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## Constructing Crimmigration: Latino Subordination in a “Post-Racial” World

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# Constructing Crimmigration: Latino Subordination in a “Post-Racial” World

YOLANDA VÁZQUEZ\*

*Over the last forty years, the concern over the relationship between noncitizens and criminality has reached epic proportions. Laws, policies, procedures, and rules have been developed, the immigration and criminal justice system have been employed, and billions of dollars have been spent towards detecting, detaining, prosecuting, and removing those who are targeted as posing “the greatest threat to the nation.” As a result, a “new” phenomenon emerged, crimmigration, that not only redesigned the criminal and immigration systems, but also brought about a cultural transformation in the United States—restructuring social categories, diminishing economic and political power, and perpetuating the marginalization of the largest minority population in the United States—Latinos.*

*Latinos, over the years, have consistently represented over 90% of those in immigration detention, prosecuted for immigration violations, and removed as “criminal aliens.” The consequences of crimmigration have resulted in the devastation of Latinos, their families, their communities, and the countries of their origin, thereby contributing to their inability to gain economic and political stability.*

*Despite the devastating impact that crimmigration has had on Latinos over the last 30 years, little has been written about its creation and use as a mechanism for continued racial subordination. This Article seeks to fill the void, exploring the way in which crimmigration restructures the relationship between Latinos and dominant society to ensure their marginalized status. By deconstructing and understanding crimmigration’s ties to racial*

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*subordination, methods to combat and end its destructive nature can be developed.*

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## I. INTRODUCTION

Over the last fifty years, several momentous events have taken place that have caused many to believe that race no longer has any significance in the United States. While the history of the United States is replete with overt racism, the civil rights movement in the 1950s and 1960s ended segregation in education, housing, and public accommodations, as well as unequal voting practices.<sup>1</sup> Legislation during the 1960s also ended formal discrimination in U.S. immigration law by abolishing the national origins quota, which restricted individuals from entering the United States on the basis of race, ethnicity, and national origin.<sup>2</sup>

This time period has been described as a historical turning point, marking American society’s commitment to racial equality. Over the last 50 years, proof of America’s transformation into a racially equal society is shown in such events as the appointment of three minority Supreme Court Justices, Marshall, Thomas, and Sotomayor, who are often stated to hold more power

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<sup>1</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2012)) (abolishing discrimination in voting); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2012)) (abolishing laws that discriminated on the basis of race, ethnicity, religion, gender, and national origin).

<sup>2</sup> Act of Oct. 3, 1965, Pub. L. No. 89-236, § 202(a), 79 Stat. 911, 911–12 (codified as amended at 8 U.S.C. § 1152 (2012)) (abolishing the National Origins Formula).

than the President, currently Barack Obama, who is the first black president of the United States. As a result of these and other events, most markedly the election of President Obama, many tout that the United States is now a “post-racial” society, meaning that race no longer plays a part in the mistreatment, discrimination, or prejudices individuals face in the United States, and that everyone is capable of achieving the American Dream with hard work and commitment.<sup>3</sup>

While strides have been made towards racial equality, the United States remains “categorically unequal.”<sup>4</sup> Disparities exist between Latinos<sup>5</sup> and other groups of the population in incarceration rates,<sup>6</sup> poverty rates,<sup>7</sup> unemployment

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<sup>3</sup> See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593 (2008) (discussing post-racialism as an ideology and its use to “retreat from race”); Ian F. Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 807 (2011) (discussing President Obama’s election as the beginning of a post-racial era in the United States).

<sup>4</sup> See DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 5–6 (2007) (discussing his theory on why the United States remains “categorically unequal” in its income distribution between different segments of the population).

<sup>5</sup> The debate as to whether the term Latino is used to describe an ethnicity or a race is a debate into which this Article does not delve. For purposes of the Article, the author uses Latino as a term to define a race that is distinct from other racial categories, such as black, white, indigenous, and Asian. Defining Latino as a race shares a different experience than defining Latino as a concept of ethnicity, which is used to describe the belief that all ethnic groups will assimilate into white American society. The category of ethnicity, therefore, fails to recognize the nonwhite and inferior status that Latinos held and continue to hold in the United States. For further information on the subject, see LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 1–3 (2007) (discussing the use of ethnicity to mask the historically discriminatory treatment that Mexican Americans have faced as a racial group); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 7–14 (2006) (tracing the legal construction of race through America’s legal system); WENDY D. ROTH, *RACE MIGRATIONS: LATINOS AND THE CULTURAL TRANSFORMATION OF RACE* 4–8 (2012) (examining the traditional black and white racial dichotomy in America and how that dichotomy is challenged by considering Latinos a separate racial category vs. an ethnic group); Sandra Lilley, *Latinos Prefer Hispanic as a Race Category, Says Census Study*, NBCLATINO (Aug. 8, 2012, 12:20 PM), [http://nbclatino.com/2012/08/08/latinos\\_prefer\\_hispanic\\_as\\_a\\_race\\_category\\_says\\_census\\_stud/](http://nbclatino.com/2012/08/08/latinos_prefer_hispanic_as_a_race_category_says_census_stud/), archived at <http://perma.cc/EX3C-QWA9> (discussing the finding by the Census Bureau that Latinos consider Latino origin as a race). *But cf.* Roque Planas, *Latino Is Not a Race, Despite the Census Debate*, HUFFINGTON POST (Jan. 17, 2013, 12:44 PM), [http://www.huffingtonpost.com/2013/01/17/latino-race-census-debate\\_n\\_2490592.html](http://www.huffingtonpost.com/2013/01/17/latino-race-census-debate_n_2490592.html), archived at <http://perma.cc/3X5C-THC3> (arguing that Latino is not a race although recognizing that 18 million Latinos declined to identify their race under the racial categories available in the 2010 Census).

<sup>6</sup> See PEW CTR. ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* 7 (2009), available at [http://www.pewtrusts.org/~media/legacy/uploaded\\_files/pcs\\_assets/2009/PSPP1in31reportFINALWEB32609pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploaded_files/pcs_assets/2009/PSPP1in31reportFINALWEB32609pdf.pdf), archived at <http://perma.cc/6NUG-26M4> (finding racial disparities in the rate of incarceration by race: 1 in 27 Latinos, 1 in 11 blacks, and 1 in 45 whites).

rates,<sup>8</sup> and in the detention and removal rates in the immigration system.<sup>9</sup> Blacks and Latinos<sup>10</sup> within the United States are incarcerated at higher rates than whites, named “hyper or mass incarceration” to describe the exorbitant number of individuals incarcerated and its disproportionate impact to particular groups.<sup>11</sup> And, while immigration laws are now facially race neutral,

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<sup>7</sup> See KATHLEEN SHORT, U.S. CENSUS BUREAU, *THE RESEARCH SUPPLEMENTAL POVERTY MEASURE: 2010*, at 12 tbl.5 (2011), available at <http://www.census.gov/prod/2011pubs/p60-241.pdf>, archived at <http://perma.cc/DU4W-8R7H> (finding the supplemental poverty measures for Latinos at 28.2%, blacks at 25.4%, and whites at 14.3%).

<sup>8</sup> *Economic News Release: Table A2. Employment Status of the Civilian Population by Race, Sex, and Age*, BUREAU OF LAB. STAT., <http://www.bls.gov/news.release/empsit.t02.htm> (last updated Apr. 3, 2015), archived at <http://perma.cc/96LS-K6DR> (finding the unemployment rate at 4.9% for white males, 4.8% for white females as compared to 10.8% for black males and 10.6% for black females in August 2014); see *Unemployment Rate of Workers Age 16 and Older by Race and Ethnicity*, ST. WORKING AM., <http://www.stateofworkingamerica.org/charts/unemployment-by-race-and-ethnicity/> (last updated Feb. 6, 2015), archived at <http://perma.cc/UD3U-F4ZW> (finding Latino overall rate of unemployment at 9.3% in August 2013).

<sup>9</sup> See U.S. DEP’T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2–4, 9, 12–17 (2014) [hereinafter 2014 ICE ENFORCEMENT AND REMOVAL REPORT], available at <http://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf>, archived at <http://perma.cc/GJU4-V8HM>.

<sup>10</sup> I use the word Latinos because the majority of those affected are from the Latin American countries of Mexico, Central America, and the Caribbean. I also focus on Mexican history and statistics for many reasons—they are the largest Latino group in the United States, have the longest history with the United States, and are deported at higher rates than any other group. Based on this, they share a unique history that has impacted the way in which crimmigration has been structured and executed. With that said, however, crimmigration impacts all Latino groups, including U.S. citizens, and must be viewed as not only an issue impacting Mexicans, but all Latinos. Proof can be seen in the recent treatment of Central Americans as well as the deportation of U.S. citizens from other Latin countries. See *Perez v. United States*, 502 F. Supp. 2d 301, 303 (N.D.N.Y. 2006) (involving a U.S. citizen from the Dominican Republic who was deported and then again prosecuted and given a federal sentence for unlawful reentry); Jonathan House, *Perry Says Secure Borders Needed to Protect Against Terrorists, Criminals*, WALL ST. J. (Aug. 3, 2014, 1:56 PM), <http://blogs.wsj.com/washwire/2014/08/03/perry-says-secure-borders-needed-to-protect-against-terrorists-criminals/>, archived at <http://perma.cc/3ADS-KLMX> (linking unaccompanied children from Central America as “criminal aliens”); Rania Khalek, *Why Are American Citizens Getting Locked Up and Even Deported by Immigration Authorities?*, ALTERNET (Dec. 28, 2011), [http://www.alternet.org/story/153499/why\\_are\\_american\\_citizens\\_getting\\_locked\\_up\\_and\\_even\\_deported\\_by\\_immigration\\_authorities](http://www.alternet.org/story/153499/why_are_american_citizens_getting_locked_up_and_even_deported_by_immigration_authorities), archived at <http://perma.cc/Q6NY-UWR4> (reporting that over 4,000 U.S. citizens were detained or deported in 2010).

<sup>11</sup> The United States incarcerates over 2.2 million individuals per year, leading the world in the number of individuals it has behind bars. *Incarceration*, SENT’G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Feb. 27, 2015), archived at <http://perma.cc/3ELJ-8HYK>. Of those 2.2 million individuals impacted, a disproportionate percentage are black and Latino. For further discussion, see David Garland, *Epilogue: The New Iron Cage*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND*

the removal rate of immigrants of color is disproportionately higher than whites. In fact, the vast majority that are currently detained, prosecuted, and removed under U.S. immigration law are Latinos, comprising over 90% of those impacted.<sup>12</sup> The historical number of removals from the United States as well as its disproportionate impact on Latinos as a group makes crimmigration a system of racialized mass or hyper removal.<sup>13</sup>

Despite the alarmingly disproportionate impact on Latinos, however, little has been explored concerning this phenomenon. One reason that may explain the lack of clamor is the belief that those who are accused and found to have violated immigration laws, like criminals, are in their predicament due to personal “choice and behavior” as opposed to racially discriminatory treatment. Supporters of this position point to the race-neutral laws which Latinos are charged with violating as proof that race is not a factor in Latinos’ detention and removal rates.<sup>14</sup> Another reason that may drive away vocal

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CONSEQUENCES 179, 179–81 (David Garland ed., 2001); Jonathan Simon et al., *Introduction*, in *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* 1, 1–12 (Mary Louise Frampton et al. eds., 2008); LOÏC WACQUANT, *PUNISHING THE POOR* 197–208 (2009) [hereinafter *WACQUANT, PUNISHING THE POOR*]; Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, *DÆDALUS*, Summer 2010, at 74, 74 [hereinafter *Wacquant, Class, Race & Hyperincarceration*].

<sup>12</sup> Latinos currently represent over 90% of those in immigration detention, 94% of those removed, and 94% of those removed for criminal violations. See U.S. DEP’T OF HOMELAND SEC., *FY 2013 ICE IMMIGRATION REMOVALS 4* (2013) [hereinafter *2013 ICE REMOVAL STATISTICS*], available at <http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>, archived at <http://perma.cc/C5KU-UNAC>; U.S. DEP’T OF HOMELAND SEC., *2012 YEARBOOK OF IMMIGRATION STATISTICS* 104–15 tbls.40 & 41 (2012) [hereinafter *2012 YEARBOOK*], available at [http://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf), archived at <http://perma.cc/MWG8-A9CE>.

<sup>13</sup> In 1986, the United States removed 22,314 individuals from the United States; of those removed that year, 1,708 noncitizens were removed for criminal and narcotics violations. U.S. DEP’T OF JUSTICE, *1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE* 227 tbl.69 (2000) [hereinafter *1998 YEARBOOK*], available at <http://dhs.gov/xlibrary/assets/statistics/yearbook/1998/1998yb.pdf>, archived at [perma.cc/VA8W-JQZ5](http://perma.cc/VA8W-JQZ5). In contrast, 27 years later, in 2013, over 368,644 individuals were removed from the United States. *2013 ICE REMOVAL STATISTICS*, *supra* note 12, at 1, 4. To provide a further understanding of the drastic changes that have taken place in regard to the removal of noncitizens, it is worth noting that between 1892–1998, 2,256,285 individuals were removed from the United States. *1998 YEARBOOK*, *supra*, at 212. The Obama Administration will have surpassed this number in its first six years. See *2012 YEARBOOK*, *supra* note 12, at 103 tbl.39; *2013 ICE REMOVAL STATISTICS*, *supra* note 12, at 1; *2014 ICE ENFORCEMENT AND REMOVAL REPORT*, *supra* note 9, at 7.

<sup>14</sup> Yolanda Vázquez, “Crimmigration” in the United States as a Mechanism of Racial Stratification in a Post-Racial Society, Presentation at the Borders of Crimmigration, 2nd CINETS Conference, Leiden (Oct. 9–10, 2014) (summary available at [http://www.crimmigrationcontrol.com/content/news/Borders\\_of\\_Crimmigration\\_keynote\\_speakers\\_and\\_panel\\_sessions\\_program.pdf](http://www.crimmigrationcontrol.com/content/news/Borders_of_Crimmigration_keynote_speakers_and_panel_sessions_program.pdf)); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 17, 97–139 (revised ed. 2012) (2010).

opposition is the overwhelming belief that those who are deported are a threat to America. The Department of Homeland Security (DHS) emphasizes its mission is to target those noncitizens who pose “the most serious public safety and national security threats.”<sup>15</sup> The “criminal aliens,”<sup>16</sup> therefore, are America’s greatest threat—they are foreigners and they are criminals. American society owes them nothing.

As a result, the United States has systematically and increasingly removed Latinos from its borders with little opposition despite clear evidence that immigrants are less likely to cause crime,<sup>17</sup> the vast majority of those removed as “criminal aliens” are removed for non-violent offenses, crime rates in the United States have been declining since its inception,<sup>18</sup> and unauthorized immigration rates from Latin American countries have been declining.<sup>19</sup>

Therefore, if rising deportation rates do not correlate to rising levels of crime, violence, national security risks, or migration rates, why is the United States increasingly spending billions of dollars to combat a threat that doesn’t exist among the targeted group?<sup>20</sup> Why does America allow for the destruction

<sup>15</sup> 2014 ICE ENFORCEMENT AND REMOVAL REPORT, *supra* note 9, at 5; see STEVEN RAPHAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? 62, 64, 66 (2013) (discussing findings that between 2000 and 2009, immigration offenses had increased “from 6 per 100,000 to 28;” that between 1985 and 2000, that those convicted of immigration violations and sent to prison increased by 26%; and that sentencing for immigration violations increased by 49%).

<sup>16</sup> The term “criminal alien” is used to describe a non-citizen or non-national of the United States who is removable under the Immigration and Nationality Act (INA) § 212(a)(2)(A) or § 237(a)(2)(A) for having been convicted of certain enumerated crimes. See Immigration and Nationality Act (INA) §§ 212(a)(2)(A), 237(a)(2)(A), 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A) (2012). This term currently includes immigration violators if prosecuted and convicted in federal criminal court, including those called “illegal aliens” since unauthorized migration is prosecuted in federal court under INA § 275. See *id.*; 8 U.S.C. § 1325 (2012). The term, however, does not actually exist under these INA sections but is still used to describe an individual who falls within these categories. See 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A), 1325.

<sup>17</sup> See RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CTR., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 1 (2007), available at <http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20%28IPC%29.pdf>, archived at <http://perma.cc/64DD-Q6H5>.

<sup>18</sup> Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AMER. POL. DEV. 230, 235 fig.2 (2007) (showing that crime rates in general have tended to decline since 1981).

<sup>19</sup> JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE i–iii (2010), available at <http://www.pewhispanic.org/files/reports/126.pdf>, archived at <http://perma.cc/968G-WXDA>.

<sup>20</sup> See U.S. DEP’T OF HOMELAND SEC., FY 2013 BUDGET IN BRIEF 13–17, 23, 32–38 (2013), available at <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf>, archived at <http://perma.cc/97KN-SG9A> (discussing immigration enforcement mechanisms, goals, and expenses for FY 2013); Doris Meissner, *Border Budget Is Already*

of families and communities that will further strain the economic stability of America's economy? And if Latinos do not commit "dangerous" crimes nor pose a serious threat to national security, why are they detained and removed from the United States at exponentially higher rates than other racial groups?

This Article posits that despite the abolishment of race-based laws, race continues to play an essential role in structuring and representing American society. Michael Omi and Howard Winant have asserted that "the attempt to banish the concept [of race] as an archaism is at best counterintuitive."<sup>21</sup> Loïc Wacquant finds that America's hyperincarceration cannot be supported by increasing rates of crime or by an efficient criminal justice system, but rather the system is grounded in "political choices informed by cultural values and made to matter by asymmetries of power."<sup>22</sup> When discussing the development of mass incarceration, Michelle Alexander further posits, "What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it."<sup>23</sup> This Article argues that the same holds true for crimmigration. Crimmigration cannot be supported by increased threats by Latinos to America's national security and public safety. The United States' prosecution and removal of individuals is derived from political choices and cultural norms, enforcing "colorblind white dominance."<sup>24</sup> What has changed since the 1960s has less to do with American society's enlightenment on the equality of all racial groups and more to do with the methods and tactics that American society uses to enforce racial hierarchies. At a time when the Latino population has been steadily increasing in the United States and overt discrimination has been outlawed, a new tactic needed to be implemented to maintain racial inequality

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*Enormous*, N.Y. TIMES (Jan. 31, 2013), <http://www.nytimes.com/roomfordebate/2013/01/31/is-the-border-secure-enough-1/border-budget-is-already-enormous>, archived at <http://perma.cc/Q7ZS-8UQ8> (discussing the fact that Congress spent \$18 billion in fiscal year 2012 for immigration enforcement, that it was 24% more than all other federal criminal law enforcement agencies combined (DEA, FBI, Secret Service, ATF, and the Marshall's Service), and that since the enactment of IRCA in 1986, the nation has spent almost \$187 billion on immigration enforcement (\$219 billion in 2012 dollars)); NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 3-4 (2013), available at <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>, archived at <http://perma.cc/H68V-DLJ7> (discussing the increase in immigration detention from 204,459 in 2001 to 429,247 in 2011 and that the cost of detaining 400,000 immigration detainees alone has reached approximately \$2 billion per year).

<sup>21</sup> MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 55 (2d ed. 1994).

<sup>22</sup> LOÏC WACQUANT, PRISONS OF POVERTY 5 (expanded ed. 2009); see RAPHAEL & STOLL, *supra* note 15, at 27 (finding that mass incarceration was a result of political choice and had no correlation to crime rates or keeping the country safe).

<sup>23</sup> ALEXANDER, *supra* note 14, at 2.

<sup>24</sup> LÓPEZ, *supra* note 5, at 147-48 (defining "colorblind white dominance" as the continued social, financial, and political domination of whites without explicit white supremacy rhetoric).

and “colorblind white dominance.”<sup>25</sup> From these concerns, crimmigration was created.

The structure of crimmigration disparately impacts Latinos and the disproportionate rates of incarceration, detention, and removal reify the conclusion that Latinos break more criminal and immigration laws due to their behavioral choices instead of exploring whether criminal and immigration laws are created and enforced to promote discriminatory treatment and outcomes. Society looks only to the sheer numbers as the “logical” proof. The Latino has become the “criminal alien” and through this structure the Latino is legally discriminated against through various forms of exclusion and exploitation, such as housing, employment, education, and most severely, actual banishment. As a result, Latinos’ ability to enter into American society, gain economic stability, and achieve political power continues to elude them, maintaining the status quo of white racial dominance despite Latinos’ majority–minority status.

