

## **Incarceration and the Local Origins of Border Policing**

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In 1925, a journalist from Northern New York wrote about a peculiar arrangement that had taken root in county jails throughout the region. New York's four northernmost counties, located along the Canadian border, had jails filled not just with individuals accused of violating local laws, but with immigrant detainees awaiting immigration hearings and deportations. The journalist opined that the federal government had turned county jails into "boarding houses," paying localities a nightly rate for each detained migrant. He described the scene: "Here, almost daily, Federal officers call for aliens. They are handcuffed. They are led through the main streets of this village to be photographed. Yet [the] spotlight that plays around Ellis Island is not trained upon small county jails."<sup>1</sup>

What this journalist encountered in the rural northern expanses of the nation in 1925 continues to play out throughout the United States nearly a century later: migration control is a project that relies on local carceral space, local police power, and local community support to classify, exclude, and remove. In the past decade, immigration law enforcement has become an exemplar of what scholars have described as "uncooperative federalism," as cities and states challenge forceful, but ultimately voluntary, federal requests for cooperation, fueling debates about immigration detainers and sanctuary cities throughout the U.S.<sup>2</sup> While scholars have typically conceived of U.S. borders primarily as a story of federal authority and national sovereignty, an examination of the ways that the federal government worked with local communities offers us a different narrative of how the U.S. gained the capacity to incarcerate and expel tens of thousands of migrants each year. Though the Supreme Court formally curtailed state and local authority over immigration regulation at the end of the 19<sup>th</sup> century, instead vesting exclusive control to the federal control, this distinction was rarely as neat as the rulings

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<sup>1</sup> "Northern Jails Crowded May Boost U.S. Prisoners' Board," *Chateaugay Record*, Oct. 2, 1925.

<sup>2</sup> Jessica Bulman-Pozen and Heather K. Gerken, "Uncooperative Federalism," *The Yale Law Journal* 118, no. 7 (2009): 1256–1310.

suggested.<sup>3</sup> In the United States, mass deportations were, and continue to be, impossible without the collaboration of local governments. In this paper, I will consider how the history of American border control looks different if we center the local community, rather than the federal government, and what this might tell us about American statemaking more broadly. At the center of these examinations of federal-local collaboration, I suggest, is incarceration—an arena where local and federal actors battled over money, jurisdiction, and the rapidly dissolving line between administrative and criminal law.

From the turn of the twentieth century, the U.S. immigration system faced a fundamental challenge in their project of bordermaking: how to remove unwanted migrants. With each new immigration restriction—Chinese exclusion, anti-trafficking provisions, quota laws—the capacity of a limited federal state was stretched further, creating a widening gap between the law as written and the law as enforced. The logistics of removal varied widely by region. For migrants apprehended at or near a major port of entry, such as New York, San Francisco, or Philadelphia, the immigration service had federal detention space, where migrants would await hearings, recovery from illness, or a return trip. Away from the U.S.’ urban centers the process of deportation was far more fragmented. As migrants, particularly the Chinese, turned to the courts to assert habeas corpus rights, immigration officials began contracting with dozens of city and county jails to detain migrants.<sup>4</sup> The number of migrants assigned to a local jail was unpredictable, fluctuating with changing migration patterns, court decisions, and fights over what the federal government could afford to pay the locality. Many scholars have noted that mass incarceration remade rural U.S. economies in the late twentieth century, as both the government and private companies pitched incarceration as a solution for high unemployment and

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<sup>3</sup> Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (New York, NY: Oxford University Press, 2017).

<sup>4</sup> On habeas claims see Lucy E. Salyer, *Laws Harsh as Tigers : Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995).

deindustrialization.<sup>5</sup> But rural space was seen as both an opportunity and a challenge for immigration policing long before—it offered immigration officials the chance to forge new bonds with sheriffs and local police, suggesting to local officials that even if they lacked jurisdiction, they could still be valuable partners in upholding national sovereignty. For rural communities, partnering with federal immigration law enforcement offered a rare opportunity for a windfall of federal cash, as the immigration service paid nightly rates for each detained “federal prisoner.” In some cases, the money went towards the personal enrichment of the sheriff, but in other cases, it was used to fund community services and reduce taxes.<sup>6</sup>

