN U.S. IMMIGRATION DETENTION 6 (2021), <https://www.aclu.org/report/report-behind-closed-doors-abuse-retaliation-against-hunger-strikers-us-immigration-detention>.

2015 and early 2020.”⁹² Since 2020, Detention Watch Network has mapped dozens of hunger strikes, work stoppages, and other calls to action by people organizing in detention.⁹³

In addition to these collective demonstrations, immigrants in detention are increasingly speaking out about the retaliation they face, including under the Biden Administration. In February 2021, immigrant rights groups in Florida filed a complaint alleging “retaliation in the form of pepper spray and physical assault, as well as solitary confinement, closing of commissary and texting accounts, and blocking of legal lines” at Glades County.⁹⁴ In August 2021, California immigrant rights groups filed a complaint alleging extensive and ongoing retaliation by guards and ICE personnel—including assault, solitary confinement, and deprivation of commissary and legal access—in response to protests, grievances, and other First Amendment-protected activity by people detained in Yuba County Jail, Mesa Verde Detention Facility, Otay Mesa Detention Center, Adelanto Detention Center, and Golden State Annex.⁹⁵ In July 2021, immigrant rights groups filed a complaint alleging retaliation against hunger strikers and others at Bergen County Jail in New Jersey.⁹⁶ In September 2021 and February 2022,

⁹² *Hunger Strikes*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/hunger-strikes> (last visited June 7, 2022).

⁹³ *See Voices from Detention*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/pressroom/voices> (last visited June 7, 2022) (providing an interactive map for users to see where protests by people in detention have occurred across the country).

⁹⁴ Letter from Jessica Schneider, Det. Program Dir., Ams. for Immigrant Just.; Wendy King, Exec. Dir., Immigrant Action All. & Sofia Casini, Dir. for Advocacy & Vistitation Strategies, Freedom for Immigrants, to Joseph V. Cuffari, Inspector Gen., U.S. Dep’t of Homeland Sec. & Kathy Culliton-Gonzalez, Off. for C.R. & C.L., U.S. Dep’t of Homeland Sec. 4 (Feb. 22, 2021) https://www.aclufl.org/sites/default/files/ffi_crcl_glades.pdf.

⁹⁵ *See* Letter from Lisa Knox & Kathleen Kavanagh, Cal. Collaborative for Immigrant Just.; Priya Patel, Susan Beaty & Deyci Carrillo Lopez, Centro Legal de La Raza; Vasudha Talla, ACLU Found. of N. Cal.; Monika Y. Langarica, ACLU Found. of San Diego & Imperial Cntys. & Zoë McKinney & Jordan Wells, ACLU Found. of S. Cal., to Katherine Culliton-Gonzalez, Officer, Off. for C.R. & C.L., U.S. Dep’t of Homeland Sec.; Joseph V. Cuffari, Inspector Gen., U.S. Dep’t of Homeland Sec. & David Gersten, Acting Immigr. Det. Ombudsman, U.S. Dep’t of Homeland Sec. 2 (Aug. 26, 2021) https://www.aclunc.org/sites/default/files/OCRCL%20complaint.08.26.21%20_0.pdf (highlighting many ways ICE and its contractors retaliated against detained people, including “shutting off access to lawyers, advocacy organizations, and family members” as well as exploiting solitary confinement).

⁹⁶ *See generally* Letter from Amanda Diaz, Nat’l Hotline Manager, Freedom for Immigrants; Tania Mattos, Ne. Pol’y & Monitoring Pol’y Dir., Freedom for Immigrants; Samah Sisay, Esq., Bertha Just. Fellow, Ctr. for Const. Rts. & Terry Lawson, Esq., Exec. Dir.,

New York immigrant rights groups filed complaints alleging retaliation, including abuse and solitary confinement, against immigrants detained at Rensselaer County Jail and Orange County Correctional Facility.⁹⁷ Through their organizing, complaints, and outreach to press and the broader public, immigrants in detention are exercising and seeking protection of their First Amendment rights.

B. THE IMPACT OF RESISTANCE

The impact of these protests was significant. In some cases, the protestors were able to secure meetings with immigration officials to address their immediate needs.⁹⁸ In many cases, immigration officials were intractable, but the protests of people in detention drew public attention and support to their cause, including litigation support.⁹⁹ As noted above, Haitian refugees and their allies brought multiple lawsuits in the 1980s and 1990s seeking access to counsel and release from detention.¹⁰⁰ People detained in Elizabeth Detention Center sued the Esmor Corporation in 1997 and recovered damages.¹⁰¹ People in detention have sued private prison operators like The GEO Group and CoreCivic for forced labor

UnLocal, Inc., to John Tsoukaris, Newark ICE Field Off. Dir., U.S. Immigr. & Customs Enf't; Newark ICE Field Off. Outreach & Cmty. Rels.; Michael Russo, Bergen Cnty. Jail Warden; Captain Ralph Turre, Bergen Cnty. Sheriff's Off., Corr. Div. & Kathy Culliton-Gonzalez, Off. for C.R. & C.L., U.S. Dep't of Homeland Sec. (July 13, 2021), https://ccrjustice.org/sites/default/files/attach/2021/09/%5Bredacted%5D%20Multi-Individual%20CRCL_%20Bergen%20County%20Jail%20Abuses.pdf.

⁹⁷ See generally Letter from Catholic Charities Cmty. Servs., Envision Freedom Fund, For the Many, Freedom for Immigrants, Immigrant Rts. Clinic & N.Y. Laws. for the Pub. Int., to Katherine Culliton-González, Off. for C.R. & C.L., U.S. Dep't of Homeland Sec.; Joseph V. Cuffari, Gen. Off. of the Inspector Gen., U.S. Dep't of Homeland Sec. & David Gersten, Off. of the Immigr. Det. Ombudsman, U.S. Dep't of Homeland Sec. (Feb. 17, 2022), https://www.law.nyu.edu/sites/default/files/OCCF%20Multi-Organization%20DHS%20CRCL%20Complaint%20and%20Index_2%2017%202022.pdf; Kenneth C. Crowe, *Complaint Alleges Filthy Living Conditions for Immigrants at Rensselaer County Jail*, TIMES UNION (Sept. 21, 2021), <https://www.timesunion.com/news/article/Complaint-alleges-filthy-living-conditions-for-16477034.php> (describing complaint of Catholic Charities, Brooklyn Community Bail Fund, and Justice for Migrant Families alleging abuse at Rensselaer County Jail in Troy, New York).

⁹⁸ See *supra* text accompanying note 17.

⁹⁹ See *supra* text accompanying note 56.

¹⁰⁰ See *supra* text accompanying notes 56 & 68.

¹⁰¹ See *Jama v. Esmor Corr. Servs.*, 577 F.3d 169, 171 (3d Cir. 2009) (outlining the plaintiffs' jury-awarded damages).

and wage violations with growing success.¹⁰² During the COVID-19 pandemic, many detained people joined lawsuits seeking release based on violations of their substantive due process rights.¹⁰³ Much of this litigation was spurred by the demands of detained people.

