

Criminalizing Migration

César Cuauhtémoc García Hernández

Beginning in the 1980s, the United States embarked on a decades-long restructuring of federal laws criminalizing migration and increasing the consequences for migrants engaging in criminal activity. Today, the results are clear: a law enforcement apparatus and immigration prison system propelled by a vast infrastructure of laws and policies. The presidency of Donald Trump augmented this trend and brought it to public attention. But lost in President Trump's unique flair is an ideological commitment shared by multiple presidential administrations and legislators from both major political parties to use the criminal justice system and imprisonment to sift migrants. Examining these ideological attachments reveals Trump-era policies to be the outer edge of decades-long trends rather than extreme and momentary deviations from the norm.

Jerry Armijo does not remember his move to the United States. He was about one year old at the time, so that is to be expected. After a few years in Florida, his parents moved the family to South Texas when he was eight years old. They settled there and have not moved since. Jerry – his actual name is Gerardo, but he goes by the Anglicized version – grew up in South Texas. He finished elementary school there, then middle school and high school. After that, he set his sights on exploring the world. Like many young people in the Rio Grande Valley, the southeastern tip of Texas, Jerry's ticket to the world came courtesy of the United States military.

With a high school diploma in hand, he joined the Army. In Kosovo, he received a Bronze Service Star. NATO recognized his contributions to the organization's peacemaking efforts. From a military base in Germany, he started the long process of applying for naturalization, his only option for obtaining United States citizenship. Having been born in Mexico, Jerry was not a citizen of the country whose uniform he wore. Instead, he had been a lawful permanent resident of the United States – a green-card holder – since the age of thirteen. Before then he was in the country on a long-expired tourist visa. Overwhelmed by obstacles he ran into trying to get fingerprinted for the citizenship application's background check, he eventually gave up. He planned to do it after leaving Germany, he told me when I spoke with him at my family's law firm years later. That day never came.

For the Army, it was not a problem that Jerry was not a United States citizen. Lawful permanent residents are welcomed to enlist. In 2015, years after Jerry had left the service, there were 7,926 troops in the Army who did not claim United States citizenship.¹ To the military, Jerry's willingness to put his life on the line for the United States was more important than his citizenship. To Jerry, the Army's willingness to place in him the responsibility to protect the only country he had ever called home was just as important.

Eventually, Jerry became a tank commander. And later the Army sent him to Iraq. He quickly got used to avoiding improvised explosive devices (IED). It was easier to spot them on the road, he recalled. In the undulating sands of the desert floor, however, it was hard to see a hidden lump. Leading a group of tanks through the sand one day, Jerry suddenly felt the tank shake, his spine compress, and around him he heard steel reach its breaking point. Jerry's tank had passed over an IED that blasted through the armored vehicle's bottom.

With an injured leg and traumatized psyche, he was sent back to South Texas. Instead of receiving the care that he needed, Jerry found his way to drugs. It would not take long for the police to find their way to Jerry. Going through the criminal justice system, it seemed like he might be able to get his life on track. The court was supporting his rehabilitation and Jerry was doing as asked. After a difficult few years since that fateful moment in Iraq, things seemed to be improving. Then Jerry suddenly stopped showing up for court dates. The Immigration and Customs Enforcement (ICE) agency had arrested him and was holding him in a nearby immigration prison. Part of the Department of Homeland Security, ICE is responsible for managing the federal government's network of prisons where people who are suspected of violating federal immigration law are held. While Jerry sat inside the immigration prison, ICE attorneys started the process of forcibly removing him from the United States.

This time, Jerry had some luck on his side. His parents managed to gather up enough money to hire a lawyer. In immigration courts, there is no right to government-paid legal counsel. Except for those people who are able to find pro bono assistance, representation comes at a cost. In the immigration courts of South Texas, very few are so lucky. One study, published in 2015 but still the best available, found that in cases at two South Texas courts, Los Fresnos and Harlingen, only 18 and 14 percent, respectively, of detained migrants were represented, approximating the national average of 18 percent.² Thanks to a media campaign and legal arguments, ICE released Jerry.