Crimmigration has only recently received the attention it deserves. In fact, prior to 2006, the phenomenon had no name.<sup>26</sup> Since then, legal scholars, such as Jennifer Chacón, Gabriel Chin, Ingrid Eagly, César Cuauhtémoc García Hernández, Kevin Johnson, Daniel Kanstroom, Stephen Legomsky, and Juliet Stumpf have begun to identify various components and characteristics of crimmigration.<sup>27</sup> Last year, César Cuauhtémoc García Hernández first argued in *Creating Crimmigration*, that crimmigration developed as a backlash to the civil rights movement.<sup>28</sup> In a continued attempt to limit the number of nonwhite individuals who entered and remained in the United States, the immigration system began to use criminal status as a proxy for race.<sup>29</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (coining the term “crimmigration” not only to describe what prior scholars had called, “the criminalization of immigration law” but also to describe the merger between the two institutions “in both substance and procedure [that] has created parallel systems in which immigration law and the criminal justice system are merely nominally separate”).

<sup>27</sup> See, e.g., RACIAL CRIMINALIZATION OF MIGRANTS IN THE 21ST CENTURY 1–19 (Salvatore Palidda ed., 2011) (featuring various scholars from a variety of disciplines and countries who discuss various components of crimmigration, linking the component to the racialized criminalization of migrants in Europe and the United States as a mechanism of social control); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1417–23 (2011); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1890–99 (2000); Stephen H. Legomsky, *A New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 469–75 (2007).

<sup>28</sup> See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1459.

<sup>29</sup> *Id.*

This Article expands on that thesis. While the achievements of the civil rights movement and its political backlash played an important role in the development of crimmigration, crimmigration's historical beginnings can be linked to strategies to reduce and control Latino migration already in place prior to the 1960s. Finally, while crimmigration successfully works against other racial groups, crimmigration emerged through various legislative acts, policies, decisions, and procedures that particularly targeted Latinos. Finally, while overt racism has played a role in its development, structural inequality works to mask and entrench racism within the system as it allows for the continued racial disparities in a post-racial world—court decisions refuse to recognize it, society refuses to acknowledge it, and individuals can forcefully insist that they support the system as it stands because it is not based on race or racism. That is its complexity, and that is its success. Formal equality shields structural inequality and, specifically with the criminal justice system, while the system may be constructed through racial animus or result in a disparate impact on certain groups, the structure is protected and racial hierarchy continues as any discriminatory effects will only be construed as inevitable parts of our criminal justice system.<sup>30</sup>

This Article explores the development of crimmigration as a mechanism through which the historical identity of Latinos, as temporary and subordinate, can be enforced without ever using race explicitly. Part II briefly discusses the relationship between immigration and crime, finding little correlation between the two, thereby calling into question the justification for increasing removal rates over the years. Part III discusses the history of Latinos in the United States as temporary, menial, and subordinated. Part IV discusses the creation of crimmigration over the last sixty years. This section examines the converging legislative acts, policies, and decisions as well as the shifting politics and culture that have structured crimmigration in a way that has led to the inevitable effect—racialized mass removal and the continued subordination of Latinos, which is more fully discussed in Part V.<sup>31</sup>

We are only now starting to uncover the complexity of crimmigration. It will take decades to understand crimmigration's multiple dimensions—its purpose, its impact, and its extent. This Article cannot do it all. It does, however, start the discussion as to crimmigration's underlying purpose in the hope that future research can build off this hypothesis to further uncover crimmigration's structure and look to ways to end its destructive nature.

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<sup>30</sup> See ALEXANDER, *supra* note 14, at 12–14; see also *McCleskey v. Kemp*, 481 U.S. 279, 279, 287 (1987) (holding that, in Georgia, despite empirical evidence that finds that black defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than those charged with killing black victims, the defense failed to show evidence of intentional racial bias necessary for a violation under the Fourteenth Amendment).

<sup>31</sup> See OMI & WINANT, *supra* note 21, at 56–57 (discussing the theory of racial formation).

## II. IMMIGRANTS AND CRIME

Crimmigration was developed over the last sixty years as a result of the social and political debates that have increasingly brought the immigration system and its role in regulating the flow of migrants into this country to the forefront. These debates have increasingly focused on threats to national security and community safety, connecting the “harms” against the public safety and national security to “criminal aliens.”<sup>32</sup> As a result, this rhetoric gives the American public the perception that those individuals who are removed are either dangerous criminals or terrorists.<sup>33</sup>

This perception is further reinforced by the main objective of DHS over the years that the rationale for the increase in the deportation of millions of individuals is based on national security and community safety. Specifically, DHS’s mission is to remove those noncitizens who pose “the most serious public safety and national security threats.”<sup>34</sup> DHS has determined that there are two categories of noncitizens that fall into the above category.<sup>35</sup> These individuals have been identified as falling under groups labeled “criminal aliens” and “illegal aliens.”<sup>36</sup>

In 2012, over 419,000 individuals were removed from the United States.<sup>37</sup> Of those removed that year, 199,000 were “criminal aliens.”<sup>38</sup> Of those who are removed for “criminal” offenses, few statistics are available to support the claim that the high rate of deportation is due to increased criminal activity and dangerousness to the community or nation by immigrants. Studies have found that immigrants are less likely to cause crime than their United States citizen counterparts, and those who have entered the United States over the last few

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<sup>32</sup> See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1856–75 (2007).

<sup>33</sup> Kevin R. Johnson, *It’s the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 597 (2010).

<sup>34</sup> 2014 ICE ENFORCEMENT AND REMOVAL REPORT, *supra* note 9, at 5.

<sup>35</sup> See 2013 ICE REMOVAL STATISTICS, *supra* note 12, at 2.

<sup>36</sup> The term “illegal alien” is a pejorative term used to describe a noncitizen or non-national of the United States who is inadmissible under INA § 212(a)(6)(A) because he is “present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General . . . .” Immigration and Nationality Act (INA) § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2012). The term “illegal alien,” however, is not defined in the INA. See 8 U.S.C. § 1182 (2012).

<sup>37</sup> JOHN F. SIMANSKI & LESLEY M. SAPP, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012, at 1 (2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2012\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf), archived at <http://perma.cc/S7BM-6T8M>.

<sup>38</sup> *Id.*

years are increasingly less likely to commit crime.<sup>39</sup> In fact, recent studies have found that immigration and violent crime actually share a negative correlation.<sup>40</sup>

Immigration statistics provided by Immigration and Customs Enforcement (ICE) also do not support a finding that immigrants deported are dangerous or violent individuals. Statistics that are available state that the leading crimes of removal are dangerous drugs, criminal traffic offenses, and immigration violations.<sup>41</sup> These three categories represented 68.3% of all removals based on criminal convictions in 2012.<sup>42</sup>

Further support for the disconnect between immigrants and crime is found in the fact that violent crime rates in the United States have declined 34.2% and the property crime rate has fallen 26.4% while the immigrant population has continued to grow since 1994.<sup>43</sup> Crime itself has decreased in the United States since the 1980s.<sup>44</sup>

While rates of deportation have been increasing, unauthorized migration has been declining, including Latinos' rate of entry.<sup>45</sup> This rate has declined since 2007.<sup>46</sup> In fact, there has been a 22% decrease in unauthorized immigrants coming from the Caribbean, Central America, and South America.<sup>47</sup> The influx of unauthorized migration from 2007 to 2009 decreased 66% in comparison from the 2000 to 2005 period.<sup>48</sup>

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<sup>39</sup> Kristin F. Butcher & Anne Morrison Piehl, *Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation* 2 (Fed. Res. Bank of Chi., Working Paper No. 2005-19, 2005), available at <https://chicagofed.org/publications/working-papers/2005/2005-19>, archived at <http://perma.cc/GC4F-6Z52> (finding that immigrants have a lower propensity to commit crime and that the rates have been found to be increasingly lower among arriving immigrants over the years); Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION POL'Y INST. (June 1, 2006), <http://www.migrationinformation.org/usfocus/display.cfm?ID=403>, archived at <http://perma.cc/TGY5-2THY>.

<sup>40</sup> See JACOB I. STOWELL, IMMIGRATION AND CRIME: THE EFFECTS OF IMMIGRATION ON CRIMINAL BEHAVIOR 150–52 (2007).

<sup>41</sup> See SIMANSKI & SAPP, *supra* note 37, at 7 tbl.8 (defining immigration violations as entry and reentry, false claims of citizenship, and alien smuggling; criminal traffic offenses as hit and run and driving under the influence; and dangerous drugs as manufacturing, distribution, sale, and simple possession of illegal drugs).

<sup>42</sup> See *id.* (calculating immigration violations as 23.8%, criminal traffic offenses as 23.1%, and dangerous drugs as 21.4%).

<sup>43</sup> RUMBAUT & EWING, *supra* note 17, at 1.

<sup>44</sup> Weaver, *supra* note 18, at 235 fig.2.

<sup>45</sup> See PASSEL & COHN, *supra* note 19, at i–iii; Julia Preston, *Mexican Immigration to U.S. Slowed Significantly, Report Says*, N.Y. TIMES (Apr. 23, 2012), <http://www.nytimes.com/2012/04/24/us/mexican-immigration-to-united-states-slows.html>, archived at <http://perma.cc/74Q8-TR2S>.

<sup>46</sup> See PASSEL & COHN, *supra* note 19, at i–iii; Preston, *supra* note 45.

<sup>47</sup> PASSEL & COHN, *supra* note 19, at i & fig.1.

<sup>48</sup> *Id.*

As provided above, the increasing prosecution and removal of “criminal aliens” has little correlation between immigration and crime rates as well as overall crime rates and unauthorized immigration over the last thirty years. The remainder of this Article, therefore, begins to explore the supposition that crimmigration was created, not to combat increasing rates of violent or dangerous crime, but as a mechanism to ensure “colorblind white dominance” as the population of Latinos in the United States increases.

### III. THE HISTORICAL ROLE OF LATINOS IN THE UNITED STATES

The current state of affairs in the United States regarding crimmigration and its impact on Latinos cannot be properly put into context without first discussing the historical role that Latin American countries and their citizens have played in the development and political strategy of the United States. As this section will reveal, Latinos in the United States have been a valuable source of unskilled labor while at the same time being identified as undesirable for permanent membership into American society due to perceptions of their inferior status and inability to assimilate. This duality provides the framework that underlies the United States’ laws and policies pertaining to Latinos and their place in American society.

#### A. *The Manifest Destiny of Europeans*

The relationship between the United States and Latin American countries has its historical roots in conceptions of the innate superiority of whites.<sup>49</sup> Belief in Anglo-Saxon superiority provided the “logical” conclusion that whites were destined to rule all of the American continents as well as the rest of the world; they were “chosen” and dominance was their manifest destiny.<sup>50</sup> This firmly rooted belief justified their expansion, conflict, and conquest of Latin American countries as well as others.<sup>51</sup>

The mid to late 1800s was a period in which the United States expanded its rule and began to establish itself as a world power. This feat required the

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<sup>49</sup> See generally REGINALD HORSMAN, RACE AND MANIFEST DESTINY (1981) (discussing that the belief that whites were superior to all other races was deeply held in the United States by 1800).

<sup>50</sup> *Id.* at 2 (discussing that the belief that whites were “destined to bring good government, commercial prosperity, and Christianity to the American continents and to the world”).

<sup>51</sup> See WALTER LAFEVER, INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA 19, 22–25, 80–85, 87, 367 (1993); JOSÉ LUIS MORÍN, LATINO/A RIGHTS AND JUSTICE IN THE UNITED STATES 38 (2005) (summarizing LaFeber’s work as demonstrating that “the primary U.S. government objective in Latin America, past and present, has been to create and maintain a system that assures U.S. economic and political hegemony”); Suzanne Oboler, “*So Far from God, So Close to the United States*”: *The Roots of Hispanic Homogenization*, in CHALLENGING FRONTERAS: STRUCTURING LATINA AND LATINO LIVES IN THE U.S. 43–44 (Mary Romero et al. eds., 1997).

continued expansion into and conquest of territories belonging to other countries and inhabited by those perceived as inferior.<sup>52</sup> As Anglo-Saxons expanded into the West of their newly formed country, they encountered land that was already owned and occupied by Mexico and its citizens,<sup>53</sup> having just become independent from its colonial rule by Spain in 1821.<sup>54</sup> In 1898, the United States expanded into the Caribbean and the Pacific Ocean.<sup>55</sup> Intervening into the war between Cuba and Spain, the United States entered into the Spanish–American War.<sup>56</sup>

The Mexican–American War ended with the Treaty of Guadalupe Hidalgo in 1848, where the United States gained parts of Mexico, which are now known as California, Texas, New Mexico, Arizona, Utah, and Colorado.<sup>57</sup> America won the war against Spain after only ten weeks, gaining temporary control of Cuba and the colonial authority over Guam, Puerto Rico, and the Philippine Islands of Spain.<sup>58</sup> As a result, the United States gained dominance in the Caribbean region.<sup>59</sup>

The gaining of the above territories resulted in the “acquisition” of groups who would become the two largest Latino populations living in the United States—Mexicans and Puerto Ricans, as part of the spoils of war, gaining new territory as well as the individuals who resided on the newly acquired land.<sup>60</sup>

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<sup>52</sup> See *Native American Displacement amid U.S. Expansion*, PBS, [http://www.pbs.org/kerawar/ushistory/prelude/md\\_native\\_american\\_displacement.html](http://www.pbs.org/kerawar/ushistory/prelude/md_native_american_displacement.html) (last visited Mar. 1, 2015), archived at <http://perma.cc/UF2E-QN6A>.

<sup>53</sup> See *Westward Expansion*, HISTORY, <http://www.history.com/topics/westward-expansion> (last visited Mar. 1, 2015), archived at <http://perma.cc/T6EA-GD6S>.

<sup>54</sup> See *The War for Independence 1810–1821*, MEXICANHISTORY.ORG, <http://mexicanhistory.org/Independence.htm> (last visited Mar. 1, 2015), archived at <http://perma.cc/BJR5-BBSY>.

<sup>55</sup> See *After Two Great Wars, The United States Comes of Age*, IIP DIGITAL (Apr. 5, 2008), <http://iipdigital.usembassy.gov/st/english/publication/2008/04/20080407121204eaf/as0.3910181.html#axzz3T9k7LisO>, archived at <http://perma.cc/AMR7-TFSL>.

<sup>56</sup> See *The Spanish American War, 1898*, U.S. DEP'T ST. OFFICE HISTORIAN, <https://history.state.gov/milestones/1866-1898/spanish-american-war> (last visited Mar. 1, 2015), archived at <http://perma.cc/6SR4-RW72>.

<sup>57</sup> See, e.g., OTIS A. SINGLETARY, *THE MEXICAN WAR 160–62 (1960)*; *Treaty of Guadalupe Hidalgo*, HISTORY, <http://www.history.com/topics/treaty-of-guadalupe-hidalgo> (last visited Feb. 29, 2015), archived at <http://perma.cc/7YKZ-F873>.

<sup>58</sup> *The Spanish American War, 1898*, *supra* note 56. It is worth noting that the two American infantries that were largely responsible for the fall of Spain in Cuba were African American infantries. See, e.g., JOHN H. NANKIVELL, *BUFFALO SOLDIER REGIMENT: HISTORY OF THE TWENTY-FIFTH UNITED STATES INFANTRY, 1869–1926* xiv–xvi (2001).

<sup>59</sup> See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 97 (2004) (stating that during this time, America annexed Hawaii as well as gained the Spanish Islands of the Philippines during the war to establish a strategic location for American interests in the Pacific).

<sup>60</sup> The Mexican–American War ended with the Treaty of Guadalupe Hidalgo in 1848, where the United States gained parts of Mexico, which are now known as California, Texas, New Mexico, Arizona, Utah and Colorado, as well as the Mexican nationals who resided on that land. SINGLETARY, *supra* note 57, at 160–62; *Treaty of Guadalupe Hidalgo*,

The conquest of territories already occupied required the construction of a society in which all races would have to coexist.<sup>61</sup> Puerto Ricans, however, were seen as lazy, unambitious, and inappropriately sexual.<sup>62</sup> Latinos in the Southwest were viewed as animalistic—less than fully human.<sup>63</sup> Mexicans were described as a “mongrel race”<sup>64</sup> and labeled “lazy, ignorant, . . . vicious, and dishonest.”<sup>65</sup>

Latinos and their “mixed” race also conflicted with Europeans’ rigid construction of racial hierarchy.<sup>66</sup> First, because Anglo-Saxons’ believed in the sanctity of racial purity, the identity of Latinos as “mixed” created an abhorrence towards them.<sup>67</sup> Second, Latinos’ social construction was further

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*supra* note 57. The Spanish-American War ended in 1898 with the United States gaining the island of Puerto Rico, which included the individuals who were living there at the time. *The Spanish American War, 1989, supra* note 56.

<sup>61</sup> See HORSMAN, *supra* note 49, at 208–48 (describing historical subordination of Mexicans); MORIN, *supra* note 51, at 22–41.

<sup>62</sup> FELIX M. PADILLA, PUERTO RICAN CHICAGO 59 (1987) (stating that Puerto Ricans were perceived as lazy and sensuous); Ramón Grosfoguel & Chloé S. Georas, *The Racialization of Latino Caribbean Migrants in the New York Metropolitan Area*, 8 CENTRO J. 191, 195 (1996) (discussing how Puerto Ricans were seen as “lazy, violent, stupid, and dirty”).

<sup>63</sup> See HORSMAN, *supra* note 49, at 208–48.

<sup>64</sup> See *id.* at 212 (citing FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 72 (David J. Weber ed., 1973)) (“There are no people . . . more miserable in condition or despicable in morals than the mongrel race inhabiting New Mexico.”).

<sup>65</sup> *Id.* (citing WADDY THOMPSON, RECOLLECTIONS OF MEXICO 6, 23, 187, 239 (1846)).

<sup>66</sup> It is widely acknowledged that no race exists that is “pure” and that this idea is the product of social construct. Despite this fact, race in the United States was seen as a biological product and the “natural order of humankind.” OMI & WINANT, *supra* note 21, at 14–15; see LOPEZ, *supra* note 5, at 2–14 (discussing the social construction of race as well as the historical legal construction of Latinos as “white” despite their social construction as “other”); Grosfoguel & Georas, *supra* note 62, at 191–92 (discussing the inability for white Americans to put Puerto Ricans into a fixed racial category, finally viewing them as a racialized other).

<sup>67</sup> See HORSMAN, *supra* note 49, at 212; OMI & WINANT, *supra* note 21, at 15 (stating that “[r]acial intermixture was seen as a sin against nature which would lead to the creation of ‘biological throwbacks’”); Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 997 (2007) (discussing the prevalence in the belief that the “mixing” of races resulted in racial degeneration of whites); Ian Haney López, *Race on the 2010 Census: Hispanics & the Shrinking White Majority*, DÆDALUS, Winter 2005, at 42, 43–44 (discussing white perceptions of Latin Americans as “mongrels debased by their mixture of Spanish and Native American (and sometimes African and Asian) blood”); Frances Negrón-Muntaner et al., *Introduction: Beyond Nationalist and Colonialist Discourses: The Jaiba Politics of the Puerto Rican Ethno-Nation*, in PUERTO RICAN JAM 1, 21 (Frances Negrón-Muntaner & Ramón Grosfoguel eds., 1997) (discussing the dilemma caused by Puerto Ricans based upon their non-conformity to “the rigid racial definitions structuring American social and political relationships” and their reconstruction into a subordinated racialized other).

complicated by degrees of “whiteness” and perceptions of inferiority.<sup>68</sup> Those who are perceived as more indigenous or black have been historically treated harsher and subject to greater forms of discrimination than those individuals who are perceived as white.<sup>69</sup> Since racial hierarchy already existed in Latin countries as a result of their prior colonialization, Americans continued discriminatory treatment of certain Latinos based on perceptions of “whiteness” and continued to subjugate certain members, leaving dark or indigenous looking Latinos to continue to bear the brunt of racial subordination.<sup>70</sup> Regardless of phenotype, however, even “white” Latinos did not fit into the American framework of who was American. They became the racialized other.<sup>71</sup> Through these notions of Latinos’ inferior, savage, and morally depraved character, the social construction of this “new” society demanded their separation, regulation, and, if possible, exclusion.

