

QUEER, UNDOCUMENTED, AND SITTING IN AN IMMIGRATION DETENTION CENTER: A POST-*OBERGEFELL* REFLECTION

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“I left my country because I am gay and I don’t fit into Honduras’ society; I also fled for my life because I refused to do work for a drug trafficker and he threatened to kill me.” Central American refugee (2014)

On the day the Supreme Court decided, in Obergefell v. Hodges,¹ that gay people too enjoy the fundamental right to marry, a moment for joy and celebration for social justice activists appeared, just as the nation grieved the racist murder of nine worshippers in a Southern black church by a young white supremacist. While the Obergefell decision ushered in a time of hope in our nation, that same day, President Obama was delivering a eulogy for Clementa Pinckney, the senior pastor of the Emanuel African Methodist Episcopal Church, who had been coldly murdered because of race. This Essay examines the complex nature of the Court’s landmark decision in which the right to marry was deemed constitutionally protected, regardless of sexuality or gender; the decision, however, embodies a right to human dignity that remains elusive to many LGBTs. As Justice Kennedy stated in the majority opinion, “[t]he nature of injustice is that we may not see it in our own times.”² This Essay takes those words seriously and applies them to the question of how differences in race, class, and citizenship status weaken the promises of constitutional liberty that were expounded in Justice Kennedy’s eloquent opinion in Obergefell. This Essay is a reflection on how undocumented persons, particularly gay migrants in federal detention facilities, do not enjoy the same constitutional rights that are the focus of the Court’s majority opinion. This Essay uses narratives from undocumented gay migrants gathered from a delegation organized by activist educators, who toured a South Texas immigration detention center in order to see the human impact of American law and policy at for-profit detention centers. Among those detained and interviewed were migrants from Central America whose pleas for asylum are based on persecution in their own countries because of their sexual orientation. This Essay argues that the current immigration system is deeply flawed as undocumented migrants are not allowed the equality guaranteed by the Fourteenth Amendment; those who are undocumented come to America for a number of reasons, but one reason in particular is that America is considered to be a place of sexual and gendered freedom—rights that have now been guaranteed by the ruling in Obergefell. Many of these migrants come from countries where they are persecuted for being part of a sexual minority. The rights of sexual and gendered freedom are thus elusive to those undocumented

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¹ 135 S. Ct. 2584 (2015).

² Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

migrants in immigration detention facilities, rendering the breathtaking promise of equality for all, affirmed in Obergefell, an elusive right conditioned on an individual's race, class and citizenship status.

I. INTRODUCTION

I was thrilled by the outcome in *Obergefell* given my experiences as a young civil rights lawyer in the 1980s when I volunteered for the Lambda Legal Defense and Education fund³ in the fight to decriminalize homosexuality. My experiences in the growing movement to challenge the discriminatory impact of sodomy laws was so important that it inspired me to write what would be my first law review Article on the topic of applying the equality theory to sexual minorities as a class.⁴ But my joy over the decision was mixed throughout the day. As the Supreme Court announced the ruling in *Obergefell*, President Obama was delivering a eulogy at the memorial service for Senator Clementa Pinckney, senior pastor, and one of the nine congregants of the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, coldly murdered days before by a young white supremacist.⁵ Just as the majority articulated a breathtaking view of the constitutional right to dignity and equality that had been historically denied to gay people, the nation again was facing an example of a disturbing pattern of violence against a historically marginalized and constitutionally protected class—African-Americans and other people of color. It was ironic to hear the Supreme Court expound on a constitutional right to dignity and equality for all, embraced by the Fourteenth Amendment, which is a legacy of the Civil War fought to end racial enslavement, on the same day that the nation's leader was participating in a memorial to heal the grief caused by the senseless murder of nine innocent people who were targeted because of their racial identity.

In the days prior to *Obergefell*, the country was engaged in a painful and conflicting discourse around racial hatred and systemic inequality, as public

³ The Lambda Legal Defense and Education fund is the oldest and largest national nonprofit legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, as well as those with HIV, through impact litigation, education, and public policy work. See LAMBDA LEGAL, <http://www.lambdalegal.org/> (last visited Oct. 10, 2015). Lambda served as counsel to John Lawrence and Tyrone Gardner in the landmark Supreme Court case *Lawrence v. Texas*, 539 U.S. 558 (2003). The *Lawrence* court held that Section 21.06 of the Texas Penal Code, which criminalized homosexual sodomy, violated the constitutional right to sexual privacy under the Fourteenth amendment due process clause. *Id.* at 578.

⁴ See generally Elvia Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263 (1988).

⁵ On June 17, 2015, Dylann Storm Roof opened fire at the Emmanuel African Methodist Episcopal Church in Charleston, South Carolina; a historically significant church to the African American community. Roof intended to start a race war and aligned himself with the white supremacy movement. See Eliza Gray, *What We Know About the South Carolina Shooting Suspect Dylann Roof*, TIME (June 18, 2015), <http://time.com/3926263/charleston-church-shooting-dylann-roof/>.

buildings throughout the South began to remove Confederate flags,⁶ which was followed, on Friday, June 26th, by public displays of rainbow flags in celebration of the fundamental right to marry for same-sex couples.⁷ At the week's end, I felt our country had both moved forward and stepped back on the achievement of a meaningful sense of constitutional equality under the law for all. With the intersecting events of the nation on the one hand, and mourning racial murders on the other, while celebrating the individual freedom to love and marry, I found myself at times feeling so happy, and at others incredibly depressed over matters I deeply care about.

To this civil rights lawyer and activist, the intersection on Friday, June 26th of celebrating liberty, while at the same time grieving the senseless loss of life, two words and values enshrined in the text of the Fourteenth Amendment to the United States Constitution, were very disturbing. The marriage equality decision addressed an important aspect of the historic discrimination against gay people—the freedom to love and create families. Meanwhile, the ongoing examples of police killings of unarmed black people, together with the South Carolina murders by a man who virtually wrapped himself in the Confederate flag,⁸ revealed a greater truth—that the nation continues to struggle to achieve racialized justice. By the morning following the Court's delivery of the opinions, I was convinced that the constitutional promise of justice and equality for all remains elusive and incomplete following *Obergefell v. Hodges*.⁹ The very nature of our pluralistic society, including the diversity of LGBT persons, is a reminder that freedom remains conditional for too many people and we, social justice activists, can celebrate the ruling and the spirit of Justice Kennedy's poetic expressions of liberty and equality,¹⁰ but, we still have much work to do.

⁶ On June 24, 2015, Nikki Haley, Governor of South Carolina, called for the removal of the Confederate flag from statehouse grounds. See Jeremy Diamond & Diana Bush, *Nikki Haley Calls for Removal of Confederate Flag from Capitol Grounds*, CNN POLITICS (June 24, 2015), <http://www.cnn.com/2015/06/22/politics/nikki-haley-confederate-flag-south-carolina-press-conference/>.

⁷ See, e.g., Gregory Korte, *White House Turns to Rainbow After Gay Marriage Ruling*, USA TODAY (June 26, 2015), <http://www.usatoday.com/story/theoval/2015/06/26/white-house-rainbow-gay-marriage/29374471/>. While the image of the rainbow, especially over the White House, served as a symbol of inclusion and unity for all Americans, the Confederate flag, which Dylann Roof propagandized across the internet, symbolized a historic and enduring commitment to the values of racial exclusion—of white over black in America.

⁸ See Frances Robles, *Dylann Roof Photos and a Manifesto are Posted on Website*, N.Y. TIMES (June 20, 2015), http://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html?_r=0.

⁹ 135 S. Ct. 2584 (2015).

