

---

---

## BOOK REVIEW

### UNSETTLING HISTORY

CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965. By Kelly Lytle Hernández. Chapel Hill, N.C.: University of North Carolina Press. 2017. Pp. 301. \$28.00.

*Reviewed by Jennifer M. Chacón\**

At the time she set out to write *City of Inmates*, Professor Kelly Lytle Hernández wanted to tell the story of the “long rise of incarceration in Los Angeles” (p. 1). As a Los Angeles–based scholar, she was understandably drawn to study the question of how it was that Los Angeles came to “operate[] the world’s largest jail system.”<sup>1</sup> How did it come to be that “no city in the world incarcerates more people than Los Angeles” (p. 1)? The book jacket for *City of Inmates* states that the resulting book “explains *how* the City of Angels became the capital city of the world’s leading incarcerator.”<sup>2</sup> Although this characterization is consistent with some passages in the book itself, it is also not quite right. *City of Inmates* is not, in fact, an analysis of the mechanisms of racialized mass incarceration in Los Angeles. This book seeks to explain *why* Los Angeles is a leading site of racialized mass incarceration. Understanding that distinction is the key to grasping the significance of the work.

In her initial conception of this book, Hernández’s plan was to answer the “how” question. Her efforts to study the carceral state of Los Angeles are responsive to Professor Heather Ann Thompson’s call to historians to focus their trained eyes on the rise of mass incarceration in the second half of the twentieth century (pp. 1–2, 222 n.6).<sup>3</sup> But the project ultimately took unexpected twists and turns. Most notably, Hernández was unable to get a hold of the key materials that would have illuminated the inner workings of the twentieth-century jail system

---

\* Professor of Law and Senior Associate Dean for Administration, U.C. Irvine School of Law. The author wishes to thank Professors Sunita Patel, Sharon Dolovich, Eric Miller, Christine Scott-Hayward, and India Thusi for their very thoughtful comments on an early draft.

<sup>1</sup> VERA INST. OF JUSTICE, LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION REPORT, at i (2011), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/los-angeles-county-jail-overcrowding-reduction-project-final-report/legacy\\_downloads/LA\\_County\\_Jail\\_Overcrowding\\_Reduction\\_Report.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/los-angeles-county-jail-overcrowding-reduction-project-final-report/legacy_downloads/LA_County_Jail_Overcrowding_Reduction_Report.pdf) [<https://perma.cc/2LGR-EM2K>]. The report goes on to note that “[t]he County’s criminal justice system is extraordinarily complex, involving 88 municipalities, 47 law enforcement agencies, more than 30 criminal courthouses, and eight jail facilities.” *Id.*

<sup>2</sup> Emphasis has been added.

<sup>3</sup> The author cites Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703 (2010).

---

---

in Los Angeles (pp. 2–3). As Hernández observes in her introduction to the book, at some point after Professor Edward Escobar completed research for his work on early twentieth-century relations between Chicanos and the Los Angeles Police Department (LAPD),<sup>4</sup> the LAPD, “as well as the L.A. City Archives[,] destroyed all but four boxes of the LAPD’s historical records. Similarly, the Los Angeles Sheriff’s Department (LASD) either does not have or will not share its records” (p. 3). This lack of city and county records pertaining to policing and incarceration might have discouraged a lesser scholar from undertaking a historical project concerning incarceration in Los Angeles.

Rather than surrender, Hernández turned to media accounts, court records, “the personal papers of local elites, authorities, and activists,” and “the records of local institutions and organizations” (p. 3). As she notes, the records of the powerful — those who control criminalization and incarceration — provided a great deal of relevant evidence concerning the history of incarceration in Los Angeles (pp. 2–3). But even more important to her were the traces of history that she found in what she calls the “rebel archive” (p. 4). Her rebels “were an eclectic bunch, including the incarcerated as well as journalists, musicians, migrants, mothers, and many others” (p. 4). Relying on the archival information provided by the powerful as well as by those who rebelled against them, Hernández ultimately weaves together six different stories of incarceration in Los Angeles. Her tale begins with the human caging of members of the Tongva-Gabrielino nation by the Spaniards in the Los Angeles Basin in the mid-eighteenth century and ends with the spiking incarceration rates of black Angelinos in the first half of the twentieth century (pp. 4–6). Both of these stories, and the other four that fall between, are summarized in Part I of this Review.

The act of weaving together these distinct stories over time led Hernández to conclude that incarceration in Los Angeles was and remains a form of elimination, incident and instrumental to settler colonialism. Or, as she puts it:

[T]he rebel archive pulled me toward one chilling conclusion: incarceration is elimination. Why? Because incarceration is a pillar in the structure of conquest and, in particular, settler colonialism. In the Tongva Basin, it was first used to clear Native peoples from life and land in the region by criminalizing, categorizing, and caging them as vagrants with no right to be in Los Angeles, a city of conquest. In the decades ahead, as the structure of U.S. invasion advanced and evolved in the region, settlers in the city repeatedly pivoted the practices of incarceration to address a series of racial and political threats, such as “tramps” and “hobos” as well as Chinese immigrants, magonistas, Mexican migrants, and black citizens. By the 1950s, Los Angeles imprisoned more people than any other city in the United States, and the pattern was clear: on the arc of an enduring conquest in the

---

<sup>4</sup> EDWARD J. ESCOBAR, *RACE, POLICE, AND THE MAKING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900–1945* (1999).

---

---

Tongva Basin, incarceration was born and bred as a system of elimination, targeting Native peoples and racialized outsiders for disappearance. (p. 197)

Hernández thus presents incarceration as one of a number of “eliminatory options” deployed by the settler state in service of conquest, land appropriation, and the subjugation of conquered and excluded peoples (p. 9).<sup>5</sup>

In the same way that her archival focus shifted over the course of the project, the intellectual framework that Hernández ultimately relies upon in the book is not the one that she envisioned at the start. She notes that, as a field of study, the history of incarceration is “dominated by analyses of labor control and racial subjugation” (p. 9). But, in Hernández’s view, these frameworks have gaps in their explanatory capacity; they fail to account for some of what Hernández found in the rebel archive (p. 9). In filling these gaps, Hernández took seriously a challenge issued by Professor Angela Davis, who urged researchers of policing and state violence to work against an acknowledged backdrop that we “live on colonized land.”<sup>6</sup>

The recent explosion of scholarly literature on settler colonialism<sup>7</sup> and foundational literature by indigenous scholars<sup>8</sup> therefore provides the theoretical through line for Hernández’s analysis of the eliminatory practices that she identifies in the two-hundred-year period traversed by her book. As defined by Patrick Wolfe, “settler colonialism is an inclusive, land-centred project that coordinates a comprehensive range of agencies, from the metropolitan centre to the frontier encampment, with

---

<sup>5</sup> Hernández acknowledges the scholarly debate concerning distinctions between the settler-colonial projects of eliminating indigenous people and racial outsiders who are themselves “arrivants” (p. 12), but ultimately concludes that the term can be used capaciously to include both sets of processes (pp. 8–9).

<sup>6</sup> ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* 136 (2016).

<sup>7</sup> See generally JODI A. BYRD, *THE TRANSIT OF EMPIRE* (2011); WALTER L. HIXSON, *AMERICAN SETTLER COLONIALISM* (2013); WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* (2013); AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010); LORENZO VERACINI, *SETTLER COLONIALISM: A THEORETICAL OVERVIEW* (2010); LORENZO VERACINI, *THE SETTLER COLONIAL PRESENT* (2015); PATRICK WOLFE, *TRACES OF HISTORY* (2016); Jodi A. Byrd & Michael Rothberg, *Between Subalternity and Indigeneity*, 13 *INTERVENTIONS* 1 (2011); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 *J. GENOCIDE RES.* 387 (2006) [hereinafter Wolfe, *Settler Colonialism*].

<sup>8</sup> See generally NED BLACKHAWK, *VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST* (2006); BYRD, *supra* note 7; ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES* (2014); LISBETH HAAS, *SAINTS AND CITIZENS: INDIGENOUS HISTORIES OF COLONIAL MISSIONS AND MEXICAN CALIFORNIA* (2013); ROBERT H. JACKSON & EDWARD CASTILLO, *INDIANS, FRANCISCANS, AND SPANISH COLONIZATION: THE IMPACT OF THE MISSION SYSTEM ON CALIFORNIA INDIANS* (1995); BRENDAN C. LINDSAY, *MURDER STATE: CALIFORNIA’S NATIVE AMERICAN GENOCIDE, 1846–1873* (2012); *NATIVE HISTORIANS WRITE BACK: DECOLONIZING AMERICAN INDIAN HISTORY* (Susan A. Miller & James Riding In eds., 2011).

a view to eliminating Indigenous societies.”<sup>9</sup> Settler colonialism is both a historical reality and an ongoing process.<sup>10</sup> In recent years, “[s]ettler colonialism has flourished as a mode of critical inquiry, one that centers the originary violence directed at indigenous peoples as the active and expanding underside of colonial states.”<sup>11</sup> In the six different historical moments outlined in Part I, settler colonialism is the key conceptual link that Hernández offers to explain why the carceral state evolved and functioned as it did over the two hundred years of her historical survey.

This is not to say that the “how” questions are ignored. In the book, Hernández explores the critical role of state and municipal vagrancy laws under both Mexican and U.S. rule. She also highlights the role of federal immigration controls,<sup>12</sup> insufficient checks on racialized police violence, and other legal tools and bureaucratic powers that, over more than two centuries, have provided officials with the means of locking up and banishing those denizens of Los Angeles deemed undesirable. But Hernández’s book is most valuable not for what it tells us about the specific deployment of the varied tools of the carceral state, but for its attempt to identify the ideology that drove and continues to drive the deployment of these tools. Hernández’s argument is that the legacy and ongoing processes of settler colonialism in the forms of “native elimination, immigrant exclusion, and black disappearance” (to quote the book jacket again) were the driving forces behind the expansion of Los Angeles’s vast jail system.

Hernández’s book is unsettling for several reasons. As with any story that focuses on our nation’s prisons and jails, it is unsettling because it forces the reader to take an intimate walk with some of the many millions of individuals that spend time within the walls of U.S. prisons, jails, and detention centers. It is increasingly difficult for scholars and journalists to gain access to these spaces, and the fleeting glimpses that the general public has of them offer haunting reminders of just how incredibly dehumanizing they are.<sup>13</sup> Through the distancing lens of history, we can observe with greater clarity the extent to which criminal

---

<sup>9</sup> Wolfe, *Settler Colonialism*, *supra* note 7, at 393.

<sup>10</sup> See, e.g., VERACINI, *THE SETTLER COLONIAL PRESENT*, *supra* note 7, at 68.

<sup>11</sup> Renisa Mawani, *Law, Settler Colonialism, and “the Forgotten Space” of Maritime Worlds*, 12 ANN. REV. L. & SOC. SCI. 107, 113 (2016); see, e.g., DUNBAR-ORTIZ, *supra* note 8, at 7; Alyosha Goldstein, *Introduction: Toward a Genealogy of the U.S. Colonial Present*, in FORMATIONS OF UNITED STATES COLONIALISM, 1, 1–26 (Alyosha Goldstein ed., 2014); RANA, *supra* note 7, at 1–19.

<sup>12</sup> In other work, she also takes on the rise of the Border Patrol. See generally KELLY LYTLE HERNÁNDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* (2010).

<sup>13</sup> One such glimpse into the carceral state came in *Brown v. Plata*, 563 U.S. 493 (2011), the first Supreme Court case to include photographs in the decision, in this case to illustrate the stark overcrowding of California prison facilities. *Id.* at 548–49. For a detailed discussion of the *Plata* case and its broader significance, see generally JONATHAN SIMON, *MASS INCARCERATION ON TRIAL* (2014). For a more pessimistic account of the *Plata* case, see Keramet Reiter & Natalie Pifer, *Brown*

punishment has always been, and remains, a political project. Part I of this Review summarizes Hernández's deeply troubling history of Los Angeles, which centers on the lives of those most powerfully affected by the city's carceral web. This summary attempts to pinpoint precisely the ways that Hernández seeks to unsettle conventional understandings of what drives incarceration in the United States through her focus on settler colonialism.

*City of Inmates* also unsettles theoretical conventions in contemporary scholarship on criminal enforcement in the United States. Legal scholars might find the book unsettling in the way that it deliberately rejects legal formalism in its exploration of incarceration. Hernández's account generally ignores legalistic distinctions between forms of incarceration — jails, prisons, immigration detention centers, and locked dormitories — in favor of an approach that presents all modes of state-sponsored liberty deprivations as comparable instances of “human caging.” Although multiple governmental agencies, actors, and institutions make up the carceral state in Los Angeles at any given time, Hernández does not spend a great deal of time allocating blame and responsibility among these actors. As I explain in section II.A, this approach opens itself up to legal critique and questioning. Legal scholars might find it difficult to map out specific doctrinal or bureaucratic fixes that would follow from Hernández's account, and some will see this as a problem with the book. For reasons that I explain below, I do not see this as a problem. This approach seems true to the voices in Hernández's rebel archive. Moreover, it offers an important reminder that carceral control is both exercised and experienced in ways that can be obscured by formalistic analysis. Ultimately, there is great value in following the lead of the rebel archive because the narratives contained therein reveal the interconnected nature of governmental oppression.

---

v. Plata, OXFORD HANDBOOKS ONLINE (June 2015), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-113> [<https://perma.cc/T6VQ-8EVZ>], arguing that the realignment remedy spurred by the *Plata* litigation will merely push prison populations down to less transparent and less accountable jail facilities. For an empirical assessment of the effects of the realignment spurred by the *Plata* litigation, see Anjuli Verma, *A Turning Point in Mass Incarceration?: Local Imprisonment Trajectories and Decarceration Under California's Realignment*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 108–10, 128, 132 (2016), finding that post-realignment county-level decarceration rates have been tremendously variable and notably distinct from county-level incarceration patterns.

For other recent and important glimpses into prison life, see generally KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016); and David Kaiser & Lovisa Stannow, *The Shame of Our Prisons: New Evidence*, N.Y. REV. BOOKS (Oct. 24, 2013), <http://www.nybooks.com/articles/2013/10/24/shame-our-prisons-new-evidence/> [<https://perma.cc/99ZX-A3H4>], discussing prevalence of sexual violence in prisons and juvenile detention facilities. For a discussion of the worsening of modern prison conditions as a response to the Attica Uprising, see HEATHER ANN THOMPSON, BLOOD IN THE WATER 561 (2016), noting that Attica “reflected, and helped to fuel, a historically unprecedented backlash against all efforts to humanize prison conditions in America.”

A related unsettling aspect of the book is the way that its narrative arc veers away from the book's initial framing. Throughout the book, but particularly toward the end, Hernández's focus is not so much on "human caging" — which has a prominent place in the very title of the book — but on policing, broadly defined. Hernández never explicitly accounts for this shifting focus. Section II.B of this Review therefore analyzes the shift. The central preoccupation of the book is the carceral state in Los Angeles, not just the cages of Los Angeles. The carceral state encompasses prisons, jails, and nominally civil detention centers, of course, but it also encompasses the state actors who are charged with maintaining order and who process individuals in and around these human cages. By expanding her focus from jails to the full set of actors in the carceral state, Hernández reminds readers how the explosive growth of the carceral state has been generated by a host of actors and decisions, making it unlikely that a single-minded focus on prosecutors, or police, or prison guards, or immigration enforcement agents will get to the root of our current carceral crisis.