In some cases, the combination of hunger strikes and demonstrations within immigration jails and abolitionists organizing and advocating in the surrounding communities have been successful in closing facilities through state and local action. In 2020 and 2021, the series of protests in and outside of Bergen County Jail, Essex County Correctional Facility, and Hudson County Correctional Facility in New Jersey ultimately led to the passage of state legislation limiting detention contracts, and shortly thereafter, the three counties decided to no longer hold immigrants under their existing contracts.¹⁰⁴ Years of organizing by La Resistencia, in coordination with people inside NWDC and other advocates, eventually led to the passage of legislation to end private prison contracts in Washington State.¹⁰⁵

¹⁰² See Eduardo Medina, *Immigration Detainees Are Owed \$17 Million in Back Pay*, *Jury Says*, N.Y. TIMES (Oct. 31, 2021), <https://www.nytimes.com/2021/10/31/us/immigrant-detainee-minimum-wage.html> (noting a federal jury in Washington State found that The Geo Group “owed \$17.3 million in back pay to immigration detainees who were denied minimum wage for the work they performed there”); see also Amanda Holpuch, *Private Prison Companies Served with Lawsuits over Using Detainee Labor*, *GUARDIAN* (Nov. 25, 2018, 6:00 AM), <https://www.theguardian.com/us-news/2018/nov/25/private-prison-companies-served-with-lawsuits-over-usng-detainee-labor> (noting that CoreCivic has been sued for wage theft and forced labor).

¹⁰³ See, e.g., *Savino v. Souza*, 453 F. Supp. 3d 441, 443 (D. Mass. 2020) (indicating that detained people were held in tight quarters and were unable to keep a safe distance from others who may be contagious with COVID-19); see also Defendants’ Reply to Plaintiffs’ Response to Defendants’ Motion for Summary Judgment at 4, *Gayle v. Meade*, No. 20-21553-CIV-COOKE (S.D. Fla. Dec. 23, 2021) (refuting plaintiffs’ claims that the detention center was not following CDC guidelines and arguing that “[t]he CDC Guidelines [p]lainly [s]tate [t]hat [i]ts [p]rovisions [m]ay [n]eed to [b]e [a]dapted to each [i]nstitution”); *Roman v. Wolf*, 977 F.3d 935, 939 (9th Cir. 2020) (relaying the allegation that a detention center’s failure to implement necessary protective measures in light of the COVID-19 pandemic violated detained people’s Fifth Amendment due process rights); *Zepeda Rivas v. Jennings*, 465 F. Supp. 3d 1028, 1029 (N.D. Cal. 2020) (complaining that conditions at the detention center placed detained people at serious risk of becoming infected with COVID-19).

¹⁰⁴ See *Lind*, *supra* note 90 (noting that hunger strikes over inadequate COVID-19 protection measures were occurring in at least three New Jersey ICE detention facilities); *Katz*, *supra* note 90 (noting that dozens of detained individuals in three county jails in New Jersey had started hunger strikes since November 2020); Anzidei et al., *supra* note 90 (describing two hunger strikes in 2020 at Bergen County Jail and Essex County Correctional Facility in New Jersey).

¹⁰⁵ See Lilly Fowler, *Private Prison Ban Could Limit ICE Detention in the Pacific Northwest*, *CROSSCUT* (Mar. 2, 2021), <https://crosscut.com/news/2021/03/private-prison-ban->

Protests, in combination with whistleblowers in immigration detention, also spurred the federal government to announce the cancellation of detention contracts. In Irwin County, Georgia, immigrants inside the Irwin County Detention Center have been organizing for their freedom for years, supported by outside activism by immigrant rights organizers in Georgia.¹⁰⁶ After a nurse and several detained women in Irwin came forward to report medical abuse, including nonconsensual hysterectomies and sterilization procedures, the Department of Homeland Security announced the closure of the facility.¹⁰⁷ In Bristol County, Massachusetts, years of strikes and protests inside the Bristol County House of Corrections, activist organizing outside the jail, detained individuals' allegations of civil rights violations by guards, and a class action lawsuit seeking release during the COVID-19 pandemic ultimately led to the Department of Homeland Security cancelling its contract.¹⁰⁸

could-limit-ice-detention-pacific-northwest (reporting on proposed legislation that would ban “for-profit prison companies that contract with local, state and such federal agencies as [ICE] from operating in Washington state”); *see also* Rachel La Corte, *Washington State Governor OKs Bill Banning For-Profit Jails*, AP (Apr. 14, 2021), <https://apnews.com/article/legislature-prisons-washington-legislation-immigration-ceda36fec7dfc3a56c8fe8f7a66d3d76> (stating that Washington is only the third state to include immigration facilities as part of a private prison ban).

¹⁰⁶ *See* Seth Freed Wessler, *Fear, Illness and Death in ICE Detention: How a Protest Grew on the Inside*, N.Y. TIMES MAG. (June 7, 2021), <https://www.nytimes.com/2020/06/04/magazine/covid-ice.html> (detailing recent efforts of detained people, as well as outsiders, to ensure detained people's safety during the COVID-19 pandemic); *see also* PENN. STATE LAW CTR. FOR IMMIGRANTS' RTS. CLINIC, IMPRISONED JUSTICE: INSIDE TWO GEORGIA IMMIGRANT DETENTION CENTERS 40–50 (2017), https://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf (documenting the conditions inside Irwin County Detention Center).

¹⁰⁷ *See* Molly O'Toole, *ICE to Close Georgia Detention Center Where Immigrant Women Alleged Medical Abuse*, L.A. TIMES (May 20, 2021, 2:02 PM), <https://www.latimes.com/politics/story/2021-05-20/ice-irwin-detention-center-georgia-immigrant-women-alleged-abuse> (discussing the closure of the Irwin facility); Jonathan Blitzer, *The Private Georgia Immigration-Detention Facility at the Center of a Whistle-Blower's Complaint*, NEW YORKER (Sept. 19, 2020), <https://www.newyorker.com/news/daily-comment/the-private-georgia-immigration-detention-facility-at-the-center-of-a-whistle-blowers-complaint> (placing the Irwin closure in the context of the events leading up to 2020). Several of the detained women filed a class action lawsuit and habeas petition alleging their medical mistreatment and subsequent retaliation. *See* Consolidated Amended Petition for Writ of Habeas Corpus & Class Action Complaint for Declaratory & Injunctive Relief & for Damages, *Oldaker v. Giles*, No. 7:20-cv-00224-WLS-MSH (M.D. Ga. Dec. 21, 2020).

¹⁰⁸ *See* FANG Collective & Steve Ahlquist, *FANG Announces End to ICE Contracts in Bristol County, Massachusetts*, UPRISER (May 20, 2021), <https://upriseri.com/fang-announces-end-to-ice-contracts-in-bristol-county-massachusetts/> (announcing the

Many people have emerged from their experiences in detention to become prominent community leaders. Formerly detained individuals like Alejandra Pablos, Claudio Rojas, Edafe Okporo, Uchechukwu Onwa, Jean Montreuil, and Ravi Ragbir are all examples.¹⁰⁹ Countless other detained and formerly detained individuals have shared their stories through complaints, lawsuits, reports, publications, and social media.