¹⁰ In an angered dissent, Justice Antonin Scalia stated that there was not even a thin veneer of law behind Justice Kennedy's opinion. Scalia states that “[b]uried beneath the mummeries and straining-to-be memorable passages of the opinion is a candid and startling assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its ‘reasoned judgment’ thinks the Fourteenth Amendment ought to protect.” *Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting).

In this Essay I will reflect on how differences based on race, class, and citizenship status weaken the promises of constitutional liberty and equality for queer and undocumented persons, in particular those gay migrants who end up in immigration detention facilities. I question herein, on several grounds, the breadth of the notions of freedom and equality in Justice Kennedy's opinion by examining the situation of gay undocumented migrants detained by the U.S. First, *Obergefell* provides a landmark decision affirming a right to human dignity embraced by the language of the Fourteenth Amendment. By recognizing a fundamental right to dignity in one's choice for intimate, committed relationships, the majority has espoused a view of constitutionalism that is meaningful nationally and internationally. It may provide hope to those who seek justice in the treatment of non-citizen residents, whose human dignity is frequently the object of judgment, criticism, and even attack.

Second, the domestic picture on gay civil rights may have changed for the better, and the impact of the metaphorical borders of gender and sexuality have lessened the overall experience of discrimination against the LGBT individual,¹¹ but this does not mean that homophobia is erased simply because homosexuality has been decriminalized¹² and gay people can now marry. The reaction throughout the country following the Court's decision of religious conservatives,¹³ and the sentiments expressed in the dissents to the majority opinion,¹⁴ practically promise the rise of a resistance movement and backlash.¹⁵

¹¹ The greatest success of *Obergefell* may be its reducing overt examples of discrimination that have historically been directed at gay people based on gender stereotypes concerning what is considered "normal" male/masculinity and female/femininity. Of course, some question whether the Supreme Court's ruling will do enough to liberate transgendered persons—in particular where gender identity and race or class intersect—from the oppression of unfair bigotry and violence. See Samantha Allen, *LGBT Leaders: Gay Marriage is not Enough*, DAILY BEAST (June 26, 2015), <http://www.thedailybeast.com/articles/2015/06/26/same-sex-marriage-is-legal-now-what.html>; see generally Elvia Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian?"*, 8 HASTINGS WOMEN'S L.J. 1 (1997) (discussing the unique difficulties facing transgender individuals within the context of gender identity).

¹² *Lawrence*, 539 U.S. 558, held a Texas statute that criminalized certain sexual acts between persons of the same sex as repugnant to the Constitution. "The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.* at 578 (internal quotation marks omitted).

¹³ 2016 Presidential hopeful, Bobby Jindal took to Twitter to state that "[m]arriage between a man and woman was established by God, and no earthly court could alter that." *Governor Jindal Releases Statement on Gay Marriage Ruling*, BOBBY JINDAL FOR PRESIDENT (June 26, 2015), <https://www.bobbyjindal.com/governor-jindal-releases-statement-on-gay-marriage-ruling/>. Another GOP candidate, Mike Huckabee, also expressed his disgust in the opinion via Twitter stating, "I will not acquiesce to an imperial court any more than our founders acquiesced to an imperial British monarch. We must resist and reject judicial tyranny, not retreat." Tom LoBianco, *GOP 2016 Candidates Seek Footing on Marriage Ruling*, CNN POLITICS (June 26, 2015), <http://www.cnn.com/2015/06/26/politics/2016-candidates-gay-marriage-supreme-court/>.

¹⁴ Incensed, Scalia wrote, "it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my

Negative attitudes about sex and gender minorities will continue to affect those who cannot rely on class or racial privilege to shield themselves from unfair discrimination.

Third, queer migrants may have the same motivations of the thousands of people who migrate daily, seeking to escape poverty or violence in their countries of origin, but they also see the United States as a kind of mecca of sexual and gendered freedom. An example is the situation of those persons migrating here from countries that have close economic and political ties to the U.S. through trade agreements like the Central American Free Trade Agreement (CAFTA)¹⁶ which, like the North American Free Trade Agreement (NAFTA),¹⁷ has implemented a neoliberal model of economic activities linked to the rise in gender violence in parts of the world where global companies invest.¹⁸ It is no coincidence that among those fleeing places like Honduras, Guatemala, or El Salvador are persons who not only fall into the category of penniless and powerless refugees, but also want to escape persecution at home for being members of a sexual minority. These migrants suffer oppression, deprivation, and violence because homosexuality is still a crime in their home countries, and the dominant social and moral attitudes put them at constant risk of physical assault, harassment, and even death.¹⁹ Because the undocumented gay migrant

Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.” *Obergefell*, 135 S. Ct. at 2627. He further stated, “[t]hese justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until [fifteen] years ago, cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until [fifteen] years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.” *Id.* at 2630.

¹⁵ As I complete this Essay, a clerk in Kentucky has taken a controversial and illegal stance in defying the Supreme Court’s ruling in *Obergefell* by refusing to issue marriage licenses to gay couples asserting her religious freedom not to do so under the First Amendment. See Marina Fang, *Lindsey Graham: Kentucky Clerk Must Comply with the Law or Resign*, HUFFPOST POLITICS (Sept. 1, 2015), http://www.huffingtonpost.com/entry/lindsey-graham-kim-davis-resign_55e629b8e4b0aec9f3550c49.

¹⁶ *The Dominican Republic-Central American Free Trade Agreement (CAFTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dominican-republic-central-america-fta/final-text> (last visited Oct. 10, 2015). For an analysis of the drafters’ intent to expand NAFTA through CAFTA to the Central American region, see *Central America Free Trade Agreement (CAFTA)*, PUBLIC CITIZEN, <http://www.citizen.org/Page.aspx?pid=1046> (last visited Oct. 10, 2015).

¹⁷ *The North American Free Trade Agreement (NAFTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Oct. 10, 2015).

¹⁸ Elvia Arriola, *Accountability for Murder in the Maquiladoras: Linking Corporate Indifference to Gender Violence at the U.S.-Mexico Border*, 5 SEATTLE J. SOC. JUST. 1, 5 (2007).

¹⁹ Ian Gordon, *70,000 Kids Will Show Up Alone at Our Border This Year. What Happens to Them?*, MOTHER JONES, <http://www.motherjones.com/politics/2014/06/child-migrants-surge-unaccompanied-central-america> (last updated Nov. 20, 2014). The story gathered by a journalist of a Guatemalan young gay man caught by the border patrol in Arizona illustrates a not uncommon example: A boy referred to as “Adrian” is a seventeen-year-old gay boy from Guatemala, who grew up on the streets of Guatemala, with crack addict parents and an absentee mother. He was left with

arriving in this country is also poor and brown, his citizenship status²⁰ and his being gay or transgender, intensifies his vulnerability to the insensitivity of policies and the prejudices of the staff in an immigration detention center. As described within, at least some gay migrants share stories involving the financial and physical abuses that typify the migration experience to the U.S. border. Once caught, however, the border patrol delivers them to a for-profit system of prison and detention,²¹ where because of the actions of the detention staff and officials, they appear unable to escape the homophobic attitudes that led them to seek asylum.

