

## PUNISHMENT, RACE, AND THE ORGANIZATION OF U.S. IMMIGRATION EXCLUSION

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### ABSTRACT

Although the punitive character of the US immigration enforcement regime has been noted, less research has inquired into the productivity of punishment beyond detention and deportation, the particular rationale of punishment, and the way in which punitive enforcement *shapes* (rather than *targets*) race. By analyzing anti-migrant rhetoric and the practices of immigration enforcement, I argue that punishment is best understood as a violent material reassertion of the narrative of the United States as a nation of laws. My biopolitical approach to immigration innovates by (a) conceptualizing the process through which race becomes a biopolitical divide, (b) noting that the construction of race also shapes the meaning of whiteness, and (c) showing the particular ways in which sovereignty, discipline and biopower are combined in the U.S. immigration enforcement regime. I illustrate these claims by examining policies and practices that characterize contemporary immigration enforcement and find that punishment fulfills functions of regeneration, discipline, or moralization, among others, and treats different subpopulations of migrants differently. Even inclusionary interventions involve processes of subjectification among the beneficiaries. I conclude by examining the implications of this framework for understanding the current political stalemate.

**KEYWORDS:** Immigration; Foucault; Biopolitics; Punishment; Race; Latino Politics.

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In this sense, the fixity of the body, its contours, its movements, will be fully material, but materiality will be rethought as the effect of power, as power's most productive effect.

Judith Butler, *Bodies that Matter*, p. xii

In 2014, President Barack Obama issued an executive order providing temporary relief from deportation for undocumented parents of citizens or permanent residents. This measure, along with the 2012 reprieve from deportation for children who arrived as minors, are the first measures to provide any kind of status to undocumented migrants since the 1986 regularization. In the three decades that separate these events, legislation has focused on enforcement, reducing procedural rights, expanding detention and deportation, increasing grounds for expedited removal, strengthening immigration policing, and connecting immigration and local law enforcement. In the absence of a unified path to legal status, the everyday lives of undocumented migrants are marked by the possible encounter with a vast system of enforcement that could put them on the path to detention and deportation.

The literature on the U.S. immigration regime has engaged with the increasing punitiveness of immigration enforcement (Kanstroom 2000, 2007; García Hernández 2014)<sup>1</sup> and with the multifaceted constructions of the immigrant in contemporary debates (Behdad 2005; Sampaio 2015; Gonzales 2013; Honig 2001). In particular, scholars have relied on Foucault's writings on governmentality and, in particular, his notion of biopolitics, to critically conceptualize the current immigration regime (Apostolidis 2010; Arnold 2011; Brendese 2014; Yeng 2014). In this article I take this route but—

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<sup>1</sup> The literature on immigration detention claims that immigration detention is punitive and challenges its legality given the civil character of immigration law (García Hernández 2014). While I agree, my focus is on the punitive character of interior enforcement and, because of space limitations, I cannot address at length this literature.

unlike other approaches—I give an account of the process through which a racialized biopolitical division is established. In discussing the process of construction of race I argue that discourses also construct whiteness in a way that is central to define the threatening character of racialized immigrants. Finally, in addition to discourse, I focus on the particular disciplinary *practices* that materially affect racialized migrants and others who define themselves in opposition to them. My focus on punishment goes beyond the existing literature by thinking beyond detention and deportation to include the way in which practices and discourses of enforcement punitively shape the everyday spaces and experiences of racialized migrants (see also Sampaio 2015). Second, I argue that we should understand punishment in a productive—rather than retributive—manner. Finally, I note that even migrants constructed as “good migrants,” are subject to punishment.

The punitive dimensions of the contemporary U.S. immigration regime follow from a violent reassertion of the narrative of the United States as a nation of laws, which grounds the opposition between law-abiding, tax-paying citizens and *illegals* prevalent in discourses of white victimization. This rhetoric both justifies and is reinforced by the punitive dimension of immigration enforcement through its entanglement with power and its manifestations in specific practices. Practices are the “places where what is said and what is done, rules imposed and reasons given, the planned and the taken-for-granted meet and interconnect” (Foucault 2001, 225, 2008, 19).

I conceptualize punitive enforcement practices through a Foucaultian framework and show how sovereignty, discipline, and biopower are jointly at work. Not all forms of exclusion are punitive; if one considers the shape of the system of immigration enforcement only two decades ago, we find that the amount of resources and manpower could not result in the policing, surveillance and entrapment that characterizes the lives of undocumented migrants today. Punitiveness is a question of kind and scope. While policies might have the motive to encumber the lives of migrants and make them precarious, the

feeling of precariousness ultimately depends on resources and manpower that determine the actual reach of policing. A framework of governmentality also facilitates the identification of the particular techniques and tactics through which marginalization materializes; it connects the technical knowledge of demography, social risk, and security to the forms of disciplinary intervention that render bodies useful and docile, and the way in which sovereign law buttresses these techniques. Accordingly, my goal is not to substantiate a pre-existing notion of biopolitical governmentality using the U.S. immigration regime but rather to reconstruct—from the ground up—the techniques and technologies of power and the way in which they are linked in a particular topological space (Collier 2009). Foucault’s framework also allows us to understand the productivity of these interventions. In the case at hand I argue that the practices of immigration enforcement: (a) shape the particular meaning of race that is taken for granted in the polity (i.e., the targeted Latino/a subject does not pre-exist these interventions); (b) constitute the lived experience of migrants as punitive; and (c) produce particular migrant subjectivities. The resulting construction of a racialized threatening group,<sup>2</sup> along with the punitive rationale predicated in their supposed challenge to the law, is what naturalizes the unprecedented coercion involved in immigration management (Coleman 2012; King and Valdez 2011; Stevens 2011; Varsanyi et al. 2012). By highlighting the threatening character of the construction, I agree with Leo Chavez’s arguments about the “Latino Threat” (Chavez 2008) but I focus both on discourse *and*