While the promise of federal money was central to creating the local migration state in the early twentieth century, the economic promise was fortified by racism and evolving ideas about who “deserved” incarceration.<sup>7</sup> By focusing on local communities, we can see how attitudes towards migrant prisoners shifted as the demographics of detainees evolved. At the beginning of the twentieth century, nearly all migrant detainees in Northern New York jails were Chinese held for violating the Chinese Exclusion Act. Mainstream racist thought at the time of the exclusion acts characterized the Chinese as docile, subservient, and effeminate—as a semi-slave or “coolie” race.<sup>8</sup> Advocates of exclusion viewed these traits as a threat to American democracy and manhood, fundamentally incompatible with an American vision of citizenship. But these characterizations were highly compatible with the traits that made an ideal prisoner. Rather than fighting to rid the town of Chinese

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<sup>5</sup> John M. Eason, *Big House on the Prairie: Rise of the Rural Ghetto and Prison Proliferation* (Chicago: University of Chicago Press, 2017); Clarence Jefferson Hall, *A Prison in the Woods: Environment and Incarceration in New York's North Country*, (Amherst: University of Massachusetts Press, 2020).

<sup>6</sup> In some localities, alarm about sheriffs profiting from immigrant detainees accelerated the end of the “fee system,” in which the sheriff was paid per prisoner. See: Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940*, (New Haven: Yale University Press, 2013).

<sup>7</sup> “Local migration state” is a term coined by geographer Mathew Coleman, see: Mathew Coleman, “The ‘Local’ Migration State: The Site-Specific Devolution of Immigration Enforcement in the U.S. South,” *Law & Policy* 34, no. 2 (2012): 159–90.

<sup>8</sup> David L. Eng, *Racial Castration: Managing Masculinity in Asian America* (Durham, NC: Duke University Press, 2001).

prisoners, counties actively negotiated to *bring in* Chinese prisoners and the federal money that accompanied them. These towns did not want Chinese residents, but the *Chinese prisoner* filled a distinct social and economic role: his potential social threat had been neutralized by his lack of freedom, and his economic benefit outweighed his potential danger.

But communities' cost-benefit calculations changed as the detainees changed. As growing numbers of European migrants became illegal in the 1910s and 1920s, the same towns that had once battled to secure Chinese detainees grew wary of white migrant detainees.<sup>9</sup> News stories proliferated about “innocent” immigrant women and children trapped in local jails, the long-neglected carceral spaces that even the most adamant prison reformers had declared a lost cause. The immigration service recognized that to ensure local cooperation they needed not just to pay local officials, but also to construct migrants and unregulated migration as an existential, racialized threat, that could be swiftly removed by curtailing access to courts and communities. The immigration service surveyed local leaders throughout the U.S. about their feelings about border control and strategized new ideas for “selling cooperation” to mayors and police chiefs. By the end of the twentieth century, the immigration service would still be selling.

Scholars of the carceral state and immigration often use the term *crimmigration* to describe a bleeding of norms and practices from criminal justice into the realm of immigration law.<sup>10</sup> The logic goes that as mass incarceration became the de facto bipartisan solution for all social problems in the last decades of the twentieth century, immigration became yet another realm where the optimal form of social control was punishment. In this new era, misdemeanors were transformed into aggravated felonies, tactics of crime control were adopted by immigration officials, and an expansive system of

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<sup>9</sup> On constructions of illegality, see: Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, N.J.: Princeton University Press, 2004).

<sup>10</sup> César Cuauhtémoc García Hernández, “Creating Crimmigration,” *Brigham Young University Law Review; Provo* 2013, no. 6 (2013): 1457–1515; Juliet Stumpf, “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power,” *American University Law Review* 56 (2006): 367–420.

detainers moved migrants swiftly between the criminal and immigration systems. But looking at earlier relationships between federal immigration policing and local governments shows that concerns about the border *catalyzed* carceral expansion. In the 1930s, the creation of the Bureau of Prisons and the first federal jails grew out of concerns about the number of migrants and traffickers overwhelming city and county jails. Concerns about the border also triggered new data collection efforts. When a representative from the American Prison Association sought data in the 1920s on how many federal prisoners were boarded in local jails, the Department of Justice told him that no such data existed—the process of migrant jailing was so ad hoc that there was no comprehensive list of the counties working with the federal government.<sup>11</sup> Rather than the immigration system borrowing from the criminal justice system, the criminal justice system and immigration system evolved in tandem.