Ultimately, the book is unsettling in the way that it attempts to reorient our thinking about the historical forces that helped to define the contours of criminal punishment in the United States. Much of the recent literature on policing and punishment has turned away from accounts of the carceral state as a feature of bureaucratic modernity.<sup>14</sup> More recent accounts center instead on the role of race and racism in explaining the pathologies of U.S. criminal punishment; in most accounts, the legacy of slavery dominates the frame.<sup>15</sup> Slavery is important to Hernández's account as well, but Hernández situates slavery in the broader rubric of settler colonialism and argues that incarceration in Los Angeles is best understood not as a direct legacy of the U.S. system of slavery alone, but as a manifestation of a settler-colonial legacy that included slavery as part of a much broader system of exploitative and eliminatory practices. This analytic brings the Southwest — and a host of settler-colonial practices in the West — back into the story of the formation of U.S. criminal laws and legal institutions. In so doing, it

---

<sup>14</sup> For a classic account of modern punishment, see, for example, MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 293–308 (Alan Sheridan, trans., Vintage Books 1979) (1975). For a more recent, grounded, and nuanced account, see *MASS IMPRISONMENT* 1–27 (David Garland ed., 2001).

<sup>15</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 21–58 (2010); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS* 192–268 (2011) (focusing on the urban northeast in the late nineteenth and early twentieth century); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT* 40–66 (2014); cf. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 10–14, 139–62 (2015) (stressing the role of both race and neoliberal ideology); JAMES Q. WHITMAN, *HARSH JUSTICE* 6 (2003) (eschewing discussion of the role of race and racism in shaping the United States' uniquely punitive and degrading approach to criminal law enforcement, but acknowledging the historical legacy of racism in shaping the mores that favored harsh punishments); Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the U.S.*, 13 *NEW LEFT REV.* 41 (2002) (tracing the origins of the hyperincarceration of African American men from urban centers).

suggests an important reorientation in how we think about the roots of the current pathologies of our system of criminal punishment. At the same time, the capaciousness of this theoretical frame also raises questions about its explanatory capacity. Section II.C of this Review therefore evaluates the utility of the settler-colonial framework as a means for understanding policing practices and the rise of the carceral state in the United States.

## I. THE LONG ARC OF ANGELINO IMPRISONMENT

Two hundred years is a long time. Any effort to generate a totalizing theory of incarceration carried out by successive and nested governmental and nongovernmental actors over the course of two hundred years is bound to feel loose and ill fitting at times. Unsurprisingly, the settler-colonial frame that Hernández crafts offers both insights and frustrations.<sup>16</sup> But Hernández's focus on incarceration in the U.S. Southwest and her excavation of the broad interplay between settler-colonial objectives and the rise of the carceral state are important supplements to much of the criminal justice scholarship of recent years.

*City of Inmates* argues for a recognition of the unacknowledged extent to which so much of our criminal enforcement system — and particularly the growth of the carceral state — embodies a broader settler-colonial project. The enslavement and the continued subjugation of African Americans is an essential component of this story; however, Hernández's work situates the legacy of slavery in the broader settler-colonial frame, while simultaneously bringing into focus the ways that the elimination of indigenous peoples and related imperialist foreign policy objectives have also been important ingredients in the evolution of the contemporary criminal enforcement system. She not only provides details of events and developments that are overlooked in some other accounts, but also complicates our understanding of some well-known developments, including the growth of the federal prison system, the development and enforcement of vagrancy laws, and the interplay between immigration enforcement and criminal enforcement. In this Part, I set forth the arc of Hernández's narrative, with commentary on these aspects of her findings and analysis.

### A. *Early Human Caging in the Los Angeles Basin*

Hernández begins her exploration of elimination through incarceration with a look at the practices of Spanish colonial settlers in the area that is now known as the Los Angeles Basin. Hernández writes that the first documented use of caging of human beings was undertaken by Spanish missionaries who locked up women and girls over the age of eight “to compel behaviors concordant with the priests’ spiritual and

---

<sup>16</sup> For a full discussion of this issue, see *infra* section II.C, pp. 1116–21.

cultural beliefs” (p. 25). But human caging did not figure prominently in the early Spanish settlement. The dispossession of the area’s native inhabitants was effectuated through different forms of violence.

Throughout the Spanish Empire, officials forcibly appropriated the land from its indigenous inhabitants and reallocated that land in accordance with a rigid racial caste system. As mission settlement gave way to town in the remote outpost of El Pueblo Sobre el Rio de Nuestra Señora la Reina de Los Ángeles del Rio Porciúncula, the biggest winners in this land reallocation were individuals who were of mixed racial descent, claiming some Spanish ancestry, but also African or Native ancestry (pp. 26–27). Ninety-five percent of valley settlers among the original eleven families of settler recruits were of mixed race (pp. 26–27).<sup>17</sup> They were lured to the area with the promise of land, which they were not allowed to own in the more settled parts of New Spain (pp. 26–27). Once there, they worked to reinscribe the colonial caste system in a form favorable to themselves, casting themselves as the *gente de razón*, entitled to rule over and appropriate the labor of the indigenous residents, whom they labeled *gente sin razón* (p. 27–28). They implemented the Spanish system of law that criminalized social and religious practices of the prior residents of the land and that punished those infractions through brutal physical coercion and concomitant labor extraction. Incarceration, however, was not a significant practice. “[O]ne of the first buildings colonists built in Los Angeles was a jail, but incarceration did not become a social institution in the city until the end of the Spanish colonial era” (p. 29).

The revolutionary leaders of the War for Mexican Independence (1810–1821) espoused an anticaste policy and ultimately adopted a constitutional guarantee of equal citizenship for all adult men, regardless of race, religion, or class (p. 29). But in a historical pattern that seems

---

<sup>17</sup> This is only one telling example that hints at the fraught question of how various arriving immigrants should be conceptualized in the settler-colonial framework. As Professor Renisa Mawani has observed, “[t]he ongoing emphasis on ‘settlers’ and ‘natives’ obscures the disorderly conditions and entanglements produced by the changing objectives of imperialism, colonialism, and global capitalism.” Mawani, *supra* note 11, at 114. Hernández ultimately distinguishes between settlers and “arrivants” (p. 12), but takes the position that the eliminatory logic of settler colonialism was aimed at both indigenous peoples and arrivants; for example, incarceration “has been deployed in different ways in different times against different Indigenous and racially disparaged communities, but the punch line has been the same: elimination in the service of establishing, defending, and reproducing a settler society” (p. 9). See also BYRD, *supra* note 7, at 12–13, 21 (distinguishing between settlers and arrivants but acknowledging that “colonizing of indigenous peoples’ lands . . . implicate[s] all arrivants and settlers regardless of their own experiences of race, class, gender, colonial, and imperial oppressions,” *id.* at 21). But see Bonita Lawrence & Enakshi Dua, *Decolonizing Antiracism*, 32 SOC. JUST., no. 4, 2005, at 120, 134 (arguing that “[p]eople of color are settlers”). The recruited Spanish colonists who peopled the Los Angeles Basin presumably fit most neatly into the former category of settlers, but their own racial subordination and histories of dispossession highlight the historical and theoretical complexities that are at the heart of an ongoing debate in the settler-colonial literature.

hauntingly familiar,<sup>18</sup> old caste distinctions were replaced by new distinctions between citizens and “criminals.” The jails and prisons of the newly established Mexican nation “quickly filled with the historically marginalized, namely Natives but also Africans and poorer and darker *castas*” (p. 29). And “[m]ost of the nation’s imprisoned were arrested on public order charges” (p. 30). In Los Angeles, millions of acres of land were redistributed from the Gabrielinos to Mexican settlers, making the settlers wealthy landowners and turning the Gabrielino people into “refugees” (p. 32). The city council passed laws compelling the dispossessed to work — they were punished with incarceration when they failed to do so (p. 33). While the labor control aspects of Native criminalization are hugely significant,<sup>19</sup> Hernández notes that even more was at stake (pp. 33–34). Vagrancy laws were used to deny these former residents the right to live in the city at all. They were effectively banished from their own lands (p. 34).

### B. *The Rise of the Jail in Early Los Angeles*

Hernández argues that the use of the criminal law as a means of achieving Native elimination continued when the United States seized control of the land at the end of the United States–Mexico War (1846–1848). And with the rise of U.S. settler colonialism in the Los Angeles basin came the increasing prominence of the local jail. Hernández writes that:

Imprisonment was the first act of governance in Anglo-American Los Angeles. Before the first vote was ever held in the new U.S. town, the transition team in charge of guiding the shift from Mexican to U.S. rule hired a jailer. It was the jailer’s job to hold and feed people incarcerated in

---

<sup>18</sup> See generally ALEXANDER, *supra* note 15 (discussing the replacement of de jure racial discrimination through Jim Crow laws with de facto discriminatory practices achieved through the incarceration and disenfranchisement of African Americans through the criminal law). On the racial effects of felon disenfranchisement, see, for example, Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1162–64 (2004); Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 154–55 (2013); and Bailey Figler, Note, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 725 (2006), explaining that racial “[m]inorities bear the brunt of the impact of these laws; for example, felon disenfranchisement bars black men from voting at a rate seven times higher than the national average rate of disenfranchisement.”

<sup>19</sup> See also ANDRÉS RESÉNDEZ, *THE OTHER SLAVERY* 203–09 (2016) (identifying these labor control practices as the underpinnings of a system of enslavement of the indigenous residents of what is now the United States); STACEY L. SMITH, *FREEDOM’S FRONTIER: CALIFORNIA AND THE STRUGGLE OVER UNFREE LABOR, EMANCIPATION, AND RECONSTRUCTION* 18–21 (2013); DAVID SAMUEL TORRES-ROUFF, *BEFORE L.A.: RACE, SPACE, AND MUNICIPAL POWER IN LOS ANGELES, 1781–1894*, at 39 (2013); Benjamin Madley, “*Unholy Traffic in Human Blood and Souls*”: *Systems of California Indian Servitude Under U.S. Rule*, 83 PAC. HIST. REV. 626, 627 (2014); Michael Magliari, *Free Soil, Unfree Labor: Cave Johnson Courts and the Binding of Indian Workers in California, 1850–1867*, 73 PAC. HIST. REV. 349, 355 (2004).

the county jail, which was the only publicly owned building in Los Angeles. The local jail, therefore, represented the foundational structure of U.S. conquest in Los Angeles. Native elimination was one of its principal functions. (p. 35)<sup>20</sup>

Local elites continued to use public order charges to funnel large percentages of the region's indigenous inhabitants into the new jail (p. 36).

Hernández details the enactment of state public order laws allowing for the arrest of Native peoples for vagrancy “on the complaint of any [reasonable] citizen” (p. 36).<sup>21</sup> Comparable but facially neutral public order laws at the municipal level were enforced primarily against “Indians” (p. 36). The enactment and enforcement of vagrancy laws was so obviously aimed at containing the indigenous population “that the common council described the jailer’s monthly salary as payment for ‘board[ing] Indians as city prisoners’” (p. 36).<sup>22</sup> “Establishing the rule of law in Anglo-American Los Angeles, therefore, mostly meant denying” its prior inhabitants “the ‘right to *be*’ in Los Angeles” at all (p. 36). Vagrancy laws required these individuals to work or to “seek their old homes in the mountains,” ignoring the fact that they were the valley’s original inhabitants (p. 42).<sup>23</sup> Individuals rounded up as vagrants faced being auctioned off as forced labor or dying in jail cells (pp. 38–40). In this way, the jail became the center of a legal system intentionally designed to achieve the containment and elimination of the indigenous inhabitants of the Tongva Basin.

Chapter Two charts how, as “[d]isease, broken treaties, forced labor, incarceration, reservations, and genocidal violence pushed the California Indian population toward critical lows in towns and cities across the state” during this period (p. 55), native-born whites and immigrants from Northern and Western Europe began pouring into Los Angeles.<sup>24</sup> Los Angeles became a city with an Anglo-American majority in the mid-nineteenth century, and old vagrancy laws were repurposed and complemented by laws that allowed indigenous residents locked up on vagrancy charges to be auctioned to the white employers. The vague and overbroad California Anti-Vagrancy Act of 1872 was instrumental in providing the legal justification for many of these incarcerations (p. 52). By 1901, the public order charges of drunkenness, vagrancy, and “disorderly conduct” comprised nearly seventy percent of all arrests made by the Los Angeles Police Department (p. 53 tbl.). These arrests drove an expansion in jail capacity. The crumbling adobe Los Angeles

<sup>20</sup> A footnote has been omitted.

<sup>21</sup> The author quotes Act for the Government and Protection of Indians, 1850 Cal. Stat. 408, 410. The author alters the original text by using the word “reasonable” rather than “resident.”

<sup>22</sup> Alteration is in the original.

<sup>23</sup> The author quotes *Presentment of the Grand Jury — February Term, A.D. 1859*, L.A. STAR, Mar. 12, 1859, at 2.

<sup>24</sup> By the turn of the century, these groups “comprised over 90 percent of the local population” (p. 49).

County Jail was replaced with a building with a capacity of 160 in 1886, and again with a building with a capacity of 228 by 1903, with further expansion occurring in 1905 (pp. 54–55). “It is infinitely better to take tramps and vagrants into custody on minor charges, than to permit them to roam about the city unmolested,” explained the *Los Angeles Herald* in 1902” (p. 51).

The unpaid labor of the newly jailed residents helped to build modern Los Angeles (pp. 38–39). Working as convict labor exempt from the Thirteenth Amendment’s slavery prohibition,<sup>25</sup> these inmates formed an essential part of the labor force that built Los Angeles. “At a time when Mexican immigrants were emerging as the city’s main source of casual labor, incarcerated white males supplemented the work of Mexicans in the construction of modern Los Angeles” (p. 59).<sup>26</sup> This meant that the city used its growing criminal enforcement system to subsidize the cost of labor through the coercive deployment of potentially subversive social actors — a formula that city elites strongly supported (p. 61).

### C. Migration Control and Human Caging

Paralleling these developments was an unprecedented tide of racial violence against Chinese immigrants, which Hernández chronicles in Chapter Three. Long before Congress acted to exclude Chinese nationals, individuals from China were denied the right to vote under California state law and also banned by state law from testifying against whites or serving on juries (p. 66). The Geary Act<sup>27</sup> federalized xenophobic laws. But Hernández points out that when Congress passed the Geary Act (an extension and expansion of the 1882 Chinese Exclusion Act), it not only enacted racial exclusion but also criminalized unregistered immigrants — empowering judges to issue prison sentences to immigrants “unlawfully residing within the United States,” thereby marking the first federal criminalization of immigration (p. 72). As she does throughout

<sup>25</sup> Hernández cites to the case of *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871), which defined imprisoned people as “slave[s] of the state,” as a critical doubling-down on the Thirteenth Amendment’s slavery exemption (p. 58). Although Hernández characterizes the case as a U.S. Supreme Court decision, it was an 1871 decision of the Virginia Supreme Court. The decision nevertheless highlights the Thirteenth Amendment loophole that did, indeed, have national importance, even as it chillingly evinced the inability of the white political elite to view black citizens as free people. For additional discussion of the case, see, for example, Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 877–78 (2012). For discussions of contemporary penal policies that point to the legacy of *Ruffin*, see, for example, Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 258 (2009); and Teresa A. Miller, *Bright Lines, Black Bodies: The Florence Strip Search Case and Its Dire Repercussions*, 46 AKRON L. REV. 433, 441 (2013).

<sup>26</sup> During this time, Mexican immigrants and Mexican Americans made up only a small portion of the jailed population (p. 57).

<sup>27</sup> Pub. L. No. 52-60, 27 Stat. 25 (1892).

the book, Hernández chronicles these acts of oppression and the resistance these acts inspired. She accords attention to the movement in opposition to the Geary Act, including calls for civil disobedience of the registration provisions spearheaded by the Chinese Six Companies and broadly promoted in Chinese immigrant communities, calling this the “first massive civil disobedience campaign for immigrant rights in U.S. history” (p. 73).

The third chapter is far more focused on Supreme Court jurisprudence than any of the other chapters. Hernández charts the arguments and outcomes in *Chae Chan Ping v. United States*,<sup>28</sup> *Fong Yue Ting v. United States*,<sup>29</sup> and, ultimately, *Wong Wing v. United States*.<sup>30</sup> Hernández explains that the first two cases affirm the federal government’s plenary power to exclude and to deport noncitizens, respectively (p. 78). The final case distinguishes deportation from criminal punishment, denying to those who face deportation the criminal procedure protections afforded to those facing criminal punishment (pp. 87–88). Hernández’s discussions of these cases generally do not stray from standard critical accounts,<sup>31</sup> but they are enriched by her discussion about how the Chinese Exclusion and Geary Acts played out on the ground in California.