### B. *Latinos and Labor*

Regardless of their perceived inferior status, Latinos served a very important role in the formation of the United States. Similar to blacks and Asians, Latinos were vital to the economic success of the “newly” formed nation. In fact, Latino labor has played a dominant role in the development of the United States over the last 160 years.<sup>72</sup>

Latinos’ contribution to the American labor force has predominantly been in unskilled and agricultural labor. Three explanations exist for this. First,

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<sup>68</sup> Despite the fact that all groups are “mixed” and that racial groups are socially constructed, race continues to be identified through visual stereotypes. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710, 1712 (1993) (discussing racial identity and the right to claim “whiteness” through visual perceptions and assumptions by the dominant class, often called “passing”).

<sup>69</sup> *See* Negrón-Muntaner et al., *supra* note 67, at 21 (discussing racism experienced by Afro-Puerto Ricans as being harsher than light-skinned Puerto Ricans, although both are considered inferior); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 665–73 (2011) (discussing the different treatment between Mexicans perceived as white versus those perceived as indigenous or “mixed,” such as varying ability to vote, hold office, and own land).

<sup>70</sup> *See* Grosfoguel & Georas, *supra* note 62, at 192–96 (discussing labor contributions of Latinos (Puerto Ricans, Cubans, and Dominicans) in New York City); Negrón-Muntaner et al., *supra* note 67, at 21.

<sup>71</sup> *See, e.g.*, Negrón-Muntaner et al., *supra* note 67, at 21 (discussing the inability of light-skinned Puerto Ricans to “pass” due to self-identification, accent, language, or surname and thereby becoming the racialized other).

<sup>72</sup> *See* Mark Overmyer-Velázquez, *Introduction: Histories and Historiographies of Greater Mexico*, in BEYOND LA FRONTERA: THE HISTORY OF MEXICO-U.S. MIGRATION xix, xix (Mark Overmyer-Velázquez ed., 2011); FELIX M. PADILLA, LATINO ETHNIC CONSCIOUSNESS: THE CASE OF MEXICAN AMERICANS AND PUERTO RICANS IN CHICAGO 20–58 (1985); *see also* Grosfoguel & Georas, *supra* note 62, at 192–96.

Latinos were recruited to fill menial jobs.<sup>73</sup> Second, many who came to the United States from Latin American countries were poor with low levels of education and a lack of professional skills. Third, based on the inferior status of Latinos, those who did come to the United States with higher education and skill levels were discriminated against and Americans relegated them to menial labor, which ensured their continued temporary and lower condition.<sup>74</sup>

The U.S.–Mexican border, stretching 1,969 miles, separates the largest wealth gap between any bordering countries in the world.<sup>75</sup> During the late 1800s, the United States was expanding into the West and Southwest territories, creating a need for labor to help in its development. American companies looked to the region’s occupants and neighbors in the Southwest, as these laborers would be inexpensive and easy to obtain.<sup>76</sup> Mexican laborers were recruited to assist with the United States’ burgeoning economy and development in industries such as mining, railroad, and agriculture.<sup>77</sup> Mechanisms developed by which Mexican laborers could be brought in on a temporary basis only, as they were undesirable as citizens.<sup>78</sup> This relationship has resulted in Mexico supplying the largest number of laborers into the United States, creating the largest migration in the world.<sup>79</sup>

Puerto Ricans were recruited under labor contracts to work in agriculture as well as industrial work in the United States mainland and Hawaii.<sup>80</sup> Puerto Ricans worked on sugar cane plantations in Hawaii, picked cotton in Arizona, as well as worked in other agricultural and industrial jobs in railroad, food processing plants, and copper mines throughout the United States.<sup>81</sup> Manufacturing industries and low-wage services in New York City also drew

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<sup>73</sup> See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 6–7* (1992) (discussing the role of Mexicans as an “ideal source of cheap labor”); Grosfoguel & Georas, *supra* note 62, at 192–95 (discussing the recruitment of Puerto Ricans for menial labor).

<sup>74</sup> See PADILLA, *supra* note 72, at 33; Grosfoguel & Georas, *supra* note 62, at 191–92 (finding that Dominicans that came to the United States with higher levels of skill and education were still relegated to menial and temporary labor).

<sup>75</sup> See Overmyer-Velázquez, *supra* note 72, at xxx n.28.

<sup>76</sup> See *id.* at xxx.

<sup>77</sup> See BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 118–19 (2004); NGAI, *supra* note 59, at 64.

<sup>78</sup> See CALAVITA, *supra* note 73, at 180 (citing 1 U.S. IMMIGRATION COMM’N, *ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION*, S. DOC. NO. 61-747, at 690 (3d Sess. 1911) (“[I]n the case of the Mexican he is less desirable as a citizen than as a laborer.”)).

<sup>79</sup> Overmyer-Velázquez, *supra* note 72, at xix.

<sup>80</sup> See generally Edwin Maldonado, *Contract Labor and the Origins of Puerto Rican Communities in the United States*, 13 *INT’L MIGRATION REV.* 103 (1979) (discussing the recruitment of Puerto Ricans as contract laborers throughout the United States).

<sup>81</sup> See *id.* at 105–06 (discussing the recruitment of Puerto Ricans as contract laborers in various sectors of the labor market throughout the United States, such as Hawaii, Arizona, Maryland, Wisconsin, Illinois, Ohio, Florida, and Indiana).

Puerto Ricans during the early 1900s.<sup>82</sup> By the 1920s, Puerto Ricans were the second largest group to work in the lower wage jobs in New York City, receiving low wages in comparison to whites.<sup>83</sup> By the late 1940s, however, Puerto Ricans occupied jobs throughout the United States, with an increasing concentration in the industrialized cities in the Midwest and Northeast.<sup>84</sup>

Mexicans began to immigrate outside the Southwest during the early 1900s.<sup>85</sup> While the expansion of cities throughout the country created economic opportunities, the economic opportunities did not exist in the same way for Mexicans as European immigrants. Once again, Mexicans were used to fulfill the need for cheap, unskilled, and temporary labor.<sup>86</sup> Mexicans were brought in to fill the needs in farm work, packing-houses, steel, railroad labor, and various factory jobs.<sup>87</sup> Mexican laborers were brought in to break a strike and immediately let go once a settlement had been reached, were seldom hired for permanent employment, were the lowest paid of all other racial groups, and were the last hired and first fired.<sup>88</sup>

Discrimination occurred in education and employment making job permanency or higher paying jobs difficult to acquire.<sup>89</sup> Even those who did obtain higher levels of skills or education were still treated differently. By the 1950s, while immigrants from Mexico began to increase their income and education levels in comparison to foreign-born Europeans, Mexican-Americans received lower wages than foreign born or even second-generation Europeans despite the fact that they had higher or equal education levels to

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<sup>82</sup> Grosfoguel & Georas, *supra* note 62, at 193–94.

<sup>83</sup> *See id.* at 194 (Puerto Ricans received \$8–\$13 per week, while Jewish and Italian workers earned between \$26–\$44 per week in the garment industry of NYC).

<sup>84</sup> *See id.* at 194–95.

<sup>85</sup> JOSEPH NEVINS, OPERATION GATEKEEPER AND BEYOND: THE WAR ON “ILLEGALS” AND THE REMAKING OF THE U.S.–MEXICO BOUNDARY 41 (2d ed. 2010).

<sup>86</sup> *See id.*; *see also* CALAVITA, *supra* note 73, at 6–7 (discussing the role of Mexicans as an “ideal source of cheap labor”).

<sup>87</sup> *See* CALAVITA, *supra* note 73, at 6–7; NEVINS, *supra* note 85, at 41; PADILLA, *supra* note 72, at 20–38 (discussing the role of Mexicans in labor forces in Chicago during the early 1900s as well as describing their routes to the urban city from packing houses in Kansas City, Texas, and parts of the Midwest for farming and other cities for railroad work).

<sup>88</sup> PADILLA, *supra* note 72, at 25; Néstor P. Rodríguez, *The Social Construction of the U.S.–Mexico Border*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 223, 235–36 (Juan F. Perea ed., 1997) [hereinafter IMMIGRANTS OUT!] (discussing the use of Mexican workers to break labor organizations’ demands for better working conditions).

<sup>89</sup> *See* PADILLA, *supra* note 72, at 24–25 (discussing the discriminatory practices of employers against Mexican workers by relegating them to temporary and unskilled work as well as the low wages paid to Mexicans).

these groups.<sup>90</sup> As a whole, Mexicans, both citizens and immigrants, lagged behind all other racial groups.<sup>91</sup>

The majority of Puerto Ricans who came from the island were poor, having low education levels and working in unskilled and rural labor.<sup>92</sup> Puerto Ricans remained unable to expand into higher skilled and better paying jobs, remaining in domestic and foundry work due to discriminatory practices in employment and education, lack of language proficiency, or because they were subject to discrimination due to their accent that was “undesirable” to many employers and reinforced their “foreignness.”<sup>93</sup> As a result, Puerto Ricans were relegated to menial jobs with poor pay and little hope for permanency or advancement.<sup>94</sup> Latinos remained a surplus supply of menial labor.

### *C. Latinos and U.S. Sovereignty*

As discussed above, Latinos were “less desirable as a citizen than as a laborer.”<sup>95</sup> As a result, laws, policies, and procedures were put in place to ensure their temporary status and inability to become full members of the United States. This section discusses the various ways in which dominant society attempted to ensure Latinos’ cheap labor and temporary status in the United States.<sup>96</sup>

#### *1. Immigration Law*

While America describes itself as the “nation of immigrants,”<sup>97</sup> membership in America’s “imagined community”<sup>98</sup> has been directly

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<sup>90</sup> *Id.* at 33.

<sup>91</sup> *Id.* at 32–33 (stating that Mexican, both citizen and immigrant, workers lagged behind other racial groups).

<sup>92</sup> Grosfoguel & Georas, *supra* note 62, at 192.

<sup>93</sup> See SUSAN S. BAKER, UNDERSTANDING MAINLAND PUERTO RICAN POVERTY 168–69 (2002) (discussing the hypothesis that U.S. citizenship has actually hindered Puerto Ricans in the United States due to continued perceptions of “foreignness”).

<sup>94</sup> See PADILLA, *supra* note 72, at 43 (discussing Puerto Ricans in unskilled jobs with only 1.6% of all Puerto Rican workers in white-collar professional occupations in 1960).

<sup>95</sup> HING, *supra* note 77, at 122 (discussing the Dillingham Commission of 1911 that focused on the desire to keep Mexican workers cheap and temporary due to their perceived inferior status).

<sup>96</sup> See *id.* at 120 (discussing the impositions of a head tax, denial of admission to those who were likely to be a public charge, and a literacy test, all of which were largely ignored for recruitment purposes but set the tone for the recruitment of cheap and temporary labor from Mexico into the United States).

<sup>97</sup> See generally JOHN F. KENNEDY, A NATION OF IMMIGRANTS (rev. and enlarged ed. 1964).

<sup>98</sup> BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6 (rev. ed. 2006) (defining the nation as “an imagined political community—and imagined as both inherently limited and sovereign”).

correlated to white superiority.<sup>99</sup> For centuries, immigration policy has been responsible for shaping our nation's composition.<sup>100</sup> Through its laws of exclusion and inclusion, individuals are categorized and separated into "desirable" and "undesirable" groups, excluding the undesirables, while admitting the desirables into the social and territorial fabric of the nation as members and citizens.<sup>101</sup> Historically, categories of "undesirables" have included ethnicity, national origin, and race.<sup>102</sup>

As this Article has discussed, although Latinos were brought in to build America and they positively contributed to the development of American society, full membership into the fabric of dominant white society was denied. Legal hurdles as well as discretionary actions were put into place to exclude Latinos from integration and assimilation into Anglo-American society and solidify their subordinated status as temporary, menial, and voiceless.<sup>103</sup> Immigration law and policy has been used throughout history to curtail permanent admission for members of Latin American countries.

Prior to the 1920s, the Mexican–U.S. border went largely unnoticed, with the United States focusing only on the entry of unlawful Chinese migrants.<sup>104</sup> The border between Mexico and the United States was largely irrelevant to the two countries, as the supply of Mexican laborers was in constant demand by U.S. based owners of growing companies.<sup>105</sup> The construct of an actual border between the two nations, therefore, was neither seen nor enforced by either side as its crossing benefited both countries and was regulated by the fluctuating labor demands in the United States.<sup>106</sup> However, while the recruitment of Mexican workers was beneficial to the United States, their perceived inferior status continued to dictate the parameters in which they would be allowed legal and/or permanent entry into the United States.<sup>107</sup> U.S.

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<sup>99</sup> See generally HING, *supra* note 77 (tracing the discriminatory immigration laws used throughout American history that shaped its perception of American identity).

<sup>100</sup> See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 1 (2006).

<sup>101</sup> See NGAI, *supra* note 59, at 5.

<sup>102</sup> See HING, *supra* note 77, at 5–6 (discussing the different categories that have been constructed to create a certain framework in which to define the United States).

<sup>103</sup> See, e.g., Act of May 5, 1892, ch. 60, 27 Stat. 25, 25–26 (banning entry of Chinese laborers into the United States); Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103–04 (banning anyone except "free white persons" from naturalization); NICHOLAS DE GENOVA & ANA Y. RAMOS-ZAYAS, *LATINO CROSSINGS: MEXICANS, PUERTO RICANS, AND THE POLITICS OF RACE AND CITIZENSHIP* 12 (2003) (discussing Anglo-Americans' perceptions of "whiteness," the struggle to create a mechanism for Mexicans and Puerto Ricans to obtain "whiteness," and the right of citizenship and the benefits that came with it).

<sup>104</sup> See NGAI, *supra* note 59, at 64.

<sup>105</sup> Overmyer-Velázquez, *supra* note 72, at xxxv.

<sup>106</sup> See HING, *supra* note 77, at 118 (discussing how the "naïve obliviousness" to the border was "encouraged from the outset by mutual economic advantage"); NGAI, *supra* note 59, at 64.

<sup>107</sup> See HING, *supra* note 77, at 122.

practices continued to reinforce the idea that Latinos should perform temporary and menial labor.

a. *The Discretionary and Dehumanizing Crossing*

Although prior to the 1920s Mexican migration across the U.S.–Mexican border went largely unnoticed, it did not go completely unnoticed. As stated before, the regulation of border crossing through the natural ups and downs of the labor market and discretionary enforcement of immigration laws, such as head tax, literacy tests, and poverty guidelines, kept immigration numbers down and maintained Latinos' temporary status.<sup>108</sup>

By the 1920s, however, the U.S.–Mexican border became an established and rigid border. The Border Patrol was formed, new inspection procedures were put into place, and head taxes, visa fees, and other formal admission and inspection criteria were enforced.<sup>109</sup> Those who tried to enter through inspection by foot, mainly poor and unskilled laborers, were subjected to degrading treatment that others were not subjected to, such as delousing, having their hair shorn, inspection while naked, walking naked past medical officers, and fumigation of their belongings and clothes.<sup>110</sup> Discriminatory treatment, and not the law, subjected only Mexican laborers to this type of inspection; this is continued evidence of their inferior status.<sup>111</sup>

The law and its discretion, imposition of head taxes, literacy tests, poverty criteria, and visa fees made it difficult for those without financial means and education to cross the border. Others found the inspection itself degrading and inhumane. Of those who were able to cross through lawful admission, many could only cross as temporary workers, either as visitors or commuters.<sup>112</sup>

b. *The Temporary Laborer*

The temporary and marginalized status of Mexican workers was further reinforced through various immigration laws and policies. In an effort to control the number of workers entering the United States from Mexico, immigration laws and policies produced various avenues by which Mexican workers would enter temporarily and their departure would be ensured.

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<sup>108</sup> See, e.g., *id.* at 120; NGAI, *supra* note 59, at 64 (stating that in 1917 the head tax was doubled and a literacy test was imposed).

<sup>109</sup> See NGAI, *supra* note 59, at 66–67.

<sup>110</sup> *Id.* at 68 (remarking that these requirements were unique to Mexicans as compared to other immigrants and also unnecessary because all those who were eligible for admission had received a medical certification prior to the border inspection).

<sup>111</sup> See *id.*; see also CALAVITA, *supra* note 73, at 7 (discussing Mexican laborers' importance as a source of cheap labor and their exemption from the literacy test imposed in 1917 due to agricultural growers' lobbying of policymakers for their exemption).

<sup>112</sup> See NGAI, *supra* note 59, at 70 (stating that twenty to thirty percent of Mexicans who entered during the 1920s and 1930s did so at “temporary visitors”).

During the 1920s, for example, 20% of a Mexican laborer's wages were withheld and returned only after his departure was guaranteed.<sup>113</sup> In 1942, one of the first temporary worker programs was developed. The Labor Importation Program, commonly known as the Bracero Program, was established to bring unskilled temporary labor into the United States due to the agricultural labor shortage brought about by the United States entering into WWII.<sup>114</sup> The H-2 program, another temporary visa program for agricultural or other labor,<sup>115</sup> is one of the last remaining mechanisms by which Latino labor is temporary and Latinos are limited in number<sup>116</sup> and their marginalized status ensured.

Temporary worker programs ensured that Latinos remained temporary and marginalized—the laws favored the U.S. companies: Latinos were tied to their employer, they were tied to a specific occupation, wages were low, and they could not remain permanently in the United States.<sup>117</sup> Furthermore, they could not bring their spouse or children<sup>118</sup> as such actions might cause them to try to reside permanently in the country; if they did stay, Latinos' undocumented status would ensure their marginalization. As the President's Commission on Migratory Labor emphasized, “[t]he demand for migratory workers is thus essentially twofold: To be ready to go to work when needed; to be gone when not needed.”<sup>119</sup>

## 2. *Expulsion*

As the above illustrates, informal and formal procedures were set in place to ensure that poor Latinos and their labor were controlled and temporary, and that their presence in American society remained negligible. There were moments, however, in U.S. history where white society perceived Latinos as having broken their agreement to remain temporary, invisible, and outside the boundaries of its nation. As the occurrences below will demonstrate, the

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<sup>113</sup> CALAVITA, *supra* note 73, at 7.

<sup>114</sup> *Id.* at 20–21; Michelle Hall Kells, *Questions of Race, Caste, and Citizenship, in WHO BELONGS IN AMERICA? PRESIDENTS, RHETORIC, AND IMMIGRATION* 183, 192 (Vanessa B. Beasley ed., 2006).

<sup>115</sup> See 8 U.S.C. § 1101(a)(15)(H) (2012).

<sup>116</sup> See 8 U.S.C. § 1184(g)(1)(B) (2012) (limiting the number of H-2B visas allowed per year to 66,000); TABLE XVI(B): NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING CREWLIST VISAS AND BORDER CROSSING CARDS) FISCAL YEARS 2009–2013 (2013), *available at* <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXVIB.pdf>, *archived at* <http://perma.cc/9P68-PX8A> (demonstrating that the number H-2A visas usually do not rise above 65,000 each year).

<sup>117</sup> See CALAVITA, *supra* note 73, at 21–26.

<sup>118</sup> Leo R. Chavez, *Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge, in IMMIGRANTS OUT!*, *supra* note 88, at 61, 72.

<sup>119</sup> CALAVITA, *supra* note 73, at 21 (quoting THE PRESIDENT'S COMM'N ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE 16 (1951)) (internal quotation marks omitted).

physical expulsion of Latinos left little doubt of dominant society's unwillingness to compromise on these points.

a. *Mexican Repatriation*

As discussed, the 1920s were a time when immigration into the United States from Mexico began to take on its rigidity in both form and substance. Despite the imposition of the laws and procedures, Mexican laborers continued to enter the United States and the Mexican population grew, as citizens, lawful immigrants, lawful nonimmigrants, and unauthorized immigrants.<sup>120</sup> In 1929, however, the economy of the United States collapsed, the stock market crashed, and Mexicans were blamed for the deterioration of the nation's economy.<sup>121</sup> The first mass deportation was implemented. Despite its rhetoric that all unauthorized individuals living in the United States were to be removed, Mexicans were targeted. From 1929 to 1939, Mexican repatriation, as it was dubbed, was responsible for the removal of over 1 million individuals of Mexican ancestry, both U.S. citizens and noncitizens.<sup>122</sup>

b. *Operation Wetback*

Another mass deportation of Mexicans from the United States took place after WWII. During WWII, Mexican labor had again been used to fill the void that the war had caused.<sup>123</sup> In 1954, however, after WWII ended and the country no longer needed Mexican laborers, another mass deportation program was implemented to remove unauthorized Mexican migrants from the United States.<sup>124</sup> This time, the name of the program itself gave little doubt as to the target: Operation Wetback was implemented.<sup>125</sup> State and local officials and law enforcement officers were used to locate and remove "illegal aliens."<sup>126</sup>

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<sup>120</sup> See HING, *supra* note 77, at 125 (discussing the belief by private and public sectors in the United States that "if Mexicans were needed for nonwhite jobs, their temporary presence was to be encouraged and accommodated; if not they were to be kept out and if necessary driven out").

<sup>121</sup> See TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992*, at 13 (1996).

<sup>122</sup> See Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 2, 4 (2005).

<sup>123</sup> CLARA E. RODRÍGUEZ, *HEROES, LOVERS, AND OTHERS: THE STORY OF LATINOS IN HOLLYWOOD* 107 (2004).

<sup>124</sup> Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile, in IMMIGRANTS OUT!*, *supra* note 88, at 190, 197.

<sup>125</sup> *Id.* "Wetback" is the pejorative name given to Mexicans to reflect the means of their crossing through the Rio Grande, specifically referring to their arrival into the United States with a wet back. *Wetback*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/wetback> (last visited Jan. 18, 2015), archived at <http://perma.cc/537N-M936>.

<sup>126</sup> See Eleanor M. Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW & CONTEMP. PROBS. 334, 351 (1956).

Similar to Mexican repatriation, Mexicans and Mexican–Americans were removed, but this time the numbers were even higher than the last mass deportation. Operation Wetback was responsible for the removal of approximately 3.7 million individuals of Mexican ancestry, both U.S. citizens and noncitizens.<sup>127</sup>

### 3. *Latinos and Second Class Citizenship*

Despite the desire to exclude Latinos from full membership in the United States, many Latinos became citizens or permanent residents of the United States. Various laws, customs, and practices, therefore, were developed to construct and maintain racial hierarchy, reinforcing the supposition that Latinos were inferior and their exclusion from mainstream society was necessary to achieve national prosperity.<sup>128</sup>

#### a. *Puerto Ricans*

Although Puerto Ricans are now U.S. citizens, their status in the United States remains unequal to other citizens. Their history, therefore, assists in the understanding of the marginalized status of Latinos in the United States, even as citizens. As Rexford G. Tugwell revealed, “[Puerto Ricans] are citizens of the United States who are nonetheless socially and politically constructed as ‘foreign’ to the United States.”<sup>129</sup> “Americans generally had not come to think of Puerto Ricans as real citizens—rather, when they thought of them at all, as citizens of a sort of second class.”<sup>130</sup>

These truths are further reinforced with Puerto Rico’s history and relationship to American society and its political system. Although Puerto Rico became part of the United States in 1898, Puerto Ricans were not given U.S. citizenship until 1917 through congressional act and were not able to elect their own governor until 1947.<sup>131</sup> To this day, Puerto Ricans are not guaranteed citizenship nor do they have the right to full participation in the political process: those living in Puerto Rico do not have representation in

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<sup>127</sup> Carrasco, *supra* note 124, at 197.

<sup>128</sup> See Vázquez, *supra* note 69, at 646–47.

<sup>129</sup> PEDRO A. MALAVET, AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO 153, 220 n.31 (2004) (citing REXFORD GUY TUGWELL, THE STRICKEN LAND: THE STORY OF PUERTO RICO 70 (1946)).

<sup>130</sup> *Id.* (quoting TUGWELL, *supra* note 129, at 70).

<sup>131</sup> R. SAM GARRETT, CONG. RESEARCH SERV., RL32933, POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS 30 (2011). Citizenship was given partly due to the need for military personnel—as their citizenship resulted in the immediate deployment of approximately 20,000 Puerto Ricans who were drafted to fight in World War I—as well as the strategic need for United States’ global policy and reputation. See Frank J. Collazo, *Part I – Puerto Ricans Contributions to All Wars*, CNN (Aug. 26, 2010), <http://ireport.cnn.com/docs/DOC-485498>, archived at <http://perma.cc/A9TB-FH8M>; see also Grosfoguel & Georas, *supra* note 62, at 193.

Congress, do not have the right to a jury, and do not have the right to vote in federal elections, including for the President of the United States, excluding the presidential primaries.<sup>132</sup>

b. *Latinos in the United States*

Latinos living in the United States remained excluded from participation in the dominant society's framework. The perceived inferior status of Latinos legitimated the confiscation of their particular lands and property at the hands of whites, who rationalized their taking as the only way that the land could achieve its full potential—an act of social utility.<sup>133</sup> As a result, many Latinos lost their wealth, income, and independence, which further reinforced their perceived inferior status and ensured racial dominance by whites.<sup>134</sup>

Latinos living in the Southwest were lynched for violating laws or customs.<sup>135</sup> Similarly to blacks, Latinos were subjected to physical separation and segregation in housing, public facilities, schools, etc. through “Juan Crow” laws.<sup>136</sup> They were also denied full participation in the political system.<sup>137</sup> Mexicans faced societal barriers that reified inferior status and

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<sup>132</sup> See Act of Mar. 2, 1917, Pub. L. No. 64-368, ch. 145, 39 Stat. 951, 951–68 (codified as amended in scattered sections of 48 U.S.C.). Prior to the the passing of this Act, Puerto Ricans were noncitizens. See *Balzac v. Porto Rico*, 258 U.S. 298, 313 (1922) (concluding that Congress had not incorporated Puerto Ricans into the Union and denying the Sixth Amendment right of trial by jury to Puerto Ricans living on the island). This case was one of a number of cases known as *The Insular Cases*, which generally held that inhabitants of unincorporated territories, such as Puerto Rico, may lack some constitutional rights. See *id.* at 312–13; *Gonzales v. Williams*, 192 U.S. 1, 13 (1904) (declaring that Puerto Ricans were not “aliens” and, therefore, could not be denied entry into the United States, but neither were they U.S. citizens); NGAI, *supra* note 59, at 100 (noting Puerto Ricans’ second class citizenship).

<sup>133</sup> See HORSMAN, *supra* note 49, at 210 (describing the taking of Mexican land and property by whites).

<sup>134</sup> See *id.* at 214; DUNN, *supra* note 121, at 13 (discussing the use of the Juan Crow segregation mechanism as helpful in Mexican repatriation, which included seizure and theft of property).

<sup>135</sup> See RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 66, 77, 147–48, 155 (4th ed. 2000) (discussing the lynching of Latinos in Texas and California during mid- to late-1800s); Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 299–303 (2009) (examining the history of Latino lynching in the United States).

<sup>136</sup> *Hernandez v. Texas*, 347 U.S. 475, 479–80 (1954) (discussing the fact that Latinos were denied the right to share bathroom facilities with whites).

<sup>137</sup> See *id.* at 476–77 (discussing the fact that Latinos were denied the right to sit on juries); Vázquez, *supra* note 69, at 665–73 (discussing the different treatment between Mexicans perceived as white versus those perceived as indigenous or “mixed,” such as varying ability to vote, hold office, and own land). See generally GÓMEZ, *supra* note 5 (describing the conflict between whites and Latinos in New Mexico over the structure of state leadership).

marginalization, such as the denial of the right to sit on a jury,<sup>138</sup> separate public facilities,<sup>139</sup> and denial of access to facilities.<sup>140</sup> Puerto Ricans and Dominicans were relegated into urban cities facing deindustrialization and subjected to the “urban ghetto,” facing unemployment, lack of education, and little opportunity for upward mobility.<sup>141</sup> And for those that remained in or returned to Puerto Rico, their lives were plagued by the realities of living within a U.S. territory, where an individual yearly income is less than half the level of the poorest state, Mississippi,<sup>142</sup> and is marked by 41% of its families living below the poverty level.<sup>143</sup>

The overarching belief in the inferiority of Latinos has permeated American laws, culture, and customs, creating structural mechanisms enforcing the identity of Latinos as temporary and menial workers, disposable, and outside the boundaries of full membership in American society. The examples above touch the surface of the complex ways in which laws are fashioned to maintain Latinos’ marginalized status. The mass deportation of Mexicans, both U.S. citizens and noncitizens alike, and the continued instability of Puerto Rico and Puerto Ricans within the United States reinforce this stark reality.

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<sup>138</sup> See 28 U.S.C. § 1865(b)(2) (2012) (disallowing the right to sit on jury if unable to speak English); *Hernandez*, 347 U.S. at 482 (holding that the denial of the right of Mexican Americans to sit on jury violated the Fourteenth Amendment); *United States v. Valentine*, 288 F. Supp. 957, 964 (D.P.R. 1968) (holding that the proceedings in the District of Puerto Rico must be held in English, not Spanish). See generally Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497 (2011) (discussing the impact of Puerto Ricans’ inability to sit on a federal jury in Puerto Rico if they do not understand or speak English despite the fact that it is a Spanish-speaking island).

<sup>139</sup> *Hernandez*, 347 U.S. at 479–80.

<sup>140</sup> *Id.*

<sup>141</sup> See WACQUANT, *PUNISHING THE POOR*, *supra* note 11, at 12 (discussing the urban ghetto as a means by which dominant society maintains a disposable working class population).

<sup>142</sup> Lizette Alvarez, *Economy and Crime Spur New Puerto Rican Exodus*, N.Y. TIMES (Feb. 8, 2014), [http://www.nytimes.com/2014/02/09/us/economy-and-crime-spur-new-puerto-rican-exodus.html?\\_r=1](http://www.nytimes.com/2014/02/09/us/economy-and-crime-spur-new-puerto-rican-exodus.html?_r=1), archived at <http://perma.cc/SR3V-NKPY> (stating that Puerto Rico’s per capital income is approximately \$15,200, which is half that of Mississippi, the United States’ poorest state); see also Grosfoguel & Georas, *supra* note 62, at 195 (discussing the decline in Puerto Ricans’ economic prosperity as a collateral consequence to U.S. economic and political strategy for the island).

<sup>143</sup> GOV’T DEV. BANK FOR P.R., PUERTO RICO FACT SHEET (2014), available at <http://gdbpr.com/economy/documents/PREconomicFactSheet-Dec2014.pdf>, archived at <http://perma.cc/K49U-QD4M>.

#### IV. FASHIONING CRIMMIGRATION TO DISPROPORTIONATELY IMPACT LATINOS

As discussed above, Latinos have been relegated into American society as temporary and cheap labor. This status legally limits their ability to obtain full membership into American society. As a result of their temporary and unequal membership, their social and economic capital in the United States is marginal.<sup>144</sup> As discussed below, despite dominant society's desire to control the number of Latinos entering the country, the number of those entering and remaining in the United States has steadily increased over the last forty years, becoming increasingly noticeable. By the 1970s, the Mexican population alone had tripled and Latinos entering the United States from other countries surged in the 1980s and 1990s, as they were fleeing countries suffering from war, political unrest, economic crisis, or natural disaster.<sup>145</sup> Latinos, today, represent the largest minority in the United States, comprising approximately 17.1% of the total U.S. population.<sup>146</sup> While the immigrant population was approximately 13% in 2012, Latinos accounted for approximately 46% of the total number of noncitizens residing in the United States.<sup>147</sup>

While once formal and informal procedures could be put into place to limit Latinos' entry or to expel them from the territorial United States, the globalization of the world, as well as the politics of the 1950s, began to put formal and informal restrictions on the means by which exclusion and expulsion were possible. Air, train, and land travel made entry into the United States from the Caribbean and other Latin countries easier. Latinos began to reside in states throughout the country, as opposed to remaining contained

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<sup>144</sup> See CALAVITA, *supra* note 73, at 21 (“[Growers] want a labor supply which, on the one hand, is ready and willing to meet the short-term work requirements and which, on the other hand, will not impose social and economic problems on them or on their community when the work is finished . . . .” (alteration in original)).

<sup>145</sup> See Grosfoguel & Georas, *supra* note 62, at 192 (discussing the arrival of Puerto Ricans, Dominicans, and Cubans into the United States); Douglas S. Massey & Mariano Sana, *Patterns of U.S. Migration from Mexico, the Caribbean, and Central America*, 2 *MIGRACIONES INTERNACIONALES* 5, 37 (2003) (discussing the arrival of and reasons for the migration of Latinos from different countries into the United States, such as Dominicans, who came beginning in 1961 as a result of foreign policy and the dictatorship of Trujillo, and Nicaraguans, whose migration began as a result of the Contra War during the 1980s as well). See generally Christopher Dickey, *Central America: From Quagmire to Cauldron?*, 62 *FOREIGN AFF.* 659 (1984) (discussing the political interest of the United States in Central America and its subsequent civil unrest and the mass migration to the United States during the 1980s).

<sup>146</sup> See *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Jan. 18, 2015), archived at <http://perma.cc/52UX-YKEG>.

<sup>147</sup> See *American Community Survey 2012 Data Release*, U.S. CENSUS BUREAU, [http://www.census.gov/acs/www/data\\_documentation/2012\\_release/](http://www.census.gov/acs/www/data_documentation/2012_release/) (last visited Jan. 18, 2015), archived at <http://perma.cc/LN6B-NYYT>.

within the traditional “gateway” states.<sup>148</sup> Puerto Ricans, as citizens, could not be forced to return to the island.<sup>149</sup> The demand for racial equality in the United States took root, and discriminatory laws and practices that were enacted during this time made programs like Mexican repatriation and Operation Wetback impossible.

Despite the impediments caused by the legal abolishment of overt discriminatory laws, policies, and procedures, two things remained true. First, immigration law allowed for the development and enforcement of discrimination on the basis of race. As professor and scholar Gabriel “Jack” Chin has pointed out, immigration law is “segregation’s last stronghold.”<sup>150</sup> Immigration law has continued to allow racial discrimination through Congress’s plenary power doctrine, justifying its discriminatory holdings on the basis of national security and absolute sovereign power.<sup>151</sup> Second, other mechanisms have been constructed through race-neutral laws, which continue to discriminate against and disproportionately impact “undesirable” groups within the United States.<sup>152</sup> The criminal justice system has been argued by many to be one such institution.<sup>153</sup> Scholars, researchers, and advocates assert

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<sup>148</sup> Jorge Durand et al., *The Changing Geography of Mexican Immigration to the United States: 1910–1996*, 81 SOC. SCI. Q. 1, 1 (2000) (stating that Mexican migration did not noticeably go outside the five “gateway” states until 1990 and that by 1996, almost 33% of all Mexican migrants were going to states other than the traditional five: California, New Mexico, Texas, Illinois, and Arizona).

<sup>149</sup> See Maldonado, *supra* note 80, at 111–12 (discussing Congress’s frustration that Puerto Rican contract workers were not returning to the island but remaining in the United States).

<sup>150</sup> See generally Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (arguing that Congress’s inherent power to exclude or remove any alien through the plenary power doctrine should be reexamined as it is premised on racially discriminatory holdings, which conflict with modern constitutional law).

<sup>151</sup> See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603–04 (1889) (holding that Congress has the absolute power to exclude anyone who it determines is a threat to the nation); see also Chin, *supra* note 150, at 3–7 & nn.1–41 (discussing court holdings in immigration law that continue to discriminate on the basis of race).

<sup>152</sup> See generally ALEXANDER, *supra* note 14 (discussing the way in which the criminal justice system was fashioned to subordinate blacks through race neutral laws); MASSEY, *supra* note 4 (discussing ways in which institutions can be created to maintain inequalities in race, class, and gender); LOÏC WACQUANT, *URBAN OUTCASTS: A COMPARATIVE SOCIOLOGY OF ADVANCED MARGINALITY* (2008) (discussing the way in which state institutions and their policies play a pivotal role in the way race, class, and gender are understood and viewed in society).

<sup>153</sup> See generally ALEXANDER, *supra* note 14; MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES, *supra* note 11 (discussing the social and financial costs of mass imprisonment); THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES (John Pratt et al. eds., 2005) (analyzing the significance of the recent drastic increases in the use of imprisonment); WACQUANT, *PUNISHING THE POOR*, *supra* note 11 (arguing that the current penal system is overgrown and intrusive, harming the ideals of democratic citizenship);

that the criminal justice system was created as a backlash to the civil rights movement—created as a method by which to control blacks in the United States without the explicit use of race.<sup>154</sup> The label “criminal” was used as a substitute for race, deriving the ability to continue to control, discriminate against, and subordinate blacks.<sup>155</sup> Considerable research has been done to prove this hypothesis, bringing to light statistical proof that politics and public policies, not increasing crime rates, drug use, or other explanations, produced the United States’ current system of mass (hyper) incarceration.<sup>156</sup>

As “mass incarceration is an inevitable effect of reshaping political authority around crime[,]” so too is crimmigration.<sup>157</sup> Crimmigration in many respects derives from many of the same historical events as mass incarceration. This section focuses on the political choices and public policies established over the last sixty years that have fashioned the structure of “crimmigration,” making the racialized mass removal and continued subordination of Latinos inevitable.

#### A. *A Humble Beginning: Constructing the “Illegal Alien” as Latino*

A noncitizen in immigration law is defined as an “alien.”<sup>158</sup> And as immigration and constitutional law have held, aliens are subject to fewer protections than U.S. citizens.<sup>159</sup> The “alien” has been given lower status because full membership into the United States has not yet been allowed. They are on “probation” and, depending on their behavior, they may be granted full membership or may be physically removed from the community.<sup>160</sup> Until an

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SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA* (4th ed. 2007) (discussing the racial and ethnic discrimination in the criminal justice system).

<sup>154</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2012)). See generally ALEXANDER, *supra* note 14; MASSEY, *supra* note 4 (discussing ways in which institutions can be created to maintain inequalities in race, class, and gender); WACQUANT, *supra* note 152.

<sup>155</sup> ALEXANDER, *supra* note 14, at 2.

<sup>156</sup> See *id.* at 12–13; RAPHAEL & STOLL, *supra* note 15, at 27; Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1038 (2010).

<sup>157</sup> JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 8 (2007).

<sup>158</sup> Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2012) (defining “alien” as “any person not a citizen or national of the United States”).

<sup>159</sup> See Kevin R. Johnson, *“Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 264–65, 271 (1996–1997) (discussing the limits on rights received by “aliens” as compared to citizens of the United States, such as denial of the rights to vote, sit on a jury, and be free from indefinite detention).

<sup>160</sup> See *id.* at 270 & nn.33–34.

“alien” becomes a full member of the United States, he or she is an “other,” which brings with it suspicion, judgment, and rejection.<sup>161</sup>

While the term “alien” has been criticized for its pejorative and dehumanizing impact on individuals,<sup>162</sup> the term “illegal alien,” was used to describe individuals who entered the United States without inspection<sup>163</sup> and denigrates an individual from all aspects of humanity and personhood.<sup>164</sup> “Illegal aliens” are the most despised, not only of all noncitizens, but also of all social groups within the United States.<sup>165</sup> They are viewed as “less than fully human,” deserving of exploitation and exclusion from society.<sup>166</sup> Their membership into society and their receipt of any rights granted members will be contested on grounds of their “trespass” into the boundaries of the nation.

As exemplified below, the construction of the “illegal alien” forms an important piece in the development of crimmigration and the creation of the “criminal alien.” The metamorphosis from the “illegal alien” to the “criminal alien” over the last sixty years was a natural expansion from the label “illegal alien”—a race-neutral term already linked with criminal behavior and racialized as Latino.<sup>167</sup>

### 1. *Elimination of Bracero Program*

Although the Bracero Program was meant to control the flow of Mexican unskilled labor into the United States, the program by many accounts was viewed as a failure. First, although the Bracero Program was meant to supply cheap labor without the financial or social costs associated with a permanent work force, Mexican immigrants continued to enter and remain in the United States.<sup>168</sup> Despite attempts to limit entry to unaccompanied male workers on a

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<sup>161</sup> See *id.* at 272 & nn.42–45 (discussing the term “alien” and its relationship to images of space invaders, intruders, interlopers, and outsiders).

<sup>162</sup> *Id.* at 272.

<sup>163</sup> *Illegal Alien*, DICTIONARY.COM, <http://dictionary.reference.com/browse/illegal%20alien?s=t> (last visited Feb. 19, 2015), archived at <http://perma.cc/GZ9Q-895D>.