While the devolution of immigration authority to local governments began far earlier than most discussions acknowledge, reliance on local communities for migration control reached new heights in the second half of the twentieth century. As immigration laws shifted to include mandatory detention for asylum seekers and other categories of migrants, the immigration service began building its own federal facilities to use alongside local jails. These new sites were controversial for many reasons: they were not held to the same standards as prisons, they raised questions about whether the flurry of prisoners' rights litigation could extend to migrant detainees, and they signaled a more permanent embrace of incarceration as a tool of migrant deterrence. Still, the expanding categories of “mandatory” detainees meant that the immigration service would continue to rely on hundreds of local facilities. Migrants held in local jails often lodged complaints that specifically invoked their rights as federal, rather than local, detainees. “At every county jail I live, I am by the rules of the State INMATE NOT

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<sup>11</sup> Hastings D. Hart, *United States Prisoners in County Jails: Report of the Committee of the American Prison Association on Lockups, Municipal and County Jails* (New York: Russell Sage Foundation, 1926).

by the federal...What is the different between INMATE and DETAINEE?” one detainee wrote in a 1996 letter.<sup>12</sup>

Even as privatized detention centers proliferated post-9/11, local jails and prisons continued to be critical. According to data compiled by Immigration & Customs Enforcement (ICE) in November 2017, the federal government maintained approximately 850 contracts with local authorities to detain immigrants in 669 counties.<sup>13</sup> In several cases, ICE has taken local jails and prisons at risk of closure or downsizing and converted them into immigration detention facilities.<sup>14</sup> Some criminal justice reform advocates have identified this as an unanticipated consequence of efforts to reform the criminal justice system by reducing sentences and increasing access to bail—the number of people incarcerated for criminal offenses has waned, but the number of immigrant detainees has not.<sup>15</sup> In other cases, municipalities have contracted with private companies to operate their jails.<sup>16</sup> And even in cases where private companies build a detention center from the ground up, local governments still stand to benefit economically. In Adams County, Mississippi, a rural county with a high rate of poverty, the privately-owned Adams County Correctional Center is the county’s largest taxpayer. The facility generates more than \$1.8 million in real and personal property taxes, while ICE pays the county 50 cents per detainee per night—money that Adams County says is critical to funding their school system.<sup>17</sup>

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<sup>12</sup> “11-16-96 Affidavit of Cuban detainee in Bay Co. Jail Annex” in Cheryl Little and Joan Friedland, “Florida County Jails: INS’s Secret Detention World: A Report by Florida Immigrant Advocacy Center, Nov. 1997,” Box 13, Americans For Immigrant Justice Records, David M. Rubenstein Rare Book & Manuscript Library, Duke University.

<sup>13</sup> Emily Ryo and Ian Peacock, “Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983–2013,” *Law & Society Review* 54, no. 1 (2020): 67.

<sup>14</sup> See, for example: Riham Feshir, “Detainees wanted: Minnesota’s closed private prison eyes a deal with ICE,” *MPR News*, Aug. 23, 2019.

<sup>15</sup> Zhen Zheng, *Jail Inmates in 2017* (Washington, D.C., U.S. Department of Justice, Bureau of Justice Statistics, 2019) NCJ 251774.

<sup>16</sup> See, for example: Sarah Tory, “How for-profit detention persists in the West” *High Country News*, Sept. 15, 2016.

<sup>17</sup> Alan Gomez, “‘These people are profitable’: Under Trump, private prisons are cashing in on ICE detainees,” *USA Today*, Dec. 20, 2019.

The enduring idea that deportation and border control is a federal project has obscured the ways that detention and removal of migrants has always been a local project. Federal agents have worked closely with local officials to keep the gears of the “deportation machine” turning, both because of the potential for profit and because many communities and their constituents saw unauthorized immigration as criminal and as a violation of local, as well as national, sovereignty.<sup>18</sup> Examining the local deportation landscape helps us understand how the immigration service worked around its limited budget and resources for much of the twentieth century—they effectively deputized local officials as immigration agents, adjusting their exact responsibilities and authority as activists and lawsuits intervened.<sup>19</sup> Framing the deportation system as local also encourages us to rethink how illegality is constructed, not just through law but through the physical space of punishment—holding migrants in the same space as those characterized as criminal sent a message to communities that unauthorized migrants were also a threat and were also criminal. It also raises questions about how migrants confront a fractured, unstable state, where they can move between local and federal jurisdiction multiple times over the course of one removal proceeding. As local practices have deviated from federal norms, as local officials have been intermittently vested with and then stripped of immigration authority, and as the immigration service has relied on an ever-expanding number of jails, prisons, and private carceral facilities, it has produced an immigration system where jurisdiction is perpetually up for grabs rather than a settled fact. This has produced even greater vulnerability for migrants, and has empowered the state with a flexible, expansive network of control.

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<sup>18</sup> Adam Goodman, *The Deportation Machine: America’s Long History of Expelling Immigrants*, Illustrated edition (Princeton: Princeton University Press, 2020).

<sup>19</sup> Amada Armenta, *Protect, Serve, and Deport: The Rise of Policing as Immigration Enforcement* (Oakland: University of California Press, 2017) 25–26.