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<sup>2</sup> When I discuss race as a construction that structures the biopolitical divide my aim is not to accurately reflect the racial and ethnic make-up of Latina/os—which is extremely heterogeneous and marked by differences of class, national origin, and language, among other characteristics (Bonilla-Silva 2002). I also do not mean to diminish efforts to reconceive of Latina/os and *Latinidad* as a “site of ongoing resignificability” (Beltrán 2010, 9). Instead, my goal is to uncover the process of racial homogenization that marks as threatening an artificially constructed group.

practices. My analysis is closer to Mae Ngai's consideration of the role of "administrative enforcement of restrictive immigration policy" in the construction of the "illegal alien". (2004) However, unlike Ngai's historical analysis, I focus on a period when race is not explicitly written in law or discussed openly as in the early twentieth century. My focus on practice extends Jonathan Inda's work on the "specific tactics, techniques, and programs" deployed to manage the undocumented population and Douglas Massey's work on the system of immigration enforcement as a "race-making institution," by further refining the characterization of these interventions as punitive and specifying the particular spatialized practices that racialize (Inda 2008; Massey 2013). I also complement work on the state's role defining racial difference (Hayward 2003) by exploring the contribution of immigration policing to the "built forms and ordered spaces" that construct race.

A biopolitical approach complements two other approaches to the study of migration, Marxism and American Political Development. A biopolitical approach does not deny that—as Marxists claim—economic relations are profoundly enmeshed with power, either through the support of global capital for anti-immigrant hegemony or through the vast displacements that result from capitalist exploitation of migrant-sending countries (Gonzales 2013, 5; Gonzalez 2013, chapter 2). My analysis is complementary because it characterizes the indissolubility between power and economics by looking into the particular ways in which it takes shape on the ground, exploring the "various contrivances of power," its ramifications, and reach toward different sectors (Foucault 1980, 88-9).

Vis-à-vis scholars of American political development, a focus on the particular trajectories that power follows is also complementary because reconstructing the relationship between power and subjectivities complements the conceptualization of institutions and elite political processes that interest institutional and "nation building" approaches (Tichenor 2002; Zolberg 2006).

Centering on the punitiveness of the immigration regime reverses the connection between punishment and immigration violations, making punishment the instrument to racialize the Latina/o population and legitimize the exclusion of migrants from the group worthy of protection.<sup>3</sup> The (inevitable) immigration violations by racialized groups follow from the punitive laws rather than being the cause of punishment. In other words, “illegality... is ... unrecognizable without a body of color” (Cacho 2012, 101).

In the rest of this article I support these claims. Next section develops the Foucaultian framework of governmentality and specifies the role that punishment and white victimization play in it. Section three identifies and categorizes the multiple and specific local tactics that result from legislation passed over the last two decades and describes the resulting punitive realms—lived experience, working conditions, and paths to legal status. Section four illustrates—through the DREAM Act—the multiple

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<sup>3</sup> The categories of Latina/o, immigrant and undocumented immigrant are obviously separate (though overlapping) and encompass descendants of the Mexican population that remained in territory annexed by the United States, subsequent waves of Mexican immigration, and more recently Central Americans seeking work, fleeing authoritarian regimes, or violence. My claim here is that the conflation of immigration and “illegal” immigration, and the identification of the latter with “Latina/o” migration in the discourse and tactics devoted to police undocumented migration domestically result in the racialization of Latina/os (on these confluences see Ramakrishnan et al. 2014; and Balibar 1991, 221). I understand racialization as the production of a homogenized perception of foreignness that denigrates certain alleged physical and cultural characteristics (Rocco 2014; Cobas et al. 2009; Oboler 1995). To reflect this project of racialization, throughout this article I refer to Latina/o, immigrant, and undocumented immigrant interchangeably.

subjugation effects that interventions produce. Section five draws the implications of my framework for the contemporary immigration debate and concludes.

### **SOVEREIGNTY, DISCIPLINE, AND BIOPOWER**

To think about the punitive dimensions of the interior enforcement regime it is necessary to conceptualize how laws, enforcement practices, and forms of inter-agency cooperation work productively on the ground and shape the experiences of targeted migrants. Their productivity is threefold: these laws and practices shape our understanding of race, structure migrants' lived spaces and experiences, and produce particular migrants' subjectivities. These productive effects are not homogeneous. The understanding of race that results from these practices is polyvalent and contradictory. Different localities across the U.S. offer particular configuration of practices of enforcement. Finally, migrants' subjectivities may be a consequence of disciplinary intervention such as racialized surveillance, or be more subtly determined through self-government.

Laws and practices of the immigration regime are governmental because the administrative state relies on a set of tactics—including disciplinary tactics operating over bodies, biopolitical regulatory techniques operating over populations, and laws (sovereignty) used as tactics—to dispose of things to attain a certain aim, which in the case of the immigration regime is defined by public and bureaucratic discourses of homeland security, criminality, and welfare abuse (Foucault 1978, 146; Rose 1999, 23; Foucault 2000, 211, 2003, 249). Governmentality encompasses three forms of power superimposed in historical and localized ways (Foucault 2003, 249). No form of power is overarching; mechanisms directed at regulating populations (biopower) and discipline over bodies permeate the rule of sovereignty and appear in concrete arrangements that result in diverse forms of subjugation within a broader governmental system (Foucault 2003, 241-3, 1978, 139-40). This complementary action is a

response to things escaping sovereignty as an organizing schema, which called for discipline and biopower to work at the level of detail and population, respectively (Foucault 2003, 249).