<sup>164</sup> See Jose Antonio Vargas, *Immigration Debate: The Problem with the Word Illegal*, TIME (Sept. 21, 2012), <http://ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal/>, archived at <http://perma.cc/H4XD-VMXK>.

<sup>165</sup> See MASSEY, *supra* note 4, at 11–13 (citing Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 887 (2002)) (discussing Fiske’s stereotype content model, which divides groups and individuals into four “social spaces” based on stereotypical judgment and describes one quadrant as the “despised out-group” that consists of the most socially stigmatized and detested groups).

<sup>166</sup> *Id.* at 13 (citing Fiske et al., *supra* note 165, at 887 (finding through a stereotype content model study that the most socially stigmatized and detested groups include Hispanics and migrant workers)).

<sup>167</sup> NGAI, *supra* note 59, at 149 (discussing “illegal aliens” as synonymous with criminals, “wetbacks,” and Mexicans).

<sup>168</sup> See *id.* at 149–50.

temporary basis, many Mexicans came as a family and remained in the United States.<sup>169</sup> In addition, the Bracero Program did not deter the unauthorized migration of Mexican laborers into the United States and many entered as such.<sup>170</sup> Three reasons exist for the increase in unauthorized migration: (1) the abundance of jobs and the limited number of visas through the program as the continued demand for Mexican labor exceeded the number of laborers allowed; (2) growers' continued recruitment of unauthorized workers in order to circumvent the "red tape" of the program; and (3) states that were exempt from the program because of their history of discriminatory and harsh treatment of Mexicans, such as Texas, continued to demand Mexican labor.<sup>171</sup> Therefore, unauthorized migration continued despite the program's attempt to act as a control valve.<sup>172</sup>

By the same token, the Bracero Program admitted over 200,000 workers into the United States per year and continued to be used as a legal entry for Mexican laborers for over twenty years, allowing millions of Mexicans legal status in the United States, if only temporary.<sup>173</sup> Due to various tensions created by the Bracero Program, however, it was terminated in 1964.<sup>174</sup> During the program's existence, over 4.5 million temporary Mexican workers entered the United States to work under the program.<sup>175</sup> The end of the Bracero Program ended the largest flow of temporary contract labor into the United States, creating a void in the ability for Mexican migrant labor to enter the country through legal channels and conflicting with the continued need for unskilled labor in the United States.

## *2. Immigration, the Nationalization Act of 1965, and Its 1976 Amendments*

The 1960s brought an end to racially discriminatory laws. Although changes started prior to the 1960s, the wave of change officially became a reality with the legislative enactments of the Civil Rights Act of 1964 and the Voter Registration Act of 1965.<sup>176</sup> The Civil Rights Act of 1964 abolished

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<sup>169</sup> *See id.*

<sup>170</sup> *See id.* at 150–52.

<sup>171</sup> *See* CALAVITA, *supra* note 73, at 108–20; NGAI, *supra* note 59, at 152 (stating that Texas farmers continued to use illegal labor).

<sup>172</sup> *See* CALAVITA, *supra* note 73, at 112; NGAI, *supra* note 59, at 157.

<sup>173</sup> NGAI, *supra* note 59, at 139.

<sup>174</sup> S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 3 (2013), available at <http://www.splcenter.org/sites/default/files/download/publication/SPLC-Close-to-Slavery-2013.pdf>, archived at <http://perma.cc/B98W-BAGF>.

<sup>175</sup> *Id.*; see *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 n.12 (1975).

<sup>176</sup> *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that state laws establishing separate public schools for black and white children were unconstitutional under the Fourteenth Amendment); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954)

discriminatory treatment of individuals based upon gender, race, ethnicity, religion, and national origin in public facilities,<sup>177</sup> and the Voters Rights Act of 1965 abolished discriminatory treatment in voting laws.<sup>178</sup> Title VIII of the Civil Rights Act of 1968 prohibited discrimination in housing on the basis of race, color, national origin, and religion.<sup>179</sup>

The Immigration and Nationality Act of 1965 prohibited discrimination against immigrants on the basis of their national origin.<sup>180</sup> The Immigration and Nationality Act of 1952 had favored Western and Eastern Europeans over other immigrants.<sup>181</sup> Coming on the heels of the civil rights movement and banning overtly discriminatory practices, the Immigration and Nationalization Act of 1965 (INA) was seen by many as another significant step toward equality for all.<sup>182</sup> Prior to 1965, Southern Europeans made up the composition of “illegal aliens,” but these groups were legalized using the power of administrative discretion through the Registry Act, suspension of deportation, and pre-examination.<sup>183</sup> By 1965, white Europeans were granted inclusion into the United States.<sup>184</sup> Latinos, however, were not.<sup>185</sup>

While the 1960s may have brought an end to national quotas based upon race, national origin, and ethnicity, this legislative act did not benefit the nation’s southern border members.<sup>186</sup> For the first time, the INA established a quota on the Western Hemisphere countries.<sup>187</sup> The INA also put formal

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(holding that Mexican Americans denied the right to sit on juries was a violation of the Fourteenth Amendment).

<sup>177</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2012)).

<sup>178</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2012)) (establishing the right to be free from certain forms of discrimination in voting).

<sup>179</sup> Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)).

<sup>180</sup> Act of Oct. 3, 1965, Pub. L. No. 89-236, § 202(a), 79 Stat. 911, 911–12 (codified as amended at 8 U.S.C. § 1152 (2012)).

<sup>181</sup> See Immigration and Nationality (McCarran-Walter) Act (INA), Pub. L. No. 82-414, ch. 477, § 202, 66 Stat. 163, 176–78 (1952) (codified as amended at 8 U.S.C. § 1152 (2012)).

<sup>182</sup> See, e.g., Peter H. Schuck, *Immigration Policy: Myths, Realities, and Reforms*, 51 WASHBURN L.J. 189, 189 (2012) (stating that “the Immigration Act of 1965 [is] perhaps the most important nation shaping statute ever enacted—at least in the modern era” (footnote omitted)).

<sup>183</sup> NGAI, *supra* note 59, at 89.

<sup>184</sup> See *id.*

<sup>185</sup> *Id.*

<sup>186</sup> See Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of the Modern U.S.–Mexico Border State*, 34 IMMIGR. & NAT’LITY L. REV. 3, 8 (2013) (discussing the negative impact of the INA on Latinos).

<sup>187</sup> Act of Oct. 3, 1965, Pub. L. No. 89-236, §§ 201, 206, 79 Stat. 911, 911, 916 (codified as amended at 8 U.S.C. § 1151 (2012)). The Immigration Acts of 1924 and 1952 did not impose numerical restrictions on immigration from countries in the Western

restrictions on unskilled migrant labor.<sup>188</sup> The INA, therefore, significantly curtailed legal immigration from Mexico, Latin America, and the Caribbean.<sup>189</sup>

These laws significantly impacted legal immigration into the United States from Mexico; because Mexico's numbers were severely cut by the new quota,<sup>190</sup> there were new restrictions on work visas and new restrictions on legalization through family members.<sup>191</sup> As discussed above, the relationship between Mexico and the United States had been strong and Mexicans migrated into the United States at higher rates than any other country.<sup>192</sup> Acknowledging this relationship, President Ford himself admitted his concern in the reduction of legal immigration to the United States that would come as a result of the 1976 Amendments to the INA.<sup>193</sup> However, efforts to implement a quota system for Mexicans had been rising since the early 1900s,<sup>194</sup> and, therefore, the Amendments were passed. Prior to the abolishment of the Bracero Program and the enactment of the INA, approximately 235,000 Mexicans entered the United States each year.<sup>195</sup> After the enactment of the INA and its Amendments, only 20,000 visas were allotted to Mexico.<sup>196</sup>

Unsurprisingly, Mexican migration continued despite the reduction of legal migration through the INA and its Amendments, although now through increasingly unauthorized means.<sup>197</sup> In 1968, the number of deportations for

Hemisphere. *See* Immigration and Nationality (McCarran-Walter) Act (INA), Pub. L. No. 82-414, ch. 477, § 201, 66 Stat. 163, 175–76 (1952) (codified as amended at 8 U.S.C. § 1151 (2012)); Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, 43 Stat. 153.

<sup>188</sup> Act of Oct. 3, 1965 § 203 (codified as amended at 8 U.S.C. § 1153 (2012)); *see also* INA §§ 203, 212(a)(14).

<sup>189</sup> *See* KEVIN R. JOHNSON & BERNARD TRUJILLO, IMMIGRATION LAW AND THE US–MEXICO BORDER: ¿SÍ SE PUEDE? 125 (2011) (stating that the INA “coupled more generous treatment of those outside the Western Hemisphere with less generous treatment of Latin Americans”); NGAI, *supra* note 59, at 263.

<sup>190</sup> *See* Act of Oct. 3, 1965 § 203 (cutting the allocation of visas to Mexico in half).

<sup>191</sup> *See* NGAI, *supra* note 59, at 261 (discussing the new restrictions, such as the inability for undocumented parents to legalize through their children).

<sup>192</sup> *See* Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 641–72 (1981).

<sup>193</sup> *See* Statement by the President on Signing H.R. 14535 into Law, 12 WEEKLY COMP. PRES. DOC. 1548, 1548 (Oct. 25, 1976); *see also* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (codified as amended in scattered sections of 8 U.S.C.).

<sup>194</sup> *See* HING, *supra* note 77, at 122–25 (discussing the restrictionists' desire to limit migration from Mexico through quotas).

<sup>195</sup> NGAI, *supra* note 59, at 261 (stating that in the early 1960s, 200,000 Mexicans were admitted under the Bracero Program and 35,000 entered as permanent residents each year).

<sup>196</sup> *Id.* (stating that the 1976 amendments to the INA imposed country quotas of 20,000 on the Western Hemisphere).

<sup>197</sup> *See* Hernández, *supra* note 28, at 1491 (discussing how Mexican migration increased after 1965 because the Mexican economy declined and the Mexican community had already been established in the U.S.).

unauthorized entry had increased by 40%.<sup>198</sup> In 1976, 781,000 Mexicans were deported.<sup>199</sup> These numbers reflected the Immigration and Naturalization Service (INS) enforcement priorities, which focused on the southwestern border, thereby increasing the number of Mexicans removed while the number of noncitizens deported from other countries remained significantly lower.<sup>200</sup> These occurrences contributed and reinforced the growing perception that “illegal aliens” were Mexican.<sup>201</sup>

The historical narration of the INA and its Amendments as a symbol of equality towards all migrants would be used to rationalize increasing unauthorized migration from Latin American countries as an indication of their aberrant behavior, justifying the need for enforcement and further restrictive measures. By limiting all nations to the same visa numbers, equality was perceived, but not actually accomplished. As Nicholas DeGenova observed,

enforcement proclivities and prerogatives [of the INS], and the statistics they produce, have made an extraordinary contribution to the commonplace fallacy insinuating that Mexicans account for virtually all “illegal aliens,” have served to restage the U.S.–Mexico border as the theater of an enforcement “crisis,” and have rendered “Mexican” the distinctive national/racialized name for migrant “illegality.”<sup>202</sup>

### B. From “*Illegal*” to “*Criminal*”: Shifting the “*Illegal Alien*” to a *Criminal Threat*

As a result of the events that transpired during the 1960s, the social construct of the “illegal alien” departed its definition from those of the “lower races of Europe.”<sup>203</sup> The “illegal alien” emerged during this time as those who were perceived as migratory, not having homes and families within the United States, and violating entry into the Nation’s space by “walking (or wading).”<sup>204</sup> As a result, increasing unauthorized migration from Latin America, Mexico, and the Caribbean brought about a significant change in attitude and an end to immigration law as it was known.

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<sup>198</sup> NGAI, *supra* note 59, at 261 (stating that 151,000 Mexicans were deported from the United States in 1968).

<sup>199</sup> *Id.*

<sup>200</sup> *See id.* (stating that the amount of deportation of individuals from all other countries combined remained below 100,000 per year).

<sup>201</sup> *Id.*

<sup>202</sup> Nicholas P. De Genova, *Migrant “Illegality” and Deportability in Everyday Life*, 31 ANN. REV. OF ANTHROPOLOGY 419, 436 (2002).

<sup>203</sup> *See* NGAI, *supra* note 59, at 89 (internal quotation marks omitted).

<sup>204</sup> *Id.*

While unauthorized migration remains low as compared to all other forms of migration,<sup>205</sup> unauthorized migration has developed as a national security issue. Over the next thirty years, American politics and societal attitudes began to see the increasing numbers of unauthorized Latinos as a serious threat to American norms and values, refusing to reconstruct Latinos as “desirable” candidates for membership into U.S. society and enacting policies and procedures that brought about more restrictive mechanisms and increased enforcement.<sup>206</sup>

This section discusses the “illegal alien’s” transition from “immigration violator” to “criminal threat,” setting up the expansion of the “criminal alien” to its eventual construction as both criminal and immigration violators within the criminal justice system.

### 1. *The Shifting Demographics of Post-1965*

Against the backdrop of the increasingly restrictive immigration policies that commenced in the 1980s stood the ever-increasing number of Latinos residing in the United States.<sup>207</sup> Many factors contributed to this—the continued recruitment by the United States labor markets, the economic or social decline of certain Latinos’ country of origin, the growing ease in which to arrive in the United States, the increasing difficulty in border migration due to the ever-increasing restrictions, and the strong familial ties to individuals living in the United States.<sup>208</sup>

While, prior to 1960, the countries that sent the largest numbers of individuals to the United States were white,<sup>209</sup> the majority of immigrants today are immigrants of color—predominantly Latino.<sup>210</sup> In 1960, 75% of the foreign born were from countries in Europe.<sup>211</sup> During this time, Mexican

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<sup>205</sup> JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 9 (2011), available at <http://www.pewhispanic.org/files/reports/133.pdf>, archived at <http://perma.cc/Q3Z5-6FXN> (stating that, in March 2010, unauthorized immigrants accounted for only 28% of the nation’s foreign-born population of 40.2 million and 3.7% of the total U.S. population).

<sup>206</sup> See generally NEVINS, *supra* note 85 (discussing the public’s negative perceptions of immigrants).

<sup>207</sup> See Hernández, *supra* note 28, at 1491–92.

<sup>208</sup> See *id.*

<sup>209</sup> See MICHAEL FIX ET AL., IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 25–27 (1994).

<sup>210</sup> ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, at 2 tbl.2 (2012), available at <http://www.census.gov/prod/2012pubs/acs-19.pdf>, archived at <http://perma.cc/78WR-E7X5> (stating that in 2009, over 80% of the foreign-born population were from countries in Latin America and Asia).

<sup>211</sup> ELIZABETH M. GRIECO, U.S. CENSUS BUREAU, RACE AND HISPANIC ORIGIN OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2007, at 1 fig.1 (2010), available at

immigration ranked seventh behind Italy, Germany, Canada, the Soviet Union, the United Kingdom, and Poland.<sup>212</sup> The landscape of migration, today, has a different view with the largest numbers of immigrants from Mexico, China, Philippines, El Salvador, Vietnam, Korea, Cuba, Dominican Republic, and Guatemala.<sup>213</sup> These ten countries make up approximately 60% of the total immigrant population.<sup>214</sup>

The increase in Latino migration occurred primarily between 1990 and 2006.<sup>215</sup> By 2009, over 53.1% of the foreign born were from countries in Latin America.<sup>216</sup> Mexicans, by far, make up the majority of Latinos living in the United States, followed by Puerto Ricans, Cubans, Salvadorans, and Dominicans.<sup>217</sup> The Mexican population soared between the 1970s and 2008, increasing from 760,000 to 12.7 million, as U.S. citizens and immigrants.<sup>218</sup> Cubans, Salvadorans, and Dominicans migrated into the United States at higher numbers during the 1980s.<sup>219</sup>

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<http://www.census.gov/prod/2010pubs/acs-11.pdf>, archived at <http://perma.cc/7VJ2-4WFV>.

<sup>212</sup> *Mexican Immigrants in the United States, 2008*, PEW RES. CENTER (Apr. 15, 2009), <http://www.pewhispanic.org/2009/04/15/mexican-immigrants-in-the-united-states-2008/>, archived at <http://perma.cc/9VL8-M65P>.

<sup>213</sup> ELIZABETH M. GRIECO & EDWARD N. TREVELYAN, U.S. CENSUS BUREAU, PLACE OF BIRTH OF THE FOREIGN-BORN POPULATION: 2009, at 2 fig.2 (2010), available at <http://www.census.gov/prod/2010pubs/acsbr09-15.pdf>, archived at <http://perma.cc/FC68-NJ56>.

<sup>214</sup> Chiamaka Nwosu et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Apr. 28, 2014), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>, archived at <http://perma.cc/6BAN-XGJH>.

<sup>215</sup> See News Release, U.S. Census Bureau, Hispanic Heritage Month 2013: Sept. 15 – Oct. 15 (July 30, 2013), available at [http://www.census.gov/newsroom/releases/pdf/cb13ff-19\\_hispanicheritage.pdf](http://www.census.gov/newsroom/releases/pdf/cb13ff-19_hispanicheritage.pdf), archived at <http://perma.cc/6BAN-XGJH>; see also Sandra Lilley, *Latinos in U.S. Reach 52 Million but Growth Is from Births Not Immigration*, NBCLATINO (Feb. 16, 2013, 12:51 PM), <http://nbclatino.com/2013/02/16/latinos-in-u-s-reach-52-million-but-growth-is-from-births-not-immigration/>, archived at <http://perma.cc/2ZGN-MGEE>.

<sup>216</sup> See GRIECO & TREVELYAN, *supra* note 213, at 2 fig.1; News Release, U.S. Census Bureau, *supra* note 215.

<sup>217</sup> See Seth Motel & Eileen Patten, *The 10 Largest Hispanic Origin Groups: Characteristics, Rankings, Top Countries*, PEW RES. CENTER (June 27, 2012), <http://www.pewhispanic.org/2012/06/27/the-10-largest-hispanic-origin-groups-characteristics-rankings-top-counties/>, archived at <http://perma.cc/JS25-95UZ> (showing that in 2010, Mexicans make up 64.9% of the total Latino population, followed by Puerto Ricans at 9.2%, Cubans at 3.7%, Salvadorans at 3.6%, and Dominicans at 3.0%).

<sup>218</sup> *Mexican Immigrants in the United States, 2008*, *supra* note 212; see also Lilley, *supra* note 215 (inferring that Latinos who are born U.S. citizens comprise 64% of the Hispanic population in the U.S.).

<sup>219</sup> See *Largest U.S. Immigrant Groups over Time, 1960–Present*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/programs/data-hub/charts/largest-immigrant-groups->

The changing demographics and the increasing rate of migration from nonwhite countries, specifically Latin-American countries, after 1965 assists in understanding the underlying motivations and reasons that were the catalyst for the ever increasing restrictive immigration laws that were implemented.

## 2. *Immigration Relief and Control Act of 1986*

By the 1980s, Mexican rates of entry had almost tripled and entry of Latinos from various countries in Central America and the Caribbean had also increased significantly.<sup>220</sup> Because of the limited legal avenues of entry available, many entered or remained in the country without authorization.<sup>221</sup> Unauthorized immigrants' presence in the United States was again perceived as a danger to American society, its well-being, and safety.<sup>222</sup> Their increasing numbers were correlated to an "invasion by aliens."<sup>223</sup> This time, however, unauthorized immigrants began to be viewed as "criminals," and socially deviant, based on their act of unauthorized crossing and their perceived propensity towards future criminal activity.

Despite these negative assumptions, "illegal aliens" were a large percentage of the work force in janitorial service, construction clean-up, agriculture, and other low-skilled and minimum-wage jobs.<sup>224</sup> U.S. citizens viewed their unauthorized entry into the work force, not as a positive trait, but as further evidence of their socially deviant behavior—Americans accused "illegal" immigrants of "stealing" jobs from hard working Americans, contributing to the decline of the economy, lowering wages, and, contradictorily, emptying the coffers of the federal and state treasuries in their attempt to receive social services and public benefits.<sup>225</sup> Conflict, therefore,

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over-time (last visited Feb. 13, 2015), *archived at* <http://perma.cc/X56L-QNS4> (providing specific immigration numbers in site's downloadable data).

<sup>220</sup> *See id.*

<sup>221</sup> *See* Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in IMMIGRANTS OUT!, *supra* note 88, at 165, 174; *see also* Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in IMMIGRANTS OUT!, *supra* note 88, at 13, 28 (discussing how limited legal avenues also included the long wait for family visas to those who were eligible).

<sup>222</sup> *See* Johnson, *supra* note 221, at 166.

<sup>223</sup> William Bradley, *How Prop 187 Became the Pivot for the Immigration Issue and Future of Democratic Politics*, HUFFPOST POL., [http://www.huffingtonpost.com/william-bradley/how-prop-187-became-the-pivot\\_b\\_3619634.html](http://www.huffingtonpost.com/william-bradley/how-prop-187-became-the-pivot_b_3619634.html) (last updated Sept. 17, 2013, 5:12 AM), *archived at* <http://perma.cc/5QK5-FCMM> (discussing how Pete Wilson's 1994 campaign ran television ads that had "Mexicans dashing across the border into California as the announcer intoned, 'They keep coming'").

<sup>224</sup> CALAVITA, *supra* note 73, at 7.

<sup>225</sup> This contention remains prevalent in contemporary society. *See Illegal Aliens Taking U.S. Jobs (2013)*, FED'N FOR AM. IMMIGR. REFORM, <http://www.fairus.org/issue/illegal-aliens-taking-u-s-jobs> (last updated Mar. 2013), *archived at* <http://perma.cc/Z5UP-M2H3>; Bonnie Kavoussi, *Undocumented Workers Have 'Negligible Impact' on Wages: Study*, HUFFPOST BUS., <http://www.huffingtonpost.com/2012/04/12/undocumented-work>

occurred because of the continued need for unskilled labor, especially in agriculture, and the negative perceptions of Latino immigrants and their “undesirability” as permanent members of society.

Political debates again tried to reconcile the dichotomy by offering a labor surplus for American companies while at the same time limiting the permanent status of Latinos in the United States. In 1985, Congress introduced a bill that would allow 350,000 agricultural workers to enter the country on a temporary basis for seasonal work.<sup>226</sup> The anti-immigrant sentiment, however, did not wane at the obvious need for unskilled labor and the contribution of Latinos to fill this need. Instead the *Washington Post* declared that the bill was a “cave in” and insinuated that Congress was putting the interests of the country against agricultural growers and “illegal” workers.<sup>227</sup>

One year later, the Immigration Reform and Control Act (IRCA) was introduced. IRCA was brought out as a compromise. IRCA was seen as a mechanism to ensure jobs for citizens and lawful immigrants by targeting employers who knowingly employed unauthorized immigrants through fines and criminal prosecution, which, it was believed, would deter migration by drying up jobs in the United States.<sup>228</sup> Immigration advocates also supported IRCA because it provided the approximately three million unauthorized workers the ability to remain in the United States as conditional residents, while at the same time promising them eventual permanent residency.<sup>229</sup>

The reality of IRCA, however, was that it became the first major legislative act that started the militarization of the southwest border and further reached into the interior to regulate migrants instead of punishing employers.<sup>230</sup>

### 3. Changes in Southwest Border Policy

The concept of border security began to take place in the 1970s and reached new heights in the 1990s, largely due to IRCA and the increasing migration from Latin American countries. Although all ports of entry could

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ers-illegal-immigrants-negligible-impact-wages\_n\_1420375.html (last updated Apr. 12, 2012, 2:36 PM), *archived at* <http://perma.cc/84EW-6BR3> (discussing the continued unsubstantiated belief that unauthorized workers depress wages).

<sup>226</sup> See Jerry Kammer, *The Road to IRCA, June 1986*, CENTER FOR IMMIGR. STUD. (June 29, 2011), <http://cis.org/Kammer/IRCA-25-Years>, *archived at* <http://perma.cc/9VZY-LXZ9>.

<sup>227</sup> *Id.*

<sup>228</sup> See Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360–74 (codified as amended at 8 U.S.C. § 1324a (2012)); see also Ryan D. King et al., *Employment and Exile: U.S. Criminal Deportation, 1908–2005*, 117 AM. J. SOC. 1786, 1797 (2012).

<sup>229</sup> See Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. (2012)).

<sup>230</sup> See JASON JUFFRAS, IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON THE IMMIGRATION AND NATURALIZATION SERVICE 31 (1991).

have been targeted to combat the increase in “illegal” migration, emphasis was put on the southwest border.<sup>231</sup>

a. *Reagan and the Militarization of the Border*

Between 1981–1988, the rhetoric of the “uncontrolled border” of the Southwest, both in terms of unauthorized immigration as well as drug trafficking became entrenched in the political rhetoric and determined how the southwest border would be regulated. The Reagan Administration framed unauthorized migration as a national security issue, capturing images of Central Americans as terrorists when he stated, “terrorists and subversives are just two days’ driving time from Harlingen, Texas”<sup>232</sup> and as undesirables as “tidal waves” of refugees come into the United States from Central America.<sup>233</sup> During the Reagan Administration, the Department of State emphasized that the borders of the United States had to be enforced at all costs against Caribbeans, Central Americans, and Mexicans.<sup>234</sup> Year after year, political discourse spoke of “regaining control of the borders,”<sup>235</sup> plural, but focusing on the United States–Mexico border.

The former Immigration and Naturalization Service (INS) grew to unprecedented levels during the Reagan Administration, obtaining high-tech air-support systems, spotter observation helicopters, infrared radar, night vision scopes, goggles, and electronic surveillance mechanisms.<sup>236</sup> Congressional spending towards Border Patrol increased by 149%, 85% of the funds were authorized specifically for the United States’ southwest border.<sup>237</sup>

In addition, Border Patrol became the agency designated to enforce drug and contraband smuggling in addition to immigration enforcement.<sup>238</sup> The duality of Border Patrol’s function made a political statement that the United States–Mexico border was a serious threat to national security, which called for restrictive and harsh measures for both humans and drugs. The war on

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<sup>231</sup> See David Seminara, *New Pew Report Confirms Visa Overstays Are Driving Increased Illegal Immigration*, CENTER FOR IMMIGR. STUD. (Sept. 24, 2013), <http://www.cis.org/seminara/new-pew-report-confirms-visa-overstays-are-driving-increase-d-illegal-immigration>, archived at <http://perma.cc/8M3U-RRXD>.

<sup>232</sup> DUNN, *supra* note 121, at 3 (internal quotation marks omitted).

<sup>233</sup> *Id.* at 42.

<sup>234</sup> See *id.* at 2.

<sup>235</sup> See, e.g., Bob Belcher, *Barton Hears from Corsicana*, CORSICANA DAILY SUN (Aug. 12, 2006), [http://www.corsicanadailysun.com/news/local\\_news/barton-hears-from-corsicana/article\\_ccb208b7-b05e-586e-9526-a8524e56095c.html?mode=jqm](http://www.corsicanadailysun.com/news/local_news/barton-hears-from-corsicana/article_ccb208b7-b05e-586e-9526-a8524e56095c.html?mode=jqm), archived at <http://perma.cc/A8LD-LJEU>.

<sup>236</sup> See DUNN, *supra* note 121, at 41–46 (discussing how INS appropriations rose 130% from 1980 to the end of 1988 and that 60% of the new funds and 82% of the newly created position went to immigration enforcement).

<sup>237</sup> *Id.* at 49.

<sup>238</sup> *Id.* at 52–53.

drugs at the border and the increasing migration of unauthorized migrants was conflated into the belief that unauthorized migrants were drug traffickers.<sup>239</sup>

The link between “illegality” and drug trafficking and their enforcement through Border Patrol further blurred the lines between civil and criminal offenses, continuing in the transformation from the “illegal alien” into a criminal and terrorist threat. “Illegal aliens” became an enemy of the nation and their conflation into the war on drugs led to further deterioration of society’s perception of them, legitimizing the continued degradation of the lives of Mexicans living on both sides of the border as justified by their perceived threat.<sup>240</sup>

### b. *Clinton and Operation Gatekeeper*

The Clinton Administration continued the rhetoric of the out of control southwest border.<sup>241</sup> Developing Operation Gatekeeper at the southwest border, Clinton reinforced that America, “cannot . . . allow our people to be endangered by those who would enter our country to terrorize Americans. . . . We will make it tougher for illegal aliens to get into our country.”<sup>242</sup> Coming closer to the concept of a civil immigration violator as a criminal, he touted that “[t]oday’s initiatives are about stopping crime, toughening the penalties for the criminals, and giving our law enforcement people the tools they need to do the job.”<sup>243</sup> Clinton’s rhetoric continued to enforce the view of “illegals” as per se “criminals,” stating “illegal” immigrants were “those who [did] not obey the laws.”<sup>244</sup>

The continued rhetoric and enforcement at the southwest border only reinforced the public’s anti-immigrant sentiment, resulting in beliefs that “illegal” immigration was the country’s most pressing issue, immigrants took jobs away from Americans, and that there was a direct correlation between unauthorized immigration and crime.<sup>245</sup>

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<sup>239</sup> *Id.* at 87 (discussing the continuing practice of associating unauthorized migrants with drug traffickers).

<sup>240</sup> See Bob Ortega, *Mother of Dead Mexican Teen Sues Border Patrol*, USA TODAY (July 29, 2014, 4:46 PM), <http://www.usatoday.com/story/news/nation/2014/07/29/border-teen-death-nogales/13327509/>, archived at <http://perma.cc/SG9N-AQXA> (discussing that the Border Patrol has been responsible for the deaths of forty-two individuals—thirteen of them U.S. citizens—since 2005).

<sup>241</sup> See NEVINS, *supra* note 85, at 107 (discussing Clinton’s rhetoric on controlling the border).

<sup>242</sup> *Id.* at 110 (quoting Remarks and an Exchange with Reporters on Immigration Policy, 1 PUB. PAPERS 1194 (July 27, 1993)).

<sup>243</sup> *Id.* at 110 n.13.

<sup>244</sup> *Id.* at 113 (citation omitted).

<sup>245</sup> See *id.* at 111.

c. *Taking Our Jobs and Our Savings: “Illegal Immigrants” and Their Threat to Society*

Despite the fact that unauthorized immigrants comprise a disproportionately large percentage of the labor force relative to the size of the overall population,<sup>246</sup> anti-immigrant sentiment alleged that unauthorized immigrants were entering the United States to receive social services, including welfare benefits, social security, unemployment, and health care benefits. Unauthorized immigrants were seen as coming to this country to drain the state and public services, leaving nothing for U.S. citizens who had paid into the system.<sup>247</sup> Similar to the increasing hostility towards poor U.S. citizens, predominately viewed as black, migrants too were increasingly viewed as “social leeches” and “‘enemies’ of the state.”<sup>248</sup>

To remedy these assertions, various policies, legislative acts, and court decisions “targeted” noncitizens that posed a threat to economic security. Those who entered without authorization were targeted through direct enforcement.<sup>249</sup> States sought to deny education, health, and social service benefits to unauthorized migrants, threatening criminal prosecution and notification to authorities.<sup>250</sup> The federal government followed suit, emphasizing the continued supposition that immigrants were a drain on society and the only solution to the problem was to eliminate the “carrot.” As a result, immigrants, both legal and unauthorized, were denied welfare benefits to curtail their arrival into the United States to become drains on society.<sup>251</sup>

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<sup>246</sup> See CAP Immigration Team, *The Facts on Immigration Today*, CENTER FOR AM. PROGRESS (Oct. 23, 2014), <https://www.americanprogress.org/issues/immigration/report/2014/10/23/59040/the-facts-on-immigration-today-3/> (“In 2010, 8.4 million undocumented immigrants were employed in the United States. They represented 5.2 percent of the U.S. labor force, although they comprised only 3.7 percent of the U.S. population.”).

<sup>247</sup> See 1994 Cal. Legis. Serv. Prop. 187 (West) (nullified by injunction) (seeking to make “illegal aliens” in California ineligible for public services, health care, and education as well as require mandatory reporting of suspected “illegal aliens” to government officials). Approximately, 58.93% of Californians voted to pass the ballot. *California Proposition 187, Illegal Aliens Ineligible for Public Benefits (1994)*, BALLOTPEdia, [http://ballotpedia.org/California\\_Proposition\\_187,\\_Illegal\\_Aliens\\_Ineligible\\_for\\_Public\\_Benefits\\_%281994%29](http://ballotpedia.org/California_Proposition_187,_Illegal_Aliens_Ineligible_for_Public_Benefits_%281994%29) (last visited Jan. 19, 2015), archived at <http://perma.cc/S7E4-96P4>.

<sup>248</sup> WACQUANT, PUNISHING THE POOR, *supra* note 11, at 83 (noting the racial connection between increasing hostility towards welfare recipients, leading to a curtailment and punitive structure of social service programs).

<sup>249</sup> DUNN, *supra* note 121, at 51–53 (discussing the militarization of the U.S.–Mexico Border as a method of social control over specific civilian populations); Johnson, *supra* note 221, at 166 (discussing the rise in border enforcement along the U.S.–Mexico border).

<sup>250</sup> See, e.g., 1994 Cal. Legis. Serv. Prop. 187.

<sup>251</sup> See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, and 42 U.S.C.) (creating restrictions on noncitizen eligibility for public assistance for food stamps/SNAP, Medicaid, Supplemental Security Income, and Temporary Assistance for Needy Families, which impacted lawful permanent residents,

d. *Bush and Operation Streamline*

In 2005, the Bush Administration implemented a program named Operation Streamline.<sup>252</sup> Operation Streamline is a zero-tolerance program that requires the federal criminal prosecution and imprisonment of all migrants who attempt to enter the country without authorization through the southwest border.<sup>253</sup> The use of the federal criminal justice system to prosecute violations of immigration law formally transformed the construct of the “illegal alien” from a civil immigration violator to that of a formal “criminal alien.”<sup>254</sup> The incorporation of immigration status into the criminal justice system allowed for the labeling of the nonviolent immigrant as “criminal,” thereby, introducing him to punishment as a “criminal” and exclusion as an “alien.”<sup>255</sup>

C. *When Immigration Law Meets the Criminal Justice System: Crimmigration and Its Expansion of the “Criminal Alien”*

Since the 1960s, the threat to national safety, both at the border and in the streets, has remained at the forefront of political debate, public perceptions, and legislative action.<sup>256</sup> As a result, our criminal justice system has swelled to exorbitant proportions over the last 30 years. Despite the fact that the increased punitiveness of our criminal justice system has had little correlation with crime rates, it has been responsible for the mass (hyper) incarceration of millions of individuals, mostly poor black and Latino males, and the

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asylees, refugees, as well as unauthorized migrants); RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33809, NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC ASSISTANCE: POLICY OVERVIEW AND TRENDS 10–11 (2014), available at <https://www.fas.org/sgp/crs/misc/RL33809.pdf>, archived at <http://perma.cc/SLMS-MQFY>.

<sup>252</sup> See JOANNA LYDGATE, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 1 (2010), available at [http://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf), archived at <http://perma.cc/ZFV9-D2B2>.

<sup>253</sup> See *id.*

<sup>254</sup> DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 92–98 (Jan. 2013), available at <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>, archived at <http://perma.cc/S2VY-D29H> (discussing the programs, their results, and a critique of the immigration enforcement system developed since 1986); see Chacón, *supra* note 32, at 1880 & n.290 (discussing the increase in the border patrol budget from \$362 million in 1993 to \$1.4 billion in 2005); Meissner, *supra* note 20.

<sup>255</sup> See MEISSNER ET AL., *supra* note 254, at 92–98.

<sup>256</sup> See generally JULIE A. DOWLING & JONATHAN XAVIER INDA, GOVERNING IMMIGRATION THROUGH CRIME (2013); DUNN, *supra* note 121, at 35–37; MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES, *supra* note 11.

destruction of families, communities, and the instability of the social and economic fabric of the nation.<sup>257</sup>

While many have detailed the 1968 election period as deeply divided by race, black and white, the war on crime included Latinos as well. Nixon's famous remark concerning the election being "all about those damn Negro–Puerto Rican groups out there" reflects the complexity of Latinos and the future role of the criminal justice system as it pertains to all Latinos, both as citizens and as immigrants. The war on drugs solidifies this concept as both citizens and immigrants, blacks and Latinos, were to feel its power.

The section below discusses the way in which the immigration and criminal justice system were brought together to remove, not only those unauthorized to remain, but also lawful immigrants. By expanding the "criminal alien" to punish and remove already admitted members of society, dominant society could restructure current demographics to better reflect their preferred population as well as curtail upward mobility of those out-group members who remained.<sup>258</sup>

### 1. *Expanding the "Criminal" to "Criminal Alien"*

The war on crime and the war on drugs shifted societal attitudes towards those who were poor, addicted to drugs, or labeled a "criminal." During this time, the focus on the eradication of crime, drugs, and poverty shifted from a social welfare state to a penal welfare state. Programs put into place that aimed to help individuals rehabilitate and overcome their condition were replaced by punishment. Society now believed that individuals who fell into these categories were the cause of social problems instead of recognizing them as the victim. They were "criminals" in the pejorative sense. They were lazy and morally depraved. For this reason, punishment became the only justifiable remedy against this threat.

#### a. *The War on Crime and the War on Drugs*

While the wars on crime and drugs were being waged against the nation's "criminals," on the southern border, so too was there a war being waged on poor Latino immigrants. The punitiveness of the criminal justice system was

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<sup>257</sup> See Garland, *supra* note 11, at 179–81; Simon et al., *supra* note 11, at 1–12; WACQUANT, PUNISHING THE POOR, *supra* note 11, at 129; Wacquant, *Class, Race & Hyperincarceration*, *supra* note 11, at 74.

<sup>258</sup> See 42 U.S.C. § 1320a-7 (2012) (listing exclusions from certain healthcare benefits and Medicare for certain criminal convictions); NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org> (last visited Jan. 19, 2015), archived at <http://perma.cc/TA6P-8WSX>; see also *Felony Disenfranchisement News*, SENT'G PROJECT (Feb. 3, 2014), <http://www.sentencingproject.org/template/page.cfm?MODE=view&id=133&start=56>, archived at <http://perma.cc/5MAN-ZEEC>.

spilling over to the immigration system. By the 1980s, the attack was not just on U.S. citizens alleged to have engaged in unlawful activity, but on the “criminal alien,” who was coming to the United States to commit crimes against its citizens. Politicians blamed noncitizens for the “rising” levels of drugs that were entering the United States and causing harm to its citizens.<sup>259</sup> Those migrants who did reside in the United States were increasingly blamed for horrific crimes and seen as murderers of innocent Americans.<sup>260</sup>

Bills enacted during this time included provisions to target the “criminal alien.” In 1988, Congress passed the Anti-Drug Abuse Act (Drug Kingpin Act).<sup>261</sup> This Act went beyond drug offenses and was the first of a series of acts that seriously affected the immigration status of noncitizens convicted of crimes, introducing the term “aggravated felonies.” Under the Act, the definition of an “aggravated felony” included three crimes: murder, drug trafficking, and illegal trafficking in firearms or explosive devices.<sup>262</sup> Those who were convicted of “aggravated felonies” were stripped of most forms of relief and removed from the country with little to no chance of ever returning.<sup>263</sup>

Although the Anti-Drug Abuse Act came in response to perceptions of drugs in American society, it was the first in a series of legislative acts that would focus on noncitizens and their relationship to crime, aiming to limit or exclude their ability to remain in the United States regardless of the severity of their offense or their ties to the United States.<sup>264</sup>

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<sup>259</sup> Gebe Martinez, *Learning from Proposition 187: California's Past Is Arizona's Prologue*, CENTER FOR AM. PROGRESS (May 5, 2010), <http://www.americanprogress.org/issues/immigration/news/2010/05/05/7847/learning-from-proposition-187/>, archived at <http://perma.cc/X365-SE9U> (writing that citizens are “frightened by reports of illegal drug-trafficking and violence across the U.S.–Mexico border”).

<sup>260</sup> *House Judiciary Subcommittee Holds Second Hearing on Impact of S. 2611*, 83 INTERPRETER RELEASES 1688, 1689 (2006); see Chacón, *supra* note 32, at 1854–56 (citing various instances when noncitizens were blamed for crimes that threaten national security and public safety).

<sup>261</sup> Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (codified as amended at 8 U.S.C. § 1101(a)(43) (2012)); see Yolanda Vázquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 43–46 (2010) (discussing in more detail the history of legislative change and its effect on noncitizens).

<sup>262</sup> Anti-Drug Abuse Act of 1988 § 7342; see Vázquez, *supra* note 261, at 43–44.

<sup>263</sup> For further explanation of aggravated felonies, see *Aggravated Felonies: An Overview*, IMMIGR. POL'Y CENTER, <http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview> (last visited Jan. 19, 2015), archived at <http://perma.cc/M5WC-W575>.

<sup>264</sup> See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.); see also PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998); López, *supra* note 156, at 1038.

b. *Shifting Focus to Locate, Prosecute, and Detain the “Criminal Alien”*

i. *“Criminal Alien” and Immigration Law*

From the mid-1980s onward, as policy debates and public perceptions shifted more and more towards a negative perception of immigrants and immigration, the number of crimes that became deportable offenses increased so that those immigrants would be permanently removed regardless of their ties to the United States.<sup>265</sup> Judicial discretion was removed so that judges, who were perceived to be soft on crime, could not manipulate the laws enacted by Congress to keep “criminal aliens” in the United States.<sup>266</sup> Relief from removal was also curtailed and restructured so that immigrants who entered the criminal justice system were not allowed to stay.<sup>267</sup> “Criminal aliens” were 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.<sup>268</sup> The laws were also retroactive, making thousands of noncitizens “criminal aliens” overnight and subjecting them to removal for crimes they may have committed decades before.<sup>269</sup>

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<sup>265</sup> See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 §§ 106, 212(c).

<sup>266</sup> See, e.g., *id.* (amending former § 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c), so that those convicted of aggravated felonies would no longer be eligible for discretionary relief from deportation and severely restricted judicial review of removal orders and discretionary relief); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 242 (severely limiting judicial review of removal orders and discretionary relief of removal, adding new crimes subjecting noncitizens to removal, and lowering the thresholds for which offenses qualified as aggravated felonies).

<sup>267</sup> See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 § 212(c); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 §§ 101(a)(43), 242, 1546(a); Immigration Act of 1990, Pub. L. No. 101-649, §§ 101(a)(43), 208, 241(b), 104 Stat. 4978, 5048, 5050, 5053 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1158, 1226 (2012)) (repealing criminal sentencing judges’ discretion to prevent deportation through a judicial recommendation against deportation that had existed since 1917, as well as executive pardons, broadening the definition of aggravated felonies, and limiting the forms of relief available to possible deportees, such as withholding or suspension of deportation, asylum, naturalization, voluntary departure, and registry); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, §§ 222, 224, 108 Stat. 4305, 4320, 4322 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1252(a) (2012)) (broadening the category of aggravated felons and giving criminal courts the power to order deportation at sentencing, thus bypassing immigration courts).

<sup>268</sup> Immigration and Nationality Act (INA) § 236(c), 8 U.S.C. § 1226(c) (2012).

<sup>269</sup> See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 § 212(c); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 358.

ii. “*Criminal Alien*” and the Criminal Justice System

As an increasing number of laws were put in place to rid the United States of “criminal aliens,” the immigration system looked to the criminal justice system to assist the immigration system in the detection, arrest, and removal of “criminal aliens.” Immigration status and its enforcement now have a dominant role in the criminal justice system.<sup>270</sup> Crimmigration has restructured the criminal justice system to incorporate immigration status as a method of managing the functioning and structure of the organizations within it, such as: program implementation, mission statements, enforcement protocols in detention, arrest and enforcement, prosecutorial decisions in charging and plea agreements, substantive laws proposed and enacted, and the interpretation of procedural rights and obligations flowing from the Fourth, Fifth, and Sixth Amendments that function to target noncitizens differently from citizens.<sup>271</sup>

Local and state law enforcement officers are prioritizing the detection, detention, and transfer to Immigration and Customs Enforcement of noncitizens in their enforcement strategies.<sup>272</sup> In the courtroom, immigration status is used in determining the plea offer and the procedural rights given, thereby determining the noncitizen’s fate in removal and his understanding of that future.<sup>273</sup> In addition, over the years, state legislators have equipped local

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<sup>270</sup> See generally Chin, *supra* note 27 (discussing various ways in which immigration status is used in criminal proceedings).

<sup>271</sup> See, e.g., *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (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 “Mexican appearance” 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, 193–98 (2013) (critiquing the inability to use the exclusionary rule in immigration proceedings despite Fourth Amendment constitutional violations used by officers); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1129–30 (2013) (discussing the use of noncitizen status during criminal prosecutions); César Cuauhtémoc García Hernández, *Strickland-Lite: Padilla’s Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 844 (2013) (concluding that the *Padilla v. Kentucky* holding subjects noncitizens’ claims of ineffective assistance of counsel to a different analysis of the Sixth Amendment than citizens’).

<sup>272</sup> See Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1817 & n.411 (2011) [hereinafter Eagly, *Local Immigration Prosecution*] (listing the growing number of states that have been adopting criminal immigration laws to prosecute immigrants as criminals, obtain felony convictions, and then transfer them into ICE custody); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–82 (2010) [hereinafter Eagly, *Prosecuting Immigration*] (discussing the increasing criminal prosecution of immigration violations in the federal criminal courts).

<sup>273</sup> *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (finding that noncitizens are entitled to be warned on the immigration consequences of a criminal conviction under the Sixth Amendment). *But see* Eagly, *supra* note 271, at 1130 (discussing the realities that

and state law enforcement to arrest, and state prosecutors to institute legal proceedings against, those who violate state immigration laws.<sup>274</sup>

As a result, many states have been able to regulate migration despite the fact that immigration law has consistently been described as a federal regulation.<sup>275</sup> Arizona by far has been the most famous for using its criminal smuggling statute to prosecute unauthorized immigrants for smuggling themselves.<sup>276</sup> Arizona's justification is simple. By criminally punishing migrants on felony charges, it has ensured that the migrant will most likely be ineligible for relief,<sup>277</sup> prevented from future legal immigration,<sup>278</sup> and forced to endure enhanced federal criminal penalties if the migrant is ever to return without permission into the United States.<sup>279</sup> The prosecution of migrants has soared in Arizona, especially Maricopa County, increasing both the prison

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immigration enforcement is now deeply connected with the local enforcement of criminal law); Eagly, *Prosecuting Immigration*, *supra* note 272, at 1289 (finding that the prosecution of immigrants in the criminal justice system causes prosecutors to act as immigration screeners as well as circumvent rights traditionally given to criminal defendants); 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) (critiquing the ambiguity of the *Padilla* decision and its inability to serve its goal).

<sup>274</sup> See, e.g., COLO. REV. STAT. ANN. § 18-13-128 (West 2014) (adopted in 2006); FLA. STAT. ANN. § 787.07 (West 2014) (adopted in 2009); OKLA. STAT. ANN. tit. 21, § 446(A) (West 2014) (adopted in 2007); TENN. CODE ANN. § 39-17-114 (West 2014) (adopted in 2007); UTAH CODE ANN. § 76-10-2901 (LexisNexis 2008) (adopted in 2008); Eagly, *Local Immigration Prosecution*, *supra* note 272, at 1809 (analyzing Arizona's smuggling statute and concluding that state criminal laws that regulate immigration have been responsible for the shift in immigration enforcement from federal to state governments).

<sup>275</sup> See Eagly, *Local Immigration Prosecution*, *supra* note 272, at 1817 & n.411 (listing the growing number of states that have been adopting criminal immigration laws).

<sup>276</sup> *Id.* at 1809 (discussing the prosecution of unauthorized immigrants on charges of smuggling).

<sup>277</sup> For an in depth explanation on the impact of criminal convictions on the availability of relief from removal, see generally DAN KESSELBRENNER & LORY D. ROSENBERG, *IMMIGRATION LAW AND CRIMES PRELIMINARY MATERIALS*, available at Westlaw.

<sup>278</sup> Eagly, *Local Immigration Prosecution*, *supra* note 272, at 1812 n.386 (citing Joe Arpaio, *Joe Arpaio & Andrew Thomas Press Conference*, YOUTUBE (May 18, 2010), <http://www.youtube.com/watch?v=aPp3Oy-8rE4>, archived at <http://perma.cc/F8DA-VRME> (quoting County Attorney Thomas as stating, "they get a felony conviction so that if they were deported they would have a very difficult time becoming a U.S. Citizen or legally immigrating to the United States"))).

<sup>279</sup> See 8 U.S.C. § 1326(b) (2012) (requiring 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").

population and immigration removals.<sup>280</sup> By far, the vast majority are Latinos.<sup>281</sup>

Once the state has a person in custody, the Department of Homeland Security (DHS) has various programs to enter into the local and state criminal justice system.<sup>282</sup> ICE appears on a regular basis in local and state jails in an attempt to identify potential noncitizens that may be subject to removal after the termination of the criminal proceeding or as a result of an immigration violation.<sup>283</sup> Every person who is booked has their fingerprints routed through DHS for possible detention based on an immigration hold.<sup>284</sup>

While these laws have been passed throughout the United States, their creation and enforcement has occurred in areas that have increasing populations of Latinos. States such as Alabama, Tennessee, North Carolina, Georgia, and Utah have seen faster growing Latino populations in their states than in other places in the United States.<sup>285</sup> By allowing state and local

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<sup>280</sup> Eagly, *Local Immigration Prosecution*, *supra* note 272, at 1753 n.20 (reporting that 21% of detainees in Arizona jails in 2008 were noncitizens).

<sup>281</sup> See Letter from Thomas E. Perez, Assistant Attorney Gen., to Bill Montgomery, Maricopa Cnty. Attorney (Dec. 15, 2011), available at [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf), archived at <http://perma.cc/G6A5-XC7F>.

<sup>282</sup> See, e.g., *ICE Agreements of Cooperation in Communities to Enhance Safety and Security*, ICE ACCESS, Fact Sheet, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/doclib/news/library/factsheets/pdf/access.pdf> (last visited Jan. 19, 2015), archived at <http://perma.cc/57SP-N59E> (discussing the Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) program that houses various programs that create working relationships with state and local law enforcement).

<sup>283</sup> *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Feb. 24, 2015), <http://www.ice.gov/news/library/factsheets/287g.htm>, archived at <http://perma.cc/ZAS5-G6HH> (“Currently, ICE has 287(g) agreements with 34 law enforcement agencies in 17 states. From January 2006 through September 30, 2014, the 287(g) program is credited with identifying more than 373,800 potentially removable aliens—mostly at local jails.”).

<sup>284</sup> See *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Mar. 24, 2015), archived at <http://perma.cc/WS3S-D5QR> (discussing the biometric program that is hooked into state and local law enforcement databases that allows DHS to look through all fingerprints that are processed through their system to determine whether or not an ICE detainer should be put on the individual booked).

<sup>285</sup> Anna Brown & Mark Hugo Lopez, *Mapping the Latino Population, By State, County and City*, PEW RES. CENTER (Aug. 29, 2013), <http://www.pewhispanic.org/2013/08/29/mapping-the-latino-population-by-state-county-and-city/>, archived at <http://perma.cc/7299-RSGY> (stating that states, such as Alabama, have witnessed an increase in their Latino population by over 100%); *Latino Populations Are Growing Fastest Where We Aren't Looking*, NIELSEN (May 1, 2013), <http://www.nielsen.com/us/en/insights/news/2013/latino-populations-are-growing-fastest-where-we-arent-looking.html>, archived at <http://perma.cc/8F3L-SN35> (listing the top fifteen cities with the largest Latino populations (including cities in Arizona, California, NY, Texas, DC, Colorado), as well as the fifteen cities with the fastest growing Latino populations (including cities in North Carolina, Oklahoma, Kansas, Nevada, Minnesota, Utah, Florida, and Georgia)); *Latino*

governments to be the pipeline through which federal immigration law is enforced, racial bias can manipulate the overall outcomes of those who are removed.<sup>286</sup>

## 2. “Criminal Alien” and Law Enforcement

### a. Mexican Appearance and the Fourth Amendment

The United States Supreme Court ruled in *INS v. Lopez-Mendoza*, that if a violation of the Fourth Amendment does occur, while a noncitizen may be entitled to the exclusionary rule in criminal court,<sup>287</sup> a noncitizen could not exclude the unlawfully obtained evidence in his civil removal proceeding.<sup>288</sup> In addition, while under the Fourth Amendment, racial ancestry or appearance cannot be a factor for search and seizure of an individual in criminal law, in immigration law and its enforcement, “Mexican appearance or ancestry” can be a factor in stopping an individual.<sup>289</sup> 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[.]”<sup>290</sup>

These distinctions have several problems, especially in light of the growing function of state and local law enforcement officers who are involved in the enforcement of immigration law.<sup>291</sup> Although a state law enforcement officer may stop a noncitizen either based on race, the person’s perceived “Hispanic appearance,” or other illegitimate mechanism that violates the person’s Fourth Amendment rights, the evidence that was illegally obtained by the criminal justice system’s procedures may still be admitted in the civil

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*Population Booms in the South: Pew*, HUFFPOST LATINO VOICES, [http://www.huffingtonpost.com/2013/09/03/latino-population-growth\\_n\\_3860441.html](http://www.huffingtonpost.com/2013/09/03/latino-population-growth_n_3860441.html) (last updated Sept. 23, 2013, 1:40 PM), archived at <http://perma.cc/R3WP-CW6H>.

<sup>286</sup> See Eagly, *Local Immigration Prosecution*, *supra* note 272, at 1816–17 (discussing state and local governments’ ability to restructure federal immigration enforcement agendas).

<sup>287</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655–60 (1961); see also *Weeks v. United States*, 232 U.S. 383, 398 (1914).

<sup>288</sup> See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984); *Matter of Sandoval*, 17 I. & N. Dec. 70, 98 (B.I.A. 1979).

<sup>289</sup> See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (refusing to find unconstitutional an immigration officer’s decision to send arrestees’ to secondary inspection based on apparent Mexican ancestry); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975).

<sup>290</sup> *Brignoni-Ponce*, 422 U.S. at 886–87. It is worth noting that *Brignoni-Ponce* is Puerto Rican, and, therefore, neither “alien” nor Mexican. JOHNSON & TRUJILLO, *supra* note 189, at 174.

<sup>291</sup> Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g) (2012) (allowing state and local police to enforce immigration laws by agreement with the Attorney General).

immigration proceedings to remove the individual from the United States.<sup>292</sup> Local and state law enforcement agencies, therefore, which have been found to engage in racial profiling against Latinos, may engage in such tactics with impunity.<sup>293</sup> The Fourth Amendment, therefore, allows for separate and distinct applications between Latinos and others unlawfully seized, functionally legalizing racial profiling against them.

### b. *Secure Communities*

Secure Communities is a program that allows ICE to locate noncitizens, who enter the criminal justice system.<sup>294</sup> Everyone who is arrested or booked must have his or her fingerprints sent to the DHS to check against its immigration database to determine whether the person is a criminal alien.<sup>295</sup> Secure Communities was developed in response to the growing concern over racial profiling by local and state law enforcement who had entered into 287(g) Memorandum of Understanding agreements with the federal government to assist in immigration enforcement as well as a mechanism by which all “criminal aliens” and “immigration violators” could be detected more efficiently.<sup>296</sup>

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<sup>292</sup> See *Lopez-Mendoza*, 468 U.S. at 1034.

<sup>293</sup> See, e.g., *Melendres v. Arpaio*, 695 F.3d 990, 994, 1002 (9th Cir. 2012) (upholding partial injunctive relief against Maricopa County Sheriff Joe Arpaio, which prohibits the detainment of individuals “based only on knowledge or reasonable belief, without more, that the person is unlawfully present within the United States”); AM. CIVIL LIBERTIES UNION, *THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES* 43 (2009), available at [https://www.aclu.org/files/pdfs/humanrights/cerd\\_finalreport.pdf](https://www.aclu.org/files/pdfs/humanrights/cerd_finalreport.pdf), archived at <https://perma.cc/RGD6-4YDF> (discussing Arizona Sheriff Arpaio using more than one hundred deputies, a volunteer posse, and a helicopter for two days, to stop residents and chase them into their homes in an attempt to catch Latino unauthorized migrants); Julia Preston, *Opposing Immigration Program*, N.Y. TIMES, Aug. 28, 2009, at A16 (noting that despite the urging of the abolishment of 287(g) on the basis of its use in the discriminatory practices of law enforcement, Janet Napolitano praises the program as a “force multiplier” for immigration agents).

<sup>294</sup> *Secure Communities*, *supra* note 284. On November 20, 2015, President Obama discontinued Secure Communities and created a new program to replace it called the “Priority Enforcement Program.” See Memorandum from U.S. Dep’t of Homeland Sec. to Thomas S. Winkowski, U.S. Immigration & Customs Enforcement, Megan Mack, Office of Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Sec’y for Intergovernmental Affairs (Nov. 20, 2014), available at [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf), archived at <http://perma.cc/YQ4J-ZNHE>. As of this Article going to press, it is premature to assess this change’s significance—if any—to the issues discussed in this Article. Notwithstanding such, this announcement does not diminish the role that Secure Communities has played in creating and reinforcing the identity of the “criminal alien” as Latino.

<sup>295</sup> *Secure Communities*, *supra* note 284.

<sup>296</sup> See Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317, 319 & nn.3–4, 321 (2012) (discussing the development of Secure Communities to prevent racial profiling).

Across the country, local and state law enforcement agencies had been criticized for their use of racial profiling against Latinos in pursuit of “illegal aliens.”<sup>297</sup> Secure Communities was seen as a way to circumvent racial profiling. It presumably took away police discretion because it analyzed the biometrics of every person arrested or booked into the criminal justice system. In addition, Secure Communities has been used to strengthen DHS’s position that the “criminal aliens” who are removed through Secure Communities are the worst of the worst. In speaking about Secure Communities, DHS stated that “[t]o maximize [its] impact, [it is] prioritizing enforcement actions to focus on those individuals posing the greatest threat to public safety.”<sup>298</sup>

Secure Communities, started in 2008,<sup>299</sup> however, has failed on both counts. First, it has failed to remove the most dangerous noncitizens in the United States. As its own data and other resources have found, the majority of individuals removed have either no criminal conviction or have been convicted of minor crimes, in which the sentence was less than one year.<sup>300</sup> Second, Secure Communities has failed to eliminate legitimate continued criticism surrounding racial disparities of those in the system, all of whom come through state and local law enforcement. While more research is needed in this area, the few studies available have begun to bear witness to Secure Communities’ racial inequities and Administration’s possible motivations. In an analysis of Secure Communities, the Warren Institute found that Secure Communities appeared to disproportionately impact Latino males as a group as they comprised 93% of those arrested in spite of being less than 46% of the noncitizen population.<sup>301</sup>

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<sup>297</sup> See AARTI KOHLI ET AL., *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* 2, 3 (2011), available at [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf), archived at <http://perma.cc/EP4U-7FC7>; see also *Melendres*, 695 F.3d at 994, 1002; AM. CIVIL LIBERTIES UNION, *supra* note 293, at 43; Ramos, *supra* note 296, at 318–21 (discussing the use of Secure Communities to racially profile Latinos, specifically in Illinois).

<sup>298</sup> U.S. DEP’T OF HOMELAND SEC., *SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS* 1 (2009), available at [https://epic.org/privacy/secure\\_communities/securecommunitiesstrategicplan09.pdf](https://epic.org/privacy/secure_communities/securecommunitiesstrategicplan09.pdf), archived at <http://perma.cc/8VSR-PWNJ>; see 2013 ICE REMOVAL STATISTICS, *supra* note 12, at 1 (discussing the prioritization of the limited resources of the ICE on the removal of criminal aliens); Ramos, *supra* note 296, at 324 & n.34 (noting that, in Illinois, the majority of those detained under Secure Communities has no criminal background).

<sup>299</sup> *Secure Communities: A Fact Sheet*, IMMIGR. POL’Y CENTER, <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet> (last updated Nov. 29, 2011), archived at <http://perma.cc/UUJ7-5X7P>.

<sup>300</sup> *See id.*

<sup>301</sup> KOHLI ET AL., *supra* note 297, at 2, 13; Nwosu et al., *supra* note 214 (stating that 46% of the total immigrant population, including women, men, and children, are Latinos or of Hispanic origin).

While this can be argued to be a result of Latino males causing higher levels of crime, research already has shown that argument to be false.<sup>302</sup> In addition, the work of Adam B. Cox and Thomas J. Miles has further questioned the true mission of Secure Communities.<sup>303</sup> Cox and Miles are the first to run an empirical evaluation of Secure Communities. In their preliminary findings, they found that the rollout of Secure Communities was not tied to things such as areas with large pockets of unauthorized immigrants, support for its implementation, or rates of crime, but instead was directly tied to communities that had a high percentage of the Latino population living within the jurisdiction.<sup>304</sup> While unable to give a concrete finding of racial targeting of Latinos under the Secure Communities program, their findings reveal that Secure Communities was “rolled out” in jurisdictions that had high population of Latinos living in the area and not based upon high levels of criminal activity, lending further support that criminality and Latinos do not have a significant correlation despite Latinos’ extraordinary presence in this system.<sup>305</sup>

## V. THE RISE OF RACIALIZED MASS REMOVAL

Crimmigration has structured racial hierarchies through a series of converging race-neutral policies, legislative acts, and court decisions “targeted” at fighting crime, enforcing immigration, and protecting our communities and borders. Despite its creation through race-neutral laws, crimmigration enforces racial politics as well as organizes and constructs racial identities through the laws and procedures it institutes and uses for detection, arrest, detention, and surveillance.<sup>306</sup> Through the label of the “criminal alien,” the law legitimates the exclusion and exploitation of Latinos, thereby, ensuring their subordination and marginal status.<sup>307</sup>

This section reveals the way in which crimmigration has impacted Latinos, filling the empty beds, court dockets, detention centers, and prison facilities of both systems with Latino defendants, creating the largest system of racialized mass removal in the world, and maintaining the continued subordination of those who remain.

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<sup>302</sup> See, e.g., KOHLI ET AL., *supra* note 297, at 2–3, 5–6, 13; Ralph De La Cruz, *Report: Secure Communities Encourages Racial Profiling, Lack of Due Process*, FL. CENTER FOR INVESTIGATIVE REPORTING (Oct. 20, 2011), <http://fcir.org/2011/10/20/report-secure-communities-encourages-racial-profiling-lack-of-due-process/>, archived at <http://perma.cc/4PRW-7DJT>; Julia Preston, *Latinos Said to Bear Weight of a Deportation Program*, N.Y. TIMES (Oct. 18 2011), <http://mobile.nytimes.com/2011/10/19/us/latinos-said-to-bear-weight-of-deportation-program.html>, archived at <http://perma.cc/HK2L-7YXH>.

<sup>303</sup> See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 88 (2013).

<sup>304</sup> *Id.* at 89.

<sup>305</sup> See *id.* at 88–89.

<sup>306</sup> OMI & WINANT, *supra* note 21, at 83.

<sup>307</sup> See ALEXANDER, *supra* note 14, at 182–84.

## A. Mass Removal and Detention

### 1. The Numbers

The number of individuals that are removed each year has grown astronomically over the last 34 years. In 1980, 18,013 individuals were removed from the United States,<sup>308</sup> in 2013, the number removed from the country rose to over 368,644 individuals.<sup>309</sup> To provide a further understanding of the drastic changes that have taken place in regard to the removal of noncitizens, between 1892 and 2004, 3,345,365 individuals were removed from the United States.<sup>310</sup> The Obama Administration has surpassed this number in its first six years.<sup>311</sup>

The rising number of total removals from the United States can be attributable to the overall rise in the number of “criminal aliens” removed. In 1980, 394 individuals were removed for criminal and narcotics violations;<sup>312</sup> in contrast, in 2013, approximately 198,394 individuals were removed as “criminal aliens.”<sup>313</sup> In 2014, approximately 177,960 individuals were removed as “criminal aliens,” representing 56% of all ICE removals, and 85% of all individuals removed from the interior had previously been convicted of a crime.<sup>314</sup> The increase in removals has risen most significantly since 1996.<sup>315</sup>

### 2. Federal Prosecutions

Since Operation Streamline, there has been a structural shift in the number of immigration violation cases prosecuted and the number of noncitizens held in federal prison. While immigration violations were once a low priority, the federal criminal system’s prosecution strategies have been refocused to

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<sup>308</sup> U.S. DEP’T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 95 tbl.36 (2010), available at [https://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](https://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf), archived at <http://perma.cc/Y9N3-E5PW>.

<sup>309</sup> 2014 ICE ENFORCEMENT AND REMOVAL REPORT, *supra* note 9, at 1.

<sup>310</sup> U.S. DEP’T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 159 tbl.40 (2006), available at <https://www.dhs.gov/yearbook-immigration-statistics-2004>, archived at <http://perma.cc/HPN5-2H4W>.

<sup>311</sup> See 2012 YEARBOOK, *supra* note 12, at 103 tbl.39; 2013 ICE REMOVAL STATISTICS, *supra* note 12, at 1; 2014 ICE ENFORCEMENT AND REMOVAL REPORT, *supra* note 9, at 5.

<sup>312</sup> 1998 YEARBOOK, *supra* note 13, at 227 tbl.68.

<sup>313</sup> JOHN F. SIMANSKI, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 6 tbl.8 (2014), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf), archived at <http://perma.cc/3SSJ-RE5A>.

<sup>314</sup> 2014 ICE ENFORCEMENT AND REMOVAL REPORT, *supra* note 9, at 7.

<sup>315</sup> House Subcommittee Holds Hearing on Deportees to Latin American and Caribbean Countries, 84 INTERPRETER RELEASES 1802, 1802 (2007) [hereinafter *Hearing on Deportees*] (discussing Rep. Eliot L. Engel’s (D-N.Y.), Chairman of the H. Comm. on Foreign Affairs, Subcomm. on the W. Hemisphere, statements at a July 24, 2007 hearing); see also 2012 YEARBOOK, *supra* note 12, at 103 tbl.39.

accommodate the priorities of DHS.<sup>316</sup> As a result, the prosecution of federal immigration laws has skyrocketed. While unauthorized entry was first introduced as a criminal offense in 1929, it has only recently become a significant percentage of federal prosecutions.<sup>317</sup> In 1993, only 5.4% of federal prosecutions were for immigration violations.<sup>318</sup> Presently, immigration crimes represent the single largest group of all federal prosecutions, totaling approximately 54% of criminal filings.<sup>319</sup> As a result of the shifting focus of federal prosecutions, violent crimes, drug offenses, white-collar crime, and other federal crimes have been prosecuted less vigorously.<sup>320</sup>

### 3. Detention

#### a. Federal Criminal Detention

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.<sup>321</sup> The Bureau of Justice Statistics reports that from 1995 to 2003, the number of individuals in federal prison for immigration violations grew 394% from 3,420 individuals to 16,903.<sup>322</sup> The number continues to rise. On February 21, 2015, the Federal Bureau of Prisons reported that 19,348, or

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<sup>316</sup> See *Immigration Enforcement Overview*, DEP'T HOMELAND SECURITY, <http://www.dhs.gov/topic/immigration-enforcement-overview> (last updated Nov. 15, 2013), archived at <http://perma.cc/B4VR-87WX> (stating that ICE must prioritize who to pursue based on the inability to detain the more than 10 million individuals unlawfully in the United States and that, therefore, its list is composed of those individuals who have: violated criminal laws, crossed the border recently, violated immigration law repeatedly, or have missed their immigration court hearing).

<sup>317</sup> NGAI, *supra* note 59, at 60.

<sup>318</sup> See U.S. COURTS, TABLE D-2. U.S. DISTRICT COURTS—CRIMINAL CASES COMMENCED, BY MAJOR OFFENSE (EXCLUDES TRANSFERS), DURING THE TWELVE-MONTH PERIODS ENDED SEPTEMBER 30, 1993 THROUGH 1997 (1997), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/appendices/d02sep97.pdf>, archived at <http://perma.cc/G6FJ-L7JU> (reporting that out of 45,902 federal cases, 2,487 of them were for immigration violations).

<sup>319</sup> *New Data on Federal Court Prosecutions Reveal Non-Violent Immigration Prosecutions Up*, IMMIGR. POL'Y CENTER, <http://www.immigrationpolicy.org/just-facts/new-data-federal-court-prosecutions-reveal-non-violent-immigration-prosecutions>, archived at <http://perma.cc/7PTZ-VNN2> (analyzing and reporting on the Transactional Record Access Clearinghouse (TRAC) report on the subject).

<sup>320</sup> See *id.* (discussing the fact that immigration crimes are increasing but other federal crimes have decreased).

<sup>321</sup> See *id.*

<sup>322</sup> Sandra Guerra Thompson, *Immigration Law and Long-Term Residents: A Missing Chapter in American Criminal Law*, 5 OHIO ST. J. CRIM. L. 645, 660 (2008).

9.8%, of the federal prison population were incarcerated for immigration violations.<sup>323</sup>

### b. *Immigration Detention*

The detention of immigration violators has also expanded with the rise of crimmigration due to the implementation of the mandatory detention of “criminal aliens” under the INA, Operation Streamline, and Secure Communities.<sup>324</sup> Operation Streamline, for example, has been largely responsible for the 49% increase in the detainee population since 2005.<sup>325</sup> Since 1996, the number of individuals detained on immigration violations has tripled.<sup>326</sup> Over 2.5 million individuals have been detained in immigration detention facilities in the United States over the last 11 years alone.<sup>327</sup>

To put the exorbitant level of immigration detainees in perspective, a comparison to the federal prison population is helpful. In 2012, the number of individuals detained exceeded 400,000 individuals.<sup>328</sup> The current number of individuals detained in the United States on immigration violations each year represents twice as many individuals as those housed annually in the Federal Bureau of Prisons.<sup>329</sup> The United States now has the largest immigration detention system in the world.<sup>330</sup>

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<sup>323</sup> *Inmate Statistics: Offenses*, FED. BUREAU PRISONS, <http://www.bop.gov/news/quick.jsp> (last updated Feb. 21, 2015), *archived at* <http://perma.cc/F5KW-CDBC>; *see Historical Information*, FED. BUREAU PRISONS, [www.bop.gov/about/history/](http://www.bop.gov/about/history/) (last visited Jan. 20, 2015), *archived at* <http://perma.cc/6MCW-GR9F> (stating that the federal prison population doubled during the 1990s as a result of enforcement of illegal drugs, weapons, and immigration, which significantly contributed to its growth from 58,000 in 1989 to 136,000 in 1999).

<sup>324</sup> *See* Immigration and Nationality Act (INA) § 236(c), 8 U.S.C. 1226(c) (2012) (requiring the Attorney General to take into custody “criminal aliens”); LYDGATE, *supra* note 252, at 3; *Secure Communities*, *supra* note 284.

<sup>325</sup> Paul Szoldra, *Private Prisons Will Get Totally Slammed by Immigration Reform*, BUS. INSIDER (Feb. 2, 2013, 8:30 AM), <http://www.businessinsider.com/a-3-billion-industry-is-going-to-be-slammed-by-immigration-reform-2013-1>, *archived at* <http://perma.cc/UKA6-2SFY> (discussing the billion-dollar industry that has reshaped the private prison corporations’, GEO and CCA, priorities to immigration detention).

<sup>326</sup> *The Influence of the Private Prison Industry in Immigration Detention*, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/privateprisons> (last visited Jan. 20, 2015), *archived at* <http://perma.cc/9N97-2RUX>.

<sup>327</sup> *Id.*

<sup>328</sup> *Private Prison Industry Profits from Immigration Detentions*, FEET IN 2 WORLDS (June 17, 2013), <http://fi2w.org/2013/06/17/private-prison-industry-profits-from-immi-grant-detentions/>, *archived at* <http://perma.cc/6T6W-E53X>.

<sup>329</sup> *See Historical Information*, *supra* note 323 (stating that the current federal prison population is 210,798); Letter from Thomas M. Susman, Dir., Governmental Affairs Office, Am. Bar Ass’n, to Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., *available at* [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013feb26\\_abusein](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013feb26_abusein)

## B. Racialized Removal and Continued Subordination

Crimmigration has been responsible for the mass removal of Latinos living in the United States, most significantly poor Latinos from Mexico, Guatemala, Honduras, and El Salvador.<sup>331</sup> In 2012, Latinos represented over 90% of those in immigration detention, 94% of those removed, and 94% of those removed for criminal violations.<sup>332</sup> In 2010, Mexicans specifically comprised 83% of the detained population, 73% of those removed, and 77% of those who received voluntary departure.<sup>333</sup>

### 1. Latinos and Their Identity as Federal Criminals

Latinos' rate of federal incarceration has also reached record numbers over the years. As the federal criminal system has changed its prosecutorial objectives, its demographic makeup has shifted. While in 1992, only 22% were noncitizens, in 2012, 46% of those sentenced in federal court were noncitizens.<sup>334</sup> While Latinos made up 23% of those prosecuted in 1992, the number rose to 48% in 2012.<sup>335</sup> Latinos represent the largest group prosecuted under federal immigration violation crimes—89.3%.<sup>336</sup> The percentage of all Latinos prosecuted in federal court has also drastically shifted and increased.

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confinementfacilities\_1.authcheckdam.pdf, archived at <http://perma.cc/X8UR-DKKH> (stating that ICE detains over 400,000 individuals annually).

<sup>330</sup> *End the Immigration Detention Bed Quota*, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/EndTheQuotaNarrative> (last visited Jan. 15, 2015), archived at <http://perma.cc/8FVT-7KZ3>.

<sup>331</sup> See 2013 ICE REMOVAL STATISTICS, *supra* note 12, at 1, 4. Both noncitizen and U.S. citizen Latinos are vulnerable to crimmigration's net. See, e.g., *Perez v. United States*, 502 F. Supp. 2d 301 (N.D.N.Y. 2006) (involving a U.S. citizen from the Dominican Republic who was deported and then again prosecuted and given a federal sentence for unlawful reentry); Khalek, *supra* note 10 (reporting that over 4,000 U.S. citizens were detained or deported in 2010).

<sup>332</sup> See SIMANSKI & SAPP, *supra* note 37, at 3, 5.

<sup>333</sup> Joanna Dreby, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities*, CENTER FOR AM. PROGRESS (Aug. 20, 2012), <http://www.americanprogress.org/issues/immigration/report/2012/08/20/27082/how-todays-immigration-enforcement-policies-impact-children-families-and-communities/>, archived at <http://perma.cc/G9PF-XTY9>. This article discusses the negative impact of removal on children. See *id.* One study conducted revealed that 87% of processed cases in New York involved the deportation of an individual with a U.S. citizen child. *Id.*

<sup>334</sup> Michael T. Light et al., *Changing Demographics of Sentenced Offenders*, PEW RES. CENTER (Mar. 18, 2014), <http://www.pewhispanic.org/2014/03/18/3-changing-demographics-of-sentenced-offenders/>, archived at <http://perma.cc/3T48-3CFH>.

<sup>335</sup> *Id.*

<sup>336</sup> U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2011, at 5 (2012), available at [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2012/FY11\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2012/FY11_Overview_Federal_Criminal_Cases.pdf), archived at <http://perma.cc/8MAV-D9C7>.

While in 1992, Latino noncitizens represented only 16% of all offenders, Latino noncitizens now make up 37% of offenders sentenced in federal court, representing the largest demographic group and outnumbering all other minority groups sentenced in federal court.<sup>337</sup>

## 2. *Impact on Latinos and Their Families*

Literally, millions of Latinos have been deported from the country.<sup>338</sup> Their banishment to another country for many is a fate worse than death as they will be separated from their family, unable to find work, unable to speak the language, or assimilate into their new country's customs.<sup>339</sup>

In addition, many of those deported have spouses and children. Broken families have a higher percentage of entering poverty or staying poor.<sup>340</sup> Children without one or both parents have a higher chance of ending up in foster care.<sup>341</sup> The mental and emotional toll of separation is detrimental to adults, but especially to children.<sup>342</sup> As an example of the potential impact, more than seven million children, both citizens and noncitizens, live with parents that are Mexican nationals.<sup>343</sup> Since Mexicans comprised 83% of those detained, 77% of those given voluntary departure, and 73% of those deported, the percentage of children and spouses that will be impacted by the deportation of their parent or spouse is significant.<sup>344</sup>

Finally, Latinos make up the largest percentage of unauthorized migrants.<sup>345</sup> Rates of unauthorized immigration are highest from Mexico, El Salvador, Guatemala, and Honduras.<sup>346</sup> The inability for Latinos to enter into

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<sup>337</sup> See PEW RESEARCH CTR., *THE RISE OF FEDERAL IMMIGRATION CRIMES: UNLAWFUL REENTRY DRIVES GROWTH* 12 (2014), available at [http://www.pewhispanic.org/files/2014/03/2014-03-18\\_federal-courts-immigration-final.pdf](http://www.pewhispanic.org/files/2014/03/2014-03-18_federal-courts-immigration-final.pdf), archived at <http://perma.cc/6YAL-C8F2>.

<sup>338</sup> See *supra* Part V.A.1.

<sup>339</sup> Vázquez, *supra* note 69, at 665–73 (discussing the impact of crimmigration on Latinos, their families, and the community in which they live).

<sup>340</sup> See Patrick F. Fagan, *How Broken Families Rob Children of Their Chances for Future Prosperity*, HERITAGE FOUND. (June 11, 1999), <http://www.heritage.org/research/reports/1999/06/broken-families-rob-children-of-their-chances-for-future-prosperity>, archived at <http://perma.cc/LQU5-6NCK>.

<sup>341</sup> See Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 644–46 (2014) (discussing the increasing termination of parental rights of Latino noncitizens in immigration proceedings).

<sup>342</sup> See Dreby, *supra* note 333; Vázquez, *supra* note 69, at 665–73.

<sup>343</sup> Dreby, *supra* note 333.

<sup>344</sup> See *id.*

<sup>345</sup> See PASSEL & COHN, *supra* note 19, at 4.

<sup>346</sup> See MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011*, at 5 tbl.3 (2012), available at [https://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2011.pdf](https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf), archived at <http://perma.cc/XS7Z-7YM9> (reporting that in 2011,

American society as permanent members of society continues to ensure their temporary and subordinated status.

## VI. CONCLUSION

In 2012, over 419,000 individuals were removed from the United States, of those, 199,000 were “criminal aliens.”<sup>347</sup> The record number of “criminal alien” removals has been legitimated through rhetoric that links their removal to national security and public safety concerns. The “criminal aliens” removed are said to be those noncitizens who pose “the most serious public safety and national security threats.”<sup>348</sup> Because Latinos are removed at exorbitantly higher rates, American society has correlated them as a danger to national security and public safety. As a result, their exclusion and exploitation has been legitimated through their label as “criminal aliens.”

As this Article has discussed, however, “crimmigration” has failed to make our community safer or our nation more secure. It has failed because community safety and national security was not its goal. Its goal was to ensure the continued “understanding” that had been decided between the United States and Latinos over the last 160 years—“[t]o be ready to go to work when needed; to be gone when not needed.”<sup>349</sup> Latinos broke from this as they increasingly began to enter and remain in the United States over the last 50 years. Therefore, a mechanism to enforce this understanding was necessary for dominant society to maintain control of its nation.

Crimmigration was structured for this goal. In this goal, it has succeeded. Crimmigration was fashioned through race-neutral laws, policies, and procedures, established through cultural values, and supported through political choice, to create, maintain, and perpetuate the unequal relationship between Latinos and dominant society without the explicit use of race. As a result, millions of Latinos have been removed, millions of families have been torn apart, and Latin countries will increasingly feel the negative impact of their returning citizens and their decreasing remittances. Through crimmigration, Latinos will remain relegated to temporary status and menial labor with their economic and political stability continuing to elude them.

This Article begins to uncover the structure and underlying motivation of crimmigration and is increasingly relevant as both the state and federal government look to expand the number of criminal and immigration offenses that label a noncitizen a “criminal alien.” It is also highly relevant as the Latino population in the United States continues to grow. By beginning this dialogue, further research can continue to study this hypothesis. Such

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59% of unauthorized migrants were from Mexico, 6% from El Salvador, 5% from Guatemala, and 3% from Honduras).

<sup>347</sup> See SIMANSKI & SAPP, *supra* note 37, at 1.

<sup>348</sup> See 2014 ICE ENFORCEMENT AND REMOVAL REPORT, *supra* note 9, at 4 n.1, 5.

<sup>349</sup> CALAVITA, *supra* note 73, at 21 (quoting THE PRESIDENT’S COMM’N ON MIGRATORY LABOR, *supra* note 119, at 16) (internal quotation marks omitted).

investigation is critical to further understand the complexities of crimmigration and its impact on racial inequality in the United States.