In Part II, I detail further my reaction to a particular phrase in Justice Kennedy's majority opinion, that "[t]he nature of injustice is that we may not always see it in our own times," and explain how those words affected my sense of how this nation's immigration detention system, at this point in history, is so deeply flawed and unjust. In Part II, I also describe my experiences as both a teacher and an organizer of delegations to the Mexican border, which were designed to offer visitors an opportunity to see the human effects of American free trade law and policy. I further describe the educational purpose of a newer kind of delegation I have co-produced with other activists called "The Journey of an Immigrant." Part III provides some general details about immigration

a friend, a prostitute, who exposed Adrian to her activities with johns. Throughout his childhood, Adrian saw robberies, stabbings, and shootings. Adrian never entered a classroom, but made a little money here and there by selling clothes and makeup in his stall in the city streets. The Barrio 18 street gang noticed the little money that Adrian earned and asked for a cut. However, Adrian refused and the gang responded by riddling his stall with bullets. Eventually, Adrian realized he had no choice but to leave Guatemala for the U.S. To make his trip, Adrian took a bus to the Mexico-Guatemala border and crossed the Suchiate River by inner tube. He arrived in the state of Chiapas and stole a bike, which he used to pedal to the city of Tapachula. Adrian walked 150 miles north, avoiding La Arrocera (an area known for migrant kidnappings and assaults). He learned that the migrant shelter he had planned on sleeping at had burned to the ground so, instead, he slept on a church's doorstep. He then took "la bestia," [the Beast] a freight train that many migrants ride to the U.S. Border. There are many stories involving the freight train, as thieves with machetes or .38s often go car to car. It is not uncommon for Mexican law enforcement to conduct night raids, and kidnappers sent by Los Zetas often frequent the freight. Adrian arrived in Guadalajara, Mexico where he spent Christmas night on a sidewalk. He eventually reached Monterrey, where he was attacked with a machete and forced off a train because he was gay. Adrian fled, barefoot, and walked to a village an hour away. He sold newspapers and eventually sold his body for \$50. He was able to travel to San Luis Potosi and the Sonora Desert. He finally reached the U.S. Mexico Border but was detained in the Arizona desert. *Id.*

²⁰ I use the male pronoun throughout because our delegations have so far only toured male-only detention facilities. The DHS/ICE policy of detaining families with children has been constitutionally questioned. See Cindy Carcamo, *Judge Orders Prompt Release of Immigrant Children from Detention*, L.A. TIMES (Aug. 22, 2015), <http://www.latimes.com/nation/la-na-family-detention-children-20150821-story.html>.

²¹ "Prisons 'play a direct role in capital accumulation since their operation generates profit for corporations engaged in building, equipping and operating them as well as those employing prisoners as cheap labor.' The perceived political benefits of reduced unemployment rates, additional police funding, and tough rhetoric from elected politicians, judges, and prosecutors—ultimately leading to skewed policies—ensure an 'endless supply' of criminal justice 'clients.'" See Andre Douglas Pond Cummings, "All Eyez on Me": *America's War on Drugs and the Prison-Industrialized Complex*, 15 J. GENDER, RACE & JUST. 417, 420 (2012).

detention centers based on a tour of the South Texas Detention Center located in the town of Pearsall, Texas, a facility that is managed under a contract between the Department of Homeland Security and Immigration and Customs Enforcement, and a private prison corporation known as GeoGroup. Finally, Part IV is a sharing of narratives and observations gathered in 2014 from a “Journey of an Immigrant Delegation,” in which delegates met dozens of detainees, including a few openly gay migrants from Central America. Part V provides the conclusion.

II. REASONS TO EXPLORE THE NATURE OF INJUSTICE

As news of the Supreme Court’s ruling became public, Facebook users were provided with an image application of a rainbow for their profile photos.²² I chose a photo of myself taken in 2012 with two NIU law students who had joined me, along with ten other people, on a border delegation, which was a three-day educational experience intended to humanize and connect “law and policy” to reality. This was the first of two delegations I have helped plan, called “The Journey of an Immigrant,”²³ which differ greatly in format from the dozens of “NAFTA delegations”²⁴ I’ve participated in since 2000.²⁵ My Facebook post expressed my mixed feelings of joy over winning marriage equality, but also concern that Kennedy’s message of liberty and equality might not reach all of those identifying as LGBT in this country. I asked readers of my post to consider the picture I had just uploaded. I explained that in that 2012 photo, we are standing in front of a section of a fourteen foot high, heavy steel border wall—the physical symbol of separation between Mexico and the United States,

²² The source of the rainbow image was Facebook. *Let’s Celebrate Pride*, FACEBOOK, facebook.com/celebratepride (last visited Oct. 10, 2015).

²³ In 2012 and 2014, two educational nonprofits, Women on the Border (www.womenontheborder.org) and Austin Tan Cerca de la Frontera (ATCF) (www.atcf.org), collaborated to produce a delegation where travelers could acquire some insight into the impact of immigration law and policy on migrants, laborers, undocumented residents and legal permanent residents who end up in detention. *See Reports Commentaries on the U.S. Militarized Approach to Detention*, WOMEN ON THE BORDER, <http://womenontheborder.org/militarization-of-the-border/> (last visited Oct. 10, 2015) (a brief description of the 2014 trip during which delegates toured the South Texas Detention Center, also known as “Pearsall”); *see also From Veracruz to Austin and Back: The Journey of an Immigrant*, WOMEN ON THE BORDER, <http://womenontheborder.org/2012/04/border-delegation-the-journey-of-an-immigrant-may-17-20-2012/> (last visited Oct. 10, 2015) (describing the purpose and intent of the first immigrant delegations).

²⁴ *The North American Free Trade Agreement*, *supra* note 17.

²⁵ The “NAFTA delegations” involve a twelve-person group riding together in a van that crosses the Texas-Mexico border, typically at Eagle Pass (Piedras Negras, Mexico) or McAllen (Reynosa, Mexico), and meeting with activist maquiladora workers who share stories that illuminate the varied social and economic effects of free trade law and policy on working women and their families.

appearing in strategic locations along the 2000 mile border,²⁶ a wall that is heavily guarded 24/7, and that communicates a clear “keep out” message to migrants attempting to cross the border “sin papeles.”²⁷ Near us was a pile of eleven-foot high makeshift ladders that had been recently used by anonymous migrants to cross illegally into Texas. We had hiked through a park²⁸ on the U.S. side, toward the massive steel construction with the guide of a Sierra Club volunteer who shared the environmentalist’s perspective on the arbitrariness of the southwestern border walls that do not stop the flow of migration and only contribute to migrant deaths²⁹ and destruction of wildlife.

Border walls are powerful symbols of separation, exclusion, and privilege. They exist because of politics, but they have their most tragic impact on human lives because of the violent force of the law. American history is filled with examples of the law serving as a tool for reinforcing values that maintained social order, but also harmed the innocent. The symbol of the law as a tool for violence is part of racial civil rights history, as well as the LGBT history of struggles to abolish criminal sodomy laws, long before the right to marry, because of their discriminatory impact. For too long, the law had hurt LGBT people by labeling us as criminals. We can, therefore, look upon *Obergefell* as an opportunity to celebrate the historic changes in constitutional law that should stop local and state officials from enforcing unjust laws.³⁰ But we can also take *Obergefell*’s results as an opportunity to ask, “who else?” Who is still being affected by the unjust social construction of a criminal identity, just as gay people were once categorized as criminals, who were not entitled to the security of loving relationships and families? And who else is victimized by the violent power of law to exclude and discriminate, while others benefit from that individual’s oppression?

²⁶ *Borderlands*, SIERRA CLUB, <http://www.sierraclub.org/borderlands> (last visited Oct. 10, 2015) (according to the Sierra Club, it is 600 miles long and borders all four southern border states).

²⁷ Essentially meaning “without proper documents.”

²⁸ The Old Hidalgo Pumphouse and Museum is open to the public in Hidalgo, Texas, and is minutes away from the Mc-Allen International Bridge. See *Old Hidalgo Pumphouse*, THE CITY OF HIDALGO, <http://www.cityofhidalgo.net/pumphouse.html> (last visited Oct. 10, 2015).

²⁹ See generally Christine Kovic, *Searching for the Living, the Dead, and the Disappeared on the Migrant Trail in Texas*, TEX. CIVIL RIGHTS PROJECT 1, 4 (2013).