As a lawyer, Jerry's story is relevant to me because he was a client of my family's law firm. My brother, also a lawyer, did most of the work to release him. But as a researcher interested in the expanding willingness of U.S. law and policy to criminalize migration, Jerry's experience illustrates the blurry boundaries in which lawyers, judges, and, most important, migrants live. Though immigration

law is formally classified as a type of civil law, imprisonment takes a central role in enforcing immigration law. People like Jerry regularly find themselves locked up in facilities ringed with concertina wire that resemble state prisons or county jails. Often, they are held in facilities that are nothing more than county jails from which ICE has a contract to use a certain number of beds. In other instances, immigration law transgressions are in fact handled through the formal criminal justice system. Two federal crimes in particular – unauthorized entry and unauthorized reentry – dominate dockets in many federal criminal courts. These trends have received heightened attention under the administration of President Donald Trump, but neither comes out of a vacuum. On the contrary, both present-day realities flow neatly from developments in law and policy stretching back decades.

For most of the twentieth century, few people suffered adverse immigration consequences due to involvement in criminal activity. In the ordinary course, criminal activity was investigated, prosecuted, and punished through the criminal justice system, if at all. Typically, law enforcement agencies are not required to explore the possibility that a crime was committed. Likewise, prosecutors are not usually obligated to pursue criminal charges against anyone even if the evidence of guilt is strong. Bending to the reality that resources are finite and decisions to lodge the power of the criminal justice system against someone are meant to invoke the stigmatizing power of the community, courts defer decisions about investigation and prosecution of crime to police and prosecutors.

Prior to the 1980s, concerns about the exchange and use of illicit drugs was only an infrequent cause of exclusion or deportation from the United States. For the nine decades spanning 1892 to 1984, only 15,824 people were excluded from the United States due to crime or drug activity.³ Another 56,669 people were deported for the same reasons across the different, but mostly overlapping period of 1908 to 1990.⁴ Cumulatively, it took approximately ninety years for the government to complete slightly more than 72,000 legal proceedings against migrants with criminal histories or for involvement with drugs. In fiscal year 2002, immigration officials did that in a single year.⁵ What had taken almost a century suddenly became the annual norm. In fiscal year 2012, the federal government hit a high-water mark of removing 200,039 migrants with a criminal history. Federal officials have yet to match that figure, but through the 2019 fiscal year, they have never failed to remove at least 100,000 people with criminal histories.⁶

Between the mid-1980s and the early years of the twenty-first century, far more than statistics changed. To dramatically alter enforcement trends, law and policy had to change, too. And so they did. Starting with President Ronald Reagan's election to the White House, Congress and multiple administrations have expanded the criminalization of migration, setting a trend that has evolved but not stopped. Early in Reagan's tenure, the federal government adopted a categorical policy of

detaining Haitians who arrived in the United States intent on requesting asylum. Explaining the administration's rationale in a 1981 speech, Reagan's attorney general claimed detention of asylum-seekers was necessary to discourage people from coming to the United States.⁷ The following year, a Justice Department lawyer named Rudolph Giuliani pitched to Congress a \$35 million proposal to build two prisons. The federal government needed the additional space, he told the House Judiciary Committee, "if we are to adequately enforce our immigration laws."⁸ Giuliani's request met stern resistance that year and failed to convince the House to go along, but Congress would not take long to follow the administration's lead.

Starting in the mid-1980s, Congress would enact a series of laws that raised the consequences of criminal activity and expanded imprisonment's role in enforcing immigration law. In 1986, for example, Congress enacted the Anti-Drug Abuse Act, empowering the Immigration and Naturalization Service (INS) to request that local law enforcement agencies detain anyone arrested for a drug crime.⁹ Two years later, Congress enacted the identically named Anti-Drug Abuse Act of 1988, creating a category of crime called "aggravated felony" that required the INS to take custody of any migrant convicted of such an offense.¹⁰ At the time, only three crimes – murder, drug trafficking, and firearms trafficking – fit the definition of an aggravated felony. Today, the label attaches to twenty-one categories of offenses.