Hernández fleshes out the local tale of how Los Angeles became ground zero for interior enforcement of the Geary Act. Prompted by the demands of the Los Angeles Federated Trades Union, U.S. deputy marshals arrested a number of Chinese citizens subject to deportation under the Geary Act, and federal district court Judge Erskine M. Ross duly ordered them deported (pp. 82–85).

Once Judge Ross kick-started the deportation of Chinese residents and then ruled in favor of a white farmer who made a citizen’s arrest of an unregistered Chinese farmworker, labor unions and anti-Chinese citizens’ committees began arresting Chinese nationals across southern California in an effort to hasten their deportations. The result was that “[b]y September 1893, the greater Los Angeles area was the nation’s

---

<sup>28</sup> 130 U.S. 581 (1889).

<sup>29</sup> 149 U.S. 698 (1893).

<sup>30</sup> 163 U.S. 228 (1896).

<sup>31</sup> See, e.g., Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in IMMIGRATION STORIES 7, 21–23 (David A. Martin & Peter H. Schuck eds., 2005); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1897 (2000) (“*Wong Wing* expressly distinguished deportation per se from imprisonment of deportable noncitizens at hard labor, holding that the latter required the constitutional protections applicable to criminal cases.”); Gerald L. Neuman, *Wong Wing v. United States: The Bill of Rights Protects Illegal Aliens*, in IMMIGRATION STORIES, *supra*, at 31; Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1574 (2008) (“[J]ust three years after *Fong Yue Ting*, *Wong Wing v. United States* drew a line in the sand between laws governing immigration and laws that imposed criminal punishment. The Court held that the government could not punish noncitizens for violating immigration law by imprisoning them at hard labor unless it provided the criminal law protections of the Fifth and Sixth Amendments.” (footnote omitted)).

epicenter of deportation” (pp. 85–86). The local deportation scheme hit a snag when U.S. Attorney General Richard Olney refused to reimburse Marshal George Gard for the expenses he incurred by executing deportations. “Without reimbursement, sheriffs in San Francisco, Alameda, and nearby counties all refused to receive any additional deportees from Los Angeles” (p. 86). Lack of federal enthusiasm ultimately thwarted local efforts to implement the Act. Congress extended the period during which Chinese residents could obtain certifications proving their presence before the Act’s passage. Given the poor litigation outcomes in *Chae Chan Ping* and *Fong Yue Ting*, “the Chinese Six Companies ended the civil disobedience campaign,” now encouraging residents to comply with the registration requirement. Most Chinese residents secured certificates, and few were deported (p. 87).

Hernández argues that the Geary Act deportation provisions approved in *Fong Yue Ting* transformed immigration control from “a project of immigrant exclusion at the nation’s border” to one that “expanded to include crime, policing, punishment, and forced removal from within the United States” (p. 87). This seems a bit anachronistic. As Hernández notes, *Wong Wing* stopped what might otherwise have signaled an early merger of immigration and crime control (pp. 88–89). In fact, thanks in part to the *Wong Wing* decision, the lines between crime and migration remained relatively clear in the Geary Act period, and the Geary Act did not link criminal conduct to deportation. Migrants could be deported for failing to comply with the requirements of the Geary Act, but *Wong Wing* made clear that they could not be criminally punished for their failures — at least not without a full-blown criminal trial. *Wong Wing* also made it explicitly clear for the first time that noncitizens unlawfully present were protected by the Constitution.<sup>32</sup>

The true blurring of the line between migration control and crime control occurred later, with Congress’s creation of the crime of illegal entry and the enumeration of crime-related grounds as a basis for removal. Hernández takes these matters up in Chapter Five. Still, the shift to interior enforcement was a critical step along the path that Professor Dan Kanstroom characterizes as a transformation of immigration enforcement from “extended border control” to a form of “post-entry social control.”<sup>33</sup> And, as Hernández notes, *Wong Wing*’s legitimation of administrative immigration detention, separate from criminal punishment, created “a new form of human confinement veiled within the U.S. carceral system” (p. 89). In the present day, Los Angeles and its surrounding environs are home to various immigration detention facilities, both public and private (p. 90). These facilities are filled with Latinos — the group that comprises “[ninety-seven] percent of all forced

<sup>32</sup> See Neuman, *supra* note 31, at 43–45.

<sup>33</sup> DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 92 (2007).

removals . . . from the United States” (p. 91). Hernández attempts to grapple with the reasons for this in Chapter Five.

*D. Criminal Law and Imperialism*

But first, Chapter Four follows the rise of the magonistas. This chapter is an important bridge between Chapters Three and Five, because it offers new insight into how colonialism shaped the U.S. carceral state. It is not just that Los Angeles jails were a site of native elimination and control, and later of suppression of African Americans and of Mexican immigrants. Southwestern jails and prisons also operated, at least in some small way, as tools of imperial foreign policy.

As Hernández explains, the magonista movement was a Mexican revolutionary movement reacting to U.S. imperialism (p. 93). By the late nineteenth century, U.S. investors and capitalists were substantially invested in sustaining the rule of the Mexican President Porfirio Díaz, and Díaz, in turn, facilitated capitalist acquisition of the land and resources of the Mexican people. Ricardo Flores Magón (and many others) rebelled against this in a series of moves that ultimately gave rise to the bloody, protracted Mexican revolution. But first, Magón had to build a movement. And he attempted to do so on U.S. soil, where, for a time, he successfully published newspapers and planned strikes against capitalist interests in the Mexican border region (pp. 100–03). Spurred by the requests of Enrique Creel, Governor of Chihuahua and Díaz’s appointee to lead the counterinsurgency against the magonistas and other rebels, the U.S. government began to hunt Magón and his supporters (pp. 106–07). For a time, Magón evaded detection through constant movement and secretive living. By 1907, Magón was isolated in hiding, increasingly removed from his movement, even as hundreds of his fellow magonistas were already in jails across the borderlands (pp. 112–16). He was finally arrested in August 1907 by members of the LAPD, who were operating alongside a private security company paid for by the Mexican government. He was charged with violating the U.S. Neutrality Act (p. 118).

At that time, an estimated 25,000 Mexicans were living in the city of Los Angeles, and many were “politically engaged and experienced organizers in radical movements” (p. 119). Consequently, by the time Magón and his associates arrived at the doors of the Los Angeles County Jail, “several hundred Mexicans stood on the street cheering for the rebels” (p. 119). From within the jail, Magón was able to reconnect with revolutionary activists — vibrant rallies were held outside of the jail to celebrate the man and his cause. His lawyer, Job Harriman, also helped him connect with many of the city’s progressives, unionists, and radicals (p. 125). The audience for his revolutionary cause grew, in part through relationships built in the jail between the socialist and labor movements in Los Angeles and the Mexican revolutionary cause.

When Magón and his colleagues were convicted of violations of the U.S. Neutrality Act, they were transferred to the Arizona State Penitentiary where they remained until 1910 (pp. 127–28). But at that point, incarceration “had neither pushed the . . . rebels into oblivion nor crushed their uprising. Rather, incarceration in Los Angeles brought the magonistas a new beginning at a moment when [Mexican] operatives were chasing their movement into decline” (p. 128). Francisco Madero was able to harness this revolutionary zeal in Mexico at the start of the revolution (p. 128). Magón himself, however, remained in Los Angeles, where he continued to advocate for leftist causes, and where he was eventually sentenced to a twenty-year term for violation of the U.S. Sedition Act. He died in the Leavenworth penitentiary in 1922 (p. 129).

During the final years of Magón’s life, hundreds of thousands of Mexicans migrated north.<sup>34</sup> By 1930, nearly ten percent of Mexico’s population lived in the United States (p. 129). This significant demographic shift also changed the complexion of the Los Angeles County Jail too. Chapter Five tells that story through the lens of the life story of Pedro J. Gonzalez, a Los Angeles singer and radio personality of the 1930s. That chapter focuses on “how, at the federal and local levels, efforts to control Mexican immigration to the United States prompted the rise of Mexican incarceration within the United States” (p. 131).

#### *E. Immigration Control and the Growth of the Federal Prison System*

Mexicans were exempt from the racist national origin quotas of the Immigration Act of 1924<sup>35</sup> (Johnson-Reed Act); they were included in the law’s Western Hemisphere exemption.<sup>36</sup> This is not because Mexicans were assimilated to white racial identity.<sup>37</sup> Nativists in Congress viewed Mexicans as a mongrel race that would “degrade the nation’s ‘Aryan’ stock” (p. 134).<sup>38</sup> But business interests sold the exemption to Congress by explaining that Mexicans, like migrating birds,

---

<sup>34</sup> David G. Gutiérrez, *An Historic Overview of Latino Immigration and the Demographic Transformation of the United States*, in NAT’L PARK SERV., AMERICAN LATINOS AND THE MAKING OF THE UNITED STATES: A THEME STUDY 57, 58, [https://www.nps.gov/heritageinitiatives/latino/latinothemestudy/pdfs/Immigration\\_web\\_final.pdf](https://www.nps.gov/heritageinitiatives/latino/latinothemestudy/pdfs/Immigration_web_final.pdf) [<https://perma.cc/J4HJ-BJXZ>].

<sup>35</sup> Pub. L. No. 68-139, 43 Stat. 153.

<sup>36</sup> *Id.* § 4(c), 43 Stat. at 155; see also HERNÁNDEZ, *supra* note 12, at 28–29, 72–75 (discussing the Western Hemisphere exclusion from racial quotas, but also documenting the myriad ways Mexicans were excluded at the border during this period); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 50, 54–55 (2004) (same).

<sup>37</sup> In other work, Hernández notes that the 1924 Act marked a moment when Europeans were generally assimilated to white identity (with some distinctions drawn among them), and drew a hard line between whites and nonwhites, with the widespread exclusion of the latter. HERNÁNDEZ, *supra* note 12, at 28.

<sup>38</sup> See also NATALIA MOLINA, HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS 20–22 (2014); NGAI, *supra* note 36, at 52–53; Mark Reisler, *Always the Laborer, Never the Citizen: Anglo Perceptions of the Mexican Immigrant During the 1920s*, 45 PAC. HIST. REV. 231, 233 (1976).

---

---

only came to work and had no intention of remaining in the United States (p. 136).

Racist members of Congress who feared that the workers might in fact stay and pollute the gene pool found another tool for managing the flow of migrants from Mexico in the absence of quotas — namely, the criminal law. In the spring of 1929, Congress passed a law criminalizing unlawful entry into the United States, and that law “dramatically altered the story of race and imprisonment in the U.S.-Mexico borderlands” (p. 138):

With stunning precision, the criminalization of unlawful entry caged thousands of Mexico’s proverbial birds of passage. Within one year of enforcement, U.S. attorneys prosecuted 7,001 cases of unlawful entry. By 1939, they had prosecuted more than 44,000 cases. In no year did the U.S. attorneys’ conviction rate fall below 93 percent of all immigration cases. Taking custody of individuals convicted on federal immigration charges, the U.S. Bureau of Prisons reported that Mexicans never comprised less than 84.6 percent of all imprisoned immigrants. Some years, Mexicans comprised 99 percent of immigration offenders. Therefore, by the end of the 1930s, tens of thousands of Mexicans had been arrested, charged, prosecuted, and imprisoned for unlawfully entering the United States. With 71 percent of all Mexican federal prisoners charged with immigration crimes, no other federal legislation — not prohibition, not drug laws, and neither laws against prostitution nor the Mann Act — sent more Mexicans to federal prison during these years. (pp. 138–39)<sup>39</sup>

The surge in prosecutions and incarceration — aimed squarely at Mexicans — generated pressure to build new federal prisons. Until the 1930s, the United States had just three federal prisons, and none in the U.S.-Mexico border region (p. 139). But the illegal entry law created new strains on the system, prompting legislation consolidating an expanded federal prison network within the Department of Justice. La Tuna federal prison farm was established outside of my hometown of El Paso, Texas in 1932 and quickly filled with migrant Mexicans (p. 140). Additional southwestern facilities followed (p. 141).

By telling the story of federal carceral expansion with an eye on the southwestern border, Hernández’s narrative reveals a side of the federalization of criminal law and the expansion of the federal carceral state that is lost in many contemporary accounts.<sup>40</sup> Prisons surged as a means of ensuring the continued presence of a docile Mexican labor force — a labor force that was not subject to the racial immigration exclusions, but that was selectively deportable and therefore more easily managed and controlled.

---

<sup>39</sup> Footnotes have been omitted.

<sup>40</sup> The linkage between immigration enforcement and federal prison expansion is almost never made in mainstream histories of the U.S. prison system. See, e.g., Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON* 169 (Norval Morris & David J. Rothman eds., 1995).

Nor was the impact of new migration control measures on carceral expansion limited to the federal government. Even newly expanded federal prison facilities could not satisfy the demand for bed space created by invigorated federal prosecutions. Consequently, many prisoners were housed in county jails, including the very crowded Los Angeles County Jail (p. 144). The jails also continued to house nominally civil immigration detainees, arrested by the border control, who were awaiting deportation proceedings. They were neither charged with nor convicted of any crime, but they were housed in county jails because the federal government had insufficient facilities to house all of the noncitizens they sought to detain. Once found deportable, the detainees were often transferred to the U.S. Attorney, who prosecuted them for illegal entry and sentenced them to time served — in *administrative* detention.<sup>41</sup> As Hernández notes, this process effectively transformed their purportedly civil detention into post hoc criminal punishment (but without accompanying procedural protections for pretrial detention) (pp. 145–46). Thus, “[i]mprisonment for unlawful entry bulged the federal penal system, tipped its expansion toward the borderlands, and recast the meaning of immigrant detention into punishment for crime” (p. 146).

When Mexicans and Mexican Americans could not be charged with immigration crimes, vagrancy laws filled the gaps. At the same time that Congress expanded federal criminal immigration provisions, the Los Angeles Police Department also began to incarcerate large numbers of Mexicans on public order charges. Indeed, the main grounds for arrest of Mexicans in the period were public order charges: “Eighty-six percent of the 76,327 arrests of Mexicans made by the LAPD between 1928 and 1939 were for public order charges” (p. 147).

In recounting this story of Los Angeles imprisonment, Hernández’s story dovetails with the one recently told by Dean Risa Goluboff in her book *Vagrant Nation*.<sup>42</sup> Goluboff presents these public order offenses (much as Justice Douglas did) as an effort to impose conformity, manage populations deemed deviant, and control dangerous ideas.<sup>43</sup> These po-

---

<sup>41</sup> Today, the procedure is often reversed. Individuals are briefly held in jails before being subjected to streamlined prosecutions for illegal entry en masse, whereupon they are sentenced to time served and then subjected to removal proceedings and deportation. See Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 142–43 (2009).

<sup>42</sup> RISA GOLUBOFF, *VAGRANT NATION* 12–41 (2016) (exploring the use of vagrancy laws in Los Angeles during the first half of the twentieth century as a tool for suppressing radical speech and failure to conform).

<sup>43</sup> *Id.*; see also Tracey Meares, *This Land Is My Land?*, 130 HARV. L. REV. 1877, 1882 n.26 (2017) (reviewing *VAGRANT NATION* and noting Justice Douglas’s “all but obsessed” concern for the unconventional “lifestyle”).

licing activities clearly had a racial dimension, as Goluboff acknowledges throughout her book.<sup>44</sup> But Hernández's joint analysis of immigration law charges and vagrancy law usage highlights the fact that in the Southwest, these arrests were also a critical means of creating an easily exploited Mexican labor force. Indeed, Hernández finds some evidence to support the conclusion "that labor control was the *main* reason why the LAPD arrested so many Mexicans on public order charges" (p. 148).<sup>45</sup> She notes that the Agricultural Bureau of the Los Angeles Chamber of Commerce was a key instigator of many roundups of striking or otherwise recalcitrant Mexican workers (p. 148). "[B]y 1936, more Mexicans than Anglo-Americans were incarcerated in the Los Angeles City Jail," and "[e]ver since, Mexicans and Mexican Americans have consistently comprised a major if not majority share of the local incarcerated population" (p. 157).