The voices and leadership of people inside detention have collectively shifted the policy conversation from detention reform to detention abolition. A case in point is the evolution of demands by the Detention Watch Network, an organization founded by the Catholic Legal Immigration Network, Inc., Florence Immigrant and Refugee Rights Project, and Lutheran Immigration and Refugee

cancellation of an ICE contract for the Bristol County House of Corrections after years of protest); Julia Rock & Sara Van Horn, *Bristol County Correctional Center Officials Retaliate After ICE Detainees Declare Work Strike*, UPRISE RI (Mar. 31, 2020), <https://upriseri.com/2020-03-31-julia-rock-sara-van-horn/> (reporting alleged retaliation by jail officials after detained people protested against jail conditions during the beginning of the COVID-19 pandemic); Shannon Dooling, *ICE Terminates Contracts with Bristol County Sheriff*, WBUR (May 20, 2021), <https://www.wbur.org/news/2021/05/20/ice-terminates-contracts-bristol-county-sheriff-hodgson> (reporting that the Massachusetts facility closed after “a scathing report . . . found [a] Bristol County [s]heriff . . . and his staff violated the civil rights of immigrant detainees during a violent altercation”); Shannon Dooling, *AG Report: Bristol County Sheriff Violated Civil Rights of Immigrant Detainees; Calls for Transfer of Those in Custody*, WBUR (Dec. 15, 2020), <https://www.wbur.org/news/2020/12/15/healey-hodgson-bristol-immigration-detainees-report> (relaying that the Massachusetts’s attorney general found the Bristol County sheriff and his staff “employ[ed] a variety of weapons [against detained people], including a flash bang grenade, pepper spray and pepper-balls, anti-riot shields and canines”).

¹⁰⁹ See Danielle Mackey, *The Flawed Idea of the Perfect Immigrant*, NEW YORKER (Sept. 29, 2021), <https://www.newyorker.com/culture/the-new-yorker-documentary/the-flawed-idea-of-the-perfect-immigrant> (sharing the story of Alejandra Pablos); Joel Rose, *ICE Deported Him After His Movie Came Out. Now He’s Testing the Limits of Free Speech*, NPR (Aug. 23, 2021, 8:00 AM), <https://www.npr.org/2021/08/23/1028180006/ice-deported-him-after-his-movie-came-out-now-hes-testing-the-limits-of-free-spe> (sharing the story of Claudio Rojas); David Artavia, *How a Black, Gay Refugee Created a Community for Queer Asylum Seekers*, OUT (Apr. 6, 2021, 11:00 AM), <https://www.out.com/print/2021/4/06/how-Edafe-Okporo-refugee-created-community-queer-asylum-seekers> (sharing the story of Edafe Okporo); Edafe Okporo, *Queer Immigrants Speak Out About Life in the US Under Trump*, BUZZFEED (Aug. 7, 2020), <https://www.buzzfeed.com/edafeokporo/queer-immigrants-trump-asylum-speak-out> (sharing the story of Uchechukwu Onwa); Amy Gottlieb, Opinion, *I Thought Trump’s Defeat Meant ICE Would Stop Targeting My Husband. Why Is It No Different Under Biden?*, WASH. POST (May 25, 2021, 8:00 AM), <https://www.washingtonpost.com/opinions/2021/05/25/i-thought-trumps-defeat-meant-ice-would-stop-targeting-my-husband-why-is-it-no-different-under-biden/> (sharing the story of Ravi Ragbir); Nick Pinto, *Trump Banished Immigration Rights Activist for Speaking Out. He’s Suing ICE to Come Back.*, INTERCEPT (Jan. 16, 2020, 10:00 AM), <https://theintercept.com/2020/01/16/jean-montreuil-deportation-first-amendment/> (sharing the story of Jean Montreuil).

Service in 1997 to “combat the explosive growth of the U.S. immigration detention system.”¹¹⁰ After becoming a broad, membership-based organization in 2005, its initial policy demand was “detention as a last resort.”¹¹¹ But conversations with directly impacted members and prison abolitionist groups like Critical Resistance pushed the network to reject reformist demands, which had allowed the number of people in detention to grow.¹¹² Its central demand now is to end all immigration detention, and it has developed tools by which immigrant rights organizations can measure the impact of its policy positions.¹¹³ Many other prominent immigrant rights organizations have similarly embraced abolitionist demands.¹¹⁴

The movement to abolish immigration detention today, like the movement to abolish slavery, thus owes a significant debt to the voices of people in immigration detention. The consistency of their protest from within the walls of immigration jails and prisons has had a powerful and lasting impact on the immigrant rights movement.

III. THE SUPPRESSION OF FIRST AMENDMENT RIGHTS IN IMMIGRATION DETENTION

“The jail wants to cover the entire sun with one finger, but the pain that people feel can’t be changed. The only solution for this jail is to close it. There are no rules. ICE lets the jail take whatever actions will keep us quiet.”
— Jose Salazar¹¹⁵

Left to speak freely, detained people have the power to transform the public’s understanding of and reliance on detention. Detained

¹¹⁰ *About Detention Watch Network*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/about> (last visited June 7, 2022).

¹¹¹ Silky Shah, *The Immigrant Justice Movement Should Embrace Abolition*, FORGE (Mar. 4, 2021), <https://forgeorganizing.org/article/immigrant-justice-movement-should-embrace-abolition>.

¹¹² *See id.* (“After a year of engagement with groups like Critical Resistance and sometimes contentious conversations within our membership, we updated our vision to call for a world without immigration detention.”).

¹¹³ *See id.* (providing “[s]trategies for [s]olidarity and [a]lignment”).

¹¹⁴ *See supra* notes 12–13 and accompanying text.

¹¹⁵ MONITORING REPORTS, *supra* note 79, at 9.

people are not, however, left to speak freely. Individuals in detention who have exercised their First Amendment rights have faced deportation, transfer, use of force, solitary confinement, and the punitive deprivation of various other rights and resources within the jail.

Such is the familiar pattern of suppression in the face of abolitionist debate. Proponents of slavery, as noted above, actively sought to suppress the freedom of speech and association of enslaved people, free Black people, and abolitionist allies.¹¹⁶ Slaveholders both restricted and coerced speech from the individuals they owned, using violence to control enslaved people's freedom of expression.¹¹⁷ Mobs regularly targeted abolitionists and abolitionist communications, storming public meetings, burning pamphlets, and assaulting those who spoke out against slavery.¹¹⁸

Suppression was not simply the private act of slaveholders and other proponents of slavery. Policymakers enacted rules and laws to justify restrictions on abolitionist speech. States passed slave codes, designed in part to prevent enslaved people from learning to read or interacting with free Black people from the North or abroad.¹¹⁹ Southern states enacted bans on antislavery speech, claiming fear of incitement to violent rebellion.¹²⁰ Penalties were severe. Alabama, for example, "provided the death penalty for any person who distributed or published 'any seditious papers . . . tending to produce conspiracy or insurrection . . . among the slaves or colored population,'" while Virginia "passed a statute providing for imprisonment of any antislavery society member who entered the state and advocated abolition or maintained that masters had no

¹¹⁶ See Carter, *supra* note 24, at 1084 (describing how "[t]he American slave regime severely punished Blacks' freedom of speech and speech about Black freedom"); see also William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 COLUM. L. REV. 1855, 1859–64 (2012) (describing the history of laws and private action restricting slaves' speech and punishing antislavery speech).

¹¹⁷ See Carter, *supra* note 24, at 1096–1110 (describing how slaveholders and White mobs chilled and coerced enslaved people's speech).

¹¹⁸ See Curtis, *supra* note 31, at 800–801 (providing examples of instances in which mobs attacked and harassed individuals associated with the abolition movement).

¹¹⁹ See Carter, *supra* note 24, at 1084–85 (noting examples from Mississippi and Georgia).

¹²⁰ See MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 131–34 (2000) [hereinafter CURTIS, FREE SPEECH] (describing the debate over whether to ban abolitionist expression and explaining that advocates of suppression argued that "abolition threatened to ignite slave rebellion in the South").

property in their slaves.”¹²¹ Slaveholding states banned the circulation of abolitionist books and mailings in order to prevent rebellion.¹²²

These laws and policies were not limited to southern states. Northern cities passed resolutions condemning the circulation of antislavery literature in the South.¹²³ Congress imposed a gag rule “forbidding legislators from discussing or receiving petitions from citizens regarding the issue[] of slavery.”¹²⁴ A shared justification—North and South, state and federal—was the preservation of law and order against the backdrop of “dangerous” ideas. As William Carter has explained:

The perceived dangerousness of Black and abolitionist speech was the primary justification offered by proslavery forces for restricting such speech through legal and extralegal means. . . . [A] purpose of tightly controlling the information slaves received or transmitted was to prevent actual or feared escape plans or to prevent the fomentation of slave rebellions via communication among the slaves or by exposure to “dangerous” ideas about liberty and freedom.¹²⁵

The “public” interest in safety and security—a concept that excluded considerations of the danger and insecurity that enslaved Black people faced as a result of their slavery—became the justification for the suppression of speech by Black people and their abolitionist allies.¹²⁶

¹²¹ *Id.* at 136–37 (citation omitted).

¹²² Virginia, for example, “banned circulating books with the intent of ‘persuading persons of colour within this commonwealth . . . to rebel or denying the master the right of property in their slaves and inculcating the duty of resistance to such right.’” *Id.* at 137 (citation omitted).

¹²³ See *id.* at 139–40 (describing resolutions in Albany, New York and Philadelphia, Pennsylvania, condemning abolitionist interference in southern states and explaining that “[a]lmost every sizable Northern community held antiabolition mass meetings in the summer or fall of 1835” and that “[t]hese meetings . . . typically referred to abolitionists as ‘fanatics’ and ‘incendiaries’”).

¹²⁴ Hessler, *supra* note 30, at 186.

¹²⁵ Carter, *supra* note 24, at 1110–11.

¹²⁶ See Curtis, *supra* note 31, at 862 (noting the justification for speech suppression was peace and public safety).

In the face of such widespread and legalized suppression, enslaved people had little recourse to protect the freedom of their speech. Prior to the Fourteenth Amendment, the First Amendment applied only to the federal government and not to the states.¹²⁷ More fundamentally, based on the Supreme Court's interpretation of the U.S. Constitution—in cases like *Dred Scott v. Sandford*¹²⁸ and *Prigg v. Pennsylvania*¹²⁹—Black people were not considered citizens of the United States, and their constitutional rights were not meaningfully recognized or protected.¹³⁰

It should not go unnoticed, then, that the primary legal justification for the suppression of free speech and expression in jails and prisons today is also safety and security.¹³¹ Immigrants—whose rights are too often defined by their lack of citizenship rather than their identification as persons under the U.S. Constitution—are particularly vulnerable to retaliation.¹³² The parallels lend credibility to arguments that the restrictions on the freedom of speech in immigration detention are overbroad and illegitimate—designed to protect the institution of immigration detention, rather than to truly protect public safety and security.

A. SAFETY AND SECURITY AS A PURPORTED JUSTIFICATION FOR SUPPRESSION OF DETAINED PEOPLE'S FIRST AMENDMENT RIGHTS

As described above, jailers have long used violent tactics to respond to collective action by people in detention. The purported justification for these acts is the preservation of safety and security. For those inside immigration detention, this is often framed as safety and security inside the jail. For those critiquing immigration

¹²⁷ See Carter, *supra* note 24, at 1073 (“It was not until nearly sixty years after the Second Founding that the Supreme Court held that the constitutional guarantee of free speech was also applicable to the states as part of the Fourteenth Amendment’s guarantee of due process.”).

¹²⁸ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

¹²⁹ *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

¹³⁰ See Curtis, *supra* note 27, at 1383–84 (discussing these cases).

¹³¹ See *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (weighing statutory religious accommodations against heavy deference for prison administrators’ safety and security determinations).

¹³² See Michael Kagan, *Regulatory Constitutional Law: Protecting Immigrant Free Speech without Relying on the First Amendment*, 56 GA. L. REV. 1417, 1420–26 (2022) (discussing the peculiar vulnerabilities of immigrants who choose to speak out against the government).

detention from the outside, acts of retaliation are often reframed as the neutral enforcement of immigration law, preserving the law and order of the immigration system as a whole.

Inside immigration detention, federal immigration officials consider the threat of “incitement” to be an appropriate justification for disciplinary action. The 2011 Performance-Based National Detention Standards (revised in 2016) explicitly name “[e]ngaging in or inciting a group demonstration” and “inciting others to riot” as serious offenses representing a “[t]hreat to the [f]acility.”¹³³ In practice, the label of incitement has been used to justify the retaliatory punishment of people involved in hunger striking and other forms of collective speech and expression that pose no threat of violence to the guards or others inside the facility.

Recent investigations of use of force incidents in immigration detention have revealed how often guards have used false safety and security rationales to justify violence as a response to collective speech and expression. In 2017, for example, guards pepper sprayed demonstrators at Adelanto Detention Facility in California.¹³⁴ Several guards claimed that the demonstrators were “inciting a ‘rebellion’ and ‘assaulting’ staff.”¹³⁵ Video footage showed a peaceful protest; an internal investigation nonetheless concluded that pepper spray was an appropriate response under the applicable standards while also finding that guards did engage in retaliatory behavior.¹³⁶ In 2019, following the suicide of asylum-seeker Roylan Hernandez-Diaz at Richwood Correctional Center in Louisiana, several other immigrants at the facility protested by writing “Justice for Roylan” on their shirts and refusing to eat at

¹³³ PERFORMANCE-BASED NAT’L DET. STANDARDS 2011 app. 2.2.D, § 3.1 (U.S. IMMIGR. AND CUSTOMS ENFT 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>.

¹³⁴ See Tom Dreisbach, *Exclusive: Video Shows Controversial Use of Force Inside an ICE Detention Center*, NPR (Feb. 6, 2020, 7:45 AM), <https://www.npr.org/2020/02/06/802939294/exclusive-video-shows-controversial-use-of-force-inside-an-ice-detention-center> (describing the Adelanto Detention Facility incident).

¹³⁵ *Id.*

¹³⁶ See *id.* (presenting the internal investigation results); see also Andrea Castillo, *Immigrants Detained at Adelanto Staged a Peaceful Protest. Guards in Riot Gear Pepper-Sprayed Them*, L.A. TIMES (June 26, 2020, 10:25 AM), <https://www.latimes.com/california/story/2020-06-26/immigrants-detained-at-adelanto-staged-a-peaceful-protest-guards-in-riot-gear-pepper-sprayed-them> (describing how the peaceful protest turned into a “war zone”).

mealtime.¹³⁷ Guards beat the protestors, resulting in at least one hospitalization.¹³⁸ At Farmville Detention Center in Virginia, immigrants in detention protested poor conditions and restrictions on social visitation in 2019, refusing to leave their dormitory to eat.¹³⁹ Guards entered their dormitory and pepper sprayed them, placing some in solitary confinement.¹⁴⁰ In 2020, as the COVID-19 pandemic spread through immigration jails, guards used chemical agents and solitary confinement against detained individuals who peacefully protested the unsanitary conditions in La Palma Correctional Center in Arizona.¹⁴¹ The Department of Homeland Security Office of the Inspector General investigated the incident, published photos of the use of force against the protesters, and recommended review of use of force procedures and other remedial actions.¹⁴² ICE officials did not concur with the recommendation, stating that it concluded that the use of force incidents were appropriate responses.¹⁴³ Hunger strikers report the use of solitary confinement without medical justification, use of force, and transfers to other jails as means of punishing people for speaking out and disrupting internal organizing.¹⁴⁴ At the most extreme, federal immigration officials have even force-fed hunger strikers, a practice that, like solitary confinement, has been described as

¹³⁷ Monsy Alvarado, Ashley Balcerzak, Stacey Barchenger, Jon Campbell, Rafael Carranza, Maria Clark, Alan Gomez, Daniel Gonzalez, Trevor Hughes, Rick Jervis, Dan Keemahill, Rebecca Plevin, Jeremy Schwartz, Sarah Taddeo, Lauren Villagran, Dennis Wagner, Elizabeth Weise & Alissa Zhu, *Deaths in Custody. Sexual Violence. Hunger Strikes. What We Uncovered Inside ICE Facilities Across the US*, USA TODAY (Apr. 23, 2020, 12:25 PM), <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-asylum-under-trump-exclusive-look-us-immigration-detention/4381404002/>.