A change in presidential administration would not change the course that President Reagan set by intertwining criminal justice practices and laws regulating migrants' ability to remain in the United States. On the contrary, trends brewing in the criminal justice realm would quickly make their way into immigration law. In 1990, President George H. W. Bush signed the Immigration Act, a bill that he referred to as "meet[ing] several objectives of my Administration's war on drugs and violent crime."¹¹ As President Bush suggested, the law increased the consequences of engaging in illicit drug activity. Specifically, it expanded legal authority to deport migrants convicted of a broad range of drug crimes.¹² His successor, President Bill Clinton, would likewise approve of laws increasing the penalties for migrants who commit crime. In 1994, Clinton supported the Violent Crime Control and Law Enforcement Act, a law that authorized construction of INS prisons and created a federal program that reimburses local law enforcement agencies for detaining certain migrants.¹³ Two years later, a pair of laws that Clinton signed just months apart dramatically revamped federal law and policy-making. The Antiterrorism and Effective Death Penalty Act, adopted in April 1996, added nonviolent offenses like perjury and passport counterfeiting to the aggravated felony definition.¹⁴ In September of that year, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) added to federal immigration law the statutory provision that to this day dictates which migrants federal officials, including immigration judges, are barred from releasing from custody. It also created the 287(g) programs that ICE would favor in the early years of the

Obama administration.¹⁵ In their own way, each amendment represents the war on drugs' entry into immigration law and law enforcement.

Perhaps more important than piecemeal ratcheting up of the consequences awaiting migrants who got caught in drug activity, several of these laws reflected ideological trends sweeping criminal justice circles. In particular, the 1990s witnessed multiple measures that took power away from judges. Through the 1990 immigration law, immigration judges saw their power to issue waivers of deportation limited; it would be eliminated entirely when IIRIRA was enacted in 1996. Separately, the 1990 law repealed a decades-old power that federal judges had used to bar federal immigration officials from using a specific criminal conviction to detain or deport a migrant. Called a judicial recommendation against deportation (JRAD), the special procedure essentially let judges give migrants a second chance at remaining in the United States, even after a conviction. They could use their sentencing authority to put the conviction off-limits to immigration officials. Both the waiver power taken from immigration judges and the JRAD stripped from judges in criminal cases allowed ostensibly neutral arbiters to forgive past transgressions.

Congress's decision to eliminate both authorities reflected an ideological transformation. Instead of allowing migrants to transcend their worst moments, immigration law came increasingly to limit migrants to one opportunity at making a life in the United States. While it was not categorically impossible to receive a pardon either in immigration court or in a criminal proceeding, it became increasingly difficult to do so. These shifts in law reflected a growing skepticism of judicial neutrality. A decades-long political milieu that framed judges as biased in favor of defendants reflected "the diminishing role of the judge" that Jonathan Simon chronicled in *Governing through Crime*.¹⁶ While Simon focused on criminal laws, traditional criminal policing, and criminal courtrooms, the 1990s saw numerous instances in immigration matters of the judicial backlash that he described. Instead of deferring to judges, whether in immigration courts or federal districts courts, Congress and multiple presidential administrations legislated a more constrained willingness to forgive migrants' errors.

Since the turn of the century, migration has only become more enmeshed with criminal policing practices. When immigration duties were reorganized in the aftermath of the September 11, 2001, attacks, the Department of Homeland Security's ICE was given responsibility for enforcing immigration laws in the nation's interior, and its counterpart Customs and Border Protection, which includes the Border Patrol, was given similar duties along the border. Under President George W. Bush, Congress enacted the Secure Fence Act in 2006, which required the federal government to build 850 miles of fencing along the border with Mexico, though two years later, Congress reduced that requirement to 700 miles.¹⁷ By the time Bush left office, the Border Patrol had built 306 miles of fencing intended to

stop pedestrians from crossing into the United States and another 301 to stop vehicles.¹⁸ As a backup to the steel and concrete of border walls, the Bush administration also began to rely on federal prosecutors to increase the consequence of violating immigration law. Tapping the power of two federal crimes, unauthorized entry and unauthorized reentry, the Bush administration turned federal criminal dockets into fast-paced immigration processing centers. In the last fiscal year fully under President Bush, federal prosecutors convicted 21,054 people of immigration crimes in federal district courts, one-quarter of the total number of people convicted of all crimes in all federal courthouses that year.¹⁹