³⁰ Under the Due Process Clause of the Fourteenth Amendment, no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV. “The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Obergefell*, 135 S. Ct. at 2589. “The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its new meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.” *Id.* at 2598.

A. The Delegation Experience as a Means for Revealing Injustice

I have been participating in border delegations since 2000, and in collaboration with local Texas based organizations, have often co-produced these weekend tours that provide unique experiential learning opportunities. I have done this work as a teacher committed to social justice legal education, and through my position as executive director of a nonprofit, called Women on the Border.³¹ The “NAFTA delegations” have always involved taking a group of people into Mexico to meet working women and activists who labor in factories called “maquiladoras.” The activists create opportunities for us to hear how workers are struggling daily for lives of dignity in American owned factories, where they do not earn living wages, are exposed to toxic elements, are sexually harassed, and sometimes blacklisted for trying to improve wages and working conditions.³² In 2011, those of us involved in organizing these NAFTA delegations explored the idea for a delegation model that would focus on the migration experience for some of the workers we meet at the border. On various delegations we learned that many maquila workers were not native to the border, and often migrated north from Mexico’s southern rural areas. Occasionally a worker would mention having undocumented relatives in the U.S.

As attention was drawn to anti-immigrant hostilities and laws, such as Arizona’s SB1070 (enacted in 2010), the negative public discourse in which migrant workers were viewed as criminals encouraged us to design a delegation we called “Journey of an Immigrant.” Like the NAFTA delegation, we made it our educational purpose to expose delegates to a series of meetings, events, and activities in one weekend, along with brief lectures and reading materials. The organizers felt we needed to centralize the issue of human migration and the undocumented status of many people in the U.S. who perform essential services for the American economy.³³ We thought it could certainly give people a more concrete basis from which to engage in discussion about immigration reform. We were quite aware that when we designed this delegation asking, “what is happening to the migrants when they intersect with American border officials?” that “immigration” had been socially constructed and racially profiled into a particular type of “illegality” for people caught within our borders without proper documentation (e.g., travel visa, permanent residence card, work permit). As Aviva Chomsky has argued, in the “post-civil rights era” Mexicans and other

³¹ Women on the Border is a Texas-based 501c3 organization. See *About*, WOMEN ON THE BORDER, <http://www.womenontheborder.org> (last visited Oct. 10, 2015).

³² See Elvia Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras*, *Latina Critical Theory and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729, 739-40 (2000).

³³ One common reality of the border is the existence of people with family ties on both sides of the border, with mixed examples of citizen or resident status under American law. A policy that enforces the arbitrary separation of families by criminalizing undocumented entry obviously hurts legal permanent residents who want to visit relatives in Mexico and vice-versa. See César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J. L. ETHICS & PUB. POL’Y 167, 179 (2009).

Latino Americans have been systematically criminalized through the framework of immigration law and policy.³⁴ The system is portrayed on the surface as color-blind, that is, never using racial background, ethnicity, or language difference as a basis for classification. But, by criminalizing a status (undocumented), which happens to be occupied by a majority racial/ethnic group (Mexicans/Latinos) in certain parts of the country, the social construction of the criminal identity is complete. This was the sentiment behind the “immigration reform” movement that began around 2005 in Hazelton, Pennsylvania,³⁵ appeared at the state level in Arizona, and became the basis of the constitutionally defective SB 1070,³⁶ which instituted a range of new laws that had a direct racial profiling impact on Mexicans and Mexican Americans in the Southwest.

With this basic understanding of the need to question critically the operative framework of American immigration policies and the treatment of undocumented migrants, the organizers³⁷ for Journey of an Immigrant delegations collaborate with many other community groups to produce a set of weekend experiences intended to demonstrate how the law and policy actually affects migrants’ or laborers’ lives. We have included visits to migrant shelters like Casa Marianella³⁸ in Austin, Texas, meetings with immigrant community groups like Fuerza Unida,³⁹ in San Antonio, meetings with environmentalists who oppose the construction and expansion of border walls,⁴⁰ as well as pro bono

³⁴ “When race-based discrimination was outlawed, a new system emerged: turn people of color into criminals. Then you can discriminate against them because of their criminality, rather than because of their race. A new legitimacy for discrimination was thus born.” AVIVA CHOMSKY, UNDOCUMENTED: HOW IMMIGRATION BECAME ILLEGAL 16 (2014).

³⁵ Muzzaffar Chishti & Claire Bergeron, *Hazelton Immigration Ordinance that Began with a Bang Goes Out with a Whimper*, MIGRATION POL’Y INST. (Mar. 18, 2014), <http://www.migrationpolicy.org/article/hazleton-immigration-ordinance-began-bang-goes-out-whimper>; see also Jennifer Coleman, *A Divisive Split in the Eighth, Fifth, and Third Circuits: What the Courts Have to Say about States and Communities Taking Immigration Into their Own Hands*, 27 GEO. IMMIGR. L.J. 871, 881 (2013).

³⁶ See *Arizona v. U.S.*, 132 S. Ct. 2492, 2494-95 (2012) (striking down as unconstitutional provisions in SB 1070 that intrude upon the preemptive role of federal regulation of immigration). The provisions struck down included Section 3 which created a misdemeanor charge for failure to comply with federal alien-registration requirements, Section 5 which made it a misdemeanor for an unauthorized alien to work in the state, and Section 6 which authorized police officers to arrest without a warrant a person they believe might be removable for being in the U.S. illegally.

³⁷ *Women on the Border, Inc.*, WOMEN ON THE BORDER, www.womenontheborder.org (last visited Oct. 10, 2015); see also *Austin Tan Cerca de la Frontera, Inc.*, AUSTIN TAN CERCA DE LA FRONTERA, www.atcf.org (last visited Oct. 10, 2015).

³⁸ Casa Marianella is an emergency shelter for recently arrived immigrants and refugees in Austin, Texas. Services include housing, food, and education for mother and child. CASA MARIANELLA, <http://www.casamarianella.org/> (last visited Oct. 10, 2015).

³⁹ Fuerza Unida is involved in many social struggles, including issues of women’s empowerment and self-sufficiency, women’s labor rights, immigration, environmental issues, and health education. FUERZA UNIDA, <http://www.lafuerzaunida.org/> (last visited Oct. 10, 2015).

⁴⁰ The Sierra Club is the nation’s largest and most influential grassroots environmental organization—with more than two million members and supporters. Successes range from protecting millions of acres of wilderness to helping pass the Clean Air Act, Clean Water Act, and

immigration attorneys⁴¹ who generally educate delegates on the bizarre and complex system of immigration laws that impact client/deportees and their families.⁴²

We produced our first “Journey of an Immigrant” delegation in 2012. Among the varied experiences for travelers, we toured the Port Isabel immigration detention center near McAllen, Texas. Unlike the NAFTA delegations, registrants for the “Journey of an Immigrant” delegation do not cross the border into Mexico. So far, all of the activities have taken place in Texas, in areas in and around South Texas, and the Lower Rio Grande Valley. In Texas everyone calls this area “the valley”; it is a large four-county area next to the Rio Grande River and the U.S.-Mexico boundary, with an economy dependent on agriculture and tourism. Among the top agricultural regions of the U.S., Texas growers of essential crops like corn, cotton, sorghum, and grapefruit have historically enjoyed a constant flow of migrant laborers from Mexico to meet production demands. In 2012, we toured the 1200-bed Port Isabel facility (McAllen), which is completely owned and operated by the Department of Homeland Security, Division of Immigration and Customs Enforcement (DHS/ICE). In 2014, we toured the 1900-bed South Texas Detention Center (Pearsall), located in the small town of Pearsall, near San Antonio.

Pearsall is typical of a detention facility where most of the staff is not employed by the government. Instead, staff is employed by the private contractor GeoGroup, Inc., a for-profit corporation hired by the federal government, or DHS/ICE, to run the detention centers. Together with the Corrections Corporation of America (CCA), GeoGroup and CCA are heavily invested in the American prison industrial complex.⁴³ Notably, 2011 reports on the profitability of companies in the business of building and operating prisons indicated that the two largest private prison companies, CCA and GEO Group, together profited \$2.9 billion in 2010 alone.

Endangered Species Act. *About*, SIERRA CLUB, <http://www.sierraclub.org> (last visited Oct. 10, 2015).

⁴¹ The American Bar Association funds a free legal service for immigration services known as Pro Bar. *See About ProBAR*, AM. BAR ASS'N, http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/south_texas_pro_bono_asylum_representation_project_probar/about_us.html (last visited Oct. 13, 2015).

⁴² “The immigration system in general is designed to deprive undocumented adults of most rights, but, in some cases, laws designed to protect children transcend status and are applied equally to all children. Laws and policies thus struggle between two contradictory aims: to punish violations of immigration status or to protect the rights of children and their need to be with their parents.” CHOMSKY, *supra* note 34, at 153.

⁴³ GEO Group and CCA profited more than \$2.9 billion in 2010 due to their extensive lobbying efforts aimed at keeping their prisons at full capacity. *See Cummings, supra* note 21, at 436-37. “The thought that the boards of directors of prison companies are hiring lobbying firms to assist them in privatizing public prisons and increasing prisoner populations is a terribly disturbing conceptualization.” *Id.* at 437.

The stories herein are from migrants' conversations with delegates⁴⁴ that took place at Pearsall as part of the May 16-19, 2014 "Journey of an Immigrant" Delegation.

III. TOURING AN IMMIGRATION DETENTION CENTER IN SOUTH TEXAS

Gaining access to an immigration detention facility requires patience and significant long-term planning, as the social construction indication of illegality is most visible in the less than welcoming attitude of DHS staff to citizen queries such as, "can we tour this facility?" Voluminous e-mail exchanges and phone calls between the organizers ultimately produced a mutual understanding of the protocols, expectations, restrictions, and limits on a visit that would last a mere three hours. For the 2014 delegation in particular, where we sought access to in-person meetings with detainees, the vetting process by local DHS officials led to requests for information (e.g., social security numbers, government IDs, and criminal background checks) that felt unnecessary, and like "last-ditch" delay tactics.⁴⁵ Again, the impact of the construction of "illegality" of those detained for a presumably civil matter, without any criminal background,⁴⁶ affected the interaction between agency officials and organizers that in the final planning stages, with the officials appearing obstructionist, if not hostile.⁴⁷ The organizers ultimately reframed the seeming defensiveness of the ICE officials as

⁴⁴ The delegation had thirteen people, and twelve were vetted and approved for entry to the STDC. We were allowed notepads and pens. Delegates took notes, some extensive, which were later shared with the organizers. The documentary information herein is a composite of observations and notes by the delegates, including this author. *See generally Summary Notes of Visit to Pearsall Facility, May 14, 2014*, WOMEN ON THE BORDER, <http://womenontheborder.org/2015/08/summary-report-for-tour-of-so-texas-detention-center-may-16-2014-pearsall/> (last visited Oct. 10, 2015).

⁴⁵ Even before we got to this stage, the DHS official we dealt with in the San Antonio field office, Norma E. Lacy, kept trying to get us to visit a smaller, different facility. It took considerable back and forth communication to make her understand that the tour was simply part of a series of pre-planned activities in the area, and that a different facility would disrupt our educational agenda. *See* E-mail from Norma E. Lacy, Office of the Director, Department of Homeland Security to author (March 6, 2014, 11:06 AM) (on file with author). The relevant rules and regulations used by the DHS/ICE for visitor tours can be viewed at: <http://womenontheborder.org/2015/08/icedhs-regulations-for-tours-of-detention-facilities/>.

⁴⁶ The civil versus criminal distinction has made it difficult to demand that an indigent migrant be provided with free legal counsel, as the Sixth Amendment guarantees a right to counsel only for criminal proceedings. There are reasons to question this limitation. *See Anita Maddali, Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 15 (2011).

⁴⁷ In an e-mail communication among organizers about the planning for the STDC tour, Dr. Judith Rosenberg, one of the key organizers for Austin Tan Cerca de la Frontera (ATCF) complained, "I fear STDC will make a[nother] requirement at the last minute which we cannot fulfill so that they can deny us access. Popping up late with the request for SSN is a harassment. What additional background info does that give them? Besides, it violates privacy." E-mail from Judy Rosenberg, Organizer for Austin Tan Cerca de la Frontera, to author (May 4, 2014, 11:18 PM) (on file with author).

institutional reaction to increasing public criticism of DHS immigration practices.⁴⁸

Tight security measures are used at immigration detention facilities. At the 2014 delegation, we gained access to meetings with detainees. As educational nonprofits, we qualified as “stakeholders” with rights to tour the facilities.⁴⁹ Under the visitors’ code of conduct, we could bring in notepads and pens, but no recording devices, food or drink, and were prohibited from making efforts to market materials or offer legal services. While the federal government persists in describing immigration detention as a civil process, the facilities I have now toured each have the look and feel of a prison.⁵⁰ On the afternoon of May 16, 2014, our van approached the Pearsall facility, a massive construction of 236,000 square feet, with several buildings and open areas that included recreational yards, all surrounded by barbed wire. Pearsall booked over 23,000 individuals in the 2013 fiscal year, and transferred out about 8,000 persons according to our guide.⁵¹

The tour was preceded by an informational lecture on operations and services by Assistant Field Director, Randall Henderson, who was sometimes accompanied by a GEO Group representative. Henderson consistently referred to the detainees as “aliens,” a term that has been criticized because it socially constructs a “nonperson.”⁵² We were advised that in this all male unit, the detainees might be wearing one of three colored uniforms: navy blue, for “no criminal history,” save the immigration violation; orange for a deportee, often a person with a “green card”⁵³ who had been convicted of crimes like possession of

⁴⁸ A 2009 victory in a civil rights lawsuit against DHS/ICE for conditions at the Hutto Family Detention Center likely factored into the officials’ defensiveness. The Hutto, Texas center ultimately shut down, but the practice of family detention has continued and is severely criticized by civil rights lawyers for humanitarian concerns. See Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?_r=0.

⁴⁹ Included in the list of “stakeholders” are non-governmental organizations, community groups, faith-based organizations, members of academic, and pro bono legal service providers. See *Stakeholder Visitor Code of Conduct*, DEP’T OF HOMELAND SEC., <http://womenontheborder.org/2015/08/icedhs-regulations-for-tours-of-detention-facilities/> (last visited Oct. 10, 2015).

⁵⁰ Statements to the lawyers representing Central American detainees included: women and children had been “kept for prolonged periods in very cold rooms, given inadequate or inappropriate food, and denied medical care.” See Allie Yee, *Conditions at For-Profit Immigrant Detention Facilities in Texas Face Legal Action*, FACING SOUTH (Feb. 19, 2015), <http://www.southernstudies.org/2015/02/conditions-at-for-profit-immigrant-detention-facil.html>.

⁵¹ This information is available publicly, but was also gathered by delegates who took notes in the meeting with Assistant Field Director, Officer Randall Henderson.

⁵² The term “alien” has been criticized for its role in feeding into unnecessary biases against non-citizens and undocumented residents. See Kevin Johnson, *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 264 (1997).

⁵³ The lawful permanent resident (LPR) historically carried a laminated green ID issued by the former INS, or Immigration and Naturalization Service. There are numerous grounds found in Section 237 of the Immigration and National Act for which an LPR becomes deportable, including

drugs, burglary or robbery; and red for convicted felon deportees who had committed aggravated assault, murder, rape, etc. Just as we saw at Port Isabel in 2012, the high majority of detainees wore the navy blue, and at Pearsall almost all were from Guatemala, Honduras, Mexico, or El Salvador.⁵⁴ According to Officer Henderson, a detention period could be as little as two days or as long as two years, with the average stay being about twenty-four days. Each detainee would end up in front of one of three immigration judges assigned to Pearsall to conduct approximately 400 deportation hearings per week.

A. Meeting the Detainees

After an hour, we exited the conference room for a walking tour. We viewed dormitories, medical centers, quarantine rooms, the booking station (where we saw new arrestees in handcuffs being processed), a tiny library and computer center, recreation fields, and a chapel. We peered through glass doors holding dozens of bunk beds for seventy-five to a hundred men, a few tables, open showers, and open toilets. Some delegates made friendly eye contact, and many detainees sent back curious, strained looks. After the tour, we had only ninety minutes to meet the dozens of detainees who had read our flyers in Spanish and English posted in advance where we described ourselves as members of community and faith-based groups wanting to know more about the immigrants' experiences in detention. Our notices promised nothing other than a willingness to hear personal stories we would share with our communities. Over eighty persons responded to the flyers to meet and talk to visitors. When we arrived, the co-leaders paired up delegates to talk to four detainees at a time. With at least one person in the pair having strong Spanish speaking skills, we had decided upon a few open-ended questions to ask the detainee: What is your name? Where are you from? Why did you cross the border? What happened? And what has it been like for you in here?⁵⁵

Pearsall staff took us into two large classroom style rooms for the meetings with detainees. Armed guards were in each room. I oversaw the setup for the delegate-to-detainee meetings in one room (L), and my co-leader Whitney

violations of law. See Ilona Bray, *Grounds of Deportability: When Legal Resident Can be Removed*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/grounds-deportability-when-legal-us-residents-can-be-removed.html> (last visited Oct. 10, 2015). More recently, the immigration reform fervor accounted for thousands of people being deported for minor infractions, such as driving violations or parking tickets. See CHOMSKY, *supra* note 34, at 95.

⁵⁴ See *Summary Notes of Visit to Pearsall Facility*, *supra* note 44. The reporter, Whitney Devin, like others on the delegation, noted that the facility housed many that were not from Central America. The people we met, however, had responded to fliers posted in English and Spanish, which therefore attracted a large number of detainees interested in talking to us, including those from Central American countries, as well as Mexico.

⁵⁵ See *Delegates' Guidelines for Meeting Detainees at Pearsall Detention Center*, WOMEN ON THE BORDER, <http://womenontheborder.org/wp-content/uploads/2015/08/J-OF-IMMIG-DELE-2012-MISC.pdf> (last visited Oct. 10, 2015) (materials for the delegation, including the guidelines for interviews).

Devin took the other room (R). In L room, everyone wore the navy blue uniforms (caught without papers), and was mostly from Central America; in R, there were mostly men wearing the orange uniforms, people who are legal permanent residents who have committed a misdemeanor. In the end, we spoke with fifty-eight detainees in ninety minutes.⁵⁶ Although some of the details below are specific to the experiences of gay migrant detainees, the stories of Jamey, William, Arnaldo, and Ariel contain references to some standard features of the American immigration detention.

IV. IN SEARCH OF ASYLUM AS A REFUGEE GAY MIGRANT

Jamey, a 26-year-old young man from Honduras, who had been an industrial engineering student, had been at Pearsall for nine months when we met him. “I don’t fit in back home,” he said. He had been constantly harassed for being gay. One day a drugs pusher asked him to move drugs. When he turned him down, the pusher threatened to kill him.

Honduras is one of the most violent countries in Central America, and drug traffickers follow through with their threats to kill.⁵⁷ So Jamey fled. But more problems would ensue with trying to escape.

“The coyote (human trafficker) charged me \$4,500 (U.S. Dollars) to get me as far as the Mexican border, and another \$2,000 to get me to Houston to connect with my mother and cousin.”

The gay migrants from Central America often described situations where they or their relatives were victimized by thugs connected to cartels, but in addition, they claimed to be fleeing their own countries because of the widespread cultural homophobia against openly gay or transgender people.

Ariel, from El Salvador, said his own nephew paid a gang to kill him for being gay. In 2010, he was beat up, verbally abused, and a group of men tried to gang rape him. The police were no help.⁵⁸

⁵⁶ None of the delegates saw or interacted with detainees wearing red uniforms.

⁵⁷ Much of the violence in Honduras is drug and gang related. According to the Council on Foreign Relations, Honduras has the world’s highest murder rate for a country not at war. In 2012 alone, over 7,000 persons were killed in Honduras, a rate of 90.4 persons killed for every 100,000 persons. See Siobhan O’Grady, *Not Even a Beauty Queen is Safe from Honduras’s Epidemic of Violence*, FOREIGN POLICY (Nov. 19, 2014), <http://foreignpolicy.com/2014/11/19/not-even-a-beauty-queen-is-safe-from-hondurass-epidemic-of-violence>. Another factor to consider in the role of violence in Central America is the historic complicity of the U.S. in producing social political unrest as part of interventions and coups that were intended to protect commercial interests. For example, Honduras underwent a military buildup in the 1980s because it was used as “a staging ground for a U.S. counterrevolutionary military campaign against Nicaragua’s leftist Sandinistas, who overthrew U.S. supported dictator Anastasio Somoza in 1979.” Bob Ortega, *Immigration Surge Rooted in History of Central America*, AZCENTRAL, <http://www.azcentral.com/story/news/politics/immigration/2014/07/14/immigration-crisis-history-central-america/12432153> (last visited Oct. 10, 2015).

⁵⁸ It is an unfortunate fact of history that throughout a major part of the twentieth century the U.S. was on the wrong side in Central America, protecting U.S. commercial interests by trying to

Arnaldo is a member of a Honduran gay club. “If you are gay, society and public authorities discriminate against you.” A typical form of harassment comes from military people who go into the gay bars to harass or beat them up. The possibility of being kidnapped and tortured in Honduras for being gay is common. Arnaldo, for example, was so afraid of becoming the victim of assault, torture, or kidnapping as a migrant, that he completely suppressed his sexual identity on the journey.⁵⁹

Ariel, from El Salvador, was raped from age seven to thirteen, beaten at school by bigots, and targeted for harassment by his family and community for being gay. He had been hoping to get all the way to Canada on this trip. He tried once to secure asylum in the United States, but was denied. He said he was very anxious about the asylum hearing three months away. He was getting psychological medicines for his anxiety and seeing a counselor. He asked his family to try to get the police report about the attempted gang rape to support his petition, but assumed the police had buried it or never filed one. Ariel was depressed, hopeless, afraid, and said “if I fail [to get asylum] I won’t appeal. It is too painful. I’ll try Europe.” He said he had known ten other gay men while at Pearsall and they had all been sent back. He feared for his life because his family in El Salvador would not accept his gay sexuality.

Several other detainees at my own table, regardless of whether they were from Guatemala, Honduras, or El Salvador, reported that at home “the police are corrupt.” The patterns of increasing levels of violence, along with the lack of accountability by police authorities, evoked a disturbing similarity to the systemic gender violence that has become a part of the political economy

prevent Latin American countries from being governed by leftist/socialist regimes. *See generally* NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM passim* (2007). For example, the U.S. helped overthrow the governments of Guatemala in 1954, supported a military coup in El Salvador in 1960, and used the CIA to support counterinsurgency campaigns in the 60’s, 70’s and 80’s, in Guatemala and El Salvador. *See* Ortega, *supra* note 57. During the wars, the local coup governments tortured and terrorized their own citizens, thus inducing mass migrations of refugees fleeing to the U.S. to get away from targeted violence and torture. A great amount of aid from the U.S. to Central America has been used to fund police forces, which in regions like El Salvador, are known to be corrupt and lack transparency. *See id.* Another reason behind the high levels of migration by undocumented poor people may be the negative socio-economic-political effects of CAFTA. It is a free trade agreement similar to NAFTA which has been shown to have failed in producing the increased wealth for all citizens in Mexico, which instead has been linked to increased poverty and gender based violence. *See* Arriola, *supra* note 18, at 5-6. Similar to NAFTA, CAFTA’s aims have allowed U.S. companies to easily invest in CAFTA countries, but the trade agreement extends similar pro-investor privileges and is empty of protections for workers. In other words, analysts have concluded that CAFTA may be replicating the now-known effects of NAFTA, including spikes in immigration and lack of protection for the temporary migration of low skilled workers. *See* Salomon Cohen, *CAFTA: What Could It Mean for Migration?*, MIGRATION POLICY INST. (Apr. 1, 2006), <http://www.migrationpolicy.org/article/cafta-what-could-it-mean-migration/>.

⁵⁹ Our interview times were extremely brief, at best ten to fifteen minutes per group of detainees. Therefore, delegates did the best they could to capture the sense of a detainee’s story, his grief over being a vulnerable migrant, and also gay.

introduced by NAFTA.⁶⁰ In this case, gendered and sexual violence are a similar likely consequence of the new political economies introduced or expanded (e.g. drug cartels and violence) with CAFTA.

All migrants describe the long journey to *el norte* as difficult and sometimes scary.

For a gay man, the journey can be especially risky.⁶¹ Jamey, for example, went several days without eating and said that the coyote took them through areas that were “very bad if one is homosexual,” meaning he feared the common threat of a brutal homophobic attack. William, from Honduras, 21-years-old and gay, said a man from Nicaragua forced him to perform oral sex during his journey.

Aside from the physical threats commonly reported by migrants are the risks that the coyotes either do not really know safe routes, or are otherwise indifferent, turning a long journey into a different kind of nightmare. For example, when Jamey got to McAllen, no sooner had they been dropped off by the coyote that the border patrol showed up and arrested all fifteen men who had trekked together through Mexico. Arnaldo, age twenty-five, described the coyote telling them to “run!”—which he did. But he fell and was then caught and roughed up by a border patrol officer.

A similar thing happened to Ariel. It took Ariel four months to get to the border because he was kidnapped. Unfortunately, kidnapping has become a way for criminals to exploit a person they suspect is connected to sources of money. Ariel has brothers in North Carolina. The kidnappers demanded a \$10,000 payment. Upon getting the money, they left him right where the border patrol could easily pick him up. The cops did not abuse him, but they put him in the very cold “hielera”⁶² for five days. He described the treatment there as cruel—only one small sandwich per day, little water, no phone calls, and rudeness from the staff “about my nationality.”

Arrests can happen next to the border or as far away as 100 miles from the boundaries between the U.S. and Mexico.⁶³ Following an arrest, and before being moved to a detention center, is detention in a holding cell, the nature of which is universally described by migrants as cruel. The migrants call them “hieleras,” meaning cold-boxes or ice lockers.

⁶⁰ See Arriola, *supra* note 18, at 5-6.

⁶¹ *El Tren de la Muerte (The Death Train)*, YOUTUBE (Apr. 20, 2012), <https://www.youtube.com/watch?v=-WHihr-G1-8>. The documentary describes the experiences of migrant children who jump on train lines heading north, which they refer to as “la bestia” (the beast) because of the dangers associated with jumping on and off a fast moving train.

⁶² In Spanish, “hielo” means ice. “Hielera” then is an icebox or freezer.

⁶³ The Border Patrol lists 128 nationwide checkpoints, a majority of which are at the southwestern border. See *ACLU Border Litigation Project*, ACLU, <https://www.aclusandiego.org/wp-content/uploads/2014/11/Border-Patrol-Checkpoint-FAQs.pdf> (last visited Oct. 10, 2015); see also *Border Patrol Sectors*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors> (last visited Oct. 10, 2015).

The icy cold boxes are so often mentioned by migrants who finally get out of detention that critics speculate it to be a sadistic tactic, keeping the temperatures cold (below sixty degrees Fahrenheit), so as to shock migrants into a new reality. It is the ultimate social construction of illegality,⁶⁴ of the culturally hegemonic belief in this country that migrants are bad and have committed a wrong against the U.S. by daring to cross the border without permission. It is as if they are being told—*Wake up. You have been caught. You are not wanted here. Do not get comfortable. Do not fall asleep.*

A. Structured Humiliation: In Detention and Waiting for a Hearing

In my group, we met men who came from Guatemala, Honduras, or El Salvador. Their stories presented a repeated pattern of worries, fears, and concerns—thugs with power who had stolen from them, threats to kill them or their relatives, stories of murders of family members by gangs, corruption among police officers, a lack of jobs, and extreme poverty. For the gay detainees, the stories mentioned these issues plus the feeling of persecution for their sexual orientation or gender identity. Likely their hope is to qualify for refugee status, where if an undocumented migrant can prove “credible fear” of persecution as the member of a racial, religious, or other vulnerable group, he can qualify for asylum under the immigration laws.⁶⁵

But in the meantime they wait.

Ariel felt that he was treated OK in the transfer to Pearsall, but complained that the correctional officers constantly yell at them and are rude. Initially he was placed in a cell with about 100 other men who, he said, were all straight. That placement triggered panic attacks in Ariel. He found it difficult to use the toilet in front of all those men, which in our tour we observed, were completely open, as were the showers. Finally, he said, “I just got used to it.”

The lack of progress on cultural sensitivity became apparent as the detainees repeatedly stated how shocked they were by the mocking and disrespectful behavior of the correctional officers (COs). Moreover, the COs do not go out of their way to shield the detainees from possible attacks; Ariel reported that during his first two months, two other detainees assaulted him, stripped him naked, but eventually a staff officer stopped them before they could go further.

⁶⁴ CHOMSKY, *supra* note 34, at 24. “We assume that these social constructions have some kind of independent reality or existence, but in fact they don’t: people invented them to serve their own interests.” *Id.*

⁶⁵ See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2015). LGBT’s have been able to qualify for asylum based on a credible fear of persecution for their sexual orientation in a few cases. See Joel Millman, *The Battle for Gay Asylum, Why Sexual Minorities Have An Inside Track to a U.S. Green Card*, WALL ST. J. (June 13, 2014), <http://www.wsj.com/articles/why-sexual-minorities-have-an-inside-track-to-a-u-s-green-card-1402676258>.

All detainees learn quickly that the attitudes of the COs are unfriendly and/or outright hostile, not only because they are presumed to be criminals who have broken the immigration laws, but also because they are gay or not white. Jamey mentioned that he might have ended up in a room set aside for gay men, but it was full when he arrived, so instead they placed him in solitary confinement for twelve days, where he said, “I was treated like a criminal.”

While most detainees either felt the general conditions in Pearsall were acceptable, such as only having television every other day for an hour, or not being provided with books or pencils, their bigger concerns were that the officers make fun of them. Jamey, who was finally able to escape general population to be with other gay detainees, said their main concern is the homophobia of the COs. One CO refused to even look at them, or pushed the gay men out of the way if he was passing through.