Reading about the complementary operation of criminal vagrancy provisions and illegal entry prosecutions also calls to mind Professor Rachel Rosenbloom's cautionary reminder that the "cimmigration" phenomenon<sup>46</sup> is not new.<sup>47</sup> The browning of the Los Angeles jails in

---

<sup>44</sup> See GOLUBOFF, *supra* note 42, at 3 (articulating the use of vagrancy laws as a means of keeping everyone in their "proper place" in postwar America, and noting the racial dimensions to some of these roles); *id.* at 10 (noting that the use of vagrancy laws as means of targeting and controlling African Americans was "critical to the growing consensus against vagrancy laws" in the mid-twentieth century).

<sup>45</sup> Emphasis has been added. The speech suppression project and the labor control project are not necessarily separate projects. Indeed, Goluboff's account suggests that prime targets of the vagrancy laws included the radical Industrial Workers of the World and, as their power declined, striking union members and labor organizers. *Id.* at 16–19. Still, Hernández's explicit focus on labor control is a needed supplement to Goluboff's account, and one that has continued salience today. See *infra* notes 107–09 and accompanying text. For an example of a recent account that incorporates labor control analysis into discussions of resulting penal policy, see LOIC WACQUANT, *URBAN OUTCASTS* (2008).

<sup>46</sup> Professor Juliet Stumpf popularized the term "cimmigration" in a 2006 article, and it has become a frequently used umbrella term under which scholars have analyzed the criminalization of migration and the areas of "merger" between immigration and criminal law. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); see also Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 742–44 (2015) (discussing the rise of cimmigration scholarship and outlining some limitations of the framework).

<sup>47</sup> Rosenbloom has stressed the long historical arc of the interplay between criminal and immigration law, with particular attention to the policing of sexual minorities in the 1950s. Rachel E. Rosenbloom, Essay, *Policing Sex, Policing Immigrants: What Cimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149 (2016). Mexican Repatriation in the 1930s and Operation Wetback in the 1950s also provide significant examples of deportation operations that were accomplished in part through the efforts of local criminal enforcement actors (as in the case of 1930s repatriation) or that relied at least in part on local law enforcement for their success. On repatriation, see FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S* (rev. ed. 2006); and GEORGE J. SÁNCHEZ, *BECOMING MEXICAN AMERICAN* 209–26 (1993). On Operation Wetback see, for example, KITTY CALAVITA, *INSIDE THE STATE* 46–61 (1992); JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN*

the 1930s reveals the pervasive and complex interplay of criminal and immigration law enforcement well before the enactment of the harsh criminalizing provisions of the 1996 immigration laws.<sup>48</sup>

*F. Prisons to Policing*

In Chapter Six, Hernández tells her final story — which is both the story of the LAPD’s shooting of an innocent, unarmed black man named Samuel Faulkner, and the broader story of the LAPD’s overpolicing and excessive use of force in “Black L.A.” (p. 159). In this chapter, Hernández’s narrative runs from the 1927 shooting of Faulkner to the Watts rebellion of 1965,<sup>49</sup> exposing the city’s long history of racist and corrupt policing. Although the NAACP had successfully fought for municipal laws protecting against residential racial discrimination by the mid-1930s, the city’s “Black Belt” was by then firmly established and kept in place through private discriminatory acts (p. 166).<sup>50</sup> At the same time, zoning laws were used to ensure that gambling, drinking, and late night clubs were centered in the Black Belt and away from the city’s white suburbs (p. 167):

Born of the cultural imperatives and spatial politics of protecting, defending, and imagining the suburbs as a white settler haven of middle-class families, the legislated concentration of vice in the central core of the city exposed Black L.A. to constant and massive policing, much of which was corrupt, brutal, and linked to the underground economies that thrived beneath the strict moral legislation of the era. (p. 167)

---

1954, at 183–223 (1980), which discusses the implementation of the program in Arizona, California, and Texas, including coordination with state and local law enforcement and local business interests; and HERNÁNDEZ, *supra* note 12, at 169–95.

<sup>48</sup> For a description and contemporary appraisal of those laws, see Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297 (2017); Anil Kalhan, *Revisiting the 1996 Experiment in Comprehensive Immigration Severity in the Age of Trump*, 9 DREXEL L. REV. 261 (2017); and Frank Sharry, *Backlash, Big Stakes, and Bad Laws: How the Right Went for Broke and the Left Fought Back in the Fight over the 1996 Immigration Laws*, 9 DREXEL L. REV. 269 (2017).

<sup>49</sup> As described by Professor Mitchell Duneier: “In the summer of 1965, the Watts ghetto in Los Angeles exploded. It took twelve thousand National Guard troops to restore order, by which time thirty-five people were dead, nine hundred injured, and thirty-five hundred arrested.” MITCHELL DUNEIER, *GHETTO: THE INVENTION OF A PLACE, THE HISTORY OF AN IDEA* 93–94 (2016); see also ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME* 64–66, 72–73 (2016) (discussing the events in Watts as a response to and manifestation of ineffectual and racist law enforcement policies that traced their intellectual and bureaucratic origin to the federal war on poverty); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1993 (2000) (“In August, 1965, after the police allegedly used excessive force in a routine traffic arrest, the city of Los Angeles came to a standstill for days as African Americans firebombed and looted businesses in Watts.”).

<sup>50</sup> On private discriminatory conduct that helped to cement patterns of racial segregation in Los Angeles, see HINTON, *supra* note 49, at 66; and ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 232, 235 (2010).

---

---

Chapter Six highlights the deep corruption and racism of the LAPD in the period from the 1930s through the 1960s. It explains how this corruption combined with patterns of residential segregation and zoning to create within Los Angeles a space where black residents, and especially black women residents, were incarcerated and at times effectively expelled from the city by vice raids and serial arrests (p. 172). Middle-class blacks sought policing as a means of ensuring security (p. 172),<sup>51</sup> but they were also affected by and resistant to policing excesses in the period. They increasingly supported the diversification of the police force as a solution that would allow them to enjoy the security brought on by policing, without the dangerous byproducts of policing by a racist and corrupt force (p. 183).

Unfortunately, as had been true from the earliest days, diversification of the force proved an ineffective means of addressing the problems of the LAPD. As World War II brought more African Americans to Los Angeles, “arrests in the Black Belt kept pace with the rise of the city’s black population,” driven by arrests on public order charges (pp. 188–89). The Federal Bureau of Narcotics began to work with the LAPD to increase drug arrests in the city, and federal drug charges also surged (p. 189). The local Anglo-American population surged as well, but for this population, “arrests stalled” (p. 189).

After World War II, African American residents of Los Angeles, organized by the NAACP and the Civil Rights Congress, delivered a petition to the U.N. charging genocide based on the destructive conduct of the Los Angeles police. The continued deterioration of relations between the LAPD and the city’s African American residents ultimately exploded in 1965 with the Watts Rebellion (p. 193). During this period, Mexican Americans and Native Americans were also targeted by the LAPD, even as the Border Patrol rounded up Mexicans (and some Mexican Americans) as part of Operation Wetback (p. 191).<sup>52</sup>

It is interesting to read Hernández’s account of the policing of “Black L.A.” alongside Professor Elizabeth Hinton’s recent historical account of the same period. Hinton focuses on federal policy and particularly how federal policies led to a militarized policing focus on black and brown youth in Los Angeles and other urban centers.<sup>53</sup> But Hernández’s focus on the local politics of policing, including her explanation of how a particular amalgam of local zoning laws and discriminatory housing practices facilitated racist policing, serves as a reminder

---

<sup>51</sup> See JAMES FORMAN, JR., *LOCKING UP OUR OWN* 13 (2017) (noting the role of class differences within the black community as a driver of the harsh politics of crime control embraced by black officials in the latter half of the twentieth century).

<sup>52</sup> Hernández does not discuss the role of state and local actors in facilitating Operation Wetback enforcement, but it is worth emphasizing their critical role. See *supra* note 47.

<sup>53</sup> HINTON, *supra* note 49, at 24–26. See generally ALEXANDER, *supra* note 15 (centering the federally led war on drugs as the driver of contemporary mass incarceration); LISA L. MILLER, *THE PERILS OF FEDERALISM* (2008).

that the driving ideology was not imposed from Washington, but was instead deeply embedded in the national fabric and operative at multiple levels of government.

## II. TRANSCENDING LEGAL FORMALISM AND UNSETTLING THE REFORM NARRATIVE

Hernández's history of Los Angeles tells a story of the rise of mass incarceration that looks different from the story captured in other widely read, high-level accounts. Her specific and distinctive geographic focus allows her to think about how various bodies of laws and a multiplicity of state actors were interacting in synergistic ways to generate a system of social control that generally served the ends of white settlers of the Los Angeles basin at the expense of its indigenous inhabitants as well as of poor, itinerant workers, Chinese immigrants, Mexicans and Mexican Americans, and black Angelinos. In telling this story, however, Hernández departs from several conventions of legal academic analysis. First, as set forth in section A, she ignores formalistic divisions among carceral categories. Second, as set forth in section B, she blurs more boundaries by interweaving her discussion of sites of incarceration with discussions of broader mechanisms of social control, particularly street policing. Finally, as set forth in section C, she upends the traditional focus on federal crime control policies and programs in favor of a multilevel analysis of governmental policies and practices designed to facilitate the creation of a white settler city.

Hernández does not offer explicit justifications for the first two of these three intellectual moves. Legal scholars might therefore take her to task for ignoring important formalistic distinctions between bodies of law and levels of government. I explore these plausible criticisms in my discussion below. But I conclude that these intellectual choices are ultimately much more helpful than harmful for at least two reasons. First, it is only by examining interconnected systems and practices that are formally separate that one can actually see the common logics behind laws and policies that are often treated as unrelated. Indeed, collapsing the boundaries between categories allows Hernández to reveal settler-colonial logic at the core of the modern carceral state. Second, and more importantly, the intellectual act of drawing connections between these formally unrelated systems and practices is essential to the reform of our current system of criminal enforcement. As past and present reform efforts clearly illustrate, reform that fails to uncover and address the root causes of hyperpunitive practices and systemic disparities is likely to result in preservation of inequitable practices even if certain specific mechanisms are reformed.

Voices in the rebel archive past and present make clear that even if the criminal justice system were reformed to look less severe, less disparate, and less dehumanizing, this would only be a beginning.

Hernández's account illustrates that the criminal enforcement system is only one method by which the powerful deploy eliminatory power. Elimination is also pursued through disease and its twinned companion of medical-care deprivation (p. 40),<sup>54</sup> through educational innovations like Indian schools and other institutions that remove children from parents,<sup>55</sup> and through English-only laws and related practices that end intergenerational knowledge transfers and create lost histories.<sup>56</sup> To reform the carceral state, we need to understand its scope. This means looking beyond the jail system or state prisons or even the criminal enforcement system as a whole. The carceral state includes the massive web of punitive social controls exerted by government actors at all levels, and by private actors operating adjunct to the government. The ethos of the society in which those institutions and actors are rooted determines how those institutions operate. Transformation requires identifying fundamental flaws in the governing ethos and correcting them. Reform that fails to grapple with root causes can still improve lives, but such reform may not alter repressive patterns embedded in institutional structures.

Section C then turns to the root causes as diagnosed by Hernández — namely, that the rise of an oppressive and expansive carceral state in Los Angeles is a legacy of settler-colonial practices. This section explains how Hernández illustrates the role of the jail as a spearhead for U.S. colonial and territorial ambition, offers new ideas for comparative inquiry designed to explain U.S. penal severity, and sheds new light on the U.S. criminal enforcement system. This section also explores the limits of the capacious settler-colonial framework as an explanatory and diagnostic tool.

#### A. *Carceral Categories*

Hernández's narrative presents all forms of human caging as eliminatory forms of incarceration. Prisons, jails, juvenile detention centers, and immigration detention centers are all part of her narrative. Indeed, many of her subjects experienced multiple forms of incarceration, and the lines of jurisdictional control were fluid. Magón spent time not only in the Los Angeles jails awaiting trial on federal charges, but also in federal prison (p. 129). Immigration detainees in the height of the Chinese exclusion fervor were incarcerated — as many current immigration detainees still are<sup>57</sup> — in local jails (p. 86). And, as Hernández

---

<sup>54</sup> See also DUNBAR-ORTIZ, *supra* note 8, at 39–42.

<sup>55</sup> *Id.* at 211–14.

<sup>56</sup> *Id.*; see also Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 307–11 (2009).

<sup>57</sup> Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 19 (2017); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV.

notes, in the era of formal Chinese exclusion, Congress originally tried to supplement Chinese migrants' detention and removal with a year of hard labor.<sup>58</sup>

In *Wong Wing*, the Supreme Court held that a punitive sentence to hard labor without a full-blown criminal trial violates the Fifth Amendment.<sup>59</sup> Yet the formal line between punishment and removal has always been blurry for those on the receiving end of both sanctions. Today, border crossers are routinely sentenced to federal prison in mass prosecutions and, after spending time in federal criminal custody, are then deported.<sup>60</sup> A prison facility that has been shut down for failure to conform to Department of Justice standards can be reopened as an immigration detention facility.<sup>61</sup> The carceral complex is connected at a practical and discursive level.<sup>62</sup> Individuals who are moved around this detention archipelago<sup>63</sup> seldom have an understanding of the technical legal distinctions between the facilities they inhabit, and most immigration detainees have no lawyer to help explain these distinctions to them.<sup>64</sup> Other boundaries are equally opaque to individuals in the system. With realignment under way in California, individuals who once would have been sentenced to prison time now serve out sentences in county jails or subject to county post-release community supervision.<sup>65</sup>

---

245, 255 (2017); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 47 (2010); Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1445 (2010). Indeed, Professor César Cuauhtémoc García Hernández theorizes a system of immigration incarceration that is a structural manifestation of anti-Latinx racism. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1502–03; see also Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015).

<sup>58</sup> See *Wong Wing v. United States*, 163 U.S. 228, 233–34 (1896).

<sup>59</sup> *Id.* at 237.

<sup>60</sup> Chacón, *supra* note 41, at 142–43.

<sup>61</sup> See Seth Freed Wessler, *ICE Plans to Reopen the Very Same Private Prison the Feds Just Closed*, THE NATION (Oct. 27, 2016), <https://www.thenation.com/article/ice-plans-to-reopen-the-very-same-private-prison-the-feds-just-closed/> [<https://perma.cc/TXD3-NBXN>].

<sup>62</sup> García Hernández, *Abolishing Immigration Prisons*, *supra* note 57, at 255; César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1491–92 (2015).

<sup>63</sup> See James F. Smith, *United States Immigration Law as We Know It: El Clandestino, the American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 786 (2005) (citing ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 1918–1956 (Thomas P. Whitney trans., 1973)).

<sup>64</sup> INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, *ACCESS TO COUNSEL IN IMMIGRATION COURT* 5 (2016); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7–8 (2015); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 119 (2016).

<sup>65</sup> See, e.g., JEFFREY LIN & JOAN PETERSILLIA, STANFORD CRIMINAL JUSTICE CTR., *FOLLOW THE MONEY: HOW CALIFORNIA COUNTIES ARE SPENDING THEIR PUBLIC SAFETY REALIGNMENT FUNDS* 8, 14 (2014), <https://law.stanford.edu/wp-content/uploads/sites/>

Unlike many of the individuals experiencing punishment in these various outposts of the carceral state, Hernández clearly understands the technical legal distinctions between carceral institutions, but she nevertheless presents them as part of a connected project — an integrated system of carceral control. Thus, in *City of Inmates*, immigration detention is as much a part of the modern mass incarceration story as are federal prisons and local jails.<sup>66</sup>

For some legal scholars, Hernández’s blurring of carceral categories may feel disorienting. Attention to the legal distinctions between various forms of incarceration and between civil measures and criminal punishment is a central component of legal scholarship on the carceral state. Much ink has been spilled on the question of whether juvenile detention is improperly categorized as nonpunitive,<sup>67</sup> on whether prisons are more transparently and accountably run than are jails,<sup>68</sup> and on whether immigration detention and deportation ought to be reclassified as “punishment.”<sup>69</sup> These are not just arcane legal niceties — among other things, the way that these questions are answered structures the constitutional and statutory procedural protections that will apply in particular processes and institutional arrangements.<sup>70</sup>

---

default/files/publication/443760/doc/slspublic/Lin%20Money%20Final%20Report%20022814.pdf [https://perma.cc/VWF7-RDC3] (explaining realignment).