Bush's successor, President Barack Obama, shied away from wall-building along the border, but his administration relied heavily on the walls of prison buildings to enforce immigration laws. President Obama oversaw the growth of ICE's population of prisoners to as many as 478,000 in a single year. Among that large group were parents held with their children in closed-access facilities called "family residential centers." After shuttering a notorious center reserved for families in 2009, the administration opened two similar sites in 2014, both of which remain operational today. To detain such a large number of people, the administration relied heavily on information-sharing agreements between state and local law enforcement agencies and their counterparts with the federal immigration services. For roughly the first six years of President Obama's tenure, ICE operated Secure Communities, an initiative that sifted identification information gathered by on-the-ground police and sheriff's deputies through DHS databases containing information about citizenship and immigration status. The administration touted the initiative as a means of identifying and apprehending dangerous individuals only to reel when public attention focused on numerous instances of people with minor infractions caught up in its policing web. DHS did itself no favors by first suggesting that participation was voluntary, then explaining that state and local law enforcement agencies could not back out. By late 2014, criticism had become so intense that Jeh Johnson, at the time Secretary of Homeland Security, announced its repeal. In the same memo, Secretary Johnson described a new initiative: the Priority Enforcement Program (PEP). Though the two programs differed markedly in scope, PEP, like Secure Communities, also used an information-sharing model between state and local law enforcement agencies and their federal counterparts.

Meanwhile, the Obama administration continued President Bush's emphasis on unauthorized entry and unauthorized reentry prosecutions. Prosecutors charged so many people with federal immigration crimes that, in 2011, an administrative unit of the U.S. Court of Appeals for the Ninth Circuit said that the situation in Arizona was "crushing" the courts.²⁰ To move large numbers of immigration crime cases through the federal courts, Operation Streamline – started in Del Rio, Texas, in late 2005 – spread across Southwestern federal courthouses during

the Obama years. In Operation Streamline proceedings, migrant defendants are processed en masse, sometimes as many as several dozen at a time.

President Trump's policies took his predecessors' positions and highlighted their sharpest edges. Having carried himself into the White House in part on the strength of racist taunts and claims to build a border wall, he spent considerable energy launching or promoting attacks on migrants. Most of the time, he laced accusations with fear-mongering rhetoric that echoed the criminal justice conversations of recent decades: innocent White victims pitted against merciless perpetrators, almost always People of Color, and the legions of White elitists who facilitate their violence. When a jury acquitted Mexican citizen José Inés García Zarate of murder in the death of Kate Steinle, a young White woman, for example, President Trump quickly released a video criticizing the outcome. In the style of George H. W. Bush's 1988 Willie Horton campaign attack against Michael Dukakis, President Trump then blamed Steinle's death on his political opponents, Democrats, accusing them of favoring dangerous migrants over blameless U.S. citizens.²¹

Aside from inflammatory rhetoric, the Trump administration also targeted migrants and their allies. Days into his presidency, President Trump issued an executive order prioritizing immigration policing against migrants who have been convicted of, charged with, or merely "committed acts that constitute a chargeable criminal offense."²² A few months later, his first attorney general, Jeff Sessions, delivered a strident speech before a crowd of Border Patrol officers accusing "criminal aliens" of "seek[ing] to overthrow our system of lawful immigration." He promised the agents assembled in Nogales, Arizona, directly on the Mexican border, "It is here, on this sliver of land, where we first take our stand against this filth."²³ Soon federal prosecutors in nearby Tucson seemed to follow the attorney general's suggestion by targeting border activists like Scott Daniel Warren for humanitarian activities that have long been common in harsh borderlands terrain. In 2017, prosecutors accused Warren of providing, at no cost, "food, water, beds, and clean clothes" to two Mexican "illegal aliens" who approached him deep in the Arizona desert.²⁴ This, they claimed, constituted conspiracy to harbor migrants, a federal crime punishable by up to twenty years imprisonment.²⁵ Two trials later, the first ending with jurors unable to reach agreement and the second in acquittal by a unanimous jury, in early 2020, prosecutors finally ceased their efforts to convict him.²⁶ Despite that prosecutorial setback, unauthorized entry and unauthorized reentry have continued to have a large presence in federal courts.

Writing in the late nineteenth century, the legal scholar and future Supreme Court Justice Oliver Wendell Holmes Jr. lifted the cloak of neutrality that often characterizes conversations about the courts. "The life of the law has not been logic: it has been experience. . . . [T]o know what it is,

we must know what it has been, and what it tends to become,” he wrote in the opening passage of his influential assessment of the U.S. legal tradition, *The Common Law*.²⁷ To Holmes, the law is the product and the result of human activity. Thought of another way, the law responds to the politics of a particular moment as much as it influences the politics of the moment.