When the group of gay detainees got fed up, they filed a complaint about one officer who constantly harassed them. He stopped only for a little while. Another complaint they filed was against a doctor, who refused to treat the gay detainees. When they inquired as to why the medic would not treat them he yelled back, “shut up!”

21-year-old William from Honduras was very distrustful of the staff at Pearsall, and said his main complaint was the racism from the COs. Arnaldo also agreed that the Pearsall staff frequently treated them badly and differently because of their race. I found this to be ironic. While Officer Henderson was Anglo white, along with the GeoGroup representative Mr. Short, virtually all of the GeoGroup staff appeared to be Latino/as. Another typical complaint of these detainees was that the English speaking Latino/as would pretend not to know or understand any Spanish, and refused to engage with detainees in their own language.⁶⁶ Language differences serve as a means of creating an “us versus them” boundary between the employee-officers and the “criminal/detainees.”

V. CONCLUSION: REFLECTIONS FOR REFORM

In *Obergefell*, Justice Kennedy wrote for the majority: “[t]he nature of injustice is that we may not always see it in our own times.”⁶⁷ These words were quite possibly some of the most profound words uttered by the Court in recent years, reaffirming the nation’s commitment to enjoy and protect our right to liberty and equality under the rule of law. Kennedy’s opinion articulated a vision of a society arriving at an understanding, through a gradual political and legal process, that among the constitutional liberties we hold as precious is the right to

⁶⁶ The detainees likely either overheard Latino/a staff speak to each other in some version of “Spanglish,” a blend of English and Spanish quite common among U.S. born people of Latino descent, or possibly observed a look on the face of a staff member that they understood what the detainee asked for in Spanish, but instead responded in English.

⁶⁷ *Obergefell*, 135 S. Ct. at 2598 (emphasis added).

“individual dignity and autonomy.”⁶⁸ And therefore, when a law unjustly strikes at the basic core of a person’s right to human dignity, that law must be held as “repugnant to the Constitution” and void.⁶⁹

The current immigration detention system, in many of its laws, regulations, and practices is a system that is daily producing and reproducing injustice in the lives of innocent men, women and children—injustices that are pervasive, all encompassing, yet invisible to those who are blinded by their privileges of race, class, and citizenship. When people in this country do not have to think about the sources of their daily enjoyment of life in a society that exploits the hard work of the migrant laborers and the undocumented person who, for example, mows their lawn, cleans their houses, or babysits their child, they are blind. When people are not encouraged to care whether or how their lives of privilege are linked to people who may disappear from one day to the next into the “civil detention” system, they are blind. The immigration system of “civil detention” is one of structured inhumanity in which the corporate overseer runs the prisons and detention facilities as far away from public scrutiny as possible.⁷⁰ It is a system in which profit will be shared with shareholders who may not understand or see that they have participated in a societal abandonment of the constitutional right to protect the fundamental right to decency and human dignity regardless of one’s citizenship, race, class, or even sex and gender identity.

Injustices can happen at places like Pearsall because the people who run the detention facilities are increasingly engaged in the privatization of incarceration.⁷¹ As such, the sense of justice and humanity for a theoretically “civil detention” process has been warped into a practice that allows the corporate overseers to treat detainees with bias and prejudices because of their national origin, race, class and, as shown above, because of a migrant’s sexual or gender identity. These same institutions that are allowed to treat the civil detainee as a presumptive criminal, are the same entities that undergird the new rise of mass incarceration and racial apartheid,⁷² and the social construction of a

⁶⁸ *Id.* at 2597.

⁶⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁷⁰ Texas based organizations and civil rights attorneys, like RAICES (Refugee and Immigrant Services Center for Education and Legal Services), and Virginia Raymond, have collaborated on critical investigations into abuse at immigration detention centers. See e.g., *Questions Remain: Investigation Into Sexual Abuse at the Karnes Family Detention Center*, RAICES, <https://www.raicestexas.org/pages/karnesabuse> (last visited Oct. 10, 2015); see also *Welcome*, VIRGINIA MARIE RAYMOND, <http://www.virginiaraymond.com> (last visited Oct. 10, 2015).

⁷¹ “The thought that the board of directors of prison companies are hiring lobbying firms to assist them in privatizing public prisons and increasing prisoner populations is a terribly disturbing conceptualization. Lobbying to increase the stream of prisoners and lobbying for untethered, harsher sentencing regimes is not just unseemly, but inhumane, which leads to another hidden problem of prison privatization.” Cummings, *supra* note 21, at 437.

⁷² MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS passim* (2010). “This larger system, referred to here as mass incarceration, is a system that locks people not only behind actual bars in actual prisons, but also behind virtual bars

new criminal identity—the undocumented migrant. As explained by Aviva Chomsky, “[w]hen race-based discrimination was outlawed, a new system emerged: turn people of color into criminals. Then you can discriminate against them because of their criminality, rather than because of their race. A new legitimacy for discrimination was thus born.”⁷³ The stories of the queer migrant are simply illustrations of fundamental injustices that this country should no longer tolerate.

It has been my purpose here simply to identify and question the ironies and the hypocrisies for the queer and undocumented person, whether he or she is captured by the Border Patrol, processed and held in prison-like conditions in a detention center, or whether he or she is a person living in the shadow of the law as an undocumented resident.

What does the promise of equality in the marriage cases offer to the young men like Jamey, Ariel, Arnaldo, and William, as well as many others who are sitting in an immigration detention center, fleeing their countries because they are not safe as gay people? The *Obergefell* decision has me reflecting on the ironies and hypocrisy of achieving, on the one hand, a new constitutional freedom to love in the U.S., regardless of sex/gender orientation, while on the other hand, American law is serving as an instrument of violence against people, like these gay detainees who are poor and gay, and who have migrated from countries with close economic and military ties to U.S. because of CAFTA (or if from Mexico, because of NAFTA). People, who in theory, should have experienced socio-economic improvements in their local economies with the introduction of CAFTA, but like the experience following introduction of NAFTA, have been betrayed by the politicians and business elite of their own countries.⁷⁴ In detention, these seekers of nothing but freedom cannot help but see hypocrisy in the celebration of sexual freedom in one context, but in their lives, they experience enforcement of practices that are xenophobic, anti-family, and inhumane. As the law of civil detention perpetuates the criminalization of the undocumented migrant, its ultimate effect is to deprive detainees of the right to human dignity, while the rest of society continues to exploit the migrant (and sometimes gay) laborer for his essential contributions to the production of the good life for privileged Americans.

Many of us involved in the movement for LGBT rights as activists, lawyers, and scholars are at the end of journey that began with the campaign to decriminalize our status. We understand well what it means to have come out when everything in society told us we were immoral criminals who were not entitled to a right to dignity of our personhood. Our histories reveal times of

and virtual walls—walls that are invisible to the naked eye but function nearly as effectively as Jim Crow laws once locked people of color into a permanent second class citizenship. The term *mass incarceration* refers not only to the criminal justice system but also to the larger web of laws, rules policies, and customs that control those labeled criminals both in and out of prison.” *Id.* at 12-13.

⁷³ CHOMSKY, *supra* note 34, at 16.

⁷⁴ See generally AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY passim* (2003).

silence and invisibility just to survive. We have known what it is like to attempt lives of dignity, security, and safety, when everything around us said we were just criminals, and judged us on the basis of stereotypes and bigotry. This is why we need to extend the promise, the vision of a just society embraced in *Obergefell*, beyond our domestic borders and beyond the persons who can benefit from the freedom to love and marry because of their race and class and citizenship privileges. There are other LGBT brothers and sisters in this globalized world today who need our support. Some of them happen to be undocumented migrants and laborers who come to this country for a variety of reasons that include not just looking for a job, but also looking for a safe place to live as a gay person, wanting to love and maybe even marry.