<sup>66</sup> Professor Marie Gottschalk provides a similar treatment in her detailing of the integrated role of the immigration detention system in the nation’s carceral system. See GOTTSCHALK, *supra* note 15, at 215–19. Hernández and Gottschalk both draw on Stumpf’s crimmigration framework (pp. 1, 196) (citing Stumpf, *supra* note 46). GOTTSCHALK, *supra* note 15, at 215 (same).

<sup>67</sup> See, e.g., Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 68 (1997) (“Within the past three decades, judicial decisions, legislative amendments, and administrative changes have transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for young people.”); Elyce Zenoff Ferster et al., *Juvenile Detention: Protection, Prevention or Punishment?*, 38 FORDHAM L. REV. 161 (1969); Sonja Marrett, Note, *Beyond Rehabilitation: Constitutional Violations Associated with the Isolation and Discrimination of Transgender Youth in the Juvenile Justice System*, 58 B.C. L. REV. 351, 351 (2017) (“The juvenile justice system is predicated on a theory of rehabilitation with concern for protecting juveniles and society. For lesbian, gay, bisexual, and transgender . . . youth, however, the system has developed into a punitive arrangement.”).

<sup>68</sup> See, e.g., Jonathan Simon, *Foreword* to JOHN IRWIN, *THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY*, at xi, xii (2013); Reiter & Pifer, *supra* note 13.

<sup>69</sup> García Hernández, *Immigration Detention as Punishment*, *supra* note 62; Kanstroom, *supra* note 31, at 1904; Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1 (2011).

<sup>70</sup> See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984) (declining to apply the Fourth Amendment suppression remedy in immigration proceedings); *In re Gault*, 387 U.S. 1, 29–31 (1967) (on the procedural protections inhering in juvenile proceedings); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1603–11 (2010) (exploring the relative deficit of Fourth and Fifth Amendment protections in removal proceedings as compared with criminal proceedings). Of course, the differ-

Hernández is less interested in what these institutions are labeled than in what they do.

Similarly, Hernández's account of the interactions between various enforcement components of the federal system lacks the formalistic boundary drawing evident in legal academic literature.<sup>71</sup> Federal, state, and local actors are all implicated in Hernández's story, but they are formally responsible for different aspects of the carceral state. A driving, if sometimes implicit, assumption of much of the legal academic literature is that it is important to identify the legal actor responsible for particular policies in order to properly calibrate policy course corrections.<sup>72</sup> A great deal of energy has gone into determining the extent to which federalism,<sup>73</sup> federal crime policy,<sup>74</sup> and the Supreme Court's federalization of criminal procedure<sup>75</sup> have driven this outcome. In the

---

ence between civil and criminal proceedings can be overstated. Some level of due process is required in deportation proceedings and civil detention. *See, e.g.,* *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950); *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 101 (1903); *Ren v. Holder*, 648 F.3d 1079, 1092 (9th Cir. 2011) (citing *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999)). And criminal procedural protections are not nearly so robust on the ground as they appear on the books. *See, e.g.,* WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 217–18 (2011) (arguing that the constitutionalization of criminal procedural protections actually increased the racial and economic inequities of the criminal justice system without sufficient payoffs in increased procedural fairness). Many scholars have persuasively challenged Professor William Stuntz's causal claims and the policy solutions that follow. *See, e.g.,* Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425 (2012) (reviewing STUNTZ, *supra*). But one does not have to accept his causal arguments to embrace his observations that the constitutional protections explicated by the Warren Court have not prevented the emergence of a hyperpunitive and racially biased carceral system, nor have they created fundamentally fair criminal trial processes.

<sup>71</sup> For explorations of immigration federalism, see generally Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994); Cristina M. Rodríguez, *Enforcement, Integration, and the Future of Immigration Federalism*, 5 J. ON MIGRATION & HUM. SECURITY 509 (2017); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014); and Cristina M. Rodríguez, *Toward Détente in Immigration Federalism*, 30 J.L. & POL. 505 (2015).

<sup>72</sup> *Cf., e.g.,* David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 214–15 (2012) (critiquing crimmigration practices for obscuring lines of accountability).

<sup>73</sup> *See, e.g.,* MILLER, *supra* note 53, at 5 (arguing that U.S. federalism actually disfavors the most severely victimized citizens in the ways it structures group representations and policy environments); Lisa L. Miller, Essay, *The Local and the Legal: American Federalism and the Carceral State*, 10 CRIMINOLOGY & PUB. POL'Y 725 (2011).

<sup>74</sup> *See, e.g.,* HINTON, *supra* note 49, at 8–11 (arguing that federal crime control policies and programs growing out of the federal war on poverty play a key and underacknowledged role in fueling modern mass incarceration).

<sup>75</sup> *See, e.g.,* STUNTZ, *supra* note 70, at 216–18 (theorizing that the federalization of criminal process fueled the pathologies of the criminal justice system).

wake of Professor Michelle Alexander's *The New Jim Crow*, which presents mass incarceration as a product of strategies deliberately designed to maintain racial hierarchy through race-neutral means in the post-Jim Crow era,<sup>76</sup> scholars have also sought to pinpoint the political<sup>77</sup> and criminal justice actors<sup>78</sup> responsible for the bloated and biased carceral system.

The practical consequences of Hernández's decision to disregard legal formalism are evident from the outset. Hernández opens her book with the observation that Los Angeles "imprison[s] more people than any other city in the United States, which incarcerates more people than any other nation on earth" (p. 1). This observation leads Hernández to label Los Angeles "the carceral capital of the world" (p. 1), a characterization she reiterates at the end of the book (p. 194).

Yet legal scholars might instantly quibble with the claim. One important reason that the absolute numbers of incarcerated Angelinos is so high is because the county is huge. The 2016 population estimate for Los Angeles County was 10,137,915.<sup>79</sup> This means that the county has more residents than all but nine of the U.S. states (including Los Angeles's home state of California).<sup>80</sup> Los Angeles County has more residents than does the entire state of Michigan,<sup>81</sup> for example. And yet, Michigan has a higher total correctional population than does Los Angeles County.<sup>82</sup> What is unique about Los Angeles County is its massive

<sup>76</sup> ALEXANDER, *supra* note 15, at 2–8.

<sup>77</sup> See, e.g., FORMAN, *supra* note 51, at 9–14 (discussing the complex role that African American citizens and politicians played in pushing for harsher treatment of criminals).

<sup>78</sup> See, e.g., JOHN F. PFAFF, LOCKED IN 127 (2017) (noting that during the 1990s and 2000s, as violent crime and arrests for violent crime both declined, the number of felony cases filed in state courts somehow went up because "the probability that a prosecutor would file felony charges against an arrestee basically doubled, and that change pushed prison populations up even as crime dropped"). Interestingly, prosecutors receive almost no mention in Hernández's book, which is likely due to the fact that, in the time period she examines, their power was more constrained and other actors in the system — including both police and judges — had a great deal more of the critical discretionary power implicated in incarceration decisions.

<sup>79</sup> *Los Angeles County QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/losangelescountycalifornia,CA/PST045216> [<https://perma.cc/QY6N-XFZU>] (giving population estimates as of July 1, 2016).

<sup>80</sup> Compare *id.*, with *United States QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/geo/chart/US/PST045216> [<https://perma.cc/FW9W-36G8>] (giving population estimates as of July 1, 2016).

<sup>81</sup> *United States QuickFacts*, *supra* note 80.

<sup>82</sup> In 2010, the latest year for which jail data was available, Michigan reported a statewide jail population of nearly 220,000. See MICH. DEP'T OF CORR., JAIL POPULATION INFORMATION SYSTEM REPORT 84 (2010), [http://www.michigan.gov/documents/corrections/JPIS\\_-\\_CY\\_2010\\_344047\\_7.pdf](http://www.michigan.gov/documents/corrections/JPIS_-_CY_2010_344047_7.pdf) [<https://perma.cc/YG4T-KB6U>]. Michigan had a further 42,628 state inmates in custody in 2015, see MICH. DEP'T OF CORR., 2015 STATISTICAL REPORT, at C-12 tbl.Cb (2017), [https://www.michigan.gov/documents/corrections/MDOC\\_2015\\_Statistical\\_Report\\_-\\_2016.08.23\\_532907\\_7.pdf](https://www.michigan.gov/documents/corrections/MDOC_2015_Statistical_Report_-_2016.08.23_532907_7.pdf) [<https://perma.cc/FQL5-WPN6>], and was home to roughly 1400 federal prisoners as of 2017, see *FCI Milan*, FED. BUREAU PRISONS, <https://www.bop.gov/locations/institutions/>

jail system — the largest in the country.<sup>83</sup> But this does not necessarily suggest that Los Angeles incarcerates at a high rate relative to other U.S. jurisdictions. In fact, it does not.<sup>84</sup>

Moreover, neither the city nor the county of Los Angeles is the sole driver of incarceration rates within their jurisdictions, and this is not just (or even primarily) because some portion of the detained population is in federal immigration detention. First, it is the state, not the county, that is responsible for warehousing state prisoners in Los Angeles County.<sup>85</sup> And when it comes to state prisons, Los Angeles County is a relatively low-use county, at least by some measures. Professor David Ball has noted: “Los Angeles County is atypically large, accounting for slightly less than a third of the state’s population and about a third of its prison population, but its prison usage is not atypically high when its high violent crime rate is taken into account.”<sup>86</sup>

Nor is it the case that Los Angeles County makes up for its comparative deficit in prisoners by placing its residents into local jails at relatively higher rates than do high-prison-use counties. The high-prison-use counties in California also *jail* their residents at rates higher than Los Angeles does.<sup>87</sup> In other words, in per capita terms, Los Angeles is

---

mil/ [https://perma.cc/8JK7-97KC]. According to the Los Angeles County Sheriff, meanwhile, Los Angeles County jails reportedly booked 112,538 individuals into jail in 2015. JIM McDONNELL, L.A. CTY. SHERIFF’S DEP’T, CUSTODY DIVISION YEAR END REVIEW 2015, at 2 (2016), [http://www.la-sheriff.org/s2/static\\_content/info/documents/PMB\\_YER2015.pdf](http://www.la-sheriff.org/s2/static_content/info/documents/PMB_YER2015.pdf) [https://perma.cc/5NCQ-7ZWD]. And the monthly inmate population in Los Angeles County is less than 3500 individuals. See CAL. DEP’T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT, OCTOBER 31, 2017, at 2 (2017), [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Monthly/TPOP1A/TPOP1Ad1710.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1710.pdf) [https://perma.cc/6GHY-8NS3]. These numbers, even in combination with the number of people detained in federal facilities, is much lower than Michigan’s inmate population. There are two federal prison facilities in Los Angeles County: MDC Los Angeles holds roughly 700 inmates, see *MDC Los Angeles*, FED. BUREAU PRISONS, <https://www.bop.gov/locations/institutions/los/> [https://perma.cc/5ZFT-KPXN], while the second facility, RRM Long Beach, is part of a nationwide network of field offices managing roughly 12,000 total federal offenders, see *RRM Long Beach*, FED. BUREAU PRISONS, <https://www.bop.gov/locations/ccm/clb/> [https://perma.cc/7GFN-MZP8]. There are several major immigration detention facilities in Southern California, but none are in Los Angeles County. See *Immigration Enforcement, Detention Facility Locator*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/detention-facilities> [https://perma.cc/22WY-8PLH].

<sup>83</sup> VERA INST. OF JUSTICE, *supra* note 1, at i.

<sup>84</sup> See *infra* pp. 1105–06.

<sup>85</sup> *The 2017–18 Budget: California Department of Corrections and Rehabilitation*, CAL. LEGIS. ANALYST’S OFF. (MAR. 1, 2017), <http://www.lao.ca.gov/Publications/Report/3595> [https://perma.cc/6V6D-4EET].

<sup>86</sup> W. David Ball, *Tough on Crime (on the State’s Dime): How Violent Crime Does Not Drive California Counties’ Incarceration Rates — And Why It Should*, 28 GA. ST. U. L. REV. 987, 1033 (2012).

<sup>87</sup> *Id.* at 1047 (“The jail numbers do not support the theory that Low Use counties are sentencing their offenders to jail rather than prison. Jail use is higher in both High and Middle Use counties than in Los Angeles and the Low Use counties.”).

hardly the worst offender in the race to incarcerate, even within the state of California.

Overall, in recent times, Los Angeles County has been consistently on the *low end* of state prison usage when the size of its population and violent crime rates are taken into account.<sup>88</sup> Los Angeles County routinely subsidizes the incarceration of prisoners from many other California counties, including wealthy ones like Orange County, where I live.<sup>89</sup> The true incarceration capital of California may be a place like Kern County, which consistently sends a disproportionately high percentage of its population to state prison by any measure, but particularly when controlling for violent crime.<sup>90</sup> The absolute numbers are less impressive than the Los Angeles numbers; Kern County is smaller than Los Angeles County.<sup>91</sup> But their practices may be more insidious. Similarly, California would not be the incarceration capital of the country if

<sup>88</sup> *Id.* Ball writes:

On a per capita basis, L.A.'s [New Felon Admission (NFA)] rate is higher than the state average. However, its violent crime rate is almost fifty percent greater than the state average. The coverage variable expresses this relationship more simply: L.A.'s coverage rate is less than the state average, and about half that of the High Use counties. L.A. does have below average property and Part I crime rates, however, and an analysis that does not center on violent crime might conclude that L.A.'s prison usage is not justified.

*Id.* at 1033. One must, of course, be skeptical of taking violent crime rates as a given, rather than as the product of a dynamic process in which violent crime is at least in part the response to state violence or neglect. WACQUANT, *supra* note 45, at 33; *see also* JILL LEVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* 48–51 (2015) (describing the realities of Los Angeles in the early 2000s and citing with approval RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1998)); Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715 (2006); Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 *U. CHI. LEGAL F.* 407, 409–10. More fundamentally, notions of violence in criminality are themselves contingent. BERNARD E. HARCOURT, *ILLUSION OF ORDER* 18 (2001) (“[C]ategories of the disorderly and the law abider do not have a preexistent fixed reality independent of the techniques of punishment that we implement as a society. The categories do not predate the policing strategies and punishment techniques. To the contrary, the notion of thick propensities or human nature is itself a reality produced by a certain method of policing and punishment.”).

<sup>89</sup> Looking at the first decade of the 2000s, Ball measured net capital transfers between counties based on their tax contributions and state prison usage and found that:

Los Angeles County was . . . on the losing end of the prison subsidy, averaging a -\$72 million subsidy for the ten years of the study. Los Angeles spent the first five years of the past decade in the -\$100 million range, hitting a peak of -\$145 million in 2003 before dropping to -\$96 million in 2004. The rest of the decade saw the Los Angeles subsidy numbers increase as Los Angeles's coverage rates increased, a product both of decreasing violent crime and increased NFA. Los Angeles had a positive net subsidy of \$970,000 in 2009.

Ball, *supra* note 86, at 1063.

<sup>90</sup> *Id.* at 1016.

<sup>91</sup> Kern had a population of 839,631 according to the 2010 Census, whereas Los Angeles County's reported population was 9,818,605. *Kern County QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/kerncountycalifornia,US/PST045216> [https://perma.cc/SVU5-FBPR]; *Los Angeles County QuickFacts*, *supra* note 79. I also note that my home county

population were taken into account; Louisiana seems to be the top contender for this dubious distinction.<sup>92</sup>

Immigration detention accounts for some of the population that Hernández counts among those imprisoned in Los Angeles (pp. 1, 90), and it is true that immigration detention figures are not captured in the data above. But there are no major immigration detention facilities in Los Angeles County, although many such facilities ring the county.<sup>93</sup> And even when it comes to the short-term detention that surely happens during everyday efforts in the county before immigrants are transferred to formal detention facilities, the connection to the county is tenuous. Formally, the county bears little responsibility for the population in immigration detention. Federal agencies determine whether or not an immigrant will be held in federal immigration detention, and for how long. So although it is significant that Los Angeles County and nearby Orange and Riverside Counties are home to a number of large immigration detention facilities, the forces that drive incarceration numbers in these facilities are arguably different from those driving the growth in local jail populations.<sup>94</sup>

---

of Orange, which borders Los Angeles County to the south, is consistently on the list of disproportionately high state prison usage when compared with other counties and controlling for violent crime rates. Ball, *supra* note 86, at 1016.

<sup>92</sup> Louisiana's overall incarceration rate was 776 per 100,000 residents in 2015. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2015, at 8 (2015), <https://www.bjs.gov/content/pub/pdf/p15.pdf> [<https://perma.cc/9B3G-HRV5>]. California's rate is lower. *Id.* at 9 tbl.6. Like California, Louisiana has recently taken steps to address this problem. Rebekah Allen, *Gov. Edwards Signs Criminal Justice Overhaul into Law, in What Some Laud as Historic Achievement*, THE ADVOCATE (June 15, 2017, 3:45 PM), [http://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_168c6d6e-5089-11e7-a0d6-7f67135f59a4.html](http://www.theadvocate.com/baton_rouge/news/politics/legislature/article_168c6d6e-5089-11e7-a0d6-7f67135f59a4.html) [<https://perma.cc/6RP8-NL5S>]; see also Editorial, *Louisiana's Big Step on Justice Reform*, N.Y. TIMES (July 19, 2017), <https://nyti.ms/2uypZpC> [<https://perma.cc/7KB4-E4V6>] (describing Louisiana's adoption of reforms designed to reduce its incarceration rate by ten percent). Even if such reductions are achieved, Louisiana incarceration rates will remain staggeringly high and racially disproportionate. Recent data demonstrates that the state incarceration rate in Louisiana for African Americans is 1740 per 100,000 residents compared with 438 per 100,000 residents for whites. THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2016).

<sup>93</sup> See *Immigration Enforcement, Detention Facility Locator*, *supra* note 82.

<sup>94</sup> On the other hand, there is a strong case to be made that local policing and local policies toward immigrants play a substantial role in determining the scope and force of federal immigration enforcement. See, e.g., AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT (2017); Chacón, *supra* note 46, at 736, 757 (discussing the significant role that local law enforcement choices play in shaping federal immigration enforcement). See generally Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842 (2011) (explaining that the discretion of local law enforcement regarding whether to arrest is often the key driver of federal immigration enforcement outcomes). Thus, Hernández's treatment of the topic arguably reflects grounded reality in its disregard for formalisms.

The Los Angeles County Jail system includes a vast network of governmental actors, spanning “88 municipalities, 47 law enforcement agencies, more than 30 criminal courthouses, and eight jail facilities.”<sup>95</sup> Arguably, the search for solutions to mass incarceration requires precise attention to the distinctions among the categories of incarceration and the responsible actors. Only after descending down the rabbit hole of multiple regression analyses can we appropriately determine the causes of mass incarceration and of its racially disparate effects. Indeed, social scientists and legal scholars have spent increasing amounts of time and effort trying to pinpoint the precise bureaucratic site of racial disparities in mass incarceration. Is it the fault of prosecutors? Of judges? Of police departments? Of police officers? Of the sentencing guidelines?<sup>96</sup> These efforts favor precision and would tend to suggest that close attention to local variation might be helpful for enhancing the picture of how race, space, class, and policing interact in the greater Los Angeles area.<sup>97</sup>

One need not defend Los Angeles County’s globally<sup>98</sup> and historically<sup>99</sup> anomalous incarceration rates to conclude that Hernández’s

<sup>95</sup> VERA INST. OF JUSTICE, *supra* note 1, at i.

<sup>96</sup> Efforts to disaggregate the particular sources of racial disparities in the criminal enforcement system are important; the identification of raw racial disparity itself also provides valuable information. See Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, 2016 U. CHI. LEGAL F. 485, 496–98.

<sup>97</sup> See *id.* (exploring the failure of many existing studies to properly disaggregate these effects); Clayton Mosher & J. Mitchell Pickerill, *Methodological Issues in Biased Policing Research with Applications to the Washington State Patrol*, 35 SEATTLE U. L. REV. 769, 785 (2012) (surveying and critiquing studies of racial profiling that focus on entire cities and states, and analyzing data from forty anonymous patrol areas in Washington); see also Mario L. Barnes & Robert S. Chang, *Analyzing Stops, Citations, and Searches in Washington and Beyond*, 35 SEATTLE U. L. REV. 673 (2012) (analyzing the same Washington stops but interpreting the data differently). For additional analyses of local and statewide policing practices, see, for example, IAN AYRES & JONATHAN BOROWSKY, ACLU OF S. CAL., A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf> [<https://perma.cc/G59B-WTZW>] (studying police stops by the LAPD across Los Angeles); and Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 476 (2000) (studying police stops across neighborhoods by the NYPD).

<sup>98</sup> As of December 31, 2015, 612 per 100,000 adult residents of Los Angeles County were incarcerated in state prisons. *Los Angeles County*, CAL. SENT’G INST., CTR. ON JUV. & CRIM. JUST. (2017), <http://casi.cjca.org/Adult/Los-Angeles> [<https://perma.cc/EHS4-H5L2>]. By comparison, Brazil’s incarceration rate that same year was 301 per 100,000 residents, China’s was 119 per 100,000 residents, and Germany’s was 78 per 100,000 residents. ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, WORLD PRISON POPULATION LIST 7 tbl.2, 9 tbl.3, 11 tbl.4 (11th ed. 2015), [http://prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition\\_o.pdf](http://prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_o.pdf) [<https://perma.cc/DX4T-ZRNF>].

<sup>99</sup> Note the relatively recent nature of the mass incarceration phenomenon. Hernández’s book makes a strong case that too many people have been incarcerated in Los Angeles for hundreds of years, of course. Her discussion in Chapter One highlights the huge percentage of Los Angeles’s indigenous residents who were incarcerated in the city’s jail in its early years, illustrating the deep roots of racialized mass incarceration. But the shockingly high national rates of incarceration in the modern system are a development of the last forty years. See, e.g., Peter Wagner, *Tracking State*

claim that Los Angeles is a leader in U.S. incarceration is problematic. Arguably, by focusing attention on the wrong place, Hernández's framework will misdirect the search for appropriate, incremental bureaucratic reforms to the criminal enforcement system.

But Hernández's category blurring also serves an important purpose. First, it offers readers a way to think about the problem of mass incarceration that is more consistent with the experiences of individuals who are caught up in the carceral state. This lens seems appropriate given that the goal of Hernández's book is not to disaggregate the enforcement practices of particular jurisdictions and actors but to offer a historical account that accurately reflects her immersion in the rebel archive. To those who experience caging, it is of little significance whether that deprivation of freedom is the responsibility of the Department of Homeland Security, the Los Angeles Sheriff's Department, or the local police of the city of Bell.<sup>100</sup> A prison is a prison is a prison.<sup>101</sup> Indeed, if anything, purportedly "non-punitive" civil immigration detention can be *more* stressful than incarceration in the criminal enforcement system, given its indeterminate nature and the potentially life-and-death nature of the

---

*Prison Growth in 50 States*, PRISON POL'Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/overtime.html> [<https://perma.cc/UV4J-TSHA>].

<sup>100</sup> For discussions of the subjective experience of immigration detention, see, for example, Emily Ryo, *Legal Attitudes of Immigrant Detainees*, 51 LAW & SOC'Y REV. 99, 115–23 (2017). For journalistic accounts see, for example, Marwa Eltagouri et al., *A Rare Look at Life Inside One of the Chicago Area's 2 ICE Immigration Detention Centers*, CHI. TRIB. (Mar. 24, 2017, 12:00 PM), <http://www.chicagotribune.com/news/immigration/ct-immigrants-mchenry-detention-center-met-20170323-story.html> [<https://perma.cc/V8V3-DRLB>]; and Lucy Nicholson, *Life in California's Largest Immigration Detention Center*, U.S. NEWS & WORLD REP. (May 1, 2017, 10:01 AM), <https://www.usnews.com/news/top-news/articles/2017-05-01/life-in-californias-largest-immigration-detention-center> [<https://perma.cc/6WPX-CTEU>].

<sup>101</sup> César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 360–63 (2012) (categorizing both criminal prison sentences for migration crimes and immigration detention as forms of immigrant incarceration). *But see* Anil Kalhan, *The Transformation of Immigration Custody and the Limits of "Crimmigration"* (Apr. 19, 2017) (unpublished manuscript) (on file with the author) (arguing for the value of categorical clarity).

immigration decisions that detainees await.<sup>102</sup> Juvenile detention, another form of purportedly civil detention, is also experienced as punitive — and certainly was during the period of Hernández's survey.<sup>103</sup>

Second, the slicing and dicing of various forms of carceral control can obscure both the scope of the United States' incarceration problem and the common logics used to justify how the various systems function.<sup>104</sup> Hernández's narrative can be read as an antidote to this problem. Her account does not obviate the need for scholarship attentive to local variance and to institutional distinctions (even within Los Angeles County), but it does offer a compelling reminder of the need to acknowledge the forest as well as the trees. As I discuss in section C, this is important because Hernández is then able to offer an unconventional view of the forest, arguing that both its scope and the depths of its historical roots are underestimated in a great deal of contemporary scholarship.

### B. Policing and the Carceral State

The same lack of formalistic attention to bureaucratic borders also characterizes Hernández's integration of the story of policing in Los Angeles with her discussion of the human cages of Los Angeles. Hernández's lack of access to the official records of the Los Angeles County Jail may help to explain why this book is not and cannot be about the daily functioning of Los Angeles jails. But it is not clear that such a book would work anyway; Hernández moves away from a narrow focus on jails for good reason. The simple fact is that, for much of the period that Hernández chronicles, jails and prisons were small and few, and social control was largely exercised through other means. It is understandable that the jails serve largely as an organizing device

<sup>102</sup> One can get a sense of the lengthy and indeterminate nature of immigration detention from the ongoing litigation in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (mem.). With respect to the relevant class of immigrant detainees, the Ninth Circuit found that:

Class members spend, on average, 404 days in immigration detention. Nearly half are detained for more than one year, one in five for more than eighteen months, and one in ten for more than two years. In some cases, detention has lasted much longer: As of April 28, 2012, when the government generated data to produce to the petitioners, one class member had been detained for 1,585 days, approaching four and a half years of civil confinement.

*Id.* at 1072. On the life-and-death nature of some immigration adjudication, see Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html> [<https://perma.cc/JMS6-HCPL>].

<sup>103</sup> See, e.g., MIROSLAVA CHÁVEZ-GARCÍA, STATES OF DELINQUENCY: RACE AND SCIENCE IN THE MAKING OF CALIFORNIA'S JUVENILE JUSTICE SYSTEM 19–20 (2012).

<sup>104</sup> For examples of arguments that reintegrate these sometimes-fragmented discussions, see GOTTSCHALK, *supra* note 15, at 1–22; JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990, at 1–14 (1993); and Chacón, *supra* note 46, at 730–43. See generally KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011).

around which Hernández structures her discussions of broader settler-colonial practices.

What is less foreseeable is the extent to which Hernández's narrative emphasis shifts from the jails to the streets and from prisons to policing just at the time when the prisons and jails of Los Angeles were assuming an outsized role in criminal justice and governance more generally. Hernández does not explicitly note or remark upon the shifting emphasis of her narrative, but it seems significant. Accordingly, I trace out the resulting narrative thread in the pages that follow. Although it is not obvious in the chronological structure of the narrative, a clear thread runs through the book that charts the rising power and discretion of the police bureaucracy.

Local police are largely incidental in the early chapters of Hernández's book. In Spanish colonial times, the first jailers were missionary priests and the cells were mission dormitories (p. 25). The system became more formalized over time, but during Spanish rule, corporal punishment, not imprisonment, was the dominant form of punishment (p. 28). Incarceration became more common in the period of Mexican rule, but the police forces that filled these jails were small, and many of the key players were private actors.<sup>105</sup> The reader gets a vivid and grim sense of what incarceration was like in Los Angeles at that time in Hernández's first two chapters (for example, pp. 39–40),<sup>106</sup> but the prison walls were only one — and not necessarily the most significant — of a number of state and private mechanisms of discipline, control, and outright elimination.

After Los Angeles became a part of the United States, the small jail system was filled by the city marshal, who would arrest individuals — almost exclusively long-time indigenous inhabitants — and auction them for chain gang labor (pp. 38–39). Laws purportedly enacted for the protection of indigenous people facilitated their arrest on vagrancy charges and their auction to white employers (p. 38).<sup>107</sup> But there was no significant “police force,” as such, in this early history. For example, Hernández notes that, in 1880, there were only eleven officers on the

---

<sup>105</sup> Hernández describes how Mexican authorities deputized a small number of wealthy California landowners to enforce the criminal laws (pp. 31–33). This they did through weekly sweeps of towns “to arrest ‘all drunken Indians’” (p. 33).

<sup>106</sup> In this section, the author discusses the deadly conditions of the Los Angeles jails during the peak years of Native incarceration.

<sup>107</sup> This put me in mind of the modern analogue in which courts instruct that federal immigration agents need to be able to use what amounts to racial profiling practices that target immigrants in order to protect immigrants. See *Maldonado v. Holder*, 763 F.3d 155, 162 (2d Cir. 2014) (suggesting that ICE's ethnic profiling and mass arrests of immigrants help immigrants by ending their exploitation); see also Jennifer M. Chacón & Susan Bibler Coutin, *Racialization Through Enforcement*, in *RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL* (Mary Bosworth, Alpa Parmar & Yolanda Vázquez eds., forthcoming 2018) (criticizing the *Maldonado* decision).

city's police force. That same year, these men made an extraordinary number of arrests: 719 in a town of 11,183 residents, with numbers growing in the years that followed (pp. 51–52), and with officers relying heavily on newly enacted vagrancy laws to achieve their goals (pp. 52–57).<sup>108</sup> But much of the resulting social control was still exercised through public channels for economic purposes that benefited private financial interests (pp. 57–63).<sup>109</sup> The jails were backstops to a convict labor system run by and for the city's elite, and the police essentially served as an arm of the elite.

Chapter Three is largely devoid of references to the police. The chapter highlights the coordinated actions of private citizens, Riverside city jailers, federal district court Judge Ross, U.S. Deputy Marshal Gard, and jailers in San Francisco and the surrounding counties in detaining and deporting Chinese nationals in the wake of Congress's passage and the Supreme Court's affirmation of the Chinese Exclusion Act (pp. 85–87). The loosely coordinated scheme broke down — as such schemes so often do — over money. The Northern California counties wanted to be reimbursed for jailing immigrants shipped north from Los Angeles pending their deportation. The funds were not forthcoming, and the northern counties refused to continue to hold immigrant detainees ordered deported by Los Angeles-based Judge Ross (p. 86). Similar patterns are emerging today in counties that have refused to honor federal detainer requests to hold immigrants beyond their period of arrest in the absence of a warrant supported by probable cause.<sup>110</sup>

---

<sup>108</sup> See also GOLUBOFF, *supra* note 42, at 15–20 (discussing the centrality of vagrancy laws to policing and arrest strategies across the United States during this period).

<sup>109</sup> The author discusses the public/private chain gang system of Los Angeles at the turn of the last century. See also SIMON, *supra* note 104, at 17–24 (discussing premodern strategies of social control involving private vouching, or the practice of private citizens assuming “the obligation to guarantee the good behavior of another,” *id.* at 17). In the United States, these private vouching systems were easily manipulated into racialized practices of labor control that strongly resembled, and at times duplicated, slavery. See, e.g., DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 117–278 (2008); TALITHA L. LEFLOURIA, *CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH* 21–60 (Heather Ann Thompson & Rhonda Y. Williams eds., 2015); MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928*, at 13–78 (1996); DAVID M. OSHINSKY, “WORSE THAN SLAVERY” 109–248 (1996); RESÉNDEZ, *supra* note 19, at 237–314.

<sup>110</sup> See, e.g., *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317, 2014 WL 1414305, at \*9–12 (D. Or. Apr. 11, 2014) (finding that extended custody on the basis of a federal civil immigration detainer would place state officials in violation of the Fourth Amendment prohibition on unreasonable seizures, exposing them to liability for money damages); *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1160 (Mass. 2017) (concluding that Massachusetts state law “provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody,” *id.*, but refraining from reaching the question of the constitutionality of extended custody, *id.* at 1146 n.2). Many counties consequently have enacted policies whereby they decline to honor federal detainer requests, setting up conflict between these counties and the Attorney General. See, e.g., Caitlin Dickerson, *A Sheriff's Bind: Cross the White House, or the*

Hernández's narrative excavates the use of jails as the first immigration detention centers — a role they continue to play.<sup>111</sup> But despite the fact that Los Angeles was briefly the “epicenter of deportation,” even at the height of Chinese exclusion efforts, the number of people detained in jails incident to removal during the Chinese Exclusion period was not at all large (pp. 85–86). Nor did the police figure heavily here, except as adjuncts to private violence.<sup>112</sup>

Up to this point in the narrative, the relatively small size of the carceral state is clear. Jails are small, police forces are tiny. Hernández's account reveals, however, that marginalized populations were disproportionately arrested and incarcerated.

Hernández also reminds readers throughout her narrative of the vital role of jails as sites of resistance and rebellion.<sup>113</sup> In Chapter Four, she brings the jail into focus as a key organizing hub of resistance (and specifically, anti-imperial resistance) (pp. 118–25). Much of the chapter revolves around the formation of and the subsequent efforts to repress the magonista network and therefore examines the incarceration of an important but very small band of magonistas. As in earlier chapters, local police are minor players. Here, they are limited to assisting a web of federal and private investigators funded by the Mexican government (pp. 92–124).

But the shift to a focus on policing becomes evident in Chapter Five. Federal immigration policy resurfaces here, and we learn of the critical role that the federal criminalization of illegal entry played in driving the expansion of the federal carceral state (pp. 138–40).<sup>114</sup> As is true today,<sup>115</sup> local police played a significant role in funneling immigrants into

---

*Courts*, N.Y. TIMES (Sept. 13, 2017), <https://nyti.ms/2xZbCZs> [<https://perma.cc/Q96Y-LRW3>] (“A meeting this spring between Mr. Sessions and several sheriffs offered one reason the Trump administration may seem so far out of sync with local authorities on the issue. According to one sheriff who was there — Richard Stanek of Hennepin County, Minn. — when the federal court decisions from the last three years concerning extended jail holds came up in discussion, Mr. Sessions appeared to be unfamiliar with them. ‘He was still living in 2014,’ Mr. Stanek said. ‘He had no idea what we were talking about.’”).

<sup>111</sup> García Hernández, *Immigrant Detention as Punishment*, *supra* note 62, at 1382–88; Kallhan, *supra* note 57, at 57 (discussing the role of local jails in the contemporary immigration detention scheme).

<sup>112</sup> The focal points of this chapter are the creation and enforcement of exclusionary federal immigration laws and the civil disobedience of Chinese residents who engaged in organized refusal to register with the federal government in accordance with the Geary Act (pp. 86–87).

<sup>113</sup> In earlier chapters, Hernández mentions inmate breakouts as evidence of rebellion and resistance. For example, the author discusses the resistance of incarcerated Native men who continually broke out of jail (p. 39) and the work of Bridget “Biddy” Mason, born a slave in Mississippi, who ministered to people in the jails both during her trial for her freedom, and even after she was freed (pp. 40–42).

<sup>114</sup> See *supra* pp. 1093–94.

<sup>115</sup> At the end of the day, local policing policies have always played and continue to play a huge role in funneling residents into removal proceedings and immigration detention. See ARMENTA,

the deportation machine in the first half of the twentieth century.<sup>116</sup> Hernández (and, indeed, many historians and sociologists who write about immigration) says little about the formal implications of this cooperation for grand theories of federalism.<sup>117</sup> But this certainly does not mean that Hernández ignores the role of local law enforcement. As previously noted,<sup>118</sup> Hernández treats criminal and immigration law enforcement as overlapping and intertwined, and as serving the same goal of settler-colonial subjugation. She thus carefully details the role played by local police as part of a larger immigration enforcement machinery.

Chapter Five therefore lays bare how local police acted as adjuncts to the immigration enforcement system through their enforcement of vagrancy laws as they took aim at a growing Mexican and Mexican American population.<sup>119</sup> It is worth stressing that these practices were unfolding just as the force was growing in size and becoming increasingly bureaucratized. Frankly, the LAPD was a much more powerful force for achieving the subjugation of Mexican labor in Southern California than was the small and often-ineffectual federal immigration enforcement bureaucracy, even though the federal immigration laws provided an important backdrop.<sup>120</sup> And after a period of remission from the 1960s through the 1980s,<sup>121</sup> the importance of subfederal law

---

*supra* note 94; Chacón, *supra* note 71, at 609–11; *cf.* Motomura, *supra* note 94, at 1848. For firsthand accounts of how unauthorized immigrants experience policing in Los Angeles, see, for example, Chacón & Coutin, *supra* note 107. Choices made in local and county policing practices in Los Angeles County — where undocumented residents make up about ten percent of the county’s total population — directly determine who enters the population of immigration detainees. For statistics on the unauthorized population of Los Angeles, see Jeffrey S. Passel & D’Vera Cohn, *20 Metro Areas Are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, PEW RES. CTR. (Feb. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/02/09/us-metro-areas-unauthorized-immigrants/> [https://perma.cc/J6UB-CRCJ].

<sup>116</sup> See BALDERRAMA & RODRÍGUEZ, *supra* note 47, at 63–88 (discussing Los Angeles–area officials’ role in 1930s expatriation); SÁNCHEZ, *supra* note 47, at 209–26 (same).

<sup>117</sup> Many of the existing historical analyses of immigration enforcement during this period focus on the rise and role of the federal immigration enforcement bureaucracy, with some attention to private interest, but generally with less attention to subfederal actors. See CALAVITA, *supra* note 47, at 18–72; ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964); HERNÁNDEZ, *supra* note 12; S. DEBORAH KANG, *THE INS ON THE LINE* 139–67 (2017).

<sup>118</sup> See *supra* pp. 1094–96.

<sup>119</sup> See *supra* pp. 1095–96. See generally ESCOBAR, *supra* note 4 (discussing proliferating confrontations between the LAPD and Mexican Americans in Los Angeles, including discussion of the Zoot Suit riot).

<sup>120</sup> On the characteristic incompetence of the INS during this period, see KANG, *supra* note 117, at 87–113.

<sup>121</sup> Chacón, *supra* note 71, at 609–17 (documenting the almost complete functional shift away from the local-federal separation that took place from the 1960s through the 1980s and the Supreme Court’s implicit endorsement of the blurred boundaries in *Arizona v. United States*, 567 U.S. 387 (2012)); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 501–09 (2001) (mapping out the rise of legal doctrines that attempted to separate local law enforcement from local immigration enforcement functions and criticizing the legal moves away from that separation).

enforcement in shaping immigration enforcement and producing migrant deportability<sup>122</sup> has only grown in the intervening years.<sup>123</sup>

By Chapter Six, the LAPD has become the center of the narrative. Hernández is deeply interested in how “Black L.A.” was policed from the late 1920s through the Watts Rebellion of 1965 (p. 158).<sup>124</sup> During the period she chronicles in this chapter, the area’s prisons and jails increasingly housed disproportionate numbers of African Americans relative to their presence in the general population (p. 172). For Hernández, the police department of the era — a corrupt, racist, and violent force — seems to provide a direct causal explanation for this trend.<sup>125</sup> Hernández also offers a helpful reminder that a diverse police force does not necessarily translate into a just police force, and that black officers also absorb prevailing racial biases (p. 186).<sup>126</sup>

This is not to say that the chapter is just about policing. Hernández acknowledges the way that local zoning, private discriminatory conduct, and even black middle-class indifference to the plight of individuals perceived as part of the criminal element all helped to fuel the rise of racially disproportionate mass incarceration in Los Angeles. But policing takes center stage in this chapter.

Perhaps it is inevitable that a book about incarceration that took shape just as the Black Lives Matter movement was building to national

---

<sup>122</sup> Nicholas P. De Genova, *Migrant “Illegality” and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 423–31 (2002) (seeking to account for the processes that generate migrant illegality and deportability).

<sup>123</sup> See sources cited *supra* note 71.

<sup>124</sup> For a description of the Watts Rebellion, see *supra* note 49.

<sup>125</sup> Chapter Six provides a detailed discussion of the LAPD, including its racial composition and policing strategies (pp. 158–94).

<sup>126</sup> The notion that nonwhite officers are somehow automatically immune from absorbing and acting upon societally prevalent racism is one that makes repeated appearances in academic and public discourse, notwithstanding social-scientific evidence to the contrary. For examples of works pointing out and debunking this common mistake in the literature, see Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 296 (2008); and Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 957–59 (2006). For academic work summarizing and challenging the notion of automatic immunity, see, for example, John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 882–83 (2004). For a recent, high-profile example of this erroneous assumption in political discourse, see Mark Berman, *Pence Suggests Implicit Bias Can’t Be Involved When a Black Officer Shoots a Black Man*, WASH. POST (Oct. 4, 2016, 10:22 PM), <https://www.washingtonpost.com/politics/2016/live-updates/general-election/real-time-fact-checking-and-analysis-of-the-vice-presidential-debate/pence-suggests-implicit-bias-cant-be-involved-when-a-black-officer-shoots-a-black-man/> [https://perma.cc/XUX5-UUMY] (quoting then-Vice Presidential Candidate Mike Pence saying in a debate: “When an African American police officer is involved in a police . . . shooting involving an African American, why would Hillary Clinton accuse that African American police officer of implicit bias?” (alteration in original)).

prominence would focus a good deal of attention on policing.<sup>127</sup> Hernández never explicitly grapples with the significance of the narrative shift from prisons to policing. But she concludes her book with an epilogue entitled “The Rebel Archive” in which she quotes long passages from contemporary “rebels” in Los Angeles fighting elimination and incarceration (pp. 199–220). In these passages, the import of the shift is revealed.

In the epilogue, Pete White, the executive director of Los Angeles Community Action Network, is quoted speaking of gentrification and the policing of Skid Row. He describes the quality-of-life policing practices on Los Angeles’s Skid Row as “banishment at its finest” (p. 201),<sup>128</sup> highlighting the analogy that Hernández’s narrative seeks to draw between Native displacement in the seventeenth and eighteenth centuries and the current eliminatory policing practices on Skid Row. Diana Zuniga, the coordinator of Californians United for a Responsible Budget, speaks of the “problematic shift in the perception of law enforcement as the new social service provider,” hinting at how the police became the bureaucratic center for the host of eliminatory social control practices that Hernández charts earlier in the book (p. 205).<sup>129</sup> Dr. Melina Abdullah reminds the Los Angeles Police Commission of their obligation to speak truth to power in the face of the death of Ezell Ford at the hands of two LAPD officers (p. 210), echoing the community calls for justice upon the death of Samuel Faulkner (p. 177). Kim McGill, a formerly incarcerated person who is an organizer with the Youth Justice

<sup>127</sup> Many recent accounts of mass incarceration, including several that Hernández cites as influential, focus significant attention on policing practices and policies. See, e.g., ALEXANDER, *supra* note 15; HINTON, *supra* note 49 (focusing on federal crime control policy as the origin of criminal enforcement pathology); MURAKAWA, *supra* note 15. A spate of highly publicized killings of civilians by police brought increased public attention to police violence, particularly against African Americans, and fueled the growth of Black Lives Matter. See, e.g., Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://nyti.ms/2jD6h5O> [<https://perma.cc/S7RW-46ED>]; Joseph Goldstein & Nate Schweber, *Man’s Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <https://nyti.ms/2lqV1uE> [<https://perma.cc/SV8V-2F3A>]. The *Floyd* litigation in New York City simultaneously highlighted the significant role of unchecked and racially biased police discretion in diminishing the quality of life — and indeed, in endangering life — in African American and Latinx neighborhoods in U.S. urban centers. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013) (finding the NYPD’s “stop and frisk” policy was carried out in an unconstitutional manner under the Fourth and Fourteenth Amendments). See generally Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (cataloguing the multiple structural factors that increase interactions between African Americans and police).

<sup>128</sup> For a discussion of banishment practices in another urban center, see KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* (2010), analyzing banishment practices in Seattle, Washington. For a discussion of the parallels and overlaps between these practices and contemporary immigration enforcement practices, see generally Chacón, *supra* note 46.

<sup>129</sup> This statement echoes Professor Naomi Murakawa’s diagnosis of the national carceral explosion. See generally MURAKAWA, *supra* note 15; see also generally HINTON, *supra* note 49.

Coalition similarly speaks of ongoing reforms as insufficient and tailored to the preferences of “law enforcement, corrections unions, prison officials, jail profiteers, and security corporations” (p. 215). She writes of the need for officials in all of these capacities to hold “precious every life,” and to “mourn[] each death” that “happen[s] under their watch” (p. 215). And the Immigrant Youth Coalition (IYC) fundamentally redefines whole conceptions of crime and justice with its reappropriation of illegality itself when its members proclaim that “[w]ith or without papers, we will always be illegal” “because we don’t obey their laws . . . of misery, exploitation, hate[,] and separatism” (p. 212 fig.).

The activists in the “rebel archive” note the shared plight of the banished, regardless of the system of laws that banish them.<sup>130</sup> They situate incarceration as a form of elimination that operates within a larger system in which the logics of settler colonialism have been fully normalized and internalized. Hernández’s reproduction of their words and organizing strategies in the book’s Epilogue casts light backward on her historical account, revealing the extent to which she views the problem of excessive and racially disparate police violence not as a deviation from the rule of law, but as a natural manifestation of the laws and priorities of the settler-colonial state.

Hernández’s narrative focus, like her nonformalistic treatment of incarceration,<sup>131</sup> is reflective of the voices that she has heard in her rebel archive. The shift in focus of Chapters Five and Six, along with the use of the rebel archive in the Epilogue, allows Hernández to highlight how the street policing of the first half of the twentieth century effectively bureaucratized targeted elimination practices that are ongoing today, and to illustrate how it did so across enforcement regimes, across the civil-criminal divide, and across all levels of government.

### C. Incarceration and Settler Colonialism

Scholars of punishment in the United States have drawn attention to the ways that institutions are shaped by their historic evolution. Professor Marie Gottschalk, for example, has noted the importance of historical accretion in the formation of the carceral state,<sup>132</sup> although her own inquiry stopped short of Hernández’s search for an origin story three hundred years in the past. Hernández’s book is a reminder of the

---

<sup>130</sup> Examples of the activists’ sentiments include the statement of Kim McGill (pp. 213–20) and an image created for IYC by Irina Crisis (p. 212 fig.).

<sup>131</sup> See *supra* section II.A, pp. 1100–09.

<sup>132</sup> MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 7 (2006) (“With each campaign for law and order and against certain crimes and vices in earlier eras, state capacity accrued . . . . As each campaign receded, the institutions it created did not necessarily disappear. Rather, the institutional capacity of the government expanded over time.”).

settler legacy at the heart of the U.S. penal system. Her analysis suggests the need for further explorations of the contemporary implications of that legacy.