Since the 1980s, a political project of regulating the lives of migrants through demonizing rhetoric and hard-edged laws has blossomed. President Trump is certainly explicit when it comes to creating and fanning fears of migrants. Beneath his bombast and racism, Trump’s efforts to tie migrants to criminal activity are not new. In a primetime address in November 2014, President Obama pitted migrant criminals against families. “[W]e’re going to keep focusing enforcement resources on actual threats to our security,” he said. “Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.”²⁸ Like in every diverse group of people, some migrants of course commit crimes, from the least objectionable to the most despicable. For almost a century, most empirical studies have found that migrants tend to commit less crime than people who are born in the United States. Associating migrants with criminality creates a false impression that there is greater criminality occurring within these communities than empirical reviews support.

The varying forms in which policy-makers tie migrants to criminal conduct reflects an ideological commitment to categorizing people on a spectrum of desirability. To President Obama, families are welcomed, but felons are not. To President Trump, Norwegians are desirable, but Mexican “rapists” are not. These binaries reveal two important assumptions. First, that it is possible to identify relevant contrasts: families versus felons, Norwegians versus Mexicans. Second, that it is possible to identify who should fit into which pole. Despite their differences, the binaries chosen by Presidents Obama and Trump equally reveal the fallacies of this enterprise.

Distinguishing who is worthy of inclusion in the U.S. political community based on criminal status is politically and logically attractive. There is little to lose politically from stigmatizing people associated with criminality. In early 2020, the campaign manager for Senator Bernie Sanders, at the time one of two leading contenders for the Democratic Party’s presidential nomination, described the senator’s willingness to deport some “violent criminals.”²⁹ A few weeks later, President Trump’s campaign released a Twitter advertisement featuring dark-skinned tattoo-faced men next to words of mock appreciation, “MS-13 Gang Members: Thanks for pledging to not deport us!”³⁰

What these distinctions offer in attractively simple rhetoric – dangerous offender versus innocent potential victim – they lose when mapped onto real people. The difficulty is that, regardless of the basis for categorization, the distinction between who is desirable and who is not falls apart quickly after piercing the

surface. Neither Senator Sanders nor President Trump seemed to leave room for rehabilitation. President Obama's emphasis on felons was similarly facile. Felons are not divorced from families. Families do not excise relatives upon the conclusion of a criminal proceeding. On the contrary, many families attempt, often at great cost, to maintain a meaningful relationship with convicted offenders. Indeed, Jerry Armijo fits the description of President Obama's felon, yet it was his family that hired a lawyer to help him. In the simplicity of political rhetoric, there is no room for nuance. Lamentably, immigration law is similarly myopic. Just about any drug conviction is "a violation of . . . any law . . . relating to a controlled substance" opening up the possibility of deportation.³¹ Many drug crimes also constitute "illicit trafficking in a controlled substance," a type of aggravated felony that comes with mandatory confinement and few avenues for avoiding deportation.³² Immigration law makes no allowance for Jerry's time in the military. Congress's stark pronouncements have rendered irrelevant his willingness to die on behalf of the United States.

President Trump's embrace of Europeans and denigration of Latin American and African migrants is equally simplistic. Is it possible, for example, to disentangle the bulk of Mexicans living today from the grandchildren of Norwegians who settled in Veracruz, on Mexico's Gulf Coast, prior to 1940?³³ Where to place someone like Leonora Carrington, the surrealist painter and writer born in England but whose professional life was anchored in Mexico City for fifty years (after stops in France, Spain, and the United States)?³⁴ And just as it is impossible to disentangle Jerry's two momentous statuses, veteran and felon, President Trump's pejorative description of an Indiana-born federal judge as a "Mexican" is a reminder that criminal status, like citizenship, race, and ethnicity, are socially constructed markers to which privilege is attached. I am a child of Mexicans born in a Texas county named after the Mexican revolutionary hero Miguel Hidalgo y Costilla and I insist on using four names, including one that harkens to the last Aztec emperor. But to President Trump, I am simply a Mexican. To President Obama, reflecting the substance of present-day immigration law, it is the fact that Jerry was unable to avoid criminal investigation, prosecution, and conviction that matters. It is that stain that makes Jerry a felon rather than a family member.