Compared to other frameworks of marginalization, governmentality allows for better specification of the techniques through which marginalization materializes by connecting the technical knowledge of demography, social risk, and security to the forms of disciplinary intervention that render bodies useful and docile, and illuminating how sovereign law buttresses these techniques.

Discipline, unlike sovereignty, is not associated with a particular law, institution, or apparatus; it comprises procedures that extend the reach of power and surveillance to minute elements and apparently unimportant gestures (Foucault 1995, 77-8, 216). Biopower, or biopolitical governmentality, regulates populations by governing all subjects and protecting the whole from internal and external dangers, racializing those who are threatening the whole, partly through fear and risk management (Foucault 1978, 138-49, 2007, 64-9, 249, 2008, 66-7). This kind of power emerges along with the scientific capacity to measure, demographically track the population, and manage risk at the mass level in order to revitalize the group of protected citizens (“to make live”) based on the identification of a threatening internal group (that is “let to die”).

For biopolitics, racism is “the basic mechanism of power” and the element that divides the regulated populations<sup>4</sup> and turns biopower into killing (Foucault 2003, 249-54).<sup>5</sup> This does not mean that the threatening racialized subject pre-exists the relation of domination. Instead, the actual relations

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<sup>4</sup> I understand racism as the sheltering of the “white race” from threatening elements. As a consequence, gender and class, among other markers, are also relevant biopolitical dimensions to understand the different vulnerability to exclusion of subjects (McWorther 2009).

<sup>5</sup> By “killing” Foucault does not mean simply murder but also exposing someone to death, increasing the risk of death for some group, or simply political death (2003, 256).

of subjugation manufacture these subjects (Foucault 2003, 45), an aspect that is not explicitly theorized in many biopolitical treatments of the U.S. immigration regime. A faithful reconstruction of the immigration enforcement regime as a system of governmentality thus requires reconstructing the particular mechanism that characterizes these interventions (punishment), the narrative that fuels interventions (white victimization), and the specific practices that make the racialized threatening migrant “real” (Foucault 2008, 19). I address the first two points in the rest of this section and turn to the third in the next.

### ***Punishment for What?***

The contemporary US immigration regime enacts a racialized biopolitical divide between the sheltered group (whites) and the group subjected to an increased risk of death (Latino/a migrants) through punitive interventions.<sup>6</sup> These interventions are motivated by a violent reassertion of the narrative of the United States as a “nation of laws” and produce/reinforce narratives of white victimization. The “race” of the white sheltered subjects and the racialized migrant subjects are jointly constructed through the punitive practices of enforcement.

The meaning of punishment, however, is not evident and it may not be constant over time or homogeneous. In *On the Genealogy of Morals*, Nietzsche distinguishes between an enduring aspect of punishment—the act itself—and a fluid aspect, constituted by the meaning, aim, and the “expectation ... attached to the execution of such procedure” (1996, 60). Among the meanings assigned to

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<sup>6</sup> This is not to diminish racial formations outside these categories. The interventions in the immigration regime complement racialized interventions that target African-Americans in the criminal justice and welfare systems. Moreover, while immigration enforcement disproportionately targets Latino/a migrants, national security discourse supporting enhanced enforcement and militarization also targets Muslim Americans.

punishment, Nietzsche mentions “[emotional] compensation for the harm done... elimination of a degenerate element... a means towards maintaining racial purity or a social type” (1996, 61). This discussion is useful to assess why and how certain groups are punitively targeted at different historical conjunctures because it makes the logic of punishment an open question.

Walter Benjamin notes in *Critique of Violence* that violence and disproportionality of punishment reveal “something rotten:” law reaffirms itself and its origins “jut manifestly and fearsomely into existence” (1986, 286). While Benjamin refers to capital punishment, his reflections apply to the question of disproportionate punishment generally, a salient complaint in the immigration debate and scholarly literature, which argues that deportation is excessive punishment for the civil violation of immigration laws, or even the minor crimes that trigger deportation (Kanstroom 2007, 243). The goal of activists is to restore proportionality: ease or eliminate the punishment for immigration violations. However, a view of punishment as violent reassertion of law suggests we should put into question the narratives of lawfulness that underlie the immigration regime, the history sanctioned by these laws, and the history erased. Ultimately, the violence stems from the need to prevent the contestation of the narrative of law by the publicity of the constitutive violence of slavery, conquest, annexation, and aggressive war.

Thus punishment is polyvalent and its violence is not connected to the severity of the violations to which it avowedly responds. Punitive conditions legislated for migrants are alternatively and/or jointly used as regenerative, disciplinary, moralizing, and criminalizing. Because the threatening racialized subject that justifies enforcement is given meaning by these actions, punitiveness both targets and shapes race. The acts of punishment that accompany migrants in their daily lives and—for those eligible—their paths to legal status, can be seen as obstacles that racialized subjects overcome to prove

they benefit the social body, or as interventions that discipline those permanently excluded. Thus punishment is a technique utilized by different forms of power: sovereign, disciplinary, or biopolitical.

### ***White victimization***

The violent reassertion of the law that underlies punitive practices is particularly evident in the discourse of white injury. The relation of subjects to the law structures anti-migrant discourse and claims the victimization of whites: *tax-paying* and *law-abiding* American citizens harmed by law-breakers, *illegals*. The supposed violation of the social contract, whose violence is erased, makes groups react virulently to the ills they associate with immigration's unlawfulness—crowded schools, unfunded welfare services, job competition, environmental degradation, and the fiscal imbalance—which legitimates the state's violent response.

