Crimmigration: The Missing Piece Of Criminal Justice Reform

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CRIMMIGRATION: THE MISSING PIECE OF CRIMINAL JUSTICE REFORM

Yolanda Vázquez *

Our nation is being robbed of men and women who could be workers and taxpayers, could be more actively involved in their children’s lives, could be role models, could be community leaders, and right now they’re locked up for a non-violent offense.

—President Barack Obama1

INTRODUCTION

On July 13, 2015, President Barack Obama commuted the sentences of forty-six individuals.2 They were nonviolent drug offenders, who had been languishing in prison as a result of the War on Drugs and increasing severity in punishment that has occurred in the criminal justice system over the last forty years.3 The commu-

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3. See id. (discussing the fact that out of the eighty-nine sentences that Obama had
tations were another act in President Obama’s attempt to address the problems that have arisen over the last several decades in the United States criminal justice system. These problems have included overcriminalization, severity in sentencing, hyperincarceration, and racial and economic disparities.

President Obama’s actions, and his request for criminal justice reform, join a larger movement called Smart on Crime. Smart on Crime reforms aim to reduce the financial and human cost of the criminal justice system, while ensuring public safety. The Smart on Crime movement has been building momentum over the last decade and has been able to circumvent the entrenched and rigid “soft on crime and tough on crime binary,” which contributed to the criminal justice system’s enormous size, as well as the inability for prior criminal justice reform efforts to materialize. This movement has gained bipartisan support. Many states, once


7. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (discussing the criminal justice system as the new mechanism to subordinate blacks after Jim Crow); STUNTZ, supra note 5 (discussing the criminal justice system’s disproportionate impact on blacks and, to a lesser extent, Latinos).

8. See generally GARRICK L. PERCIVAL, SMART ON CRIME: THE STRUGGLE TO BUILD A BETTER AMERICAN PENAL SYSTEM (2016) (emphasizing that there is an ongoing shift in thinking about crime and penal policy to make a system that is more rational and humane); Roger A. Fairfax, Jr., From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects, 7 J.L. ECON. & POLY 597 (2011) [hereinafter Fairfax, From “Overcriminalization” to “Smart on Crime”] (tracing the history of criminal justice reform over the years to its current “Smart on Crime” movement).


10. See Fairfax, From “Overcriminalization” to “Smart on Crime,” supra note 8, at 611.

Tough on Crime, have begun to reform their criminal justice systems under the Smart on Crime motto in an effort to save their jurisdictions from bankruptcy.\textsuperscript{12}

For many, these reform efforts are long overdue.\textsuperscript{13} Although the United States only has fewer than 5\% of the world’s population, it makes up almost 25\% of the world’s prison population.\textsuperscript{14} The United States has consistently incarcerated more individuals than any other country in the world, despite the fact that its crime rate, which has been declining over the last few decades, remains consistent with other developed countries.\textsuperscript{15}

\textsuperscript{12} Ronnie Ellis, How a “Tough-on-Crime” State Became Smart on Crime, THE CRIME REP. (Apr. 18, 2011), http://www.thecrimereport.org/news/articles/2011-04-how-a-tough-on-crime-state-became-smart-on-crime (discussing how Kentucky was able to successfully implement criminal justice reform); Jerry Madden, Lawmakers Give Justice Reforms in Texas a Boost, CHRON. (July 2, 2015, 12:41 PM), http://www.chron.com/opinion/outlook/article/Lawmakers-give-justice-reforms-in-Texas-a-boost-6361712.php (discussing Texas’s criminal justice reforms that have taken place in the last ten years and that have saved the state approximately $3 billion).

\textsuperscript{13} This article’s purpose is not to discuss the larger question as to whether the reform efforts that currently are developing are significant enough to have an impact; its purpose is to bring an understanding of the importance of the criminal-immigration relationship to any efforts of criminal justice reform.


\textsuperscript{15} See Peter Wagner et al., Prison Policy Initiative, States of Incarceration: The Global Context (2016), http://www.prisonpolicy.org/global/ (finding that the incarceration rate in the U.S. is 716 individuals for every 100,000 residents, which is more than five times higher than most other countries in the world); Neil Howe, What’s Behind the Decline in Crime?, FORBES (May 28, 2015, 5:04 PM), http://www.forbes.com/sites/neilhowe/2015/05/28/whats-behind-the-decline-in-crime/#4589bf7733 (discussing the decrease in crime rates since the mid-1990s and potential theories for the drop, noting that the 2013 violent crime victimization rate is down 71\% from its peak in 1994); Nick Wing, Here Are All of the Nations That Incarcerate More of Their Population Than the U.S., HUFFINGTON POST (Aug. 13, 2013, 8:21 AM), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html (stating that, according to the International Centre for Prison Studies, the United States has the highest percentage of its population incarcerated in the world, accounting for almost 25\% of the world’s prison population); World Prison Brief, INST. FOR CRIMINAL POLY RES., http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Apr. 5, 2017) (finding that the United States incarcerated at a rate of 666 per 100,000 residents. Comparing it to other first world countries, the numbers are striking—UK (England & Wales) (145), Scotland (135), Spain (129)).
As might be expected, the incarceration of millions of individuals over the last forty years has come at exorbitant fiscal and moral costs. Billions of dollars have been spent and millions of lives have been impacted by a system that fails to make the nation safer or its communities more secure.\(^\text{16}\) The moral impact has garnered the harshest critique—the devastation that it has had not only on individuals who enter the criminal justice system, but on their families and communities from which they come and someday, maybe, will return to. This moral cost has been disproportionately borne by individuals and communities of color, the majority of whom are poor and black.\(^\text{17}\)

Critiques of the latest effort in criminal justice reform have already been seen. Much of the criticisms have to do with the motives of the Right and the race-neutral reforms of the criminal justice system that fail to address the structural inequality that the system perpetuates by race, class, and gender.\(^\text{18}\) The need to craft solutions that reduce the total number affected by the criminal justice system, as well as its disparate impact on people of color, especially poor black males and their communities, should be a priority of criminal justice reform. Targeting both issues helps cure both the moral and fiscal cost of the system. If whom


the system impacts is not addressed as vehemently as how many it impacts, the criminal justice system will continue to fail and be plagued by continued racial and economic disparities that will continue to destabilize American society.\textsuperscript{19}

With that being said, however, both sides have failed to recognize the expanding nature of the criminal justice system in the last thirty years. Under the shadows of the impact it has had on poor black males, their families, and the communities in which they live, the criminal justice system has expanded to finely target other individuals—mainly poor Latino males—through the category of the “criminal alien.”\textsuperscript{20}

The development of the concept of the “criminal alien” over the last thirty years has profoundly expanded the way in which the criminal justice system operates. Emerging from the interrelationship between immigration and criminal law, migration control and enforcement—coined “crimmigration”\textsuperscript{21}—has propelled the criminal justice system into a dominant role in the detection, arrest, labeling, and removal of millions of individuals as criminal aliens. To do this, “crimmigration” restructures the criminal justice system to incorporate immigration status as a method of managing the functioning and structure of the organizations within it. Crimmigration’s impact is reflected in the way in which program implementation, mission statements, law enforcement

\textsuperscript{19} For instance, Loïc Wacquant states that “mass incarceration” is the incorrect term defining the phenomenon of the disproportionate and large percentage of individuals incarcerated. Loïc Wacquant, \textit{Class, Race \& Hyperincarceration in Revanchist America}, \textit{Daedalus} 74, 78 (2010). Hyperincarceration is more accurate because it is not the indiscriminate incarceration of the masses of U.S. society but “finely targeted” enforcement against poor black males. \textit{Id}. Therefore, to reduce only the numbers incarcerated will not solve the argument that the criminal justice system targets poor black males. \textit{Id}. at 85.

\textsuperscript{20} An “alien” is “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2012). The term “criminal alien” is used to describe a noncitizen or nonnational of the United States who is removable under the Immigration and Nationality Act (INA) for having been convicted of certain enumerated crimes. Immigration and Nationality Act, Pub. L. No. 414, § 212(a)(9)–(10), 66 Stat. 163, 182 (1952) (codified as amended at 8 U.S.C. § 1182(a)(2)(A)–(B) (2012)); \textit{id}. § 237(a)(2)(A) (codified as amended at 8 U.S.C. § 1227(a)(2)(A) (2012)). This term currently includes immigration violators if prosecuted and convicted in federal criminal court, including those commonly called “illegal aliens” since unauthorized migration is prosecuted as a federal criminal offense. \textit{Id}. §§ 237(a)(2)(A), 275, 276. In addition, the terms Latino and Hispanic are used interchangeably due to both terms being used by various individuals to describe the same group of individuals from Latin American countries. While a distinction can be made in the technicality of the word choice, there is no distinction between the two terms in the paper. For further explanation, see \textit{Latinos \& Criminal Justice}, xxiii (José Luis Morín ed., 2016).

protocols (in detention, arrest, and enforcement), prosecutorial decisions (in charging and plea agreements), laws enacted, case law determined, and procedural responsibilities under the Fourth, Fifth, and Sixth Amendments now include immigration status in their purviews.\footnote{See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not apply for Fourth Amendment violations in immigration proceedings); United States v. Brignoni-Ponce, 422 U.S. 873, 885–86 (1975) (holding that “apparent Mexican ancestry” could be a factor justifying an immigration stop); Jason A. Cade, Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment, 113 COLUM. L. REV. SIDEBAR 180, 180 (2013) (critiquing the inability to use the exclusionary rule in an immigration proceeding despite Fourth Amendment constitutional violations by officers); Ingrid V. Eagly, Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement, 88 N.Y.U. L. REV. 1126, 1130 (2013) [hereinafter, Eagly, Criminal Justice] (discussing the use of noncitizen status during criminal prosecution); César Cuauhtémoc García Hernández, Strickland-Lite: Padilla’s Two-Tiered Duty for Noncitizens, 72 MARYLAND L. REV. 844, 850 (2013) (concluding that Padilla v. Kentucky holds noncitizen claims of ineffective assistance of counsel to a different analysis of the Sixth Amendment than citizens).}

This impact is significant to the criminal justice system, with no end in sight. While in 1988, the United States removed approximately 5956 individuals for criminal or narcotics violations,\footnote{23. IMMIGRATION & NATURALIZATION SERV., U.S. DEPT. OF JUSTICE, 1997 STATISTICAL YEARBOOK 176, 187 (1997), https://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997YB.pdf (stating that 25,829 individuals were removed, of which 5782 were removed as criminal aliens).} in 2014, the criminal justice system was helpful in the arrest, detention, and removal of over 300,000 noncitizens, over 177,000 of whom were classified as aliens who “were previously convicted of a crime.”\footnote{24. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEPT. OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014 7 (Dec. 19, 2014) [hereinafter ICE REPORT: FY 2014], https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf.} Criminal prosecutions of noncitizens have flooded criminal court dockets, prisons, and jails in local, state, and federal jurisdictions. In federal court, immigration prosecutions account for roughly 50% of cases.\footnote{25. MARK MOTIVANS, U.S. DEPT. OF JUSTICE, FEDERAL JUSTICE STATISTICS 2011–2012 3 (2015), https://www.bjs.gov/content/pub/pdf/fjis1112.pdf (stating that 50% of all suspects were arrested and booked for immigration offenses in 2012); DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 116 (2013).} As a result, over the last years, approximately 40% of the annual federal prison population have been noncitizens.\footnote{26. See Fed. BUREAU OF PRISONS, INMATE CITIZENSHIP (last updated Dec. 24, 2016); U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015 4 (2016), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf.} In local and state courts, noncitizens are in-
creasingly prosecuted and sentenced to a term of incarceration. They also receive an additional “punishment” as a result of their criminal conviction: removal. During the Obama Administration, over one million individuals have been deported from the United States for their label as a “criminal alien.”