Even if it were possible to readily identify felons, linking juridical demerits to a malleable legal construction breathes substance into a fictional vessel. Criminality is created as much by the conduct of individual people who do what the law prohibits as it is by the political process that bars certain activities and not others. Immigration law, for example, imposes a heavy toll on all migrants who possess a small quantity of marijuana: imprisonment is required during the pendency of immigration court hearings and deportation is possible.³⁵ For U.S. citizens, buying marijuana in broad daylight is an important source of economic activity in communities around the country. As a result, the young couple Nate and Claudia

could be split by the same visit to a Colorado marijuana dispensary. While U.S. citizen Nate was unaffected, his on-and-off-again girlfriend Claudia, not a U.S. citizen, was detained by immigration officials, then barred from the country.³⁶

Assigning important legal consequences to the outcomes of police activity also ignores the unequal distribution of policing resources. Along the U.S. border with Mexico, the federal government deploys tens of thousands of Border Patrol agents to identify people who are committing an immigration crime. Whereas in 1980, the Border Patrol employed approximately 2,500 agents total, by 2019, it had almost 17,000 stationed along the Southwestern border alone.³⁷ By contrast, violent crime is committed on college campuses daily, but few perpetrators are investigated. Put another way, the public spaces of the overwhelmingly Mexican and economically impoverished borderlands are heavily policed for nonviolent crime, but the closed spaces of overwhelmingly White and wealthy college dormitories receive little attention despite well-documented patterns of violence.

Law's role in disbursing policing to some people and privilege to others highlights the importance of the legal system's political dimensions. Across the last four decades in the United States, the ideological commitment to stigmatize migrants through the use of criminal law has enjoyed bipartisan support. The criminalization of migration – indeed, the criminalization of migrants' bodies – has not been driven by partisan disagreements. Rather, what started with President Reagan has slowly evolved into reality under President Trump. To be sure, there are differences between the two major political parties in the United States, just as there are differences that appear across decades and from one presidential administration to another. Still, what the law bars today, as much as what it permits or encourages, reflects a shared ideological commitment to control migrants through the allure of categorization: desirable migrants on one side of the prison fence or border wall, undesirable migrants on the other. Whether promoted by Republicans or Democrats, this is an exercise in political judgment masquerading as pseudoscientific objectivity. Through its command of policing and prosecution resources, law turns a label's symbolic denigration – criminals, felons, rapists, Mexicans – into reality. Through that storytelling-turned-public-policy, simplistic political calculations have been converted into the drama and trauma of human experience one juridically constructed category at a time.

This is a vision of morality premised on the impossible search for a clean cleavage. Simplistic political rhetoric transformed into substantive laws and policies is ill-equipped to capture the complexity of the human experience that Holmes wrote about. It is worse yet at assigning privilege and penalty to the bureaucratic sorting that necessarily happens when Congress bends to the temptation to ignore the nuances that Holmes alluded to. Whatever value there is in casting aside

felons, there is less in relying on a troubled criminal justice system to decide who is allowed to make a life in the United States and who is not.

Future attempts to sort people into camps of desirables and undesirables, like today's efforts, will inevitably fail. Embracing these attempts to categorize requires shutting our eyes to the inherent fallacy that any small collection of factors can reflect a person's worth for making a life in the United States. If we are going to continue asking the law to assess worth myopically, then we should at least acknowledge that the law is turning ideological commitments into policing commands. Current laws that criminalize unpermitted human mobility across international boundaries privilege Canadians and Western Europeans who have easy access to formal permission to travel to the United States and ignore the daily reality that many of them will later violate immigration law by not leaving the country when required.³⁸ On the flip side, current laws that allow or require confinement and forcible removal based on criminality privilege the entrenched biases of the criminal justice system.

We can continue fantasizing that it is possible to neatly categorize people as fit or unfit for membership or we can own up to the reality that the pursuit of that goal is like a mythical quest. To assume that it is possible to neatly categorize people as fit or unfit for membership in the political community that is the United States requires faith in legislators' ability to identify suitable markers of undesirability and an equally powerful belief that, even if they could do that, they could also then create a bureaucracy that boxes people accordingly. Imperfect legislatures and fallible bureaucracies are unlikely to ever reach those high bars. Alternatively, the second option requires accepting that this goal is impossible to achieve but refusing to deviate. To accept this path requires concluding that Jerry Armijo is a felon first and an Army veteran second. To some, that is satisfactory. To others, it raises ethical doubts about the proper weight to give criminality versus military service.