¹³⁸ *See id.* (discussing the guards' reactions to the protest).

¹³⁹ *See id.* (describing the conditions at Farmville Detention Center resulting from a mumps outbreak).

¹⁴⁰ *Id.*

¹⁴¹ *See* Joe Walsh, *ICE Jail Used Pepper Spray on Detainees Who Protested Covid Issues, Report Alleges*, FORBES (Apr. 1, 2021, 3:26 PM), <https://www.forbes.com/sites/joewalsh/2021/04/01/ice-jail-used-pepper-spray-on-detainees-who-protested-covid-issues-report-alleges/?sh=327de911519f> (reporting on guards' reactions to protests at La Palma).

¹⁴² *See* DEP'T OF HOMELAND SEC. OFF. OF INSPECTOR GEN., OIG-21-30, VIOLATIONS OF DETENTION STANDARDS AMID COVID-19 OUTBREAK AT LA PALMA CORRECTIONAL CENTER IN ELOY, AZ 5–6, 17–18 (2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-30-Mar21.pdf> (showing pictures of the facility and the inspector general's recommendations).

¹⁴³ *See id.* at 18 (addressing the disagreements between ICE and the inspector general).

¹⁴⁴ *See* AM. CIV. LIBERTIES UNION & PHYSICIANS FOR HUM. RTS., *supra* note 91, at 40–49 (identifying the disturbing ramifications that hunger strikers face).

torture.¹⁴⁵ For example, a 2019 hunger strike by South Asian asylum seekers detained in multiple facilities along the U.S.–Mexico border resulted in force-feeding.¹⁴⁶

Safety and security is, of course, often presented as a justification for deportation policy overall.¹⁴⁷ When targeting outspoken detained immigrants for deportation, federal immigration officials often claim to be enforcing “the law,” when in fact they are violating legal constraints on governmental behavior, including the First Amendment’s prohibitions against unlawful restraint and punishment of speech. In 2020, for example, ICE deported Hector Garcia Mendoza just two days after he became a named plaintiff in a lawsuit suing federal immigration officials and the private prison warden for failing to protect immigrants in Elizabeth Detention Center from COVID-19, claiming that they were simply executing a deportation order and denying the timing of the deportation was retaliatory.¹⁴⁸ Federal immigration officials also deported a key witness, Mory Keita, in a lawsuit alleging widespread abuse by guards at Butler County Jail in Ohio despite his lawyers’ attempts to keep him in the country so that he could participate in the legal action against the jail.¹⁴⁹ That same year, when a whistleblower nurse came forward to report forced hysterectomies and other

¹⁴⁵ See *id.* at 30–35 (revealing ICE’s history of force-feeding people in detention and the lack of procedural protections it employs).

¹⁴⁶ See, e.g., Robert Moore, *Citing Inhumane Conditions, Detained Asylum Seekers in El Paso Go on Hunger Strike*, TEX. MONTHLY (Feb. 1, 2019), <https://www.texasmonthly.com/news-politics/detained-asylum-seekers-el-paso-hunger-strike/> (describing a hunger strike by eleven immigrants detained at El Paso Processing Center); Cedar Attanasio, Garance Burke & Martha Mendoza, *Attorney: Hunger-Striking Immigrants Forced to Hydrate*, AP (Jul. 28, 2019), <https://apnews.com/article/immigration-india-us-news-ap-top-news-politics-b386012b33a14d4695827a2265ea36f3> (reporting that three Indian immigrants detained at Otero detention center in Texas were forced to receive IV drops after a three-week hunger strike).

¹⁴⁷ See DAS, *supra* note 13, at 16–19, 161–185 (discussing how policymakers use public safety rationales to justify deportation policies).

¹⁴⁸ See Matt Katz, *ICE Detainee Who Sued His Jailers Was Swiftly Deported. Now He’s Missing*, GOTHAMIST (May 28, 2020), <https://gothamist.com/news/ice-detainee-who-sued-his-jailers-was-swiftly-deported-now-hes-missing> (“ICE’s field office in Newark said in a statement that his deportation had ‘no connection to lawsuit.’”).

¹⁴⁹ See Kevin Grasha, *Witness in Lawsuit Alleging Assaults of Immigrants at Butler County Jail Has Been Deported*, FOX19 NOW (Dec 18, 2020, 11:13 AM), <https://www.fox19.com/2020/12/18/witness-lawsuit-alleging-assaults-immigrants-butler-county-jail-has-been-deported/> (noting that Keita was mid-flight when a federal judge responded to Keita’s attorney’s emergency request to stop the deportation by issuing an order saying that the witness should remain in the United States pending his testimony).

unwanted gynecological procedures against immigrant women held at Irwin Detention Center in Georgia, ICE began deporting the women until immigrant rights groups filed suit and obtained a temporary restraining order.¹⁵⁰

Similarly, federal immigration officials have also used claims of protecting safety and security to target critics of U.S. immigration detention policy outside of detention, often denying retaliatory motives publicly while internal documents reveal a desire to silence or punish. As I have previously written, federal immigration officials targeted formerly detained activists like Claudio Rojas, Jean Montrevil, and Ravi Ragbir for deportation after their criticism of immigration policies received widespread attention.¹⁵¹ In several of the cases, ICE claimed that it was taking action based on the activists' past criminal records—even in cases like Rojas's, in which there was no criminal record.¹⁵² Amorphous security concerns were also used to justify federal immigration officials' surveillance of Project South, Georgia Detention Watch, El Refugio, and other immigrant rights groups in Georgia; however, Freedom of Information Act documents revealed that the officials discussed retaliating against them for their organizing to close Irwin County Detention Center and Stewart County Detention Center.¹⁵³ Federal immigration officials similarly surveilled leaders of Grassroots Leadership—barring them from meeting with detained immigrants in T. Don Hutto Detention Facility in Texas—and initiated removal proceedings against Maru Moru Villalpando, leader of La Resistencia, citing her activism as a reason for targeting her.¹⁵⁴ A

¹⁵⁰ See Molly O'Toole, *ICE Is Deporting Women at Irwin Amid Criminal Investigation into Georgia Doctor*, L.A. TIMES (Nov. 19, 2020, 4:58 PM), <https://www.latimes.com/politics/story/2020-11-18/ice-deporting-women-at-irwin-amid-criminal-investigation-into-georgia-doctor> (detailing ICE's attempts to deport potential witnesses and whistleblowers); *Oldaker v. Johnson*, No. 20-CV-00224, 2021 WL 4254864, at *3–5 (M.D. Ga. Sept. 17, 2021) (reciting the facts relevant to a motion for a temporary restraining order at Irwin).

¹⁵¹ See Das, *supra* note 21, at 234–37 (illustrating ICE's targeting of Rojas, Montrevil, and Ragbir).

¹⁵² See *id.* at 226 (noting that ICE has claimed, for example, that “it was merely enforcing old deportation orders against the noncitizens”).

¹⁵³ See José Olivares & John Washington, *ICE Discussed Punishing Immigrant Advocates for Peaceful Protest*, INTERCEPT (June 17, 2021, 7:00 AM), <https://theintercept.com/2021/06/17/ice-retaliate-immigrant-advocates-surveillance/> (revealing the pretextual nature of ICE's security justifications).

¹⁵⁴ See UNIV. OF WASH. SCH. OF LAW IMMIGR. CLINIC ET AL., TARGETED BUT NOT SILENCED: A REPORT ON GOVERNMENT SURVEILLANCE AND RETALIATION AGAINST IMMIGRATION

private contractor surveilled hundreds of demonstrations against family detention and separation policies in 2019 and prepared a “threat analysis” that the Department of Homeland Security circulated to ICE personnel.¹⁵⁵ Safety of immigration personnel was cited as the reason for relying on surveillance data of public protests.¹⁵⁶

Just as pro-slavery actors justified the suppression of anti-slavery speech by claiming it posed a threat of “incitement” to violence and rebellion, similar dynamics appear to be at play in the suppression of speech in immigration detention. These purported safety and security justifications—which result in targeted violence against immigrants who dare to advocate for their rights—demand scrutiny.

B. THE SUPPRESSION OF FIRST AMENDMENT RIGHTS UNDER THE SCRUTINY OF THE COURTS

It is rare for the federal government to be forced to justify its rationales for First Amendment suppression and retaliation in court.¹⁵⁷ A 2015 lawsuit brought by striking mothers detained at Karnes County Detention Center in Texas, however, forced the federal government to measure its actions against the First Amendment.¹⁵⁸ The case, which drew significant attention, further underscores how much the suppression of First Amendment rights

ORGANIZERS IN THE UNITED STATES 7–8, 10–11 (2021) (illustrating specific instances of ICE targeting immigration community leaders for surveillance and removal action).

¹⁵⁵ See Ryan Devereaux, *Homeland Security Used a Private Intelligence Firm to Monitor Family Separation Protests*, INTERCEPT (Apr. 29, 2019 11:25 AM), <https://theintercept.com/2019/04/29/family-separation-protests-surveillance/> (explaining how the private contractor “drilled down on physical locations where demonstrations were planned” by “[t]racking Facebook accounts affiliated with the protests”).

¹⁵⁶ See *id.* (quoting a federal immigration official as explaining that they shared the data to provide situational awareness because of protests near federal facilities and “physical threats” to federal employees).

¹⁵⁷ See Das, *supra* note 21, at 228 (explaining that immigration officials argue that “the First Amendment does not constrain their authority to deport because the courts generally lack the power to review or prevent their deportation decision” and they “do not consider themselves accountable to any other administrative or legislative body when allegations of retaliation arise” (footnotes omitted)).

¹⁵⁸ Roque Planas, *Private Prison Company Sued for Allegedly Putting Hunger-Striking Moms in Solitary Confinement*, HUFFPOST (Apr. 24, 2015, 5:48 PM), https://www.huffpost.com/entry/karnes-lawsuit-_n_7138456 (reporting on the Karnes County Detention Center lawsuit).

relies on the fear of incitement and, even more alarmingly, the legal status of the protestors to carve out exceptions to constitutional rights.

In 2014, the Department of Homeland Security began detaining Central American mothers and children seeking asylum near the U.S.–Mexico border, a departure from past policy that would generally permit those families to be released pending the adjudication of their asylum claims.¹⁵⁹ Many of the mothers in family detention centers spoke out about the harsh conditions and the impact on their children, leading to hunger strikes at family detention centers across the United States.¹⁶⁰

Federal detention standards permit the isolation of hunger strikers from others in detention when necessary for medical “monitoring.”¹⁶¹ However, many hunger strikers report that solitary confinement is used without medical necessity as a form of punishment to retaliate against the strikers. In 2015, a group of approximately eighty mothers detained at Karnes Family Residential Center engaged in a protest, circulated a petition demanding their release, and initiated a five-day hunger strike.¹⁶² The prison reacted by placing several of the leaders in solitary confinement and terminating their prison jobs, while guards engaged in verbal abuse, reportedly telling some of the strikers that they were “mentally unfit to care for their children” and threatening them with deportation and separation from their children.¹⁶³ The

¹⁵⁹ *Texans United for Families*, GRASSROOTS LEADERSHIP, <http://grassrootsleadership.org/programs/texans-united-families> (last visited June 7, 2022) (indicating the return of family detention in 2014).

¹⁶⁰ See Cristina Parker, *BREAKING: At Least 27 Women on Hunger Strike at the Hutto Detention Center #Hutto27*, GRASSROOTS LEADERSHIP (Oct. 27, 2015), <http://grassrootsleadership.org/blog/2015/10/breaking-least-27-women-hunger-strike-hutto-detention-center-hutto27> (collecting letters from the hunger strikers); Michaels, *supra* note 88 (noting the ripple effect of the Thanksgiving hunger strike).

¹⁶¹ See PERFORMANCE-BASED NAT’L DET. STANDARDS 2011, *supra* note 133, § 4.2 (discussing the purported safety and detainee health justifications for segregating hunger strikers).

¹⁶² Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CALIF. L. REV. CIR. 84, 85 (2015) (describing petitions, protests, and hunger strikes by immigrants detained at a Texas DHS detention center and retaliation that led to a class action First Amendment lawsuit).

¹⁶³ Samantha Chasworth, *Giving a Voice to the 32,000: Why Immigrant Detainees Must Have First Amendment Rights*, JURIST (Sept. 15, 2017, 12:47 PM), <https://www.jurist.org/commentary/2017/09/samantha-chasworth-immigrant-detainees/>.

mothers filed a lawsuit claiming that the prison's actions violated their First Amendment rights.¹⁶⁴

The federal government gave two responses. First, the government relied on a Supreme Court case, *Turner v. Safley*,¹⁶⁵ to argue that the detention center's actions were "reasonably related to legitimate penological interests," namely "safely operating family residential facilities."¹⁶⁶ Second, the government argued that the asylum seekers, detained on U.S. soil, were not protected by the First Amendment at all.¹⁶⁷ Ultimately, the case was voluntarily dismissed without resolving either of these arguments, but these contentions provide a window into the federal government's legal defense of First Amendment suppression in immigration detention.¹⁶⁸ Importantly, they echo the types of rationales used to justify the suppression of abolitionist speech during the debates over slavery in the United States—rationales that rely on the "danger" the speech presents while also diminishing the status and legal rights of the speakers.

First, the government's reliance on *Turner v. Safley* underscores the "danger" rationale. In *Safley*, a class action of incarcerated people sought to challenge two Missouri prison rules: one that limited correspondence between incarcerated people and another that prohibited incarcerated people from marrying without permission from the warden.¹⁶⁹ In assessing the claims, the Supreme Court declared, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."¹⁷⁰ It balanced the interests of protecting those rights, however, with principles of "judicial restraint" in light of the

¹⁶⁴ Class Action Complaint at 2, *Pineda Cruz v. Thompson*, No. 15-CV-326-XR, 2015 WL 1868560 (W.D. Tex. Apr. 23, 2015); *see also* Kagan, *supra* note 162, at 85–86 (describing the case).

¹⁶⁵ *Turner v. Safley*, 482 U.S. 78 (1987).