Discourses of white victimization can be traced to California's Proposition 187, which in 1994 proposed state-run verification of the status of persons seeking public education, non-emergency health services and other public benefits (Martin 1995). Governor Pete Wilson's inauguration speech set the tone, claiming that "it is *unfair to law-abiding taxpayers* that criminals, welfare dependents, illegal migrants and uneducated youths are draining resources from the government and *jeopardizing the state's viability*" (Leshner and Stall 1995, my emphasis).<sup>7</sup>

Regarding education, complaints about crowded schools and abuse of the public education system are pervasive in the immigration debate, despite the fact that denying undocumented children public education is unconstitutional ("Plyler vs. Doe" 1982). These discourses remain relevant and appeared in a failed amendment to the 1996 immigration bill and an enjoined clause in the 2011 Alabama HB 56 (Butler 1997; Hing 2012; Rabin et al. 2008). Despite the legal protections, the Department of Education

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<sup>7</sup> Because of space restrictions, non-scholarly references appear only in the Appendix.

receives complaints and must to clarify that public education cannot be restricted on immigration status grounds (Gibble 2014).

Regarding welfare, racialized discourses of welfare dependency that target black women and the discourse about migrants' abuse of the welfare system are continuous (Fujiwara 2006, 238-9; Park 2011). Echoes of these discourses can be found in local debates, where supporters of anti-immigrant measures blame migrants for deteriorating health services (Esbenshade and Obzurt 2008; Su 2008).

Discourses about the inherent criminality of migrants also figure in the immigration debate, despite research proving otherwise (Wadsworth 2010; Ewing et al. 2015). These arguments were salient in the debate leading up to the passage of Arizona SB1070, its copycats, and the Republican primaries at the time of writing.

The Immigration Reform Law Institute (IRLI) is a central voice in the victimization discourse and defines itself as the “only public interest law organization working exclusively to protect the legal rights, privileges, and property of U.S. citizens and their communities from injuries ... caused by unlawful immigration” (Immigration Reform Law Institute 2012).

While their mission statement does not mention race, it relies on racialized categories as “tax paying Americans,” people “on entitlements,” criminals, and migrants (Haney-Lopez 2014). The work of racialization and harm to American workers is apparent on the website of IRLI's parent organization, the Federation for American Immigration Reform (FAIR), whose leader John Tanton is linked to nativist organizations (Schrag 2010, ch. 5; Brendese 2014; Gordon 2012). Locally targeted spots note the loss of jobs to foreign workers, the rising costs of Medicaid, and the growth of non-English-speaking school children (FAIR 2012). FAIR and IRLI are not marginal political players. Their legal team advised politicians behind Arizona-style laws and local leaders about the usage of municipal

ordinances to “deter immigration,” and their reports are cited by the press and public officials, including the Supreme Court (Fahrenthold 2012).<sup>8</sup>

Discourses of victimization convey the plight of law-abiding white individuals who suffer at the hands of those without scruples who violate “the law.” The justification of the interventions in the protection of the well-being of a group, which becomes racialized through the practices of punishment over another group, makes this intervention biopolitical but the process of racialization of this divide is seen at the level of practice, to which I now turn.

### **IT’S THE HARD KNOCK LIFE**

Immigration legislation guides—but does not exhaust—the multiple and reversible local tactics that create a *tough* and *punishing* life for migrants. I explain below how these interventions construct three realms of *toughness*—lived experience, working conditions, and paths to legal status—and also do the work of racializing migrant subjects who—lacking a claim to whiteness—do not deserve membership.

#### ***Core legislation***

The Immigration Reform and Control Act (1986), was the last bill to legislate a unified path to citizenship or legal status for undocumented migrants. Since then, migrants with the most vulnerable status: undocumented and non-immigrant residents make up the largest and fastest growing share of foreigners in the United States.<sup>9</sup>

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<sup>8</sup> The court’s decision on Arizona cited a report by FAIR’s research arm (Center for Immigration Studies) to assert the higher criminality among undocumented populations (Ewing 2012).

<sup>9</sup> Non-migrant residents are foreigners with temporary visas without a permanent right to remain (Massey and Bartley 2005, 470-71).

While a unified path to citizenship has not been legislated, legislation has restricted the procedural rights available to migrants detained or in deportation procedures; created an immigration detention system that annually holds hundreds of thousands of persons on immigration charges; established obligatory detention bed quotas for Immigration and Customs Enforcement (ICE); and increased significantly the resources and reach of immigration policing at the border and domestically (Jonas and Tactaquin 2004; Detention Watch Network n/d-b). Non-immigration bills also targeted migrants through regulations on welfare, crime, and anti-terrorism.<sup>10</sup> The 1994 Violent Crime Control and Enforcement Act, for instance, increases resources for border militarization, raises penalties for “failing to depart, or reentering” after deportation, and establishes grounds for expedited deportation of legal and undocumented migrants with a criminal background, even after serving jail-time (Congressional Research Service 1994). Executive discretion, inter-agency coordination, and local level legislation have multiplied interventions and resulted in the expansion of non-border enforcement and the sources of authority regulating migrants (Keaney and Friedland 2009; Newton 2012; Varsanyi et al. 2012; ACLU et al 2009).

Two laws enacted in 1996 restricted migrants’ access to social services. The Personal Responsibility and Work Opportunity Reconciliation Act legislated welfare reform but also problematized migrants’ use of welfare. This reform solidified migrants as outsiders and less worthy of public support (Fujiwara 2006, 237). Despite the racially neutral language of the law, the debates make clear that the law’s biopolitical character: it singled out Black, Latina, and undocumented women as the source of wasteful welfare spending (Smith 2007). A second bill (Illegal Immigration Reform and

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<sup>10</sup> Because of my focus on interior enforcement, and for reasons of space, I do not cover bills devoted to border control.

Migrant Responsibility Act) was primarily devoted to issues of immigration but also restricted access to welfare for undocumented and documented residents.

The latter law introduced the program 287(g), authorizing cooperation between federal, state, and/or local law enforcement on immigration policing, making routine traffic stops potential paths to immigration detention and deportation, and extending the capacity of surveillance beyond federal authorities. It also expanded a local pilot program that screens local jails for migrants (Immigration Policy Center 2013) through the provision of databases that track individuals' immigration status, a mechanism that is also at the center of Secure Communities, which operated from 2009 to 2014.

These programs expanded the reach of sovereignty by incorporating disciplinary techniques of surveillance through the connections between federal and local law enforcement, augmented by the access to federal immigration databases established by the Patriot Act (2001). These programs are an example of interventions that result from the confluence of population management techniques (databases and the selection of a racialized group as target), discipline (surveillance by units of law enforcement geographically concentrated in migrant neighborhoods), and sovereignty (immigration law establishing vulnerability to deportation). The growth of immigration enforcement through a domestic police force (ICE) also facilitated increased utility extraction through exploitation of laboring bodies because of the threat of worksite raids.

Local legislation (sovereignty) also targets migrants' mobility through legislation that prevents undocumented migrants from complying with car and driver's license regulations, making traffic stops and check-points a source of detection (discipline). The 2005 REAL ID Act unified these regulations, requiring all applicants to prove legal status and differentiating licenses for permanent and temporary status. Even in the absence of traffic violations, states like Alabama, Arizona, Georgia, and Indiana allow law enforcement to stop individuals upon "reasonable suspicion" of their immigration status

(Preston 2011; Archibold 2010; Severson 2011; Brown 2010; Wilson 2011). Laws in Alabama and Georgia also criminalize sheltering and transporting migrants, and prevent undocumented migrants' enrollment in public colleges.

The last decade also witnessed the growth in local immigration policymaking, including regulations on housing, labor sites, English-only, municipal licensing, and employment (Bono 2007; Su 2008; Esbenshade and Obzurt 2008; Fahrenthold 2012). An estimated 1500 initiatives were proposed at the state and local level nationwide over the last decade, and hundreds of them passed.<sup>11</sup>

The legislation outlined above, in addition to the 2002 act that created the Department of Homeland Security and put immigration under its control, provide the institutional basis for the contemporary shape of the immigration regime. Of particular consequence was the creation and expansion of ICE, a division of domestic policing for non-border areas. The laws described are joined by a myriad of executive initiatives directed to *secure* communities, apprehend *fugitives*, target *criminal aliens*, *shield* communities from *gangs*, catch *predators*, and keep our neighborhoods *safe*.<sup>12</sup> The bureaucratic reach of these programs criminalizes the entire migrant population and turns the racialized Latino/a/migrant subject into a threatening subject.

The centrality of the federal level in immigration politics represents the lasting power of *sovereignty* in enforcement, yet the practices that underlie immigration law illustrate how disciplinary powers of surveillance are expanded horizontally from particular units enacting or enforcing the law

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<sup>11</sup> No comprehensive database tracks these measures. Some surveys of state level legislation exist but significant activity has also taken place at the municipal and county level (Finn 2009; Preston 2007; Walker 2008).

<sup>12</sup> Italicized words refer to ICE program names and to the text of Arizona's SB1070 (Immigration and Customs Enforcement 2011).

toward different realms of federal law—welfare, crime, and national security—and vertically toward local law enforcement. Biopower informs these actions through the collection and sharing of data on the racialized population. No single law or sovereign act racializes or results in the tough experience of migrants and Latino/as; these effects result from the practices where discourse, law, and power interact, augment, and contradict each other.<sup>13</sup> This dispersal has become evident in the executive’s effort to constrain the action of ICE through several memorandums establishing enforcement priorities and encouraging the use of prosecutorial discretion by officers, with mixed results (Johnson 2014a; Morton 2011a, 2012, 2011b).

Enforcement practices had dramatic consequences on the ground. Between 2001 and 2013 the annual number of individuals detained on the grounds of immigration violations increased from 95,000 to over 441,000 and removals reached an all-time high in 2012 (409,000) up from 70,000 in 1996 and higher than the latest available number (235,000 for FY2015). Estimated deportations (removals from the interior) also rose during this period, from approximately 120,000 in 2001 to almost 200,000 in 2012, before falling in response to different forms of executive protection to approximately 70,000 in FY2015 (Simanski and Sapp 2013; Detention Watch Network n/d-a; Immigration and Customs Enforcement 2015, n/a; Center for Migration Studies 2014). This would not have been achieved without dispersing sovereignty among government levels, enlisting the powers of surveillance of non-federal agencies, and relying on population management techniques.

These effects, stunning as they are, should not distract us from other material effects of enforcement, including the construction of the threatening racialized Latino/a/Criminal Alien, the

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<sup>13</sup> A notable contradiction is the Obama administration’s legal contestation of the constitutionality of Arizona’s SB1070, a measure that echoed the practices characteristic of federal initiatives that enlist the support of local level enforcement.

production of punitive realms of livelihood for racialized subjects, and the resulting subjectification.<sup>14</sup> Through racialization, the terms *migrant* and *criminal* are blended, a goal also pursued by legislating certain immigration violations as crimes.<sup>15</sup> Discourses and practices do not represent an underlying reality but create it by erasing the gap between discourse and reality, and producing the racialized criminal subject where none existed.

These practices also bring to life what I call “realms of toughness:” different dimensions of punitive experience that undocumented migrants and racialized Latinos undergo on a daily basis, explored next.

### ***Who’s the toughest?***

The lack of a legislated path to legal status guarantees migrants’ vulnerability to enhanced enforcement, resulting in the production of *tough* lives for migrants in the United States. The policies described above interact to produce punishing conditions along three dimensions. First, migrants’ *lived experience* is made tougher when the access to social services is denied or left to the discretion of states and driver’s license laws and the risk of encountering law enforcement affects migrants’ mobility.<sup>16</sup>

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<sup>14</sup> For the way in which the migration regime productively engages gender, in addition to race, see Anna Sampaio’s work on immigration enforcement in the age of security (2014, 2015).

<sup>15</sup> The Immigration and Nationality Act criminalizes re-entering the country without authorization after removal. Since Operation Streamline re-activated this rule in 2005, “illegal re-entry” is the most prosecuted federal crime (ACLU and National Immigration Forum 2009).

<sup>16</sup> The interventions described in this article operate over an existing topology of power with particular histories and legacies of racialization and its outcomes are consequently localized. While it was a DHS priority to extend 287(g) programs and aim for a complete coverage of Secure Communities, localities

Migrants' experience vulnerability and fear due to the constant surveillance that results from domestic immigration policing (including home raids) by immigration officials and local law enforcement, and the check-points and roadblocks set up in Latino/a and/or migrant neighborhoods (Fujiwara 2006; Hagan et al. 2011; Jones-Correa and Fennelly 2011; Núñez and Heyman 2007). When these policies result in detention and deportation, they subject the family members (often citizens or migrants with status) to economic and emotional hardship.

Secondly, working conditions deteriorate because of the fear of immigration raids and the threat of employers' contacts with ICE. In recent decades the number of workers without full labor rights has increased because of the growing reach of immigration enforcement (Harrison and Lloyd 2012; Massey and Gelatt 2010, 328; Smith et al. 2009, 5; Southern Law Poverty Center 2009, 5-6). Migrant labor fulfills the need for "powerless" workers, sought after by industries with unappealing shifts, instability, or hazardous conditions (Sassen 1988, 40; De Genova 2004, 161) but, given the dual character of discipline, these workers' docility or obedience translates into higher bodily (economic) utility (Foucault 1995, 138). Biopower operates in this realm by selecting certain predominantly migrant sectors for further vulnerability; many states do not require protection against injury for farmworkers—even if the rate of injury in this sector is five times the average—or domestic workers (BAMCF and United Farm Workers 2011, iv). This means that the tough/punitive character of the immigration regime also produces *tough* bodies in the sense of durable, resistant bodies who live without health care and other protections and from whom the maximum utility can be extracted thanks to the enforcement regime.

A third dimension of *toughness* is the opening of long and conditional paths to legal status, notably

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have opted out, challenged, or tailored the implementation of these programs (Varsanyi et al. 2012; Coleman 2012; Fujiwara 2006; Hing 2011).

through service in the military, which stems from the stated goal of the US Army Recruiting Command to capitalize on the expected growth of the Latina/o population (Pérez 2010, 173). Executive Order 13269 provides “expedited naturalization for aliens and noncitizen nationals serving in an active-duty status ... during the period of the war against terrorists of global reach” (Bush 2002, 1136). A 2006 Act that codifies the order excludes undocumented migrants, but the requirement can be waived on grounds of national interest (Davis 2007; US Congress 2006).<sup>17</sup> Recruiters court undocumented migrants with promises of permanent residency for them and their families (Davis 2007).<sup>18</sup> Undocumented migrants have enlisted in the army and died in combat, some receiving citizenship posthumously. Moreover, recent executive orders enacted in 2013 and 2014 allow parents, spouses, and children of existing and new members of the armed forces to adjust status (Johnson 2014c; U.S. Citizenship and Immigration Services 2013)

In sum, the subject produced by enforcement practices is a racialized one that lives in the shadows, works strenuously risking her health and her life to provide for the needs of privileged consumers in an ever more efficient manner. Undocumented migrants are also asked to toughen up: live and work strenuously (i.e., without access to social services or workers’ protections), and under constant surveillance and fear of deportation. A path to legal status is closed off for the majority, as inclusion would upset the existing make-up of the population. There are exceptions if migrants are willing to risk

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<sup>17</sup> Such authority was used by the Obama administration to establish a program of expedited naturalization for migrants with special skills on temporary visas (Semple 2009; U.S. Army Recruiting Command 2010).

<sup>18</sup> Recruiters, however, have no influence over the regularization of migrants and veteran permanent residents are deportable during the naturalization period, according to the triggers legislated in the 1990s (Barbassa 2010; Weiner 2003; Davis 2007)

their lives through military service or provide valuable economic skills (see below).<sup>19</sup> These practices target Latinos predominantly and disproportionately, discipline them, recruit them into military or neoliberal projects of subjectification, and simultaneously construct the racialized migrant/Latina/o subject (i.e. tireless worker, afraid, vulnerable, immobile, irresponsible, dependent on public benefits, etc.). In contrast, white subjects (creative/fulfilled worker, mobile, visible, and independent) are reaffirmed as responsible law-abiding citizens whose way of life is nurtured by the disciplined racialized workers and defended from the threatening racialized sub-group.

### **INCLUSION FOR THE WRONG REASONS**

The immigration regime produces multiple subjugation effects that differentiate sub-populations of migrants along an axis of inclusion/exclusion related to their contribution to economic profitability and national security. Racialized subjects who nurture the wellbeing of the privileged may be included, as in the case of young migrants who arrived as minors and are college-bound or willing to serve in the army.

As Ali Behdad, notes, narratives about migrants track the inherent ambivalence of the U.S.'s identification with and against migrants (1997, 2005): migrants may renew the consensual basis of citizenship or remind the polity of the value of community and family or be rejected because their traditional values threaten "our" way of life (Honig 2001; Brendese 2014). I complement these accounts by arguing that, first, even migrants deemed indispensable to the polity are incorporated through punishment, given the temporary, conditional and protracted paths to legal status available to them; second, forms of incorporation rely on processes of subjectification attached to regulatory

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<sup>19</sup> The path to naturalization is also closed off to migrants *with* permanent residency with crimes or misdemeanors in their background.

projects of entrepreneurial and/or militarized citizenship and third, such processes of subjectification are not, however, always successful.

Regarding the first point, the Development, Relief, and Education for Alien Minors Act (DREAM Act) would have provided a path to legal status for children of undocumented migrants who arrived as minors. It gave conditional residency to high school graduates with “good moral character,” who had been in the country continuously for at least five years prior to the bill. Further requirements included serving for at least two years in the military or completing two years at a four-year college. “Conditional residency” lasted five years, renewable for another conditional five (U.S. Congress 2010). During this time applicants would pay regularization fees and taxes but not qualify for federal financial aid or social benefits. Given these conditions, it was estimated that only about 38 percent of qualifying migrants would attain citizenship status after 10 years (Chishti et al. 2010).

The 2012 DREAM Act passed the House and was filibustered in the Senate. It was the most restrictive version of a bill introduced repeatedly since 2001 and its limited success was indebted to the military track, added when the Democratic leadership saw no hopes of passing comprehensive immigration reform (Herszenhorn 2010). After the victory in the House, Speaker Nancy Pelosi claimed:

[DREAMers’] identity *is all American*, some of them don’t even speak the language of the country of origin of their parents, many ... come here with this *great patriotism* .... serve in the military, and so *they strengthen our national security*. Secretary Gates has said: the DREAM Act represents an opportunity to expand the recruitment and readiness of our *armed services*. (Pelosi 2010, emphasis mine)

The bill recognizes the immigration regime as *just* by claiming that only those brought in without consent are *innocent*. Second, it defines a “deserving migrant” that holds a high school diploma

which—given the unequal quality of, and access to, education, higher dropout rates among Latina/os, and higher poverty rates among undocumented migrants—is hardly easily obtainable and selects an academically “faulty” group out and—given the requirement of a high school diploma and the limited options for financial aid—leaves even some of those who qualify out of the college track and channels them into a stressful (and potentially lethal) path to citizenship through military service.

The DREAM Act offers a regulatory inclusion; it marks the included in contrasts to the excluded and produces a variety of subjects: patriotic and/or overachieving individuals who did not willingly break immigration law are deserving, the rest are outlaws not to be trusted or not hard-working enough to be granted status, and must be disciplined and surveilled (Foucault 2003, 45-6).

While no group is exempt from the *toughness* of immigration rules, their capacity to obtain legal status is differentiated biopolitically. The undocumented parents who brought the DREAM Act beneficiaries into the country are particularly undeserving. They—unlike their children—knowingly broke immigration laws and will stay undocumented and remain surveillance targets, which is functional to their status of replaceable labor that cares for the privileged. A second group, the undocumented children and young people ineligible for the DREAM Act (or DACA, see below) or who will lose eligibility during the conditional period, is identified in contrast to the achieving or patriotic young migrants as dropouts, teenage mothers, potentially criminal or gang members who lack work ethic. They personify the threatening brown bodies that imperil the wellbeing of the privileged and will be particularly vulnerable to the racialized surveillance of immigration and law enforcement.

While discipline is the dominant way to manage those excluded, the subjects who qualify for relief remain governed subjects, with their identities shaped by and/or strategically negotiated in response to changes in the system of governmentality (Rose 1999, 65-6; Mountz et al. 2002). The practices of socialization and self-improvement that structure DREAMers’ subjectivities are ultimately indebted to

projects of entrepreneurial selves (Winnubst 2012, 83-5; Pallares 2014, 103), reflected in the practice of wearing graduation gowns or publicizing their academic successes to signal the benefits that their inclusion brings to the privileged. By adopting this particular subjectivity they make possible “to govern without governing” (Rose 1999, 88).

The centrality of youth activism within the immigration movement and the model minority status of this group explain that, in 2012, after the DREAM Act failed, President Barack Obama passed Deferred Action for Childhood Arrivals (DACA).<sup>20</sup> This executive measure defers deportation for the would-be beneficiaries of the DREAM Act. Two years later, another executive action expanded DACA eligibility and deferred deportation for parents of citizens and permanent residents (DAPA).<sup>21</sup> However, DACA and DAPA merely de-prioritize migrants’ deportation cases. These measures were accompanied by other executive actions that both expanded relief and created new vulnerabilities, continuing to differentiate sub-groups among migrants according to their contribution to economic growth and national security and/or their family connections, and intensifying the vulnerability to deportation for some (Johnson 2014b, 2014c, 2014e, 2014d, 2014f; Valdez 2015).

DACA-eligible migrants confirm the fairness myth and the legitimacy of an increasingly unequal and racialized US society. Instead of offering an egalitarian incorporation, these measures reinforce the Neoliberal myth of autonomy—even undocumented immigrants, if they are tough, can make it!—that

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<sup>20</sup> This action followed the outlines of the DREAM Act (minus the college requirement) but provides only deferral of deportation. The policy—a nod to Latino voters—maintains the generational break and the focus on military service and educational attainment (Cushman 2012). In October of 2014, this policy was augmented with the opportunity for DACA migrants with expertise in certain foreign languages to enroll in the military.

<sup>21</sup> This measure is—at the time of writing—under a temporary injunction (Roberts 2015).

mutes opposition to the dispossession that fuels migration and the informal sector that demands exploitable labor (Sassen 1988, 1998).

### ***Biopower, Politics, and Subjectivity***

DACA and the proposed DREAM Act do not deviate from *toughness*: DACA refrains from deporting undocumented youth, and the DREAM Act would have offered those who could not afford college a choice between staying undocumented or joining the army. Even these interventions, moreover, have not obtained legislative support. The “inclusion” provided by executive actions offers a still-tough road to a temporary and conditional relief from deportation which is consistent with the fluid meaning of punishment that also targets aging or low-skilled individuals, recent arrivals, and those without family connections, who remain excluded and subject to a tough life.

In her Arendtian discussion of *animal laborans*, Cristina Beltrán addresses low-skilled workers—tireless laboring bodies singled out by pro-migrant advocates. She claims that understanding subjects exclusively through their disposition to engage in arduous labor that nurtures other lives denotes a lack of political imagination because Labor makes migrants indistinct, devoid of action, speech, and individuality (2009, 600, 13). Despite the importance of labor vis-à-vis citizenship, in the case of undocumented workers labor signifies a threat to workers’ jobs, wages, and the polity (2009, 617).

Beltrán’s caution regarding the depoliticizing effects of certain representations of migrants is well taken. However, a biopolitical framing of immigration politics highlights that the logic of relying on the expenditure of a group to nurture another applies more broadly. The DREAM Act and DACA offer alternative representations of migrants depart from the *animal laborans* but still fail to offer a politicized subjectivity. When the linkage between the exploitation of some and the livelihood of others is used to justify inclusion (of bright young undocumented migrants, high skilled migrants, and army recruits) inclusion mutes political dissidence.

The proposed account should not distract us from the fact that—as Paul Apostolidis notes—migrants “shape or deform these discourses” (2010, 224). This article does not imply that the techniques described above are fully successful in disciplining subjects or making them uncritically enact the entrepreneurial or soldierly selves that facilitate their government.

Indeed, the failure of the DREAM Act led to internal critiques among young activists—which I cannot analyze fully for reasons of space. Suffice it to say that scholars have highlighted how recent DREAMer activism became more disruptive, claiming an oppositional stance of “fearlessness” and addressing directly the enforcement machinery (Beltrán 2014; Gonzales 2013, 170). These shifts hold the promise that these subjects may embrace “reflective indocility” (Foucault 1990, 39).

## **CONCLUSION**

In this article I conceptualize the immigration regime as a system of government through punishment. I argue that we should think about punishment beyond the boundaries of immigration detention and deportation, and we should move away from thinking about punitive dimensions of immigration enforcement as retributive and—following Nietzsche and Foucault—think of them as productive. I show that even “good” migrants are not exempt from punitive treatment. Punishment—in turn—must be understood as a violent defense of the narrative of the United States as a nation of laws.

Through a focus on white victimization rhetoric, recent legislation, and enforcement practices, I conceptualize the production of “realms of toughness” that affect migrants’ lived experience, workplaces, and paths to legal status, and the resulting processes of subjectification. These interventions solidify a racialized divide between disposable subjects and a group that is worth protecting by combining sovereign, disciplinary, and biopolitical techniques of power that are adapted to particular historical and local conjunctures. Diverse realms of law (such as welfare, crime, and traffic

control) are repurposed to discipline immigrants, and the biopolitical/racialized divide is crisscrossed by neoliberal and security logics of worth that may shelter some groups from the full apparatus of surveillance.

Understanding punishment as productive illuminates activists' complaints about the gap between the discourse of immigrant criminality and the reality of hard working immigrants. Activists assume punishment is retributive, and thus insist that immigrants are not criminals and do not pose a threat, expecting that this will end the practices of enforcement. My analysis shows that it is the fact that they are not criminals that makes necessary the punitive enforcement, which aims to close that gap by "producing" criminal immigrants.

This article also sheds light on the shortcomings of President Obama's legislative strategy to "get tough" on enforcement to convince Republicans of his commitment to enforcing the law (Thompson and Cohen 2014), assuming that cooperation in passing comprehensive immigration reform would follow. However, if punishment itself, rather than retribution or deterrence, is the *raison d'être* of the immigration regime, then the strategy of "getting tough" on enforcement fits squarely with the ultimate goal of anti-immigrant organizations and Republican hard-liners. The strategy misunderstands the dynamics and driving force of immigration regulation described above, which—short of further punitiveness—makes the lack of reform the preferred outcome.

As a consequence, a central focus of activism should be on dismantling the system of immigration enforcement, given that its relentless action racializes Latinos and reinforces the divide between those whose life is fostered and those left to die. Retrenching enforcement has the added benefit of facilitating migrants' political action and contributing to their recognition as political subjects. This goal need not target exclusively the federal level; local organizing in favor of sanctuary provisions can contribute to limiting the reach of immigration enforcement, making space safer for politics. The goal

of enforcement retrenchment is not meant to displace the struggle for status for migrants or the demand that immigration laws be made more responsive to the political economy of immigration. Leaner enforcement is a condition of possibility for grassroots groups working toward immigration justice. But this would be a departure from mainstream activists' support for legislation that includes *both* a path to citizenship and the strengthening of enforcement. This *quid pro quo* ignores that it is the punitive performance of enforcement that prevents immigrants from living their lives with dignity and instrumentalizes them. Along with the retrenchment of immigration enforcement, political mobilization against the use of racial profiling in immigration enforcement and the rhetoric of criminalization is necessary. The persistence of this construction speaks to the limitations of rights/human rights frameworks, as has been noted by other scholars (Cacho 2012, 19-22; Guenther 2013, chapter 6). Ultimately, dismantling the punitive interventions and denaturalizing the fact of punishment are necessary tasks in the process of opening up the political realm to more comprehensive critiques.

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