Since the 1980s, the United States has committed itself to drawing lines between migrants based on criminal conduct ferreted out by state, local, and federal police forces. This is nothing more than sorting migrants based on politically palatable characteristics flagged through problematic policing practices. Even if the sorting criteria were to change, continuing the present-day quest to categorize would inevitably require similarly dubious decision-making processes. Altering course requires radically changing existing laws and policies to leave the migrant-sorting exercise in the past. Anything less would simply reshuffle priorities just enough so that faith can once more become the overriding phenomenon that law boosts.

ABOUT THE AUTHOR

César Cuauhtémoc García Hernández is Professor of Law at the University of Denver. He is the author of *Migrating to Prison: America's Obsession with Locking Up Immigrants* (2019) and has published in such journals as *California Law Review*, *UCLA Law Review*, and *Boston University Law Review*.

ENDNOTES

- ¹ Che T. Arosemena, *Immigrants and the U.S. Army: A Study in Readiness and the American Dream* (Fort Leavenworth, Kans.: United States Army Command and General Staff College, 2016), 55, Table 2, <https://apps.dtic.mil/dtic/tr/fulltext/u2/1021804.pdf>.
- ² Ingrid V. Eagly and Steven Shafer, "A National Study of Access to Counsel in Immigration Court," *University of Pennsylvania Law Review* 164 (1) (2015): 38, Table 10a.
- ³ U.S. Immigration and Naturalization Service, *1996 Statistical Yearbook of the Immigration and Naturalization Service* (Washington, D.C.: U.S. Government Printing Office, 1997), 175, Table 60.
- ⁴ *Ibid.*, 183, Table 65.
- ⁵ U.S. Department of Homeland Security, *2005 Yearbook of Immigration Statistics* (Washington, D.C.: U.S. Department of Homeland Security, Office of Immigration Statistics, 2006), 101, Table 41.
- ⁶ U.S. Department of Homeland Security, *2019 Yearbook of Immigration Statistics* (Washington, D.C.: U.S. Department of Homeland Security, Office of Immigration Statistics, 2020), Table 41d, "Aliens Removed by Criminal Status and Region and Country of Nationality: Fiscal Years 2009 to 2019," https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/yrbk_2019_enf_excel_final.zip.
- ⁷ Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* (Berkeley: University of California Press, 2004), 7.
- ⁸ Detention of Aliens in Bureau of Prisons Facilities: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Congress 3 (1982) (statement of Rudolph W. Giuliani, Associate Attorney General, United States Department of Justice).
- ⁹ Anti-Drug Abuse Act, Pub. L. No. 99-570, § 1751(d), 100 Stat. 3207, 3207-47 (1986) [amending INA § 287, 8 U.S.C. § 1357].
- ¹⁰ Anti-Drug Abuse Act, Pub. L. No. 100-690, §§ 7342, 7343, 102 Stat. 4181, 4469-70 (1988) [amending INA § 101(a), 8 U.S.C. § 1101(a) and § 242(a), 8 U.S.C. § 1252].
- ¹¹ George H. W. Bush, *Presidential Statement on Signing the Immigration Act of 1990*, November 29, 1990, <https://www.presidency.ucsb.edu/documents/statement-signing-the-immigration-act-1990#axzz1OsUYZ1gw>.
- ¹² Immigration Act of 1990, Pub. L. No. 101-649, § 508, 104 Stat. 4978, 5051.
- ¹³ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20301, § 130007(b), 108 Stat. 1796, 1823, 2029.
- ¹⁴ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277-78 (1996).