¹⁶⁶ Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 2, 14, *Pineda Cruz v. Thompson*, No. SA-15-CV-326-XR, 2015 WL 3922298 (W.D. Tex. May 7, 2015) [hereinafter Memorandum] (quoting *Safley*, 482 U.S. at 87); *see also* Kagan, *supra* note 162, at 84, 86 (describing the government's arguments).

¹⁶⁷ Memorandum, *supra* note 166, at 2 (arguing that the detained mothers "have not established connections to the United States").

¹⁶⁸ Notice of Voluntary Dismissal, *Pineda Cruz v. Thompson*, No. SA-15-CV-326-XR (W.D. Tex. Sept. 9, 2015).

¹⁶⁹ *Safley*, 482 U.S. at 81–82.

¹⁷⁰ *Id.* at 84.

challenges of operating a prison.¹⁷¹ While violations of constitutional rights often call for strict scrutiny, the Court rejected a strict scrutiny test in favor of far more deferential review.¹⁷² Under the *Safley* test, rather than seek a compelling justification for impinging on a fundamental right, a court need only look for “a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.”¹⁷³ With this test, the views of jail and prison officials are often given primacy: “When accommodation of an asserted right will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.”¹⁷⁴ Applying this test in *Safley*, the Court concluded that while restrictions on marriage were impermissible, the restrictions on mail correspondence served the security interests of the jail despite the burden on incarcerated people’s First Amendment rights.¹⁷⁵

In *Pineda Cruz*, the government sought to apply the highly deferential test from *Turner v. Safley* to the “family residential” detention standards, citing sections addressing “Hunger Strikes”¹⁷⁶ and “Insurrection”¹⁷⁷ as justifications for the placement of detained mothers in solitary confinement. The applicability of the *Safley* standard to civil immigration detention—which does not serve a “penological” interest—is an issue of debate.¹⁷⁸ Some courts have declined to apply *Safley* to immigration detention and other forms

¹⁷¹ *Id.* at 85. Notably, the Supreme Court emphasized the need for deference from federal courts “[w]here a state penal system is involved.” *Id.*

¹⁷² *Id.* at 89.

¹⁷³ *Id.* at 89–90 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

¹⁷⁴ *Id.* at 90.

¹⁷⁵ *Id.* at 91.

¹⁷⁶ Memorandum, *supra* note 166, at 15 (quoting detention standards on “Hunger Strikes” as permitting the “monitoring, counseling, and, when appropriate, treatment of any adult resident on a hunger strike” and requiring “a medical assessment by qualified medical personnel . . . for any individual suspected or announced to be on a hunger strike, and that upon medical recommendation, ‘the resident may be placed in close supervision for observation and monitoring’” (citations omitted)).

¹⁷⁷ *Id.* at 16 (citing “ICE disciplinary standards [that] state that their purpose is to ‘provide a safe and orderly living environment’ at ICE family residential facilities, and to ‘manage discipline and behavioral problems in a manner that ensures the safety and welfare of staff, residents, and visitors’” and stating that “[i]nsurrection’ is considered a major offense at ICE family residential facilities, and under the standards requires separation from the general population” (citations omitted)).

¹⁷⁸ *Safley*, 482 U.S. at 89 (requiring an inquiry into penological interests).

of civil confinement, but many have concluded that it does apply.¹⁷⁹ Scholars have raised concerns about the *Safley* test in various immigration settings.¹⁸⁰ Irrespective of its legal merits, however, the various applications of the test demonstrate how easily First Amendment rights may be set aside in the face of a carceral facility's desire to maintain law and order. *Pineda Cruz* demonstrates that the federal government embraces this rationale in the immigration detention setting.

Even more drastically, however, the federal government also argued in *Pineda Cruz* that the mothers detained at Karnes are “non-resident aliens who have not gained admission or entry to the United States – and have not established any connections to the United States” and therefore “are not entitled to prevail in a lawsuit challenging violations of the Constitutional protections of the First

¹⁷⁹ See, e.g., *Hause v. Vaught*, 993 F.2d 1079, 1082 (4th Cir. 1993) (applying *Safley*); *Clement v. Crawford*, 1993 U.S. App. LEXIS 8746, at *6 (9th Cir. Apr. 15, 1993) (same); *Hydrick v. Hunter*, 500 F.3d 978, 991 (9th Cir. 2007) (same), *vacated*, 556 U.S. 1256 (2009); *Jones v. Salt Lake Cnty.*, 503 F.3d 1147, 1153 (10th Cir. 2007) (same); *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 218 (D.D.C. 2020) (same); *Turkmen v. Hasty*, 789 F.3d 218, 260 (2d Cir. 2015) (assuming *Safley* applied because the parties did not argue otherwise), *rev'd in part sub nom.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1067 (C.D. Cal. 2019) (applying *Safley*). *But see In re Bahadur*, 441 F. Supp. 3d 467, 475 (W.D. Tex. 2020) (declining to apply *Safley*).

¹⁸⁰ See, e.g., Kagan, *supra* note 162, at 95 (arguing that the standards and interests articulated in *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), present a better lens through which to consider the speech of detained immigrants than *Safley's* standard because *Procunier* emphasizes the importance of imprisoned people's ability to communicate with the outside world); Laura E. Winterberger, *Obstruction of Reproductive Justice: Office of Refugee Resettlement's Unconstitutional Abortion Policy for Minors*, 50 U. PAC. L. REV. 489, 497–98 (2019) (arguing that *Safley* should not apply to the Office of Refugee Resettlement's minor detention policy because immigration detention is civil in nature “and not a form of punishment”); Wesley Smithart, Note, *Pregnant in Captivity: Analyzing the Treatment of Pregnant Women in American Prisons and Immigration Detention Centers*, 71 ALA. L. REV. 867, 869 (2020) (“Regardless of whether the detention is for the purpose of punishment or simply detainment pending other legal action, delayed or inadequate access to reproductive health care does not serve a valid interest of the United States government, as required by the Supreme Court.”); Bryn L. Clegg, *Force-Feeding Pretrial Detainees: A Constitutional Violation*, 62 WM. & MARY L. REV. 683, 694 (2020) (arguing that the rationality standard applied in *Safley* is rarely available for fundamental rights); Zachary Manfredi & Joseph Meyers, *Isolated and Unreachable: Contesting Unconstitutional Restrictions on Communication in Immigration Detention*, 95 N.Y.U. L. REV. 130, 190–91 (2020) (explaining that the government's penological interest should be given less deference in the immigration context); *Chapter Four: Conditions of Confinement, COVID-19, and the CDC*, 134 HARV. L. REV. 2233, 2253–54 (2021) (arguing that *Safley* allows courts to underenforce constitutional rights in prison and that carveouts to CDC guidelines permit “the will of prison administrators” to outweigh public health interests).

Amendment.”¹⁸¹ In other words, it argued that by virtue of the mothers’ legal status as asylum seekers with limited ties to the United States, they existed outside the First Amendment. As Michael Kagan has argued, there are strong reasons to reject these arguments.¹⁸² While the Supreme Court has not squarely addressed the question, it has recognized the First Amendment rights of immigrants with longstanding ties to the United States and has developed precedent rejecting restrictions on speech based on the identity of the speaker.¹⁸³ As Kagan explains, “A central reason why the First Amendment should protect non-citizens is that, in a democracy, it is essential that the general public hear directly from those affected by a public policy.”¹⁸⁴

While the issue was not ultimately resolved in *Pineda Cruz*, the federal government’s position echoes the arguments raised by proponents of slavery to justify the suppression of antislavery speech. In both contexts, safety and security concerns are used to justify preservation of the “law and order” of the institution (then, slavery; now, confinement), at the expense of those directly affected by the system. Similarly, proponents of the institution have used the status of non-citizenship (then, of Black people; now, of people not born in the United States) to carve whole groups out from the protections of the Constitution. The parallels are significant enough to raise concerns about the legitimacy of such arguments in their present contexts.

IV. CONCLUSION

Abolitionists’ resistance to slavery depended on the exercise and protection of their freedom of speech against robust private and

¹⁸¹ Memorandum, *supra* note 166, at 11.

¹⁸² See Kagan, *supra* note 162, at 90–96 (arguing that the Supreme Court’s evolving approach to enforcing constitutional rights of immigrants and the First Amendment casts doubt on the government’s position in *Pineda Cruz*); see also Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1463–68 (2018) (assessing the viability of the First Amendment as a constraint on retaliatory enforcement actions against immigrants).

¹⁸³ See Kagan, *supra* note 162, at 92–94 (summarizing Supreme Court precedent that suggests that immigrants with longstanding ties to the United States are entitled to free speech protections, as well as precedent suggesting that identity-based free speech restrictions are unconstitutional).

¹⁸⁴ *Id.* at 95.

public attempts to suppress their messaging. The same is true in the context of today's movement to abolish immigration detention. People in detention have continued to organize for freedom, and the channels for amplifying their voices have never been greater.¹⁸⁵ These efforts are dampened by suppression and retaliation, both inside and outside of immigration jails and prisons.

Recent strides in the protection of immigrants' First Amendment rights give hope for change. After many deportations of prominent immigrant rights activists like Montreuil and Rojas, advocates brought these issues into the national debate.¹⁸⁶ In the lead-up to the 2020 presidential election, the Democratic Party committed to ending retaliation against immigrant activists as part of its national platform.¹⁸⁷ Protection against retaliation was a prominent policy demand during the early months of the Biden Administration, with civil rights complaints and reports demanding the protection of immigrant activists' First Amendment rights.¹⁸⁸ In September 2021, the Secretary of the Department of Homeland Security issued a memorandum stating that “[a] noncitizen’s exercise of their First Amendment rights also should never be a factor in deciding to take

¹⁸⁵ See *supra* notes 97–104 and accompanying text.

¹⁸⁶ See *supra* notes 148–152 and accompanying text.

¹⁸⁷ See DEMOCRATIC PLATFORM COMM., 2020 DEMOCRATIC PARTY PLATFORM 63 (2020), <https://perma.cc/9MUS-2V6X> (“We will also prevent [immigration] enforcement officials from retaliating against individuals for their political speech or activity, or because of their efforts to advocate for individuals’ rights.”).

¹⁸⁸ See, e.g., Letter from Alina Das, Professor of Clinical L., N.Y. Univ. Sch. of L.; Kyle Barron, Of Counsel, NYU Immigrant Rts. Clinic; Chiraayu Gosani, L. Student, NYU Immigrant Rts. Clinic; Jared K. Carter, Assoc. Dir., Cornell L. Sch. First. Amend. Clinic; Taylor Kay, Law Student, Cornell L. Sch. First. Amend. Clinic & Luke Williams, Law Student, Cornell L. Sch. First. Amend. Clinic, to Katherine Culliton-González & Dana Salvano-Dunn, Off. for C.R. & C.L., U.S. Dep’t of Homeland Sec. et al. 1 (July 19, 2021), https://www.law.nyu.edu/sites/default/files/NYU%20Cornell%20DHS%20OCRCL%20Complaint_First%20Amendment%20Retaliation_Final%20Letter%20and%20Index%207%2019%202021%20web%20version.pdf (seeking an “investigation of, and corrective action to address, retaliatory immigration enforcement”); Letter from Jessica Schneider, *supra* note 94, at 2 (filing a complaint on behalf of “approximately 300 individuals whose lives are being recklessly endangered today”); *Five Things that the Biden Administration Can Do Immediately to Address DHS Retaliation Against Organizers and Protesters*, JUST FUTURES L. (Feb. 6, 2021) <https://justfutureslaw.org/wp-content/uploads/2021/02/FINAL-Top-Biden-Admin-Demands-on-Retaliation-related-to-PD.pdf> (identifying actions the Biden Administration “can immediately take to put an end to DHS retaliation”); Simon Kilmurry, *Letter to President Biden to End ICE Retribution*, INT’L DOCUMENTARY ASS’N (Jan. 29, 2021), <https://www.documentary.org/advocacy/letter-president-biden-end-ice-retribution> (expressing “grave concerns that ICE . . . has been violating the First Amendment”).

enforcement action.”¹⁸⁹ That same year, targeted activists and their legal teams were able to secure the return of Montrevil and Rojas and the cessation of efforts to deport Mora-Villalpando and Ragbir.¹⁹⁰

These initial efforts to recognize the importance of immigrant organizing hold great promise. Yet they remain too limited—many activists deported over the last several years remain deported, including detention whistleblowers like Keita and Mendoza Garcia.¹⁹¹ And as the recent 2021 and 2022 civil rights complaints from detention demonstrate,¹⁹² First Amendment rights continue to be suppressed in immigration jails and prisons. The burden of retaliation continues to fall heavily on those who choose to speak out, and the public continues to be deprived of an opportunity to understand fully the institution of immigration detention.

Just as the institution of slavery thrived on the silencing of enslaved people, so too does the institution of immigration detention thrive on the silencing of detained people. In the words of Frederick Douglass, freedom of speech is “the great moral renovator of society and government.”¹⁹³ To immigration detention abolitionists, freedom of speech is a critical right that must be protected.

¹⁸⁹ Memorandum From Alejandro N. Mayorkas, Sec’y, U.S. Dep’t of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enft 5 (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>, *vacated*, Texas v. United States, No. 6:21-CV-00016, 2022 WL 2109204 (S.D. Tex. June 10, 2022).

¹⁹⁰ See Nick Pinto, *ICE Settles with Immigrant Rights Leader Who Sued over First Amendment Violations*, INTERCEPT (Feb. 24, 2022, 12:27 PM), <https://theintercept.com/2022/02/24/ice-ravi-ragbir-deportation-first-amendment> (describing how Ravi Ragbir won “a three-year reprieve from deportation”); Amy Goodman, “A Big Relief”: Haitian Immigrant Rights Leader Jean Montrevil Wins Victory in Fight to Stay in U.S., DEMOCRACY NOW! (Dec. 20, 2021), https://www.democracynow.org/2021/12/20/jean_montrevil_granted_deferred_action (describing how Jean Montrevil was “granted three years of protection from deportation”); Joel Rose, *An Immigrant Activist Says ICE Deported Him in Retaliation. Now He’s Back in the U.S.*, NPR (Dec. 15, 2021, 10:40 AM), <https://www.npr.org/2021/12/15/1064224812/immigrant-activist-deported-ice-retaliation-rojas> (describing how Claudio Rojas was allowed to return to the United States); Nina Shapiro, *Government Drops Deportation Case Against Washington State Immigration Activist*, SEATTLE TIMES (Sept. 22, 2021, 8:03 AM), <https://www.seattletimes.com/seattle-news/government-drops-deportation-case-against-immigration-activist-maru-mora-villalpando> (discussing how the government dropped a deportation case against Maru Mora Villalpando).

¹⁹¹ See *supra* notes 148–150 and accompanying text.

¹⁹² See *supra* notes 105–108 and accompanying text.

¹⁹³ Douglass, *supra* note 1.