As the foregoing discussion illustrates, Hernández's book ambitiously seeks to bridge the literature on criminal severity in the United States and the work of historians exploring U.S. legal history through the lens of settler colonialism.<sup>133</sup> This effort has important theoretical payoffs. For one thing, settler colonialism provides a promising explanation of the peculiarly harsh form taken by the U.S. carceral state, understood by Hernández and others to include immigration enforcement.

The legacy of slavery has been treated as the central historical factor that accounts for contemporary punishment practices in the United States. Hernández does not dismiss the centrality of slavery and anti-black racism to the growth and severity of the U.S. criminal enforcement system (p. 71). But by situating slavery in the broader frame of settler colonialism, Hernández also helps to restore some often-overlooked aspects of the broader system in which slavery was nested.<sup>134</sup> Hernández's book serves as a reminder that the "criminal justice system" in the United States has been used from the earliest colonial moments not only to control enslaved peoples, but also as a means of eliminating indigenous people, facilitating the involuntary transfer of their lands and banishing them from their homes — through policing, incarceration, and genocidal violence. Roxanne Dunbar-Ortiz has flagged the centrality of violence to the settler-colonial project. As she observes, settler colonialism is "an institution or system [that] requires violence or the threat of violence to attain its goals. People do not hand over their land, resources, children, and futures without a fight, and that fight is met with violence."<sup>135</sup> Hernández's book faithfully excavates the violence of this project and places it at the root of the U.S. carceral state. Violence was needed to seize and occupy land, and to coerce unfree labor to work it. Over time, this violence became bureaucratized and systematized.

---

<sup>133</sup> See, e.g., Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A & M U. L. REV. 1, 27 (2014) (citing VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW, *supra* note 7, at 67) (arguing that "[s]ettler states establish, maintain, and protect their hegemony by exercising virtually complete control over Indigenous peoples, non-Indigenous Others, and 'deviant' members of the settler class," *id.*, and urging that efforts to achieve equality and dignity under the law essentially require addressing the ongoing violence of settler colonialism, *id.* at 99).

<sup>134</sup> I certainly do not mean to imply that Hernández is the only one drawing these connections. Indigenous scholars have long made these claims, and historians both here and abroad have increasingly worked to flesh out these connections in recent years. See, e.g., LUANA ROSS, INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY 11–12 (1998).

<sup>135</sup> DUNBAR-ORTIZ, *supra* note 8, at 8.

Hernández's expansion of the dominant frame helps to weave together many apparently divergent threads in contemporary literature concerning criminal law enforcement, immigration enforcement, and foreign policy. First, it clarifies the role of the jail as the spearhead for U.S. territorial ambition in the West and as the place where state power was invoked to attempt to crush ideological movements antithetical to imperial foreign policy goals. With this geographic and theoretical shift, Hernández restores immigration enforcement to its rightful place in the constellation of social control mechanisms that constitute the contemporary carceral state. Professor Kevin Johnson once called the immigration system a "magic mirror" that allows us to see how a legal system largely unconstrained by constitutional checks would treat certain minority communities.<sup>136</sup> But as Hernández's book plainly shows, rather than separate and mirroring, immigration enforcement and foreign policy exceptionalism can also be understood as interwoven into the fabric of a domestic social control agenda that is manifested in the broader carceral state.

Second, the turn to settler colonialism allows for a productive reimagining of the appropriate comparative frame for the assessments of punishment in the United States. Professor James Whitman has noted that classic sociological arguments seeking to explain the U.S. criminal justice system as the embodiment of trends in bureaucratic modernity do not well explain why the United States diverged so dramatically in its punitive approach from continental Europe.<sup>137</sup> Whitman proposes alternative explanations rooted in American culture and mores to explain its *sui generis* approach to punishment.<sup>138</sup> Hernández and the indigenous scholars whose work she draws upon here would not necessarily reject this turn to culture to explain contemporary penal severity in the United States. But Hernández's historical excavation suggests that "American"<sup>139</sup> punishment is not really that unique after all. The appropriate comparison may not be with continental Europe, but with other Anglo settler-colonial societies. One might look to Australia, where Aboriginal incarceration rates are 2346 imprisoned individuals per 100,000,<sup>140</sup> and where immigration detention has taken on a cruel form that gives the United States a run for its money in kind if not in

---

<sup>136</sup> Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1114 (1998).

<sup>137</sup> WHITMAN, *supra* note 15, at 4–5.

<sup>138</sup> *Id.* at 6.

<sup>139</sup> Whitman uses the term throughout his book. I avoid it — as does Hernández — because it is freighted with its own neocolonial baggage.

<sup>140</sup> *Prisoners in Australia, 2016*, AUSTL. BUREAU STAT. (Aug. 12, 2016, 11:30 AM), <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Imprisonment%20rates~12> [https://perma.cc/XN65-SBGJ].

scope.<sup>141</sup> Or to Canada, where Aboriginal adults, who account for three percent of the Canadian population, constitute a full quarter of Canada's incarcerated adults.<sup>142</sup> The repeating patterns of grossly disproportionate incarceration of indigenous residents in these settler-colonial states call out for further analysis.<sup>143</sup> The connections drawn in Hernández's book suggest that scholars interested in criminal justice reform need to more fully engage this literature — including its deep indictments of the legal superstructure — as a central part of their reform analysis.

Scholars who minimize the role of U.S. settler colonialism in considering the driving forces behind U.S. penal severity find different — and

<sup>141</sup> See, e.g., Alison Mountz, *The Enforcement Archipelago: Detention, Haunting, and Asylum on Islands*, 30 POL. GEOGRAPHY 118, 124 (2011); Michael Koziol & Benjamin Preiss, *Manus Island Class Action: Government to Compensate Former Detainees in Huge Settlement*, SYDNEY MORNING HERALD (June 14, 2017, 1:12 PM), <http://www.smh.com.au/federal-politics/political-news/manus-island-class-action-government-to-compensate-former-detainees-in-huge-settlement-2017-0613-gwqlu3.html> [https://perma.cc/48L5-TMH7].

<sup>142</sup> Julie Reitano, *Adult Correctional Statistics in Canada, 2014/2015*, STAT. CAN. (Mar. 22, 2016), <http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.htm> [https://perma.cc/F8GK-LSQC]; see also Marianne O. Nielsen & Linda Robyn, *Colonialism and Criminal Justice for Indigenous Peoples in Australia, Canada, New Zealand and the United States of America*, 4 INDIGENOUS NATIONS STUD. J. 29, 31–32 (2003) (showing the growing incarceration rates of Aboriginal people in Canada).

<sup>143</sup> See, e.g., James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Situation of Indigenous Peoples in the United States of America*, ¶ 34, U.N. Doc. A/HRC/21/47/Add. 1 (Aug. 30, 2012) (reporting that in the United States, rates of incarceration and violent crime among the Native American population are double the national average — higher than for any other racial group — and linking these facts to the history of colonial practices); see also Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016); Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2016). These scholars connect the overpolicing and underprotection of Native Americans to the history of colonial practices.

Indian Law scholars have long and insistently called attention to the fact that the current legal regime continues to visit the oppressions of colonialism on Native people. See FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* (2009); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. (forthcoming 2017) (tracing the convergence of American constitutionalism and American colonialism in the concept of government power as a public trust — the foundation of federal plenary power over American Indians and Alaska Natives); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 443 (2005) (naming and criticizing “a common law of colonialism”); Angela R. Riley & Adeleene M. Rockwell, *The United States Country Report of Special Rapporteur S. James Anaya: Reflections and Aspirations*, 32 ARIZ. J. INT'L & COMP. L. 183, 188 (2015) (“[T]he doctrines of discovery and plenary power, deeply embedded in the colonial frame, remain the law in the United States, serving as foundational principles for the modern body of federal Indian jurisprudence, and the bases for on-going congressional and judicial decisions that negatively impact native peoples and reservation communities.”); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1 (2017).

Practices of Native elimination continue to operate today, sustained by the legal structure. ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

somewhat unsatisfying — answers. As Whitman seeks to explain what Tocqueville failed to grasp when he projected the rise of a mild and benign criminal justice system in the United States,<sup>144</sup> he suggests that the answer lies in “American patterns of *egalitarian social status* and . . . American patterns of *resistance to state power*.”<sup>145</sup>

Hernández’s history indicates that neither egalitarian social status nor resistance to state power can properly characterize the culture of white U.S. settlers in the American West. Other mores — namely, a self-serving belief in natural racial hierarchies and a conviction of the proper role of a strong state in maintaining control over colonized, inferior peoples — heavily influenced the development of the modern criminal enforcement system. And perhaps it was Tocqueville’s own racial prejudices<sup>146</sup> that caused him to miss the implications of this endemic legal violence for the development of the U.S. criminal enforcement system.

A final note on the theoretical payoffs of Hernández’s frame: her mode of analysis also offers new mechanisms for understanding the local varieties of punishment. Hernández’s history is a welcome addition to books that seek to bring the West back into contemporary accounts of U.S. incarceration.<sup>147</sup> But this is not just because it provides some regional flavor to a national tale. The book also raises a note of caution in understanding “national” histories of criminal justice. Federal trends are situated on variegated historical ground.<sup>148</sup> In settler societies, “[l]aws were applied with social and regional variation and in response to local circumstances,” and “colonial jurisdictions were never empty surfaces upon which European laws were projected or imposed.”<sup>149</sup> Place matters. This also means, however, that law’s meaning and practice can be reshaped in every corner of the settler nation in ways that have implications for the nation as a whole. Histories of “American” punishment that focus on the Eastern United States, or that assume that federal crime control policy is generated by a cabal of Eastern elites, rather than through informal dialogues with a host of local and regional

---

<sup>144</sup> ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 177 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010) (1835).

<sup>145</sup> WHITMAN, *supra* note 15, at 6.

<sup>146</sup> 2 TOCQUEVILLE, *supra* note 144, at 516–17.

<sup>147</sup> As Hernández notes, “[m]ost historical work on incarceration prior to World War II focuses on the urban North or the U.S. South” (p. 224 n.18) (listing examples of such work, but also noting a few examples of histories that focus on the western United States).

<sup>148</sup> As Professor Christopher Tomlins observes, in colonial societies “law was anything but a singularity.” Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 *LAW & SOC. INQUIRY* 315, 317 (2001).

<sup>149</sup> Mawani, *supra* note 11, at 116 (citing Tomlins, *supra* note 148, at 317); see also LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900* (2010) (examining the relationship between law and geography in European empires).

actors, miss the many important ways that law was made in the West and reshaped practices nationally.<sup>150</sup>

This is not to say that the totalizing narrative of settler colonialism is always convincing. When, in Chapter Two, Hernández notes that incarceration in late nineteenth-century California was imposed primarily on white men (pp. 55–56), one is left to wonder how this fits into an account of the U.S. carceral state as an eliminatory institution aimed at Native inhabitants and racialized “Others.” Hernández explains the development as evincing the distrust of the local elites for unattached and unemployed men who failed to embody the ethos of the white settler fantasy (pp. 46, 63). Hernández draws upon theories of settler colonialism that do posit a systemic need to control members of the settler class who deviated from the settler family norm (pp. 14 & 228 n.52).<sup>151</sup> But the mass criminalization of itinerant white men is not readily understood as a manifestation of racialized settler colonialism. A more rigorous theoretical account of the interrelationships between law’s violence, racialization, and labor management would be helpful here.<sup>152</sup> Perhaps if the story of Chapter 2 were tied more systematically to the contemporaneous story of racialized immigration enforcement told in Chapter 3, or to the largely unmentioned, but also contemporaneous story of U.S. imperial warfare in the Caribbean and the Pacific, the connective tissue of the book would extend more clearly through this section of the book.<sup>153</sup> Still, Hernández must be praised for excavating the stories that make it possible even to ask these and other thorny questions.

## CONCLUSION

Having belatedly awakened to the ghastly scale of and grotesque racial disparities within the U.S. carceral state, scholars across disciplines have sought to assign blame and to identify the appropriate levers of reform. With her brilliant, well-timed, and readable 2010 book, *The New Jim Crow*, Alexander fundamentally shifted that conversation. Many scholars have framed their subsequent interventions in ways that purport to dispute, rebut, and refine arguments that Alexander made in her book — for example, taking issue with the argument that the war on drugs is fundamentally to blame for mass incarceration,<sup>154</sup> or that

---

<sup>150</sup> See, e.g., KANG, *supra* note 117, at 114–15.

<sup>151</sup> The author cites Patricia Hill Collins, *It's All in the Family: Intersections of Gender, Race, and Nation*, 13 *HYPATIA* 62 (1998).

<sup>152</sup> CHRISTOPHER TOMLINS, *FREEDOM BOUND* 5 (2010) (theorizing the “intimacies of colonizing, work, and civic identity” as linked by the “connective tissue” of law).

<sup>153</sup> For a nationally focused settler-colonial account of the period that does trace out such linkages more explicitly (but without reference to the criminal enforcement system), see RANA, *supra* note 7, at 176–235.

<sup>154</sup> See, e.g., PFAFF, *supra* note 78, at 5–6.

racist white actors were the lone architects and promoters of the resulting system.<sup>155</sup>

In their critiques of Alexander, scholars often take issue with how she sought to answer the question of “how” the carceral state of today came to be. But like *City of Inmates*, *The New Jim Crow* is best understood as a “why” book — offering a theory of the culture and ideology that drove punitive logics across jurisdictional and social boundaries, and highlighting some moments when those practices became bureaucratized and systematized. Few of Alexander’s most thoughtful interlocutors in the legal academy have disputed her basic answer to the “why” question — that is, that the deeply rooted anti-black racism that was used to justify slavery continues to animate the contemporary carceral state.<sup>156</sup>

Hernández’s book, however, offers a significant, albeit friendly, amendment to Alexander’s answer to the “why” question. This is not because Hernández views Alexander’s answer as incorrect; rather, her account suggests that it may be incomplete. Hernández fully embraces the notion that anti-black racism and the social and legal legacies of slavery are foundational to our contemporary criminal enforcement practices. But so too, Hernández’s account reminds us, are the linked conquests of the hundreds of nations that were on this land before there was a United States and the related imperial practices of manifest destiny beyond the borders of the United States, both of which also have been fueled and sustained by the logics of white supremacy. Taken together, the legacy of settler colonialism is not just a criminal enforcement system built upon the models of the slaveholder past, but also an internal archipelago of immigration detention centers, a patchwork of overpoliced and underprotected reservations, and the exportation of the carceral state to places like Guantánamo Bay, Cuba, and Bagram, Afghanistan.

*The New Jim Crow* ultimately proposes domestic solutions to a domestic problem, but *City of Inmates* suggests that the problems of the carceral state are part of a transnational network of carceral control that requires a search for solutions across formalistic boundaries of crime control, immigration control, and national security policies. In short, Hernández’s work suggests that solving the current carceral crisis

---

<sup>155</sup> See, e.g., FORMAN, *supra* note 51.

<sup>156</sup> See, e.g., Eli Hager & Bill Keller, *Everything You Think You Know About Mass Incarceration Is Wrong*, MARSHALL PROJECT (Feb. 9, 2017, 5:45 PM), <https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong> [https://perma.cc/S6PC-47TU]. Despite the bold headline declaring that “everything you think you know about mass incarceration is wrong,” Professor John Pfaff, the subject of the article, “says his differences with Alexander are ‘mostly semantic.’ He concurs with her that ‘the criminal justice system is driven by and exacerbates racial inequality.’” *Id.* Scholars like Whitman have set race completely aside in their analyses of U.S. cultural mores. WHITMAN, *supra* note 15.

---

---

requires an awareness of multiple, interrelated legacies of settler colonialism.

At the end of the book, Hernández brings this point home when she introduces contemporary voices from the rebel archive. These rebels seek practical solutions for local problems of homelessness, banishment, police brutality, and overpolicing. But their call for solutions takes aim not only — or even primarily — at a handful of local actors or systems, but at a system of oppression rooted in the ideologies of a settler-colonial past and present.