While traditionally the criminal justice system has been criticized for impacting blacks at greater percentages than any other racial group, the use of the criminal justice system to regulate immigration has expanded its enforcement to poor Latinos, both citizen and noncitizen alike. As a result, there has been a lack of research on the relationship between Latinos and the criminal justice system. Research that is available reveals that, since 1980, the number of Latinos incarcerated in the United States has nearly quintupled. Estimates state that between 2011 and 2012, Latino males represented the largest increase to the incarcerated population. As a result, Michael T. Light has written


28. Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) (holding that deportation is not punishment). But see United States v. Soueiti, 154 F.3d 1018, 1019 (9th Cir. 1998) (holding that deportation is a criminal punishment when it is ordered by a federal judge sentencing a defendant for a criminal conviction, pursuant to 8 U.S.C. § 1228(c)(1)); Katherine Beckett & Naomi Murakawa, Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment, 16 THEORETICAL CRIMINOLOGY 221, 222–23 (2012) (suggesting that because civil detention, although not technically defined as punishment because it is part of the “civil” system, mimics traditional punishment and comes from the carceral state, we should think of this as part of the carceral state and, therefore, punishment); Judge H. Lee Sarokin, Debunking the Myth that Deportation is Not Punishment, HUFFINGTON POST (Mar. 18, 2010, 5:21 AM), https://www.huffingtonpost.com/judge-h-lee-sarokin/debunking-the-myth-that-d_b_321329.html.


that “Hispanics are now the most disadvantaged group within the [criminal] courts.”

As seen above, crimmigration’s use of the criminal justice system as a mode by which noncitizens are detected, prosecuted, labeled, and detained as “criminal aliens” raises similar concerns that criminal scholars, advocates, and criminal justice reform efforts have recognized and begun to address. These concerns include the system’s exorbitant fiscal cost with little benefit to the safety of the community or the nation, as well as the moral cost to individuals, families, and communities, especially poor people of color. Yet the expanding fiscal and moral costs created by the criminal justice system’s expansion into immigration enforcement via the “criminal alien” designation have been largely overlooked.

This article discusses the impact that the incorporation of migration enforcement has had on the criminal justice system and the way in which it has exacerbated pre-existing problems within it. Part I discusses the drastic expansion of the criminal justice system over the last forty years and the fiscal and moral costs it has had. Part II discusses how crimmigration has impacted the criminal justice system, its laws, policies, and practices during the last thirty years. Part III discusses the rise of the Smart on Crime movement and the goals of the criminal justice reform efforts to combat its detrimental effects. Part IV highlights the ways in which immigration control enforcement within the criminal justice system continues to perpetuate the system’s negative moral and fiscal costs. It concludes that the moral and fiscal costs, caused by the use of the criminal justice system in its expanded role in migration enforcement and control, will shift the system’s well-documented injustices to another “finely targeted” group of individuals and fail to decrease the cost and negative impact of criminal justice reform efforts.

33. Light, The New Face of Legal Inequality, supra note 27, at 448 (citing Jill K. Derner & Stephen Demuth, The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts, 27 JUST. Q. 1, 2, 23 (2010)) (discussing their treatment in federal court, though other evidence exists concerning their treatment in state courts); see also Ingrid V. Eagly, Local Immigration Prosecution: A Study of Arizona Before SB 1070, 58 UCLA L. REV. 1749, 1753 (2011) [hereinafter Eagly, Local Immigration Prosecution] (discussing the criminal prosecution against migrants for smuggling themselves); Eagly, Criminal Justice, supra note 22, at 1196–1214 (discussing the various ways that immigration status is taken into account during criminal prosecution).
I. THE TOUGH ON CRIME MOVEMENT AND ITS LEGACY

A. The Rise of the Tough on Crime Movement

Beginning in the 1970s, against the backdrop of the American commitment to life, liberty, equality, and justice, the United States criminal justice system rose in size and dimension, extinguishing the ability for millions of individuals to maintain many of these “unalienable” rights or commitments.\(^34\) Justifications for this phenomenon vary.\(^35\) One of the arguments for increasing use of the system is rising crime rates. However, it has been well recognized that the incarceration of millions has little to do with high rates of crime.\(^36\) During the last several decades, the United States has consistently incarcerated more individuals than any other developed country in the world, despite the fact that its crime rate has been declining over the last few decades and remains consistent with other “First World” countries.\(^37\)

Prior to the late 1960s, the criminal justice system focused on rehabilitation and reintegration of offenders, believing that those who committed offenses were victims of the ills of society. The 1970s, however, brought about a shift in attitude towards the cause of crime and, therefore, the use of the criminal justice system to combat it. This shift in attitude resulted in an unprecedented and unanticipated increase in the police power of the state

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\(^{34}\) The Declaration of Independence para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); see also Steven Raphael & Michael A. Stoll, Why Are So Many Americans in Prison? 240 (2013) (discussing how the prison population in the United States has more than quadrupled since 1970); President Barack Obama, State of the Union Address (Jan. 20, 2015), https://video.foxnews.com/v/4001496918001/obama-americans-we-have-profound-commitment-to-justice/?#sp=show-clips (discussing the value of the nation’s commitment to justice for United States diplomacy and societal prosperity).

\(^{35}\) See, e.g., David Dante Troutt, The Price of Paradise: The Costs of Inequality and Vision for a More Equitable America 139–41 (2013) (discussing various reasons scholars give for the expansion of the criminal justice system, such as political need, social control, financial gain, racial subordination, and constant unskilled labor supply, just to name a few).


\(^{37}\) See supra note 15 and accompanying text.
through the criminal justice system, directing blame to the offender, and not society, for their plight.\textsuperscript{38}

The beginning of this shift can be traced back to the late 1950s and 1960s, when several significant events took place in American history, most notably the struggle for racial equality and the escalation of the Vietnam War.\textsuperscript{39} The tensions between those who sought change and those who did not made it to the streets in demonstrations, both peaceful and violent. Television made these already public displays of civil unrest even more public, and during the 1964 presidential campaign, Barry Goldwater introduced “crime in the streets” as an important issue to be addressed.\textsuperscript{40} While Goldwater did not win, President Nixon followed his lead when taking office in 1969. Putting crime control on the top of his agenda, Nixon identified drug abuse as a “serious national threat.”\textsuperscript{41}

This new narrative focused on the belief that drug abuse and crime were the result of an offender’s anti-social behavior. Nixon believed that only harsh punishments would reduce crime and that social services and treatment only “codd[ed]” the offender and did nothing to reduce crime.\textsuperscript{42} As a result, Nixon’s agenda “increased grant programs to provide monetary assistance . . . for the purpose of experimenting with or expanding programs designed to reduce criminal activity.”\textsuperscript{43} On September 9, 1971, Attorney General John N. Mitchell introduced President Nixon’s War on Crime to law enforcement, emphasizing the President’s commitment to continue fighting crime through local and state law enforcement by providing increased funding for their activities.\textsuperscript{44} In two years, the Law Enforcement Assistance Administration (“LEAA”) increased law enforcement funding from $270 mil-

\textsuperscript{38} See Bruce Western, PUNISHMENT AND INEQUALITY IN AMERICA 57–58 (2006).


\textsuperscript{40} Lee Bernstein, AMERICA IS THE PRISON 42 (2010).

\textsuperscript{41} President Richard Nixon, Special Message to the Congress on Control of Narcotics and Dangerous Drugs (July 14, 1969), https://www.presidency.ucsb.edu/ws/?pid=2126.


\textsuperscript{43} Id.

lion to $700 million while reducing funding for federal juvenile delinquency programs. Nixon’s presidency was the framework by which the “law and order” agenda began, running throughout the next forty years.

As the law and order mission unfolded over the next four decades, state legislators began to enact more punitive legislation. Beginning in the 1980s, more punitive measures were made into law, such as three-strikes laws, mandatory sentencing guidelines, harsher penalties for drug offenses, life sentences without parole, mandatory minimums, and truth-in-sentencing legislation. Legislative reforms focused on broadening the types of conduct that could be defined as criminal. States enacted laws that led to increased enforcement and harsher sentences. Sentencing laws became more punitive. In addition, the increasing powers of police, prosecutors, probation officers, and parole boards led them to use their discretion in a harsher and more punitive manner. Sending people to jail became the norm, not the exception. As a result, increasingly more individuals were prosecuted and faced a longer amount of time under the control of the system, whether incarcerated or on probation or parole, and back again.

Conservatives were not the only group responsible for the construction of the criminal justice system. Liberals, including in-

49. There have been arguments as to whether sentencing policy and policing practices, as well as the War on Drugs, are the causes for mass incarceration, or whether prosecutorial discretion, which became more punitive and aggressive, caused it. Most agree, however, that sentencing policy and policing practices instigated by the War on Drugs, are the main contributing factors to overcriminalization, severity in sentencing, and mass incarceration. See Douglas A. Berman, Is the “Don’t Blame the Drug War for Mass Incarceration” Counter-Narrative Problematically Incomplete?, SENT’G L. & POL’Y (Sept. 29, 2015, 1:24 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2015/09/is-the-dont-blame-the-drug-war-for-mass-incarceration-counter-narrative-problematically-incomplete.html. But see John F. Pfaff, The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options, 52 HARV. J. ON LEGIS. 173, 220 (2015).
terest groups such as the victims’ rights movement, anti-death penalty movement, women’s movement, and prisoners’ rights movement all contributed to the punitive nature of the system. 51 Victims’ rights advocates called for mandatory arrest and no-drop policies for certain offenses, such as domestic violence offenses, regardless of the victim’s needs or desires or the consequences of the arrest. 52 Many liberals, believing that indeterminate sentences only increased racial disparities and biases in sentencing, advocated for mandatory sentencing guidelines as a mechanism for fairer sentencing. 53 Other liberals completely embraced the Tough on Crime movement without regard to its harsh impacts. Democratic President Bill Clinton embraced the “law and order” stance of the conservative party from the beginning. 54 In 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994. 55 The bill focused on increased spending for law enforcement, gun control, and increased penalties for those convicted of certain crimes. 56 Although this bill only related to the federal criminal justice system, it exacerbated its punitiveness as more states enacted mandatory minimums, three-strike laws, and death penalty sentencing. 57

51. See Marie Gottschalk, The Prison and the Gallows: The Politics of Mass Incarceration in America 8 (2006) (explaining that the rise in the carceral state was a result of punitive penal policies formed by various social movements); Murakawa, The First Civil Right, supra note 50, at 16–17.


54. For example, during his 1992 presidential campaign, then-Governor Bill Clinton not only refused to sign a stay of execution of Ricky Ray Rector, who suffered from severe mental disabilities, but returned to Arkansas to witness his death by lethal injection. It is said that Mr. Rector was so severely mentally disabled that he did not eat his pecan pie from his last meal because he wanted to save it “for later.” Death for the Mentally Disabled, THE ECONOMIST (Mar. 8, 2014), http://www.economist.com/news/united-states/21598681-can-you-execute-man-whose-iq-71-death-mentally-disabled.


56. Id.

B. The Consequences of the Tough on Crime Agenda

It has been over fifty years since the Tough on Crime agenda began.58 After decades of increased enactment of criminal offenses, the expanding use of law enforcement, and the punitive nature of sentencing, various consequences have inevitably arisen.

1. The Fiscal/Economic Indictment

From 1940 until the mid-1970s, the rate of incarceration in the United States fluctuated between 96 to 131 individuals per 100,000 residents.59 However, after 1975, the rate of incarceration in the United States began to rise dramatically60 and, by the end of 2015 stood at approximately 666 per 100,000 United States residents.61 Except for the Seychelles, the United States far surpasses all other countries in the world in the proportion of its residents put behind bars.62 In 2007, the number reached approximately 2.3 million individuals and has since remained fairly constant.63 The number reaches approximately 6.9 million if you include those under the control of the criminal justice system through alternatives to detention—probation and parole.64

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58. See supra notes 38–45 and accompanying text.
60. STUNTZ, supra note 5, at 5.
61. World Prison Brief, INST. FOR CRIMINAL POLICY RESEARCH, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Apr. 5, 2017). Comparing it to other first world countries as well as those we criticize for its humanitarian violations, the numbers are striking—UK (England & Wales) (145), Scotland (135), Spain (129), as well as Iran (287), Iraq (123), Russia Federation (436), Cuba (510), Rwanda (434), Afghanistan (74), and South Africa (291).
62. Id. (finding that the United States incarcerated at a rate of 666 per 100,000 residents. The only country surpassing the United States is Seychelles at a rate of 799 per 100,000 residents).
The criminal justice system, as a result, has an exorbitant financial cost, much of which is almost impossible to fully calculate. Costs of incarceration have been much more readily analyzed. The estimated cost to maintain the federal, state, and local prisons and jails in the United States criminal justice system currently stands at approximately $80 billion per year.65 The United States Department of Education estimated state spending for corrections was approximately $71 billion from 2012–2013.66 The budget request for the Bureau of Prisons in 2015 was approximately $8.5 billion, $97 million above that received in the 2014 fiscal year.67 Spending in other aspects of the criminal justice system, such as law enforcement, courts, prosecutors, indigent criminal defense attorneys, and services such as probation, parole, and treatment services have not been analyzed as fully, but still amount to millions of dollars.68

2. The Moral Indictment

In addition to the overall cost of the criminal justice system, there are the detrimental consequences caused by decades of arresting, incarcerating, and controlling millions of individuals each year. Even if individuals were no longer subject to the actual control of the criminal justice system, the thousands of collateral consequences that developed over the years made the long lasting

65. Matt Vespa, Our Ruinously Expensive Criminal Justice System, TOWNHALL (July 17, 2015, 2:00 PM), http://townhall.com/tipsheet/mattvespa/2015/07/17/criminal-justicerevent-n2026628 (arguing that this high cost of the system has not proven to make our nation safer).


68. See ROBERT L. SPANGENBERG ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL DEFENSE FOR THE POOR, 1986 (1988), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=3688 (stating that in 1986, indigent defense was first calculated to just under $1 billion per year, up 60% from $625 million in 1982); see also HOLLY R. STEVENS ET AL., CTR. FOR JUSTICE, LAW & SOCY AT GEORGE MASON UNIV., STATE AND COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 7 (2010) (stating that the cost of indigent defense spending had risen to approximately $5.3 billion).
impact and devastation inevitable. These effects rippled beyond the individual, to their families, communities, and society as a whole. Because criminal convictions have a detrimental impact on health, job prospects, housing, the ability to vote, political power based on prison-based gerrymandering, deportation, and numerous other collateral consequences, families and communities of color bear the heaviest burdens of the system. As a result, the criminal justice system has played a significant role in the way in which American society has been structured over the last forty years.

a. Racial, Gender, and Economic Disparities

One of the most publicized and researched consequences of the “Tough on Crime” agenda has been the stark racial disparities that are present across the entire spectrum of the criminal justice

69. See Gabriel Chin, Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. GENDER, RACE & JUST. 253, 259 (2002) (describing collateral consequences as those that flow as a result of the criminal sentence but are imposed later, such as the inability to serve on juries, the inability to pass the severity of clearance necessary for many jobs, and the inability to enlist in the military).


71. See 5 C.F.R. § 731.202(b) (2015) (listing criminal or dishonest conduct as a specific factor in determining a person’s suitability for federal employment).

72. See 24 C.F.R. § 960.204 (2015) (listing exclusions from public housing benefits for those convicted of various crimes, such as drug offenses, violent crimes, crimes that have an adverse impact on health and safety, and sex offenses).


77. See generally, Alexander, supra note 7, at 2 (arguing that the criminal justice system has contributed to a new caste system that has maintained the subordination of African Americans in the United States); After the War on Crime: Race, Democracy, and a New Reconstruction 1 (Mary Louise Frampton et al. eds., 2008) (stating that the War on Crime has “fundamentally transformed us”); Stuntz, supra note 5 (discussing the multiple dimensions in which individuals are impacted by the criminal justice system, most significantly African Americans); Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity (2009) [hereinafter Wacquant, Punishing the Poor] (finding that the rise in the use of the criminal justice system to punish millions of individuals over the years was the result of the political desire to control the marginalized population in the U.S.—specifically, poor blacks in the “ghetto”).
system.78 Arrests, court processing, incarceration, and death penalty rates are all largely skewed by race.79 The future looks particularly grim, as juvenile detention rates are even more racially disparate than those of adults. Black juveniles enter into adult prison at a rate seven times higher than white youths and their rates of residential placement were over four times that of whites.80 Latino rates are also higher than their white counterparts.81 Approximately 60% of incarcerated males are either black or Latino.82

In addition, the majority of those impacted by the criminal justice system are poor.83 As the Sentencing Project has written, “[t]he United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and minorities.”84 Those who have not finished high school are much more likely to be under the control of the criminal justice system, which has also historically incarcerated more men than women.85 Therefore, the majority of those under the direct control

78. See REDUCING RACIAL DISPARITY, supra note 17, at 1; see also Hagler, supra note 17; Inghram, supra note 17.
79. Christopher Hartney & Linh Vuong, Nat’l Council on Crime and Delinquency, Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System 3 (2009), http://www.nccglobal.org/sites/default/files/publication_pdf/created-equal.pdf (finding that arrest rates for blacks were 2.5 times higher than whites, blacks were more likely to be sentenced to incarcerations and sentenced for a longer period of time than whites; blacks were admitted into prison at six times the rate of whites; and their rates on death row was almost five times the rate for whites).
80. Id.
81. Id. Rates that are available conclude that rates of admission to punish Latinos are two times higher than that of whites and rates of incarceration of Latinos are 1.5 times higher than the rate for whites. Id.
82. See E. Ann Carson, Bureau of Justice Statistics, U.S. Dep’t of Justice, Prisoners in 2014 1, 15 (2015), http://bjs.gov/content/pub/pd/p14.pdf (showing that in 2014, approximately 37% of incarcerated males were black, and 22% were Hispanic); see also David Hudson, President Obama: “Our Criminal Justice System Isn’t as Smart as It Should Be,” THE WHITE HOUSE BLOG (July 15, 2015 at 1:12 PM), http://www.obamawhitelhouse.archives.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be (stating that of those incarcerated, one in every thirty-five are black and one in every eighty-eight are Latino, as compared to one in every 214 that are white).
83. See Bruce Western & Becky Pettit, Incarceration & Social Inequality, 139 Daedalus 8 (2010) [hereinafter Western & Pettit, Incarceration]. See generally, Waquant, Punishing the Poor, supra note 77.
85. Glaze & Kaeble, supra note 64, at 6 (stating that in 2013, an estimated 5,642,700 males made up part of the correctional population, while 1,256,300 were female). Howev-
of the criminal justice system are poor men of color. Further, it is estimated that one in every three black males born in 2013 and one in every six Latinos in the same group will be incarcerated, as compared to one in every seventeen white males.  

b. Reinforcing Social Inequality

For the individual entering the criminal justice system, the impact is profound. Once a person is processed into the system, there is a high probability that the individual will be convicted, as demonstrated by the fact that over 90% of those prosecuted plead guilty. Additionally, the sentence is likely to be longer than it would have been in the past.

i. Individuals

As was discussed previously, criminal convictions have a detrimental impact on health, job prospects, housing, the ability to vote, community political power, and numerous other consequences that continue reincarceration after an individual is released from the custody of the criminal justice system.

Approximately 650,000 individuals per year finish their sentences and are released to reenter their communities. Unfortunately, approximately two-thirds of those individuals will return to prison within three years of release. Several reasons account for the inability to gain employment and housing that leads to reincarceration. Physical and mental health disorders and drug

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87. See Jed S. Rakoff, Why Innocent People Plead Guilty, N.Y. REV. BOOKS, (Nov. 20, 2014), www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ (discussing the dilemma that over 90% of those charged plead guilty, even when they are innocent).
89. See supra notes 70–76 and accompanying text.
91. See U.S. Dep't of Justice, Prisoners and Prisoner Re-Entry, supra note 90.
abuse are among the top factors. These struggles are ones that
the Tough on Crime movement not only refused to address, but
exacerbated.

Several reasons contribute to this abysmal rate of reintegration
into the community. First, over the years, the ability of an individ-
ual to put his past behind him and become a productive mem-
ber of the community and society at large has become more and
more difficult. One of the largest hurdles is employment. Over the
last several years, collateral consequences have prevented those
with certain convictions from obtaining employment. It is esti-
mated that thousands of collateral consequences exist that pre-
vent a person from entering certain occupations. Additionally,
even if there is not a restriction on a certain job due to past crim-
inal involvement, many employers still refuse to employ someone
with a criminal conviction. As a result, poor men who are incar-
cerated are much more likely to stay at the bottom of the earning
scale. Another obstacle to employment is the fact that many indi-
viduals who are incarcerated have little formal education and
few marketable skills. Although research shows that providing
job training and education during and directly after incarceration
helps break recidivism, it is very rarely offered.

Since the majority of those impacted by the criminal justice
system are poor, many of these individuals will return to poor
communities already suffering from a lack of employment oppor-
tunities, affordable and decent housing, social welfare safety nets,
student loans, food stamps, treatment and health programs, and
social support. These communities have higher rates of crime


93. See ABA CRIMINAL JUSTICE SECTION, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION (2013), http://www.abacollateralconsequences.org/map/ (showing an interactive map with each possible collateral consequence, by state).

94. BRUCE WESTERN & BECKY PETTIT, PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 16 (2010) [hereinafter WESTERN & PETTIT, COLLATERAL COSTS] (finding that 67% of incarcerated men who were at the bottom of the earning chart remained there as compared to only approximately 33% of men who were not incarcerated).


96. WESTERN & PETTIT, supra note 94, at 23.

and larger numbers of community members who are either absent or reentering the community, causing even higher levels of instability for the individual, as well as the community. Without these safety nets, it is almost impossible to fully recover and lead a productive life.

Another obstacle is that many do not have the power to create political change because they do not have the ability to vote. An estimate from 2000 revealed that approximately 4.7 million individuals could not vote because of their felony convictions. While jurisdictions differ in various ways, some states permanently prohibit convicted felons from voting. For these reasons, it is no wonder that many return to prison within three years of release.

ii. Children

The incarceration of millions of United States residents takes a toll not only on the individual incarcerated, but also on their families and the communities that they come from and return to once released. Families face a financial cost of lost wages as well as the cost of maintaining a relationship with the individual, while he or she is incarcerated. Children may suffer the most.

It is estimated that over half of those in prison are parents of children under eighteen. The number of children living in the United States with at least one parent who is incarcerated ex-


100. Id. at 74.


102. Tracey L. Meares, Mass Incarceration: Who Pays the Price of Criminal Offending?, 3 CRIMINOLOGY & PUB. POLY 295, 297 (2004) (discussing the effects mass incarceration has on families). In addition to wages lost by the incarcerated individual, families bear the cost of lawyers’ fees, high phone bills, and lost wages, transportation, childcare, and food expenses incurred visiting a family member in prison. Id.

103. WESTERN & PETTIT, supra note 94, at 18 (stating that over 1.2 million incarcerated individuals are parents of children under age eighteen).
ceeds 2.7 million. In addition, 70 to 100 million individuals have criminal records, while 33 to 36.5 million children are impacted by their parents’ criminal records. In total, there are nearly ten million children in the United States that have had at least one parent incarcerated during their life. Nearly two-thirds of these children suffer this loss due to a parent’s nonviolent offenses, with over 25% of these being for drug crimes.

Children of parents who are absent from the household suffer tremendously. Single parent households are more likely to live in poverty. There are several reasons for this. First, over half of the parents incarcerated were employed and the primary wage earner. Once they were incarcerated, their wages no longer contributed to the household, which according to one study lowered their household’s income by an average of 22%. Second, even after the parents were released from custody, their wages were 15% less than before their incarceration.

Incarceration seems to have a direct correlation with a child’s emotional and behavioral development. Research has also shown that children with at least one incarcerated parent are three times more likely to suffer from depression, two times more likely to suffer from anxiety and learning disabilities, and have higher rates of language problems, obesity, asthma, and seizure.

104. Id.
107. WESSELM & PETITT, supra note 94, at 20.
110. Id. (citing Rucker C. Johnson, Ever-Increasing Levels of Parental Incarceration and the Consequences for Children, in The Increasing Prison Population in the United States: What Has It Done for Us and What Has It Done to Us? 177–206 (Steven Raphael & Michael Stoll eds., 2009)).
111. Id.
disorders. Depending on the child’s age, they may suffer attachment difficulties, developmental regression, traumatic stress, and rejection of limits on behavior. They are more often expelled or suspended from school. They are also more likely to enter the juvenile justice system.

In addition, many children are forced to enter the child welfare system, including the foster care system. As research has shown, children who enter the foster care system are more likely to have severe educational deficiencies. They are more likely to internalize problems at higher levels and show significant behavioral problems both during and after leaving a placement. They are also more likely to have higher rates of unemployment. From this data, it is unsurprising that they are more likely to be homeless, rely on public assistance, and become pregnant, and may be more likely to be incarcerated as an adult.

Because family income and educational attainment are the two strongest factors in determining a child’s upward mobility, it is not surprising that the majority of children with parents who are incarcerated remain in poverty and are uneducated, mentally and physically ill, and more likely to enter the criminal justice system.
iii. Communities

As stated above, the majority of those incarcerated are poor and, therefore, come from poor communities. These communities have suffered tremendously as a result of the Tough on Crime stance of the criminal justice system. They bear the greatest burden as they are the communities that have the highest crime rates, are missing large numbers of their community members, and receive large numbers of those released from prison who are unemployed, poorly educated, and have very little hope of upward mobility. All of these burdens are directly correlated to the instability created by contact with the criminal justice system.

In addition, the loss of nearly six million votes in poor jurisdictions can be devastating to the political capital of already politically voiceless communities. This is exacerbated by the fact that the absence of community members causes these communities to lose their census count because those who are incarcerated are often counted in the census of the jurisdiction where they are imprisoned.

II. CRIMMIGRATION AND THE CRIMINAL JUSTICE SYSTEM

A. What is Crimmigration?

Over the last several decades, there has been an increasing concern over the relationship between migrants and crime. While criminal conduct has been used to exclude and remove migrants from the United States for over a century, this relationship had been barely noticed. Over the last thirty years, however, the relationship between migrants and crime has taken center stage in politics, society, and news media. Increasing assumptions re-

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123. See supra notes 108–11 and accompanying text.
124. See WESTERN & PETTIT, Incarceration, supra note 83, at 14 (describing the cyclical and intergenerational harms caused to children, families, and communities by mass numbers of community members’ contact with the criminal justice system).
126. See Prison-Based Gerrymandering, supra note 74.
garding migrants’ danger to society, threat to national security, and overall propensity to engage in criminal behavior, have caused laws to be enacted and policies to be established that aim to target “those [noncitizens] who pose the greatest threat to public safety or national security.”

Currently, those noncitizens are defined as “criminal aliens.” “Criminal aliens” include not only those who have engaged in certain criminal conduct, but also noncitizens who have entered the country without inspection, referred to as “immigration violators” and even “illegal immigrants,” many of whom are now prosecuted in criminal court. The enactment of laws, formation of policies and procedures to assist in their expulsion, and prioritization of removal has contributed to the construction of the system we now know as “crimmigration.”

The increasing focus on “criminal aliens” has a similar history to the growth of the criminal justice system. During the forty years that the nation was focused on the War on Drugs and the War on Crime, the nation’s interest was not only directed at United States citizens, but at noncitizens as well. Noncitizens were also viewed with growing skepticism. No longer were they seen as those who arrived for a better life, to work hard and con-


128. Carlos Puig, Crime and Banishment, N.Y. TIMES (June 26, 2013, 10:13 AM), http://latitude.blogs.nytimes.com/2013/06/26/crime-and-banishment/?_r=0; see RAFFAEL & STOLL, supra note 34, at 62, 64, 66 (discussing findings that between 2000 and 2009, immigration offenses had increased “from 6 per 100,000 to 28”; that between 1985 and 2000, those convicted of immigration violations and sent to prison increased by 26%; and that sentencing for immigration violations increased by 49%).


tribute to society, but instead they were increasingly viewed as those who came to the United States to commit crimes and endanger the safety of the nation.\(^{133}\) Tough on Drugs, as an expanding policy in the War on Crime, was enacted to target both United States citizens and noncitizens.\(^{134}\) Criminals and criminal aliens were created together, either in the same bill or side by side.\(^{135}\)

Much like mass incarceration, crimmigration took decades to develop into its current state. The increasing relationship between the criminal justice system and the immigration system was first noticed thirty years ago.\(^{136}\) Immigration scholars and practitioners were the first to see the way in which the immigration system was taking on aspects that had previously been confined within the criminal justice system, primarily by increasing punitive treatment.\(^{137}\) However, shifting punitiveness towards noncitizens in immigration court seemed, for many, a direct violation of the way that immigration law was supposed to function. Immigration law and the process of admission and removal was an administrative process based on regulating the movement of noncitizens into and out of our nation, and not on punishment.

However, since the 1980s, immigration laws and status have increasingly subjected noncitizens to harsher penalties through the criminal court system that appeared more like punishments carved from the criminal law justifications of deterrence, retribution, and incapacitation.\(^{138}\) Increasing numbers of laws were


\(^{134}\) See César Cuauhtémoc García Hernández, Immigration Detention as Punishment, 61 UCLA L. Rev. 1346, 1360-68 (2014) (discussing the history of Congress' rising concern over the link between noncitizens and drugs).


\(^{137}\) See, e.g., Medina, supra note 135, at 671, 674; Morris, supra note 135, at 1317.

\(^{138}\) See Stumpf, supra note 21, at 369; Daniel Kanstroom, Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases, 113 Harv. L.
enacted that made noncitizens subject to removal, many of them based on criminal conduct. In addition, because these laws were civil in nature, they were retroactive, increasing the number of noncitizens who, once safe from removal, were now subject to it. The enactment of these laws have led to prolonged or mandatory detention, criminal convictions for immigration violations, decreasing relief mechanisms from deportation, mandatory deportation regardless of ties and history to the United States, increasing numbers of deportations, and permanent banishment as a result of minor infractions. The shifting punitiveness of the immigration system caused scholars and practitioners to describe the new phenomenon as the “criminalization of immigration law.”

As immigration scholars and practitioners were focusing on the ways in which immigrants were being cast as criminals within the immigration system and the immigration system’s increasing similarity to the criminal justice system, other scholars were beginning to see a symbiotic relationship between immigration and criminal law, shifting the way in which the criminal justice system was functioning. Teresa Miller, for example, reflected not only on the ways in which immigration law has been injected with criminal law and procedural norms—causing the immigration system to more closely resemble the criminal system through its harsher and more punitive treatment of noncitizens—but also on ways in which the criminal justice system had been injected with immigration law norms, turning regulatory civil law into criminal conduct by criminally prosecuting noncitizens in federal court for solely immigration violations, increasing the penalties on immigration-related crimes, and increasing the use of criminal

140. But see INS v. St. Cyr, 533 U.S. 289, 314–26 (2001) (discussing the abolishment of relief in immigration court for those convicted of crimes and deciding whether a noncitizen still could seek relief, if at the time of the conviction they were not subject to deportation).
142. See Medina, supra note 136, at 669, 674; Morris, supra note 136, at 1317.
144. Kanstroom, supra note 138, at 1891.
law enforcement to control and monitor noncitizens for immigration law violations.\textsuperscript{145}

Commenting on the prior scholarship concerning this new phenomenon and the disconnect she noticed between the immigration and criminal scholars’ perspectives on it, Miller observed that immigration scholars see this intersection as the importation of criminal categories into immigration law, while criminal scholars view it as the imposition of the administrative and regulatory characteristics of immigration control into the criminal justice system—the “immigrationization of criminal law.”\textsuperscript{146} Miller, recognizing the way in which this new phenomenon was being referred, remarked that its description as only the “criminalization of immigration law” failed to reflect the “dynamic process by which both systems converge at points to create a new system of social control that draws from both immigration and criminal justice, but it is purely neither.”\textsuperscript{147}

Three years later, this new system was formally given a name: crimmigration.\textsuperscript{148} Today, crimmigration has evolved to encompass much more than originally thought twenty years ago. The use of criminal convictions as a mechanism to expel and exclude immigrants has done four things. First, it has created an institution with its own web of laws, rules, policies, and customs that controls and stratifies groups.\textsuperscript{149} Second, the increased use of the immigration system to exclude and expel a growing number of individuals has restructured the traditional way in which the immigration system once worked.\textsuperscript{150} Third, increasing use of the criminal justice system to identify and define migrants as criminal aliens has shifted the way all levels of the criminal justice system function.\textsuperscript{151} Fourth, crimmigration has brought about a cultural transformation in the United States, restructuring social categories, diminishing economic and political power, and perpet-

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\textsuperscript{145} Teresa A. Miller, Citizenship & Severity: Recent Immigration Reforms and the New Penology, 17 GEO. IMMIGR. L.J. 611, 639–40 (2003).
\textsuperscript{146} Id. at 617–18.
\textsuperscript{147} Id. at 618.
\textsuperscript{148} See Stumpf, supra note 21, at 376.
\textsuperscript{149} See generally Michael Omi & Howard Winant, Racial Formation in the United States (2d ed. 1994); Vázquez, Constructing Crimmigration, supra note 131, at 644.
\textsuperscript{150} See Eagly, Prosecuting Immigration, supra note 130, at 1337.
\textsuperscript{151} See Vázquez, Constructing Crimmigration, supra note 131, at 644–47.
uating racial disparities.\textsuperscript{152} Unlike the criminal justice system, which has historically focused on poor United States citizens of color, specifically poor black males, crimmigration controls the largest minority population in the United States by targeting poor Latino males.\textsuperscript{153}

B. How Does Crimmigration Impact the Criminal Justice System?

As mentioned above, crimmigration has evolved into an institution that uses local, state, and federal criminal justice systems to assist in its enforcement against criminal aliens. Most obvious has been the use of the system to assist in the detection, prosecution, and transfer of criminal aliens, specifically targeted as “immigration violators,” into the immigration system for removal.\textsuperscript{154} Arguably more nuanced and insidious is the way the criminal justice system has been transformed to create criminal aliens and, by doing so, has weakened constitutional protections, not only for noncitizens in the criminal justice system but for United States citizens as well.\textsuperscript{155}

\begin{footnotesize}
\begin{enumerate}
\item[152.] See id. at 617–18, 622–24, 643 (describing how policy and public opinion regarding immigration categorized immigrants as “undesirable” and created a negative effect on their place in society); OMI & WINANT, supra note 149, at 12–13 (theorizing the fundamental impact of race as “racial formation” that has shaped and transformed all aspects of society in the United States).
\item[153.] See REDUCING RACIAL DISPARITY, supra note 17, at 5–9. See also U.S. CENSUS BUREAU, COMPARATIVE DEMOGRAPHIC ESTIMATES: 2015 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (2015), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_CP05&prodType=table (showing that Latinos are approximately 17% of the U.S. population as compared to blacks, who represent approximately 13% of the U.S. population); Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program, 11 LATINO STUD. 271, 279 (2013); Vázquez, Constructing Crimmigration, supra note 131, at 608.
\item[154.] Vázquez, Constructing Crimmigration, supra note 131, at 648; see also TRAC IMMIGRATION, IMMIGRATION PROSECUTIONS AT RECORD LEVELS IN FY 2009 (2009), http://trac.syr.edu/immigration/reports/218 (showing the increasing rate of prosecutions for immigration-related offenses).
\item[155.] See JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 1, 12, 16 (Jan. 2010), https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf (discussing the use of en masse pleading in federal criminal court prosecutions of immigration violations); Devon W. Carbado & Cheryl I. Harris, Undocumented Criminal Procedure, 58 UCLA L. REV. 1543, 1550 (2011) (discussing the role that immigration status has played in shaping issues concerning race, racial profiling, and the Fourth Amendment in the criminal justice system); Chacón, supra note 130, at 140–47 (theorizing that criminal prosecutions of immigration offenses are weakening criminal constitutional protections).
\end{enumerate}
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As discussed below, regardless of whether immigration enforcement or state and local law enforcement are the first to detect a noncitizen, noncitizens are currently more likely to be prosecuted in the criminal court system before entering into the immigration removal system. Either brought into the federal system by United States Marshalls for federal prosecution for immigration violations, or detected and prosecuted by the federal, state, or local criminal system for nonimmigration crimes, noncitizenship has become a significant factor at all stages of the criminal justice system.

1. Expanding Priorities in Criminal Policing

While the policing and enforcement of immigration laws had historically been left to immigration officials, local, state, and federal law enforcement officers have increasingly become the primary method by which noncitizens are transferred into the custody of Immigration and Customs Enforcement (“ICE”).

156 The federal government, as well as actors within various criminal justice systems across the country, have elected to become active participants in ensuring that noncitizens are brought into the criminal justice system, prosecuted, and then moved into the immigration system for removal as criminal aliens.

While the criminal prosecution of immigration violations was first introduced as a criminal offense in 1929, it was rarely used. More often, immigration violators were transferred directly into the immigration system as a civil offense only, and re-

156. U.S. IMMIGRATION AND CUSTOMS ENF’T, U.S. DEP’T HOMELAND SECURITY, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2015 2–4 (2015), https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf (showing that in each year since 2010, 50% or more of ICE removals have been for those labeled criminal aliens, and in fiscal year 2015, 59% of those removed by ICE were convicted of crimes and 91% of those removed from the interior were convicted of crimes).

157. See Eagly, Criminal Justice, supra note 22, at 1130; see also notes 129–34 and accompanying text.

moved.\textsuperscript{159} Over the last ten years, however, the federal prosecution of noncitizens has become the norm, not the exception.\textsuperscript{160}

Operation Streamline was started in 2005 and targeted the United States-Mexico border.\textsuperscript{161} Prior to Operation Streamline, federal criminal prosecutions for immigration violations were reserved for those individuals who had criminal records or were repeat immigration violators.\textsuperscript{162} All others without a criminal history or who were first-time border crossers were either put into civil immigration removal proceedings or voluntarily returned.\textsuperscript{163} Unlike other criminal prosecutions, Operation Streamline removed prosecutorial discretion by mandating a zero-tolerance policy.\textsuperscript{164} Regardless of a noncitizen’s criminal history, ties to the community, family living in the United States, etc., Operation Streamline required that all individuals found crossing the United States-Mexico border be criminally prosecuted with either a misdemeanor or a felony for the immigration violation in federal court, and be subject to incarceration before removal.\textsuperscript{165} Although described as an immigration enforcement tool, the federal criminal justice system was the means by which noncitizens became criminal aliens and were later transferred into immigration court.

The federal laws enacted and policies put into place over the years not only created the criminal alien, but developed mechanisms for federal, state, and local courts and law enforcement to locate, arrest, and transfer noncitizens into ICE custody.\textsuperscript{166} The Department of Homeland Security (“DHS”), with the cooperation

\textsuperscript{159} See Keller, \textit{supra} note 158, at 80–81 (highlighting that in the late 1940s to the early 1950s, years after immigration violations were criminalized, most illegal entry and re-entry cases were funneled through the civil system).

\textsuperscript{160} See U.S. DEP’T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT OVERVIEW, (2015), http://www.dhs.gov/topic/immigration-enforcement-overview (stating that because ICE must prioritize who to pursue based on the inability to detain the more than ten million individuals unlawfully in the United States, it prioritizes those individuals who have: violated criminal laws, crossed the border recently, violated immigration law repeatedly, or have missed their immigration court hearing).

\textsuperscript{161} Lydgate, \textit{supra} note 155, at 1.

\textsuperscript{162} Id.

\textsuperscript{163} Id.; see also IMMIGRATION POL’Y CTR., NEW DATA ON FEDERAL COURT PROSECUTIONS REVEAL NON-VIOLENT IMMIGRATION PROSECUTIONS UP, ORGANIZED CRIME, DRUGS AND WEAPONS CHARGES DOWN 3 (2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/TRAC_Fact_Sheet_020410_0.pdf [hereinafter NEW DATA ON FEDERAL COURT PROSECUTIONS].

\textsuperscript{164} Lydgate, \textit{supra} note 155, at 1, 3.

\textsuperscript{165} Id.

\textsuperscript{166} See 8 U.S.C. § 1357(g) (2012) (authorizing state and local law enforcement officers to perform the functions of federal immigration officers).
of law enforcement, appears on a regular basis in local and state jails in an attempt to identify potential noncitizens that may be subject to removal. Programs such as the Agreements of Cooperation in Communities to Enhance Safety and Security ("ACCESS"), 287(g), the Criminal Alien Program ("CAP"), National Fugitive Operations Program ("NFOP"), Secure Communities, and the Priority Enforcement Program ("PEP") were all put into place so that law enforcement and corrections could assist DHS in locating noncitizens suspected of being removable under immigration law.

Operation Streamline has dramatically shifted the focus of federal law enforcement. While the overall number of arrests and bookings through the United States Marshalls has been declining since 2010, the number of immigration offenses has been climbing. In 2012, about 50% of individuals arrested and booked by the United States Marshall Service were charged with immigration offenses. This bears a striking contrast to the second most common offense—drugs—which only made up 15% of the arrests in 2012, down by over 4000 individuals since 2011.

DHS's Priority Enforcement Program ("PEP") was established in 2014 to take the place of Secure Communities and to lower the number of 287(g) agreements. Secure Communities and PEP use state and local law enforcement arrest and booking procedures. Everyone who is arrested or booked must have their fingerprints sent to the FBI and ICE to check against the immigra-


169. LYDGATE, supra note 155, at 1.

170. MOTIVANS, supra note 25, at 3.

171. Id.

172. Id.


174. Id.
tion database to determine whether they are one of its priorities. Under PEP, ICE will await the outcome of the noncitizen's case. If the noncitizen is convicted of a crime that falls under its enforcement priority, ICE will seek to have the criminal alien transferred into its custody.

State and local criminal justice systems have not limited their role to the neutral transfer of noncitizens convicted of crimes at the request of ICE officials. 287(g) agreements give state and local law enforcement an active role in immigration enforcement, as they are formally authorized to act as immigration officers. In addition, states across the country have enacted their own laws to allow their law enforcement officers to inquire about immigration status, regardless of whether having formally entered into a 287(g) agreement with DHS. As such, many cities have refocused law enforcement efforts on migration control, diverting time and resources away from the investigation of violent crimes and other duties deemed important for public safety, such as responding to 911 calls.

2. Shifting Priorities in Criminal Prosecution

Increasing criminal prosecutions of immigration violations over the years has also structurally shifted federal caseloads. In 1993,
only 5.4% of federal prosecutions were for immigration violations. From 2002 to 2008, criminal prosecutions for unlawful entry increased by more than 330% in federal courts along the U.S.-Mexico border. Further, from 2009 to 2015, immigration violations accounted for a large percent of all federal prosecutions. Over the last “24 years, no other category has ever played such a dominant role in overall federal prosecutions.” Even during the height of the War on Drugs, drug prosecutions accounted for only 37% of federal prosecutions.

As immigration violations remain high, drug prosecutions continue to decline with the government citing the reason as a result of focusing on the most “serious defendants.” Drug prosecutions have not been the only declining category of prosecutions—prosecutions for “white collar” crimes, violent crimes, organized crime, weapons, and public corruption have all decreased in federal court while immigration prosecutions continue to be prosecuted by both federal judges and U.S. magistrates. As a result, the percentage of noncitizens prosecuted in federal court rose from 22% in 1992 to 41.5% in 2015.

184. Id.
186. New Data on Federal Court Prosecutions, supra note 163, at 3 (citing that prosecution of “white collar” crimes decreased by 18%, organized crime by 20%, public corruption by 14%, drugs by 20%, and weapons by 19%).
Increasing prosecutions of noncitizens has not been limited to federal courts. Through the years, many localities and states enacted their own immigration-related offenses in an attempt to regulate migration notwithstanding the fact that immigration law had historically been described as a federal regulation.188 One such jurisdiction, Arizona, used both its identity theft law and its smuggling law to prosecute noncitizens.189 Although the smuggling law did “not, on its face, criminalize smuggling one’s self,” Arizona interpreted “the law to criminalize all of those apprehended rather than just the smugglers.”190

The justification is simple: by criminally punishing migrants on felony charges, migrants are classified as criminal aliens.191 This identity will ensure that they will most likely be ineligible for relief,192 be prevented from legally returning to the United States,193 and subject to enhanced federal criminal penalties if they ever return to the United States without authorization.194 While some jurisdictions have not been so heavy-handed in creating criminal aliens, many take immigration status into account when determining how to proceed in a case and what punishment to offer.195

188. See, e.g., S. 1070–49, 2d Sess. (Ariz. 2010).


190. Eagly, Local Immigration Prosecution, supra note 33, at 1770.

191. See Eagly, Criminal Justice, supra note 22, at 1139–43 (discussing the increased use of the term “criminal alien” in law enforcement).

192. For an in-depth explanation on the impact of criminal convictions on the availability of relief from removal, see Dan Kesselbrenner & Lory D. Rosenberg, Immigration Law and Crimes (2016).


194. See 8 U.S.C. § 1326(b)(1)–(2) (2012) (indicating that those with felony convictions who reenter the United States without authorization are subject to up to ten years in prison, twenty years if found to have been convicted of an aggravated felony).

195. Eagly, Criminal Justice, supra note 22, at 1130–31 (discussing the realities that “immigration enforcement is now deeply intertwined with the local enforcement of crimi-
The end result can be the same. When immigration status is used in determining the plea offer and the procedural rights afforded in criminal proceedings, the noncitizen’s fate in immigration court is also determined. 196

3. Increasing Rates of Detention & Incarceration of Nonviolent Offenders

a. Denying Bail or the Release of Noncitizens in Criminal Court Proceedings

Those who are alleged to have committed a violent crime are less likely to be detained pending the outcome of the case than migrants alleged to have violated an immigration offense, despite the immigration offense’s categorization as a nonviolent regulatory offense. 197

Many courts have denied noncitizens the right to bail based on perceptions of their risk of flight, regardless of their community ties, such as family, employment, housing, and number of years in the community. 198 In fact, an increasing number of jurisdictions have enacted laws that specifically require courts to look at immigration status when determining whether or not to allow the noncitizen to be released. 199 Some have even gone so far as to presumptively deny bail until the criminal case is complete. 200 In ad-

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196. See Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (finding that noncitizens are entitled to be warned of the immigration consequences of a criminal conviction under the Sixth Amendment). But see Yolanda Vázquez, Realizing Padilla’s Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction, 39 FORDHAM URB. L.J. 169, 171 (2011) [hereinafter Vázquez, Realizing Padilla’s Promise] (critiquing the ambiguity of the Padilla decision and its inability to serve its goal); see Eagly, Prosecuting Immigration, supra note 130, at 1289 (finding that the prosecution of immigrants in the criminal justice system causes prosecutors to act as “immigration screeners” and circumvents rights traditionally given to criminal defendants).

197. See MOTIVANS, supra note 25, at 16.

198. See id. (stating that approximately 88% of criminal defendants charged with immigration crimes were detained); Gabriel J. Chin, Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process, 58 UCLA L. REV. 1417, 1423–25 (2011) [hereinafter Chin, Illegal Entry as Crime] (discussing denial of bail based on immigration status).


200. See, e.g., VA. CODE ANN. § 19.2-120.1(A) (2015) (requiring denial of bail if noncitizen is found to be in the United States without authorization and charged with one of the
dition to legislative enactments, federal and state courts across the country have held that immigration status should be a factor in deciding whether to grant bond to a criminal defendant.\textsuperscript{201}

Even if local, state, and federal courts allowed the noncitizen to receive bail, federal programs can also curtail release. For example, immigration holds and detainers place a hold on the noncitizen, which may keep him or her in custody until the outcome of the case.\textsuperscript{202}

b. Severity in Sentencing: Increasing Incarceration Rates for Noncitizens

While a sentencing court may not take into account race, ethnicity, or nationality, in some jurisdictions the judge may take into account the immigration status of the defendant.\textsuperscript{203} Even if immigration status is not officially allowed in contemplation of sentencing, research indicates that federal and state judges are more severe to noncitizens than their United States citizen counterparts.\textsuperscript{204} Punishment and immigration status were analyzed in federal court in a recent study.\textsuperscript{205} The study found that noncitizens were “more likely to be incarcerated and to receive longer prison sentences compared to U.S. citizens.”\textsuperscript{206} In addition, the study found that, while noncitizens who had entered the country without permission have received harsher sentences than those


\textsuperscript{202} 8 C.F.R. § 287.7 (2016); see also MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, \textit{INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS} 1 (2012) (discussing the four programs that the Department of Homeland Security uses to identify, detain, and remove criminal aliens).

\textsuperscript{203} See, e.g., United States v. Flores-Olugue, 717 F.3d 526, 535 (7th Cir. 2013); United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986).


\textsuperscript{205} Light et al., \textit{Citizenship and Punishment}, supra note 204, at 827–28.

\textsuperscript{206} Id. at 839.
who were here with legal status, all noncitizens were more likely to be incarcerated than their United States citizen counterparts.\textsuperscript{207} Finally, the study found that sentencing was significantly harsher in jurisdictions with increasing noncitizen populations.\textsuperscript{208} Data suggests harsher sentencing of noncitizens has only been exacerbated over time, more than doubling during the 1992–2008 time frame of the study.\textsuperscript{209}

III. The Shift to the Smart on Crime Agenda

A. Motivations for the Transition from Tough on Crime to Smart on Crime

Finally, after decades of the Tough on Crime agenda, both Democrats and Republicans are finally asking questions regarding the efficiency, effectiveness, and fairness of the criminal justice system, which for decades seemed irrelevant despite its tremendous fiscal and moral cost and lack of overall benefit. Over the last decade, these two parties, as well as other advocates, have reassessed the costs and benefits of the criminal justice system.\textsuperscript{210} State governments and the federal government are slowly moving away from the Tough on Crime stance and toward the Smart on Crime motto as a mechanism to advocate for reforms to their criminal justice systems without political backlash.\textsuperscript{211}

While many reasons have been given as to why, after decades of refusal to admit their failures, both parties began to retreat from their “law and order” stance, it seems that the fiscal indictment appears to have been largely responsible for the new surge in criminal justice reform efforts. State budgets in crisis and cities on the verge of bankruptcy made politicians and their constituents take a new look at their spending in efforts to cut their deficits.\textsuperscript{212} Regardless of the reason for criminal justice reform

\textsuperscript{207} Id.
\textsuperscript{208} Id. at 839–40.
\textsuperscript{209} Id. at 840.
\textsuperscript{210} See Fairfax, From “Overcriminalization” to “Smart on Crime,” supra note 8, at 610–11.
\textsuperscript{211} See id.
\textsuperscript{212} For example, Detroit, Michigan, and Stockton, California, filed for federal bankruptcy in 2013, and others may follow. See Gary Cameron, Fed Official Hints Many Cities to Follow Detroit Bankruptcy Road, RT (Apr. 14, 2015), http://www.rt.com/usa/249693-detroit-municipal-bankruptcy-filings/.
efforts, federal, state, and local municipalities and coalitions have created mechanisms for reducing the total number of individuals impacted, as well as looked at the system’s disparate impact on individuals and communities of color.

B. Goals of the Smart on Crime Agenda

The Smart on Crime agenda has been largely based on ways to reduce costs. Campaigns have touted the line of initiating policy that keeps crime rates low and maintains public safety, while still reducing costs. Since the cost of corrections programs has by far been the highest and most widely publicized category in spending, downsizing prisons has become a major goal in the Smart on Crime movement. At its most basic, a smaller prison population is much less expensive. At its most complex, a smaller prison population helps to alleviate the moral consequences associated with the criminal justice system. As such, the Smart on Crime movement has focused on three words: efficiency, effectiveness, and fairness.

1. Creating an Efficient, Effective, and Fair System

Efficiency has been defined as “whether a policy delivers a desired outcome at the lowest possible cost to society[,]” The questions reformers ask when thinking about whether a policy is effective are: Does the proposed policy achieve the desired outcome;


214. See MICHAEL JACOBSON, DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 85, 89 (2005).


216. See PERCIVAL, supra note 8, at 19–20.

217. Id. at 18.
and does this policy maintain public safety? 218 “Fairness” in the criminal justice reform movement takes on many meanings. First, “fairness” signifies that the system punishes only those for whom punishment is justified, meaning that the penalty imposed should be proportionate to the crime committed. Second, “fairness” can be construed as to whether similarly situated individuals should receive similar punishments for the crime for which they have been convicted. Third, “fairness” means that the criminal justice system itself is “fair.”

For a system to be “fair,” it is important that racial and socio-economic disparities are removed. It is also important that communities and families are not punished for something in which they had no part. Furthermore, individuals themselves should receive a sentence that is “fair” in relation to the crime committed. This includes creating mechanisms that ensure that once the criminal punishment is finished, the individual can become a productive member of society.

Questions to be asked when enacting new criminal justice policies that are in line with the Smart on Crime agenda include the following: Has America’s heavy reliance on the penal system actually improved public safety? Has the system achieved its desired outcome? What is the outcome of a cost-benefit analysis? Is there a way of crafting a policy that has the desired “outcomes” but at a lower “cost” to society? 219 Finally, when discussing the “cost” of the criminal justice system, there is the question of whether the system is “fair.” Questions of fairness include: Is there a moral justification for the way we treat human beings in the system? 220 Do we have a social responsibility to give offenders a second chance? 221

2. The Focus of Criminal Justice Reform Efforts

The goal to create a criminal justice system that is efficient, effective, and fair is a big task, considering the system’s current state. This section discusses a number of goals that have been introduced to alleviate the consequences of the system. While this is

218. Id.
219. See id.
220. See id. at 19–20.
221. See id. at 9.
not an exhaustive list, the consequences discussed below represent those that create the biggest savings to society, by reducing costs, reducing the moral consequences, and giving more legitimacy to the criminal justice system.

It is no secret that criminal justice reform efforts are aimed to cut the cost of the system. Balance, however, must be achieved in order to keep crime rates steady. As such, much effort in criminal justice reform has gone to “fixes” that have little probability of failure.

One method of ensuring success is to focus on nonviolent offenders, since, as reported by the DOJ in 2004, only about one in five nonviolent releases was arrested for a violent crime within three years of discharge. In addition, because of the severity of sentencing for drug-related crimes, many of those incarcerated are older than fifty years old. There are two arguments for the regular release of these older prisoners. First, release will reduce costs to the system because medical issues among the older population are more common and more expensive. Second, older prisoners are less likely to recidivate or return to prison for new crimes than their younger counterparts.

Another method to cut costs, is to focus on the back-end policies regarding arrest and incarceration. Back-end policies are beneficial because the offender has already served his or her time or is currently under the control of the criminal justice system. Re-entry efforts, touted as Second Chance Initiatives, attempt to reduce the number of individuals that will return to prison by providing them with the tools to combat their issues, such as

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mental illness, drug and alcohol abuse, and lack of employable skills. In addition, nonviolent offenders are being diverted from incarceration to alternative courts that help them combat their issues and avoid the ramifications of a conviction or the further inequality of incarceration.

A third area of reform includes combating the racial disparities that exist in the criminal justice system. Racial disparities in the system have been a source of disillusionment, because many believe that the system is neither fair nor effective. Because this dissatisfaction is linked to higher crime rates, social unrest, and political disengagement, combating racial disparities is an important component of criminal justice reform. Efforts to ensure the system is “fair” and “effective” include targeting racial profiling and disparities in sentencing. With that goal in mind, in 2010, President Obama signed the Fair Sentencing Act. The Act was aimed at reducing the racial disparities that have been occurring since Congress adopted the thresholds in the Anti-Drug Abuse Act of 1986. In addition, U.S. Attorney General Eric Holder announced new guidelines in an effort to combat racial profiling.

A front-end reform effort for decreasing the cost of the criminal justice system is reducing the courts’ caseloads. Reformers have long recognized the overuse of the criminal justice system as a


mechanism to “solve” the nation’s and its members’ conflicts.\(^{233}\) In order to reduce the use of the criminal justice system, reformers should aim to reduce the number of nonviolent criminal offenses, limit the number of criminal offenses that are subject to jail time, and divert cases from the trial courts into problem-solving courts. Each of these alternatives offers benefits to the defendant, the criminal justice system, and society.

The overall goal of reducing cases through the above means has several justifications that fit within the Smart on Crime movement. First, reducing the number of cases that are put into the system will likely decrease the overall cost—through court savings as well as lower incarceration costs—since fewer individuals will be incarcerated.\(^{234}\) Second, each alternative may offer the defendant a way to avoid a conviction, which could have adverse consequences for him in addition to incarceration.\(^{235}\) Avoiding a conviction can also offer the defendant the ability to access treatment, which would help him overcome his “failings” and assist him in successfully reintegrating into society.\(^{236}\) Third, the successful reintegration of defendants into society will help reduce crime, increase the ability of families to gain economic stability by keeping them together, allow the defendant to become or remain gainfully employed by eliminating collateral consequences of a conviction, and eliminate the addiction or other “failing” that may have prevented the defendant from working.\(^{237}\) In cases of avoiding a felony, it may also prevent the disenfranchisement of the defendant, which allows the individual to maintain political capital and remain an active member of his community and larger society.\(^{238}\) In addition, avoiding incarceration helps the defendant’s community maintain its political power.\(^{239}\) These alternatives save taxpayer dollars by reducing the incarceration rate as

\(^{234}\) See Kat Aaron, *Courts Explore New Ways to Deal with Heavy Caseloads, Overflowing Jails*, INVESTIGATIVE REPORTING WORKSHOP (July 23, 2013), http://americawhatwentwrong.org/story/changing-courts/ (discussing the effects of too many cases).
\(^{237}\) See id. at 590, 595–97; see also infra Part IV.
\(^{238}\) See Pinard & Thompson, *supra* note 236, at 598–99.
\(^{239}\) See id. at 599.
well as the other costs associated with family separation, violence, drug addiction, etc. Alternatives to incarceration also help lessen the disproportionate impact that collateral consequences have on poor people of color.\textsuperscript{240}

IV. THE CONSEQUENCES OF TARGETING CRIMINAL ALIENS PERPETUATES ALREADY RECOGNIZED PROBLEMS WITHIN THE CRIMINAL JUSTICE SYSTEM

President Obama and others widely recognized the way in which the criminal justice system fails. It has high fiscal and moral costs. Overcriminalization, severities in sentencing, hyperincarceration, and racial disparities have not only failed to make the nation more secure, but have also caused natural instability and insecurity. Hyperincarceration and racial disparities lead to national instability and insecurity because contact with the criminal justice system makes it almost impossible for individuals and their families to overcome unemployment, poverty, and continued criminal involvement. Yet, as discussed in this part, little recognition has been given to the way in which the targeting of criminal aliens in the criminal justice system causes the same fiscal cost, lack of opportunity, and “hopelessness and despair.”\textsuperscript{241}

A. The Fiscal Cost

As with the cost of the criminal justice system, it is hard to put a fixed number on the increase in spending that is caused by crimmigration. What we know is that in 2012, each prisoner cost an average of $31,286 per year.\textsuperscript{242} Over the last twenty-six years, the United States has spent almost $187 billion for the immigra-

\textsuperscript{240} Michael Pinard, \textit{Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity}, 85 N.Y.U. L. REV. 457, 463–64 (2010) (asserting collateral consequences have a disproportionate impact on people of color because of “patterns of crime and law enforcement” and not because of “racially targeted policies”).

\textsuperscript{241} See President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015) (transcript available at http://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference) (“Any system that allows us to turn a blind eye to hopelessness and despair, that’s not a justice system, it is an injustice system. But that is an extension and a reflection of some broader decisions that we’re making as a society. And that has to change.”).

tion enforcement system. In 2012, the federal criminal enforcement of immigration law alone cost taxpayers approximately $18 billion—more than all other federal criminal law enforcement agencies combined. For CAP, 287(g), NFOP, and Secure Communities, Congress appropriated $608 million to ICE in 2012. For Operation Streamline, the cost for 2010 was close to $232 million, and included a request for new federal attorneys, new United States Marshals, and construction of new federal courthouses. State and local jurisdictions that are required to enforce migration control also cost their cities millions, due to rising lawsuits, lost revenue, and increasing costs of corrections.

B. The Moral Indictment of Crimmigration Within the Criminal Justice System

1. Prosecuting Nonviolent and Nondangerous Individuals

Paralleling the overall discontent between incarceration rates and crime, the prosecution and expulsion of criminal aliens has received criticism over the years for its inability to support DHS’s claim that its program “should continue to prioritize threats to national security, public safety, and border security.” First, the majority of individuals removed from the country in 2011 had either no criminal conviction or had been convicted of minor crimes

243. Meissner et al., supra note 25, at 3.
244. Id. at 9.
245. See Rosenblum & Kandel, supra note 202, at 1.
246. New Data on Federal Court Prosecutions, supra note 163, at 3.
for which the sentence was less than one year. Second, immigrants are less likely to commit crimes. Third, there is no correlation between immigration prosecution and deterrence.

2. Hyperincarceration with a “New” Focus

Despite Smart on Crime measures and decreasing crime rates, empty bed space in penitentiaries and jails has not become a thing of the past. On the contrary, not only have these institutions remained, but more have been built to accommodate a growing number of new inmates—the criminal aliens.

a. Increasing Numbers of Noncitizens in Federal and State Prison

As a consequence of the current focus on immigration violations in federal court, the number of immigrants detained in federal detention facilities for immigration violation crimes has increased significantly in the past twenty-four years. The Bureau of Justice Statistics reports that from 1995 to 2003, the number of

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251. See NEW DATA ON FEDERAL COURT PROSECUTIONS, supra note 163, at 2, 4 (finding little correlation between immigration prosecutions and deterrence).


253. See NEW DATA ON FEDERAL COURT PROSECUTIONS, supra note 163, at 2.
people in prison who were sentenced for immigration offenses grew 394% from 3420 to 16,903.” The number of immigration violations has assisted in the federal prison population growth over the last fifteen years. Federal inmates charged with immigration crimes make up the third highest category of the detained population and approximately 22% of the federal prison population is composed of noncitizens. While numbers vary amongst local and state jurisdictions, noncitizens make up an average of 12% of the state prison and jail populations, although in Arizona approximately 21% of the prison population are noncitizens.

b. Increasing Numbers of Noncitizens in Civil Detention

For decades, immigration detention had been vehemently held to be a civil “penalty,” completely outside the purview of the criminal justice system. In recent years, however, scholars and advocates have pushed back on the civil/criminal distinction. Katherine Beckett and Naomi Murakawa have referred to immi-

257. See ROSENBLUM & KANDEL, supra note 193, at 6–7 (finding that, in 2009, noncitizens represented approximately 4.5% of the overall state prison and 7.8% of the overall local jail population); Eagly, Local Immigration Prosecution, supra note 32, at 1753 n.20 (stating that “21% of individuals sentenced for felonies” in Maricopa County, Arizona, were noncitizens in 2008).
258. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 690 (2001); Wong Wing v. United States, 163 U.S. 228, 234 (1896).
migration detention as the “shadow carceral state.” The shadow carceral state has been recognized as an expansion of punitive power that occurs through the relationship between civil and criminal law. This expansion into the area of law legally recognized as civil, however, still functions to punish and to control groups of people—it mimics and is dependent on the criminal justice system to function.

Therefore, immigration detention must be understood as part of the moral cost, as well as the fiscal cost, of the criminal justice system because the majority of those detained are fed into immigration detention through the criminal justice system. Immigration detention has expanded as a direct result of the implementation of mandatory detention for criminal aliens. Criminal aliens are subject to mandatory detention on the automatic presumption of danger to the community and flight risk, regardless of the actual criminal offense for which they were convicted or their ties to the community. Operation Streamline has been largely responsible for the 49% increase in the detainee population since 2005. Since 1996, the number of individuals detained on immigration violations has tripled. From 2011 to 2014, over 427,000 individuals were detained each year, with almost 50%...
classified as criminal aliens. Almost 4 million individuals were detained in immigration detention facilities in the United States from 2003 to 2014, many of them because of their “criminal alien” status.

To put the exorbitant level of immigration detainees in perspective, a comparison to the federal prison population may be in order. In 2014, the number of individuals detained exceeded 425,700, down from over 470,000 in 2012. The current number of individuals detained in the United States on immigration violations each year represents more than twice as many individuals than are housed annually in the Federal Bureau of Prisons. The United States now has the largest immigration detention system in the world.

c. Racial Disparities in Incarceration Rates Shifting to Latinos

From 1980 to 1998, the number of Latinos incarcerated in the United States more than quintupled. Estimates state that in 2011, Latinos represented the largest increase to the incarcerated population. “Hispanics are now the most disadvantaged group within the [criminal] courts.”

In the federal system, Latinos’ rate of incarceration has reached record numbers. Both prosecutions and overall incarceration rates of Latinos have increased. Latinos made up 23% of


269. See Det. Watch Network, The Influence of Private Prison Industry, supra note 267, at 1; see also Baker & Williams, supra note 268, at 6.

270. See Baker & Williams, supra note 268, at 6.


275. Light, The New Face of Legal Inequality, supra note 27, at 448 (noting that although discussing their treatment in federal court, other evidence exists concerning their treatment in several state jurisdictions); cf. Eagly, Criminal Justice, supra note 22, at 1196–1214 (describing the many reasons for the criminalization of immigration).
those prosecuted in 1992.276 However, by 2007, the number had risen to 40%.277 In the fiscal year 2015, Latinos represented the largest group prosecuted under federal immigration violation crimes at 95.4%.278 For Latino noncitizens, those numbers are also great. While in 1992, Latino noncitizens represented only 16% of all offenders; Latino noncitizens now make up 37% of offenders sentenced in federal court, by far the largest demographic group.279 While state incarceration rates remain low on average for Latinos, many jurisdictions, especially those with growing numbers of immigrants, have also experienced growing numbers of incarcerated Latinos.280 State incarceration has seen a browning effect. Stark racial disparities exist in immigration detention as well, with approximately 92.8% of the 425,728 detainees classified as Latino in 2014.281

3. Increased Racial Profiling of Latinos

Racial disparities have been another looming problem of the criminal justice system, and racial profiling has a long history of being one of its causes.282 Attorney General Eric Holder introduced new rules to curb racial profiling as part of the Justice Department’s criminal justice reform efforts.283 As Holder announced, “racial profiling by law enforcement is not only wrong, it is misguided and ineffective—because it can mistakenly focus

281. See Baker & Williams, supra note 268, at 6.
283. Dep’t of Justice, Stricter Policies, supra note 232.
investigative efforts, waste precious resources and, ultimately, undermine the public trust.”

Yet, the use of the criminal justice system to assist in the enforcement of immigration law has had problematic results that cannot be curtailed because they have been legitimized by law. For the last forty years, the policing of immigration offenses has repeatedly allowed race to play an overt and dominant role. By allowing state and local governments to be the pipeline through which federal immigration law is enforced, racial bias can manipulate the overall outcomes of those that are removed.

The overt use of race when enforcing immigration was solidified by the Supreme Court in 1975 in United States v. Brignoni-Ponce and in 1976 in United States v. Martinez-Fuerte. In immigration law and its enforcement, race can sometimes be the only factor used to stop an individual. As Justice Powell wrote in Brignoni-Ponce, “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.” Even if police officers unlawfully stop an individual, the Supreme Court ruled in INS v. Lopez-Mendoza,

284. Id.
286. See Carbado & Harris, supra note 148, at 1545–59 (discussing the role that immigration status has played in shaping issues concerning race, racial profiling, and the Fourth Amendment in the criminal justice system).
290. Id. at 563.
291. Brignoni-Ponce, 422 U.S. at 886–87. It is worth noting that Brignoni-Ponce is Puerto Rican, and, therefore, neither “alien” nor Mexican.
that if a violation of the Fourth Amendment does occur, a noncitizen may be entitled to the exclusionary rule in criminal court, but a noncitizen could not exclude the unlawfully obtained evidence in a civil removal proceeding. Therefore, even if police engage in racial profiling, noncitizens will still be subject to removal.

Federal programs developed to allow state and local law enforcement to assist in immigration enforcement have all been linked to rampant racial profiling abuses, with increasing racial profiling complaints coming from states that have growing numbers of Latinos. The 287(g) Memorandum of Understanding Agreements offered to train officers in immigration enforcement, but the program was criticized for racial profiling by many of these officers. On November 20, 2014, the administration announced that the Priority Enforcement Program (“PEP”) replaced Secure Communities amid similar concerns of its use as a mechanism of racial profiling by law enforcement. Even the administration is not immune from assumptions of a connection between race and criminality. As research has shown, Secure Communities’ roll out began in jurisdictions with large numbers of Latinos and disconnected from areas with high crime rates, unauthorized populations, or even jurisdictions that had an interest in the program.

Notwithstanding the fact that “racial profiling by law enforcement is not only wrong, it is misguided and ineffective,” Holder’s guidelines do not extend to immigration enforcement within 100


295. Memorandum from Jeh Johnson, Sec’y of Homeland Sec., Secure Committees (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (stating the Secure Communities will be discontinued and the Priority Enforcement Program will replace it due to its criticism and litigation issues).

296. See Adam B. Cox & Thomas J. Miles, Policing Immigration, 80 U. CHI. L. REV. 87, 134 (2013) (finding that the Secure Communities roll out was done in jurisdictions with high numbers of Latinos and not related to crime, unauthorized populations, or interest); see also AARTI KOHLI ET AL., supra note 285, at 2 (showing that Secure Communities disproportionately impacted Latino males as a group, as they comprised 93% of those arrested though only making up 77% of the noncitizen population).
miles of the border and other ports of entry. Laws, policies, and programs allow for separate and distinct applications between Latinos and others seized, legalizing racial profiling against them—continuing racial disparities within the criminal justice system, but shifting it to focus on Latinos.

4. Reinforcing Social Inequality of Latinos

As discussed earlier in this article, the criminal justice system deepens social inequality and forecloses upward mobility to individuals, their families, and their communities. In fact, more often than not, those who are touched by the criminal justice system are more likely to be worse off than before. However, for those who are labeled criminal aliens, they, as well as their families and communities, face an even bleaker future than those labeled as “criminals.”

Why? Because many criminal aliens will never have a second chance. And absent criminal justice reform efforts that take immigration into account, they will continue to be deprived of one. They may never be able to reunite with their families or reenter their communities. They will have little chance of becoming gainfully employed after incarceration. Even if they are eventually reunited with their families, their overall time away from their jobs, families, and communities is longer, as noncitizens are


298. See Carbado & Harris, supra note 149, at 1547–50 (discussing the role that immigration status has played in shaping issues concerning race, racial profiling, and the Fourth Amendment in the criminal justice system).

299. See supra Part I.B.2(b).


301. Finding Jobs an Uphill Battle for Deportees, JAMAICA OBSERVER (July 16, 2006), www.jamaicaobserver.com/pfversion/109137_Finding-jobs-an-uphill-battle-for-deportees (“Most of the time, as a deportee, it is not clear that we can trust you enough and that is a barrier for employment, so they are not getting jobs in their area of training.”); Tim Johnson, For Deportees to El Salvador, Call Centers Become a Refuge, MCCLATCHY (June 11, 2015, 12:41 PM), http://www.mcclatchydc.com/news/nation-world/world/article24785590.html (discussing the difficulties deportees face in trying to obtain a job after being deported from the United States).
more likely to be detained pending their criminal sentences, to receive a harsher sentence, and to be transferred into the custody of ICE for removal proceedings, where they will be subject to mandatory detention during the pendency of their cases.302

Children who have incarcerated parents suffer more than those who have an absent parent for other reasons.303 Additionally, children who have a noncitizen parent suffer the ramifications of incarcerated parents, but have other stressors that children with United States citizen parents do not face. As research has shown, “[a]n inconsistent, unpredictable family environment also contributes to psychiatric illness in children.”304 Children with parents who are noncitizens are faced with the ever-present fear that their parents may be taken at any moment and deported. The stress of a parent being removed from the United States leaves a child even more vulnerable than other children with two United States citizen parents.305

While incarcerated parents have a higher chance of entering poverty or staying poor, we also know that when parents do reintegrate into the family and society, their income increases, although it is still lower than before incarceration.306 However, with noncitizen parents, their removal as criminal aliens results in the inability of their families to recover because many of the deportees were their family’s primary breadwinners.307 Also, for those who are removed as criminal aliens, any social security benefits that they were legally entitled to are stripped from them.308 In ad-

308. 20 C.F.R. § 404.464(a) (2016) (stating that old-age or disability insurance benefits
dition, even if the “criminal alien” is not subject to removal, as stated above, the individual will most likely be incarcerated for a longer time than his United States citizen counterpart, causing a longer period of absence and greater ramifications for the individual, his family, and his community.  

State and local enforcement of immigration violations only exacerbates the problem, as families are more likely to be separated in jurisdictions where law enforcement aggressively targets noncitizens. In jurisdictions that entered into 287(g) agreements, children in foster care were 29% more likely to have detained or deported parents. As removals have increased, a higher number of children have entered foster care. Over 5000 children were placed in foster care due to the detention or deportation of their noncitizen parents. Estimates foresee that this number will rise by 15,000 in the next five years. Additionally, courts have been found to have a bias against reunifying children with parents who are in removal proceedings or lack immigration authorization. As a result, noncitizens face increasing termination of their parental rights so their children can be adopted.

During the Obama Administration, over one million individuals were deported from the United States for their label as a “criminal alien.” In 2016, although the total number of individuals removed decreased, those classified as criminal aliens increased to 92% of the total number of interior removals. Those

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311. Id.
313. WESSLER, supra note 310, at 4.
314. Id.
316. See, e.g., Maddali, supra note 312, at 644–45.
individuals have families, including children. It is estimated that one in ten families in the United States have mixed-family households, meaning the families consist of both noncitizen and citizen members. \textsuperscript{319} Seventy-nine percent of all immigrants living in the United States have children. \textsuperscript{320} Between 1996 and 2007, approximately 1.6 million families were separated by removal, and between 2010 and 2012, over 100,000 more parents were removed, impacting approximately 200,000 United States citizen children. \textsuperscript{321} In the first half of 2011, approximately 22\% of those deported were parents of United States-citizen children. \textsuperscript{322} Since statistics reveal that the majority of those prosecutions are based on their unauthorized status, it is also important to realize that in 2013, approximately 4.5 million United States citizen children had at least one parent who was unauthorized and, therefore, subject to criminal prosecution for immigration violations. \textsuperscript{323}

In addition, Latino children will suffer the most from immigration. For example, in 2016, 96.3\% of those removed for criminal violations were Latino. \textsuperscript{324} A majority of Latino children living in poverty reside with a foreign-born family member, although those living in deep poverty are more likely to reside without both biological parents, and if living with one, it will not be a foreign-born member. \textsuperscript{325} In fact, Latino children have the highest rate of

\textsuperscript{319} Michael Fix & Wendy Zimmerman, \textit{All Under One Roof: Mixed-Status Families in an Era of Reform}, 35 INT'L MIGRATION REV. 397, 397 (2001).


poverty—more than all other racial groups. Therefore, continuing to allow for systematic criminal enforcement of criminal aliens through the criminal justice system will only exacerbate the problems described here, and it will have a profound impact on Latinos in the United States and across the globe, as well as on the United States as a whole.

CONCLUSION

United States Attorney General Eric Holder announced that “[b]y targeting the most serious offenses, prosecuting the most dangerous criminals, directing assistance to crime ‘hot spots,’ and pursuing new ways to promote public safety, deterrence, efficiency, and fairness—we . . . can become both smarter and tougher on crime.” Despite the vast ways in which crimmigration negatively impacts the criminal justice system—having the precise effects that U.S. Attorney General Holder, President Obama, and other advocates of criminal justice reform have committed to combat—crimmigration’s impacts are largely absent from the dialogue of the criminal justice reform movement. If criminal justice reformers are serious about ensuring that the criminal justice system is effective, efficient, and fair, their efforts must begin to take a closer look at the way in which crimmigration increases cost, decreases fairness, and fails to make society safe. Otherwise, reform efforts will be unlikely to make a significant impact and will, in fact, sustain and exacerbate the criminal justice system’s financial and moral costs.

over 62% of children in poverty live with a foreign-born family member).

326. Id. at 1.