- ¹⁵ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, § 303, 110 Stat. 3009-563, 3009-585 (1996).
- ¹⁶ Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007), 128.
- ¹⁷ Michael John Garcia, *Barriers Along the U.S. Borders: Key Authorities and Requirements* (Washington, D.C.: Congressional Research Service, 2017), 9.
- ¹⁸ Chad C. Haddal, Yule Kim, and Michael John Garcia, *Border Security: Barriers along the U.S. International Border* (Washington, D.C.: Congressional Research Service, 2009), 9.
- ¹⁹ Administrative Office of the U.S. Courts, 2008 *Annual Report of the Director: Judicial Business of the United States Courts* (Washington, D.C.: U.S. Government Printing Office, 2009), 244–247, Table D-4.
- ²⁰ *In re: Approval of Judicial Emergency Declaration in District of Arizona*, 639 F.3d 970, 979 (9th Cir. 2011).
- ²¹ “Trump Blames ‘Sanctuary Cities’ for Death Even Though Jury Clears Immigrant,” December 9, 2017, YouTube, uploaded by Michael McIntee (accessed April 28, 2020), <https://youtu.be/f5uiDXfRDBc>.
- ²² Exec. Order No. 13768, 82 Fed. Reg. 8799 (January 30, 2017).
- ²³ Jefferson B. Sessions, “Attorney General Jeff Sessions Delivers Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement,” Nogales, Arizona, April 11, 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed>.
- ²⁴ Complaint, *United States v. Warren*, No. 4:18-mj-01455 (D. Ariz. Jan. 18, 2018) (describing the two men as “illegal aliens”); and Affidavit of Aaron Kiraoffe for Detention of Material Witness, *United States v. Warren*, No. 4:18-cr-00223 (D. Ariz. Jan. 18, 2018) (describing the two men as “citizens and residents of Mexico”).
- ²⁵ 8 U.S.C. § 1324(a)(1)(A)-(B).
- ²⁶ Paul Ingram, “Feds Drop Case against No More Deaths Volunteer Scott Warren,” *Tucson Sentinel*, February 27, 2020, http://www.tucsonsentinel.com/local/report/022620_warren_charge/feds-drop-case-against-no-more-deaths-volunteer-scott-warren/.
- ²⁷ Oliver Wendell Holmes Jr., *The Common Law*, rev. ed. (New York: Dover Publications, Inc., 1991), 1.
- ²⁸ Barack Obama, “Remarks by the President in Address to the Nation on Immigration,” November 20, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.
- ²⁹ Brendan O’Connor, “The Deserving Migrant,” *The Baffler*, March 11, 2020, <https://thebaffler.com/capital-offenses/the-deserving-migrant-oconnor>.
- ³⁰ @TrumpWarRoom, Twitter, April 16, 2020, 5:13 p.m. (accessed April 28, 2020), <https://twitter.com/TrumpWarRoom/status/1250925188344156166?s=20>.
- ³¹ 8 U.S.C. § 1227(a)(2)(B)(i).
- ³² 8 U.S.C. § 1101(a)(43)(B).

- ³³ Mieke Neyens, “The Good, the Bad and the Rational: Desirable and Undesirable Migration to Cuba and Mexico (1907–1909),” *Expectations Unfulfilled: Norwegian Migrants in Latin America, 1820–1940*, ed. Steinar A. Sæther (Leiden, The Netherlands: Koninklijke Brill NV, 2016), 124.
- ³⁴ Emily Wells, “The Strange, Irreverent Worlds of ‘Down Below’ and ‘The Complete Stories of Leonora Carrington,’” *Los Angeles Review of Books*, May 18, 2017; and Anwen Crawford, “Leonora Carrington Rewrote the Surrealist Narrative for Women,” *The New Yorker*, May 22, 2017, <https://www.newyorker.com/books/page-turner/leonora-carrington-rewrote-the-surrealist-narrative-for-women>.
- ³⁵ 8 U.S.C. § 1226(c)(1)(C); and 8 U.S.C. § 1227(a)(2)(B)(i).
- ³⁶ Joel Warner, “Marijuana Is Legal in Colorado—But Only If You’re a U.S. Citizen,” *Westword*, September 13, 2016, <https://www.westword.com/news/marijuana-is-legal-in-colorado-but-only-if-youre-a-us-citizen-8304837>.
- ³⁷ Joseph Nevins, *Operation Gatekeeper and Beyond: The War on “Illegals” and the Remaking of the U.S.-Mexico Boundary*, 2nd ed. (New York: Routledge, 2010), 227, Appendix F (for 1980 data); and Customs and Border Protection, United States Border Patrol, “U.S. Border Patrol Fiscal Year Staffing Statistics (FY1992–FY2019),” hosted at <https://cbp.gov/newsroom/media-resources/stats> (for 2019 data).
- ³⁸ U.S. Department of Homeland Security, *Fiscal Year 2018 Entry/Exit Overstay Report* (Washington, D.C.: U.S. Department of Homeland Security, 2018), 14, Table 2, 30, Table 6, https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf.