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CRIMMIGRATION: THE MISSING PIECE OF CRIMINAL JUSTICE REFORM

Yolanda Vázquez *

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

—President Barack Obama¹

INTRODUCTION

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

* Associate Professor, University of Cincinnati College of Law. I am grateful to Kimberly Breedon, A. Christopher Bryant, Andrea Dennis, Roger Fairfax, Kris Henning, Renée Hutchins, Sherri Keene, Elizabeth Lenhart, Michael Pinard, Carrie Rosenbaum, and Kami Chavis Simmons for their thoughts on drafts of this article. I also wish to thank Guy-Uriel Charles for his invitation to present this piece at the 2016 Jerome Culp Colloquium held at Duke University School of Law and the valuable comments of Jennifer Chacón and Kim Forde-Mazrui as well as its participants; and César Cuauhtémoc García Hernández and Christopher Lasch for their invitation to present this piece at the 2016 Crimmigration Law Lecture Series at the University of Denver School of Law and the valuable comments of Kevin Johnson and Linus Chan as well as its participants. I am also grateful for the many insightful comments from participants at the Central States Law School Association (CSLSA) Conference 2015, the LatCrit Conference 2015, and the Mid-Atlantic Criminal Law Research Collective (MACLRC) workshop at George Washington Law School. All errors are mine alone.

1. President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

2. Sari Horwitz & Juliet Eilperin, *Obama Commutes Sentences of 46 Nonviolent Drug Offenders*, WASH. POST (July 13, 2015), https://www.washingtonpost.com/world/national-security/obama-commutes-sentences-of-46-non-violent-drug-offenders/2015/07/13/b533f61e-2974-11e5-a250-42bd812efc09_story.html.

3. See *id.* (discussing the fact that out of the eighty-nine sentences that Obama had

tations were another act in President Obama's attempt to address the problems that have arisen over the last several decades in the United States criminal justice system. These problems have included overcriminalization,⁴ severity in sentencing,⁵ hyperincarceration,⁶ and racial and economic disparities.⁷

President Obama's actions, and his request for criminal justice reform, join a larger movement called Smart on Crime.⁸ Smart on Crime reforms aim to reduce the financial and human cost of the criminal justice system, while ensuring public safety.⁹ The Smart on Crime movement has been building momentum over the last decade and has been able to circumvent the entrenched and rigid "soft on crime and tough on crime binary," which contributed to the criminal justice system's enormous size, as well as the inability for prior criminal justice reform efforts to materialize.¹⁰ This movement has gained bipartisan support.¹¹ Many states, once

commuted while in office, seventy-six of those were given to nonviolent drug offenders).

4. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703-04 (2005). See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2007) (arguing that overcriminalization produces too much punishment).

5. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 245-46 (2011) (discussing severity of punishment as one of the reasons for the failure of the criminal justice system).

6. See David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1, 1-2 (David Garland ed., 2001) (discussing mass incarceration as a phenomenon that has become the "systemic imprisonment of whole groups of the population").

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

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

9. See Roger A. Fairfax, Jr., *The "Smart on Crime" Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 906-07 (2012).

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

11. See, e.g., Stephen Dinan, *Lawmakers Reach Across the Aisle to Draft Criminal Justice Reform*, WASH. TIMES (July 6, 2015), <http://www.washingtontimes.com/news/2015/jul/6/james-sensenbrenner-robert-scott-draft-criminal-ju/>; COALITION FOR PUBLIC SAFETY, <http://www.coalitionforpublicsafety.org> (last visited Apr. 3, 2017) (listing bipartisan members of the coalition, such as Koch Industries, ACLU, Laura & John Arnold, Americans for Tax Reform, and the Center for American Progress).

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

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

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

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

14. Michelle Ye Hee Lee, *Does the United States Really Have Five Percent of the World's Population and One Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/?utm_term=.f727c5ca48be; see also Haeyoun Park et al., *Prison Population Around the Globe*, N.Y. TIMES (July 19, 2013), http://www.nytimes.com/interactive/2008/04/22/us/2008_0423_PRISON_GRAPHIC.html?_r=0 (illustrating prison populations around the world on an interactive map).

15. See PETER WAGNER ET AL., PRISON POLICY INITIATIVE, STATES OF INCARCERATION: THE GLOBAL CONTEXT (2016), <http://www.prisonpolicy.org/global/> (finding that the incarceration rate in the U.S. is 716 individuals for every 100,000 residents, which is more than five times higher than most other countries in the world); Neil Howe, *What's Behind the Decline in Crime?*, FORBES (May 28, 2015, 5:04 PM), <http://www.forbes.com/sites/neilhowe/2015/05/28/whats-behind-the-decline-in-crime/#4589bbfb7733> (discussing the decrease in crime rates since the mid-1990s and potential theories for the drop, noting that the 2013 violent crime victimization rate is down 71% from its peak in 1994); Nick Wing, *Here Are All of the Nations That Incarcerate More of Their Population Than the U.S.*, HUFFINGTON POST (Aug. 13, 2013, 8:21 AM), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html (stating that, according to the International Centre for Prison Studies, the United States has the highest percentage of its population incarcerated in the world, accounting for almost 25% of the world's prison population); *World Prison Brief*, INST. FOR CRIMINAL POL'Y RES., http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Apr. 5, 2017) (finding that the United States incarcerated at a rate of 666 per 100,000 residents. Comparing it to other first world countries, the numbers are striking—UK (England & Wales) (145), Scotland (135), Spain (129)).

As might be expected, the incarceration of millions of individuals over the last forty years has come at exorbitant fiscal and moral costs. Billions of dollars have been spent and millions of lives have been impacted by a system that fails to make the nation safer or its communities more secure.¹⁶ The moral impact has garnered the harshest critique—the devastation that it has had not only on individuals who enter the criminal justice system, but on their families and communities from which they come and someday, maybe, will return to. This moral cost has been disproportionately borne by individuals and communities of color, the majority of whom are poor and black.¹⁷

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

16. See Aimee Picchi, *The High Price of Incarceration in America*, CBS NEWS (May 8, 2014, 5:53 AM), <http://www.cbsnews.com/news/the-high-price-of-americas-incarceration-80-billion/> (explaining that, despite the declining crime rate, the United States spends eighty billion dollars annually on incarceration costs).

17. See generally THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (2000), http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf [hereinafter REDUCING RACIAL DISPARITY]; Jamal Hagler, *8 Facts You Should Know About the Criminal Justice System and People of Color*, CTR. FOR AM. PROGRESS (May 28, 2015, 12:01 AM), <https://www.americanprogress.org/issues/race/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/>; Christopher Ingraham, *Charting the Shocking Rise of Racial Disparity in Our Criminal Justice System*, WASH. POST (July 15, 2014), <http://www.washingtonpost.com/news/wonkblog/wp/2014/07/15/charting-the-shocking-rise-of-racial-disparity-in-our-criminal-justice-system/>.

18. See, e.g., Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, THE ATLANTIC (Mar. 3, 2015), <http://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615/>; Nancy A. Heitzeg, *The Fallacy of Right-Wing Appeals to Race in Criminal Justice Reform*, TRUTHOUT (Dec. 4, 2014), <http://www.truth-out.org/opinion/item/27795-the-fallacy-of-right-wing-appeals-to-race-in-criminal-justice-reform>. The Sentencing Project, for instance, released a briefing paper highlighting the failure of current criminal justice reform efforts to prioritize and ensure the incorporation of methods to reduce the racial impact of the criminal justice system. See MARC MAUER & NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, INCORPORATING RACIAL EQUITY INTO CRIMINAL JUSTICE REFORM (Oct. 2014), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/incorporating-racial-equity-into-criminal-justice-reform.pdf> [hereinafter INCORPORATING RACIAL EQUITY].

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

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

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

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

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

21. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

protocols (in detention, arrest, and enforcement), prosecutorial decisions (in charging and plea agreements), laws enacted, case law determined, and procedural responsibilities under the Fourth, Fifth, and Sixth Amendments now include immigration status in their purviews.²²

This impact is significant to the criminal justice system, with no end in sight. While in 1988, the United States removed approximately 5956 individuals for criminal or narcotics violations,²³ in 2014, the criminal justice system was helpful in the arrest, detention, and removal of over 300,000 noncitizens, over 177,000 of whom were classified as aliens who “were previously convicted of a crime.”²⁴ Criminal prosecutions of noncitizens have flooded criminal court dockets, prisons, and jails in local, state, and federal jurisdictions. In federal court, immigration prosecutions account for roughly 50% of cases.²⁵ As a result, over the last years, approximately 40% of the annual federal prison population have been noncitizens.²⁶ In local and state courts, noncitizens are in-

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

23. IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 1997 STATISTICAL YEARBOOK 176, 187 (1997), https://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997_YB.pdf (stating that 25,829 individuals were removed, of which 5782 were removed as criminal aliens).

24. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014 7 (Dec. 19, 2014) [hereinafter ICE REPORT: FY 2014], <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf>.

25. MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2011–2012 3 (2015), <https://www.bjs.gov/content/pub/pdf/fjs1112.pdf> (stating that 50% of all suspects were arrested and booked for immigration offenses in 2012); DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 116 (2013).

26. See FED. BUREAU OF PRISONS, INMATE CITIZENSHIP (last updated Dec. 24, 2016); U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015 4 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf.

creasingly prosecuted and sentenced to a term of incarceration.²⁷ They also receive an additional “punishment” as a result of their criminal conviction: removal.²⁸ During the Obama Administration, over one million individuals have been deported from the United States for their label as a “criminal alien.”²⁹

While traditionally the criminal justice system has been criticized for impacting blacks at greater percentages than any other racial group, the use of the criminal justice system to regulate immigration has expanded its enforcement to poor Latinos, both citizen and noncitizen alike.³⁰ As a result, there has been a lack of research on the relationship between Latinos and the criminal justice system. Research that is available reveals that, since 1980, the number of Latinos incarcerated in the United States has nearly quintupled.³¹ Estimates state that between 2011 and 2012, Latino males represented the largest increase to the incarcerated population.³² As a result, Michael T. Light has written

27. See MOTIVANS, *supra* note 25, at 16 (stating that 88% of criminal defendants charged with immigration crimes were detained); Michael T. Light, *The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities Across U.S. District Courts, 1992–2009*, 48 L. & SOC'Y REV. 447, 447, 466 (2014) [hereinafter Light, *The New Face of Legal Inequality*] (finding that noncitizens are more severely punished at criminal sentencing than their citizen counterparts).

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

29. U.S. DEP'T OF HOMELAND SEC., 2015 YEARBOOK OF IMMIGRATION STATISTICS (2015) [hereinafter 2015 YEARBOOK OF IMMIGRATION STATISTICS], <https://www.dhs.gov/immigration-statistics/yearbook/2015>; U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FY 2015 ICE IMMIGRATION REMOVALS, <https://www.ice.gov/removal-statistics/2015> (calculating this number by adding together the number of criminal alien removals over the last eight years from the table as well as the DHS FY 2014–2016 removal statistics).

30. ALEXANDER, *supra* note 7, at 61; *see*, MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX 2 (2002).

31. ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 14 (1998).

32. MOTIVANS, *supra* note 24, at 17; LATINOS AND CRIMINAL JUSTICE 19 (José Luis Morin ed., 2016); Garance Burke, *Hispanics New Majority Sentenced to Federal Prison*, ASSOCIATED PRESS (Sept. 6, 2011), <https://www.yahoo.com/news/hispanics-majority-sentenced-federal-prison-223409875.html>.

that “Hispanics are now the most disadvantaged group within the [criminal] courts.”³³

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

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

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

I. THE TOUGH ON CRIME MOVEMENT AND ITS LEGACY

A. *The Rise of the Tough on Crime Movement*

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

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

34. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); see also STEVEN RAPHAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? 240 (2013) (discussing how the prison population in the United States has more than quadrupled since 1970); President Barack Obama, State of the Union Address (Jan. 20, 2015), <https://video.foxnews.com/v/4001496918001/obama-as-americans-we-have-profound-commitment-to-justice/?#sp=show-clips> (discussing the value of the nation’s commitment to justice for United States diplomacy and societal prosperity).

35. See, e.g., DAVID DANTE TROUTT, THE PRICE OF PARADISE: THE COSTS OF INEQUALITY AND VISION FOR A MORE EQUITABLE AMERICA 139–41 (2013) (discussing various reasons scholars give for the expansion of the criminal justice system, such as political need, social control, financial gain, racial subordination, and constant unskilled labor supply, just to name a few).

36. JEREMY TRAVIS ET AL., NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 47 (2014).

37. See *supra* note 15 and accompanying text.

through the criminal justice system, directing blame to the offender, and not society, for their plight.³⁸

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

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

38. See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 57–58 (2006).

39. See Harvard Sitkoff, *The Sixties*, GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-by-era/sixties/essays/sixties> (last visited Apr. 5, 2017) (dating the beginning of the Civil Rights Movement to February 1960, and the end of the Vietnam War to 1973, four years after Nixon became president).

40. LEE BERNSTEIN, *AMERICA IS THE PRISON* 42 (2010).

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

42. Nancy E. MARION, *A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960–1993* 70 (1994).

43. *Id.*

44. John N. Mitchell, U.S. Att’y Gen., Address at the Attorney General’s Conference on Crime Reduction: The War on Crime: The End of the Beginning (Sept. 9, 1971), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-09-1971.pdf>.

lion to \$700 million while reducing funding for federal juvenile delinquency programs.⁴⁵ Nixon's presidency was the framework by which the "law and order" agenda began, running throughout the next forty years.

As the law and order mission unfolded over the next four decades, state legislators began to enact more punitive legislation. Beginning in the 1980s, more punitive measures were made into law, such as three-strikes laws, mandatory sentencing guidelines, harsher penalties for drug offenses, life sentences without parole, mandatory minimums, and truth-in-sentencing legislation.⁴⁶ Legislative reforms focused on broadening the types of conduct that could be defined as criminal. States enacted laws that led to increased enforcement and harsher sentences.⁴⁷ Sentencing laws became more punitive.⁴⁸ In addition, the increasing powers of police, prosecutors, probation officers, and parole boards led them to use their discretion in a harsher and more punitive manner.⁴⁹ Sending people to jail became the norm, not the exception. As a result, increasingly more individuals were prosecuted and faced a longer amount of time under the control of the system, whether incarcerated or on probation or parole, and back again.

Conservatives were not the only group responsible for the construction of the criminal justice system.⁵⁰ Liberals, including in-

45. James Vorenberg, *The War on Crime: The First Five Years*, THE ATLANTIC MONTHLY (1972), www.theatlantic.com/past/docs/politics/crime/crimewar.htm.

46. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, §§ 1002, 1052, 1102, 1105 (1986).

47. See Heather Schoenfeld, *The War on Drugs, The Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER, RACE & JUST. 315, 345 (2012) (discussing Florida as an example of how "penal policies and practices influenced different stages of criminal justice . . . to create the dramatic rise in incarceration rates since the 1970s").

48. See David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 40 (2011).

49. There have been arguments as to whether sentencing policy and policing practices, as well as the War on Drugs, are the causes for mass incarceration, or whether prosecutorial discretion, which became more punitive and aggressive, caused it. Most agree, however, that sentencing policy and policing practices instigated by the War on Drugs, are the main contributing factors to overcriminalization, severity in sentencing, and mass incarceration. See Douglas A. Berman, *Is the "Don't Blame the Drug War for Mass Incarceration" Counter-Narrative Problematically Incomplete?*, SENT'G L. & POL'Y (Sept. 29, 2015, 1:24 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2015/09/is-the-dont-blame-the-drug-war-for-mass-incarceration-counter-narrative-problematically-incomplete.html. But see John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 220 (2015).

50. See NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 3-4 (2014) [hereinafter MURAKAWA, *THE FIRST CIVIL RIGHT*].

terest groups such as the victims' rights movement, anti-death penalty movement, women's movement, and prisoners' rights movement all contributed to the punitive nature of the system.⁵¹ Victims' rights advocates called for mandatory arrest and no-drop policies for certain offenses, such as domestic violence offenses, regardless of the victim's needs or desires or the consequences of the arrest.⁵² Many liberals, believing that indeterminate sentences only increased racial disparities and biases in sentencing, advocated for mandatory sentencing guidelines as a mechanism for fairer sentencing.⁵³ Other liberals completely embraced the Tough on Crime movement without regard to its harsh impacts. Democratic President Bill Clinton embraced the "law and order" stance of the conservative party from the beginning.⁵⁴ In 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994.⁵⁵ The bill focused on increased spending for law enforcement, gun control, and increased penalties for those convicted of certain crimes.⁵⁶ Although this bill only related to the federal criminal justice system, it exacerbated its punitiveness as more states enacted mandatory minimums, three-strike laws, and death penalty sentencing.⁵⁷

51. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 8 (2006) (explaining that the rise in the carceral state was a result of punitive penal policies formed by various social movements); MURAKAWA, *THE FIRST CIVIL RIGHT*, *supra* note 50, at 16–17.

52. See, e.g., COLO. REV. STAT. § 18-6-803.6 (2016) (giving officers the power to make immediate arrests when "there is probable cause to believe that a crime or offense involving domestic violence . . . has been committed"); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 560–61 (1999); Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 534.

53. David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1491 (2014).

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

55. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

56. *Id.*

57. Robert Farley, *Bill Clinton and the 1994 Crime Bill*, FACTCHECK (Apr. 12, 2016), <http://www.factcheck.org/2016/04/bill-clinton-and-the-1994-crime-bill/> (discussing the issue that the 1994 Crime Bill may not have "set the trend," as Clinton stated, but it did exacerbate the state's introduction of their own three strikes legislation). See generally MICHAEL TONRY, *SENTENCING MATTERS* (1996); FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND*

B. *The Consequences of the Tough on Crime Agenda*

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

1. The Fiscal/Economic Indictment

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

DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001); Michael G. Turner et al., *“Three Strikes and You're Out” Legislation: A National Assessment*, 59 FED. PROB. 16 (1995).

58. See *supra* notes 38–45 and accompanying text.

59. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS 1925–81, at 2 (1982), <https://www.bjs.gov/content/pub/pdf/p2581.pdf>.

60. STUNTZ, *supra* note 5, at 5.

61. *World Prison Brief*, INST. FOR CRIMINAL POLICY RESEARCH, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Apr. 5, 2017). Comparing it to other first world countries as well as those we criticize for its humanitarian violations, the numbers are striking—UK (England & Wales) (145), Scotland (135), Spain (129), as well as Iran (287), Iraq (123), Russia Federation (436), Cuba (510), Rwanda (434), Afghanistan (74), and South Africa (291)).

62. *Id.* (finding that the United States incarcerated at a rate of 666 per 100,000 residents. The only country surpassing the United States is Seychelles at a rate of 799 per 100,000 residents).

63. Pierre Thomas & Jason Ryan, *U.S. Prison Population Hits All-Time High: 2.3 Million Incarcerated*, ABC NEWS (June 6, 2008), <http://abcnews.go.com/TheLaw/story?id=5009270&page=1>; LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 3 (2013), <http://www.bjs.gov/content/pub/pdf/cpus2.pdf>.

64. LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 1 (2014), <http://www.bjs.gov/content/prb/pdf/cpus13.pdf>.

The criminal justice system, as a result, has an exorbitant financial cost, much of which is almost impossible to fully calculate. Costs of incarceration have been much more readily analyzed. The estimated cost to maintain the federal, state, and local prisons and jails in the United States criminal justice system currently stands at approximately \$80 billion per year.⁶⁵ The United States Department of Education estimated state spending for corrections was approximately \$71 billion from 2012–2013.⁶⁶ The budget request for the Bureau of Prisons in 2015 was approximately \$8.5 billion, \$97 million above that received in the 2014 fiscal year.⁶⁷ Spending in other aspects of the criminal justice system, such as law enforcement, courts, prosecutors, indigent criminal defense attorneys, and services such as probation, parole, and treatment services have not been analyzed as fully, but still amount to millions of dollars.⁶⁸

2. The Moral Indictment

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

65. Matt Vespa, *Our Ruinously Expensive Criminal Justice System*, TOWNHALL (July 17, 2015, 2:00 PM), <http://townhall.com/tipsheet/mattvespa/2015/07/17/criminal-justice-event-n2026028> (arguing that this high cost of the system has not proven to make our nation safer).

66. STEPHANIE STUTLICH ET AL., POLICY AND PROGRAM STUDIES SERV., U.S. DEP'T OF EDUCATION, STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION 5, 18 (2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf> (last visited Apr. 5, 2017); see Christopher Ingraham, *The States That Spend More Money on Prisoners Than on College Students*, WASH. POST, (July 7, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/07/the-states-that-spend-more-money-on-prisoners-than-college-students/?utm_term=.b6e1e34a647d.

67. PRISONS AND DETENTION, U.S. DEP'T OF JUSTICE, FY 2015 BUDGET REQUEST, <http://www.justice.gov/sites/default/files/jmd/legacy/2013/09/07/prisons-detention.pdf> (last visited Apr. 5, 2017).

68. See ROBERT L. SPANGENBERG ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL DEFENSE FOR THE POOR, 1986 (1988), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=3688> (stating that in 1986, indigent defense was first calculated to just under \$1 billion per year, up 60% from \$625 million in 1982); see also HOLLY R. STEVENS ET AL., CTR. FOR JUSTICE, LAW & SOC'Y AT GEORGE MASON UNIV., STATE AND COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 7 (2010) (stating that the cost of indigent defense spending had risen to approximately \$5.3 billion).

impact and devastation inevitable.⁶⁹ These effects rippled beyond the individual, to their families, communities, and society as a whole. Because criminal convictions have a detrimental impact on health,⁷⁰ job prospects,⁷¹ housing,⁷² the ability to vote,⁷³ political power based on prison-based gerrymandering,⁷⁴ deportation,⁷⁵ and numerous other collateral consequences,⁷⁶ families and communities of color bear the heaviest burdens of the system. As a result, the criminal justice system has played a significant role in the way in which American society has been structured over the last forty years.⁷⁷

a. Racial, Gender, and Economic Disparities

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

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

70. See 42 U.S.C. § 1320a-7 (2012) (listing exclusions from certain healthcare benefits and Medicare for certain criminal convictions).

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

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

73. See THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT, <http://www.sentencingproject.org/issues/felony-disenfranchisement/> (last visited Apr. 5, 2017).

74. Editorial, *Prison-Based Gerrymandering*, N.Y. TIMES (Sept. 26, 2013), <http://www.nytimes.com/2013/09/27/opinion/prison-based-gerrymandering.html>.

75. See 8 U.S.C. § 1227(a)(2) (2012 & Supp. 111 2016).

76. COUNSEL OF STATE GOVERNMENTS, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.csgjusticecenter.org> (last visited Apr. 5, 2017) (displaying an interactive map of the United States, which shows collateral consequences for every jurisdiction).

77. See generally, ALEXANDER, *supra* note 7, at 2 (arguing that the criminal justice system has contributed to a new caste system that has maintained the subordination of African Americans in the United States); AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION 1 (Mary Louise Frampton et al. eds., 2008) (stating that the War on Crime has “fundamentally transformed us”); STUNTZ, *supra* note 5 (discussing the multiple dimensions in which individuals are impacted by the criminal justice system, most significantly African Americans); LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) [hereinafter WACQUANT, PUNISHING THE POOR] (finding that the rise in the use of the criminal justice system to punish millions of individuals over the years was the result of the political desire to control the marginalized population in the U.S.—specifically, poor blacks in the “ghetto”).

system.⁷⁸ Arrests, court processing, incarceration, and death penalty rates are all largely skewed by race.⁷⁹ The future looks particularly grim, as juvenile detention rates are even more racially disparate than those of adults. Black juveniles enter into adult prison at a rate seven times higher than white youths and their rates of residential placement were over four times that of whites.⁸⁰ Latino rates are also higher than their white counterparts.⁸¹ Approximately 60% of incarcerated males are either black or Latino.⁸²

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

78. See REDUCING RACIAL DISPARITY, *supra* note 17, at 1; see also Hagler, *supra* note 17; Ingraham, *supra* note 17.

79. CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME AND DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 3 (2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf (finding that arrest rates for blacks were 2.5 times higher than whites, blacks were more likely to be sentenced to incarcerations and sentenced for a longer period of time than whites; blacks were admitted into prison at six times the rate of whites; and their rates on death row was almost five times the rate for whites).

80. *Id.*

81. *Id.* Rates that are available conclude that rates of admission to punish Latinos are two times higher than that of whites and rates of incarceration of Latinos are 1.5 times higher than the rate for whites. *Id.*

82. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, PRISONERS IN 2014 1, 15 (2015), <http://bjs.gov/content/pub/pdf/p14.pdf> (showing that in 2014, approximately 37% of incarcerated males were black, and 22% were Hispanic); see also David Hudson, *President Obama: "Our Criminal Justice System Isn't as Smart as It Should Be,"* THE WHITE HOUSE BLOG (July 15, 2015 at 1:12 PM), <http://www.obamawhitehouse.archives.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be> (stating that of those incarcerated, one in every thirty-five are black and one in every eighty-eight are Latino, as compared to one in every 214 that are white).

83. See Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8 (2010) [hereinafter Western & Pettit, *Incarceration*]. See generally, WAQUANT, PUNISHING THE POOR, *supra* note 77.

84. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf [hereinafter REPORT OF THE SENTENCING PROJECT].

85. GLAZE & KAEBLE, *supra* note 64, at 6 (stating that in 2013, an estimated 5,642,700 males made up part of the correctional population, while 1,256,300 were female). Howev-

of the criminal justice system are poor men of color. Further, it is estimated that one in every three black males born in 2013 and one in every six Latinos in the same group will be incarcerated, as compared to one in every seventeen white males.⁸⁶

b. Reinforcing Social Inequality

For the individual entering the criminal justice system, the impact is profound. Once a person is processed into the system, there is a high probability that the individual will be convicted, as demonstrated by the fact that over 90% of those prosecuted plead guilty.⁸⁷ Additionally, the sentence is likely to be longer than it would have been in the past.⁸⁸

i. Individuals

As was discussed previously, criminal convictions have a detrimental impact on health, job prospects, housing, the ability to vote, community political power, and numerous other consequences that continue reincarceration after an individual is released from the custody of the criminal justice system.⁸⁹

Approximately 650,000 individuals per year finish their sentences and are released to reenter their communities.⁹⁰ Unfortunately, approximately two-thirds of those individuals will return to prison within three years of release.⁹¹ Several reasons account for the inability to gain employment and housing that leads to reincarceration. Physical and mental health disorders and drug

er, females are the “fastest growing correctional population, increasing an average of 3.4% annually.” *Id.* at 1. See generally WACQUANT, PUNISHING THE POOR, *supra* note 77; Western & Pettit, *Incarceration*, *supra* note 83, at 8.

86. REPORT OF THE SENTENCING PROJECT, *supra* note 84, at 1.

87. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS, (Nov. 20, 2014), www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ (discussing the dilemma that over 90% of those charged plead guilty, even when they are innocent).

88. See MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 3 (2014) (discussing harsh sentencing laws over the years that resulted in longer sentences for drug crimes).

89. See *supra* notes 70–76 and accompanying text.

90. See U.S. DEP’T OF JUSTICE, FAITH-BASED AND COMMUNITY INITIATIVES, PRISONERS AND PRISONER RE-ENTRY, http://www.justice.gov/archive/fbci/progmenu_reentry.html (last visited Apr. 5, 2017); Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 FED. SENT’G REP. 103, 103 (2007).

91. See U.S. DEP’T OF JUSTICE, PRISONERS AND PRISONER RE-ENTRY, *supra* note 90.

abuse are among the top factors.⁹² These struggles are ones that the Tough on Crime movement not only refused to address, but exacerbated.

Several reasons contribute to this abysmal rate of reintegration into the community. First, over the years, the ability of an individual to put his past behind him and become a productive member of the community and society at large has become more and more difficult. One of the largest hurdles is employment. Over the last several years, collateral consequences have prevented those with certain convictions from obtaining employment. It is estimated that thousands of collateral consequences exist that prevent a person from entering certain occupations.⁹³ Additionally, even if there is not a restriction on a certain job due to past criminal involvement, many employers still refuse to employ someone with a criminal conviction. As a result, poor men who are incarcerated are much more likely to stay at the bottom of the earning scale.⁹⁴ Another obstacle to employment is the fact that many individuals who are incarcerated have little formal education and few marketable skills.⁹⁵ Although research shows that providing job training and education during and directly after incarceration helps break recidivism, it is very rarely offered.⁹⁶

Since the majority of those impacted by the criminal justice system are poor, many of these individuals will return to poor communities already suffering from a lack of employment opportunities, affordable and decent housing, social welfare safety nets, student loans, food stamps, treatment and health programs, and social support.⁹⁷ These communities have higher rates of crime

92. See *id.*; Kamala Mallik-Kane & Christy A. Wisher, *Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape the Process of Reintegration*, URBAN INST. JUSTICE POL'Y CTR. (Feb. 2008), <http://www.urban.org/sites/default/files/publication/31491/411617-Health-and-Prisoner-Reentry.pdf>.

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

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

95. Lori L. Martin, *Debt to Society: Asset Poverty and Prisoner Reentry*, 38 REV. BLACK POL. ECON. 131, 134 (2011).

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

97. See Jeffrey D. Morenoff and David J. Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 ANN. REV. SOC. 411, 413-24 (2014).

and larger numbers of community members who are either absent or reentering the community, causing even higher levels of instability for the individual, as well as the community.⁹⁸ Without these safety nets, it is almost impossible to fully recover and lead a productive life.

Another obstacle is that many do not have the power to create political change because they do not have the ability to vote. An estimate from 2000 revealed that approximately 4.7 million individuals could not vote because of their felony convictions.⁹⁹ While jurisdictions differ in various ways, some states permanently prohibit convicted felons from voting.¹⁰⁰ For these reasons, it is no wonder that many return to prison within three years of release.

ii. Children

The incarceration of millions of United States residents takes a toll not only on the individual incarcerated, but also on their families and the communities that they come from and return to once released.¹⁰¹ Families face a financial cost of lost wages as well as the cost of maintaining a relationship with the individual, while he or she is incarcerated.¹⁰² Children may suffer the most.

It is estimated that over half of those in prison are parents of children under eighteen.¹⁰³ The number of children living in the United States with at least one parent who is incarcerated ex-

98. See Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. QUAR. 33, 36–38, 46, 55–60 (2003); David S. Kirk, *Residential Change As a Turning Point in the Life Course of Crime: Desistance or Temporary Cessation?*, 50 CRIMINOLOGY 329, 329, 350–53 (2012); Warren Cornwall, *“Prisonized” Neighborhoods Make Ex-Cons More Likely to Return to the Slammer*, SCIENCE (May 22, 2015, 11:00 AM) <http://www.sciencemag.org/news/2015/05/prisonized-neighborhoods-make-ex-cons-more-likely-return-slammer>.

99. JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 177 (2006).

100. *Id.* at 74.

101. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) (discussing the community harms of mass incarceration).

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

103. WESTERN & PETTIT, *supra* note 94, at 18 (stating that over 1.2 million incarcerated individuals are parents of children under age eighteen).

ceeds 2.7 million.¹⁰⁴ In addition, 70 to 100 million individuals have criminal records, while 33 to 36.5 million children are impacted by their parents' criminal records.¹⁰⁵ In total, there are nearly ten million children in the United States that have had at least one parent incarcerated during their life.¹⁰⁶ Nearly two-thirds of these children suffer this loss due to a parent's nonviolent offenses, with over 25% of these being for drug crimes.¹⁰⁷

Children of parents who are absent from the household suffer tremendously. Single parent households are more likely to live in poverty.¹⁰⁸ There are several reasons for this. First, over half of the parents incarcerated were employed and the primary wage earner.¹⁰⁹ Once they were incarcerated, their wages no longer contributed to the household, which according to one study lowered their household's income by an average of 22%.¹¹⁰ Second, even after the parents were released from custody, their wages were 15% less than before their incarceration.¹¹¹

Incarceration seems to have a direct correlation with a child's emotional and behavioral development.¹¹² Research has also shown that children with at least one incarcerated parent are three times more likely to suffer from depression, two times more likely to suffer from anxiety and learning disabilities, and have higher rates of language problems, obesity, asthma, and seizure

104. *Id.*

105. REBECCA VALLAS ET AL., CTR. FOR AMER. PROGRESS, REMOVING BARRIERS TO OPPORTUNITY FOR PARENTS WITH CRIMINAL RECORDS AND THEIR CHILDREN 1 (Dec. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.

106. Isadora Kosofsky, *The Intersection of Love and Loss: Children of Incarcerated Parents*, TIME (May 17, 2016), <http://time.com/4327836/love-and-loss-children-of-incarcerated-parents/>.

107. WESTERN & PETTIT, *supra* note 94, at 20.

108. YANG JIANG ET AL., NAT'L CTR. FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN: CHILDREN UNDER 18 YEARS: 2014 6 (2016), http://www.nccp.org/publications/pdf/text_1145.pdf.

109. WESTERN & PETTIT, *supra* note 94, at 21.

110. *Id.* (citing Rucker C. Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, in *THE INCREASING PRISON POPULATION IN THE UNITED STATES: WHAT HAS IT DONE FOR US AND WHAT HAS IT DONE TO US?* 177–206 (Steven Raphael & Michael Stoll eds., 2009)).

111. *Id.*

112. See NANCY G. LA VIGNE ET AL., URBAN INST. JUSTICE POLICY CTR., BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS 7 (2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411616-Broken-Bonds-Understanding-and-Addressing-the-Needs-of-Children-with-Incarcerated-Parents.pdf>.

disorders.¹¹³ Depending on the child's age, they may suffer attachment difficulties, developmental regression, traumatic stress, and rejection of limits on behavior.¹¹⁴ They are more often expelled or suspended from school.¹¹⁵ They are also more likely to enter the juvenile justice system.¹¹⁶

In addition, many children are forced to enter the child welfare system, including the foster care system.¹¹⁷ As research has shown, children who enter the foster care system are more likely to have severe educational deficiencies.¹¹⁸ They are more likely to internalize problems at higher levels and show significant behavioral problems both during and after leaving a placement.¹¹⁹ They are also more likely to have higher rates of unemployment.¹²⁰ From this data, it is unsurprising that they are more likely to be homeless, rely on public assistance, and become pregnant, and may be more likely to be incarcerated as an adult.¹²¹

Because family income and educational attainment are the two strongest factors in determining a child's upward mobility, it is not surprising that the majority of children with parents who are incarcerated remain in poverty and are uneducated, mentally and physically ill, and more likely to enter the criminal justice system.¹²²

113. Tierney Sneed, *How Mass Incarceration Hurts Children*, U.S. NEWS & WORLD REP. (Aug. 16, 2014, 12:01 PM), <http://www.usnews.com/news/articles/2014/08/15/study-children-pay-the-price-of-a-parents-incarceration-with-their-health>.

114. See Denise Johnston, *Effects of Parental Incarceration*, in CHILDREN OF INCARCERATED PARENTS 59, 68 (Katherine Gabel & Denise Johnston eds., 1995).

115. WESTERN & PETTIT, COLLATERAL COSTS, *supra* note 94, at 21.

116. *Id.* at 18 (stating that children with incarcerated parents have an increased risk of juvenile delinquency).

117. See CREASIE F. HAIRSTON, ANNIE E. CASEY FOUND., FOCUS ON CHILDREN WITH INCARCERATED PARENTS: AN OVERVIEW OF THE RESEARCH LITERATURE 26 (2007), <http://www.f2f.ca.gov/res/pdf/FocusOnChildrenWith.pdf>.

118. See U.S. GOV'T ACCOUNTABILITY OFF., FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN 3 (1999), <http://www.gao.gov/assets/230/228309.pdf>.

119. Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 59, 71 (2006).

120. See RONNA COOK ET AL., WESTAT, A NATIONAL EVALUATION OF TITLE IV-E FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH 83, 86 (1991), <http://files.eric.ed.gov/fulltext/ED348599.pdf>; Mark E. Courtney et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 CHILD WELFARE 685, 713 (2001).

121. See COOK, *supra* note 120, at 14; Courtney, *supra* note 120, at 713-14.

122. See WESTERN & PETTIT, COLLATERAL COSTS, *supra* note 94, at 18, 21.

iii. Communities

As stated above, the majority of those incarcerated are poor and, therefore, come from poor communities.¹²³ These communities have suffered tremendously as a result of the Tough on Crime stance of the criminal justice system. They bear the greatest burden as they are the communities that have the highest crime rates, are missing large numbers of their community members, and receive large numbers of those released from prison who are unemployed, poorly educated, and have very little hope of upward mobility. All of these burdens are directly correlated to the instability created by contact with the criminal justice system.¹²⁴

In addition, the loss of nearly six million votes in poor jurisdictions can be devastating to the political capital of already politically voiceless communities.¹²⁵ This is exacerbated by the fact that the absence of community members causes these communities to lose their census count because those who are incarcerated are often counted in the census of the jurisdiction where they are imprisoned.¹²⁶

II. CRIMMIGRATION AND THE CRIMINAL JUSTICE SYSTEM

A. *What is Crimmigration?*

Over the last several decades, there has been an increasing concern over the relationship between migrants and crime. While criminal conduct has been used to exclude and remove migrants from the United States for over a century, this relationship had been barely noticed. Over the last thirty years, however, the relationship between migrants and crime has taken center stage in politics, society, and news media.¹²⁷ Increasing assumptions re-

123. See *supra* notes 108–11 and accompanying text.

124. See WESTERN & PETTY, *Incarceration*, *supra* note 83, at 14 (describing the cyclical and intergenerational harms caused to children, families, and communities by mass numbers of community members' contact with the criminal justice system).

125. MANZA & UGGEN, *supra* note 99, at 78; Joseph "Jazz" Hayden & Lewis Webb, Jr., *The State of Felony Disenfranchisement in America*, MSNBC (Jan. 17, 2015, 4:51 PM), <http://www.msnbc.com/msnbc/the-state-felony-disenfranchisement-america>.

126. See *Prison-Based Gerrymandering*, *supra* note 74.

127. See, e.g., Kari Hong, *Deporting Illegal Immigrants Who Commit Crimes Isn't Always the Answer*, BOSTON GLOBE (Aug. 17, 2015), <https://www.bostonglobe.com/opinion/2015/08/16/deporting-criminals-isn-always-answer/pVKNnYrZnrDyDjT7zmfkwI/story.html>

garding migrants' danger to society, threat to national security, and overall propensity to engage in criminal behavior, have caused laws to be enacted and policies to be established that aim to target "those [noncitizens] who pose the greatest threat to public safety or national security."¹²⁸ Currently, those noncitizens are defined as "criminal aliens."¹²⁹ "Criminal aliens" include not only those who have engaged in certain criminal conduct, but also noncitizens who have entered the country without inspection, referred to as "immigration violators" and even "illegal immigrants," many of whom are now prosecuted in criminal court.¹³⁰ The enactment of laws, formation of policies and procedures to assist in their expulsion, and prioritization of removal has contributed to the construction of the system we now know as "crimmigration."¹³¹

The increasing focus on "criminal aliens" has a similar history to the growth of the criminal justice system. During the forty years that the nation was focused on the War on Drugs and the War on Crime, the nation's interest was not only directed at United States citizens, but at noncitizens as well.¹³² Noncitizens were also viewed with growing skepticism. No longer were they seen as those who arrived for a better life, to work hard and con-

(arguing against deportation of noncitizens who commit crimes); *Trump to O'Reilly: If Elected, Deportation of Criminal Aliens Will Start on Day One*, FOX NEWS (Aug. 24, 2015, 8:31 PM) <http://insider.foxnews.com/2015/08/24/donald-trump-defends-mass-deportation-illegal-immigrants-oreilly-factor> (discussing Donald Trump's campaign promise to deport criminal aliens).

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

129. See WILLIAM A. KANDEL, CONG. RESEARCH SERV., INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS 2 (2016), <https://www.fas.org/sgp/crs/homesec/R44627.pdf>.

130. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281, 1326–27, 1328 (2010) [hereinafter Eagly, *Prosecuting Immigration*] (discussing the increasing criminal prosecution of immigration violations in the federal criminal courts); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 139 (2009).

131. See generally Stumpf, *supra* note 21 (coining the term "crimmigration"); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L. REV. 599 (2015) [hereinafter Vázquez, *Constructing Crimmigration*] (discussing the role of crimmigration in marginalizing Latinos).

132. See Jeff Yates et al., *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 876–78 & 78 nn.10–12 (2005).

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

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

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

133. See WALTER A. EWING ET AL., AM. IMMIGRATION COUNCIL, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* 2 (2015).

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

135. See, e.g., Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 432, 110 Stat. 1214, 1273-74 (creating a "criminal alien identification system" to assist in the location and deportation of aliens who are convicted of aggravated felonies); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 326, 110 Stat. 3009-546, 3009-630 (expanding further the criminal alien identification system to include fingerprint records); cf. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7341-47, 102 Stat. 4181, 4469-72 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1252(a) (2012)) (outlining expedited deportation proceedings for aliens convicted of "aggravated felonies," including drug trafficking).

136. See, e.g., Maria I. Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 671, 674 (1997); Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1317 (1997).

137. See, e.g., Medina, *supra* note 135, at 671, 674; Morris, *supra* note 135, at 1317.

138. See Stumpf, *supra* note 21, at 369; Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L.

enacted that made noncitizens subject to removal, many of them based on criminal conduct.¹³⁹ In addition, because these laws were civil in nature, they were retroactive, increasing the number of noncitizens who, once safe from removal, were now subject to it.¹⁴⁰ The enactment of these laws have led to prolonged or mandatory detention, criminal convictions for immigration violations, decreasing relief mechanisms from deportation, mandatory deportation regardless of ties and history to the United States, increasing numbers of deportations, and permanent banishment as a result of minor infractions.¹⁴¹ The shifting punitiveness of the immigration system caused scholars and practitioners to describe the new phenomenon as the “criminalization of immigration law.”¹⁴²

As immigration scholars and practitioners were focusing on the ways in which immigrants were being cast as criminals within the immigration system¹⁴³ and the immigration system’s increasing similarity to the criminal justice system,¹⁴⁴ other scholars were beginning to see a symbiotic relationship between immigration and criminal law, shifting the way in which the criminal justice system was functioning. Teresa Miller, for example, reflected not only on the ways in which immigration law has been injected with criminal law and procedural norms—causing the immigration system to more closely resemble the criminal system through its harsher and more punitive treatment of noncitizens—but also on ways in which the criminal justice system had been injected with immigration law norms, turning regulatory civil law into criminal conduct by criminally prosecuting noncitizens in federal court for solely immigration violations, increasing the penalties on immigration-related crimes, and increasing the use of criminal

REV. 1890, 1890–91 (2000).

139. See, e.g., Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1274; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546.

140. *But see* INS v. St. Cyr, 533 U.S. 289, 314–26 (2001) (discussing the abolishment of relief in immigration court for those convicted of crimes and deciding whether a noncitizen still could seek relief, if at the time of the conviction they were not subject to deportation).

141. See Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661, 671–79 (2015).

142. See Medina, *supra* note 136, at 669, 674; Morris, *supra* note 136, at 1317.

143. See, e.g., Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 *HASTINGS WOMEN’S L.J.* 79, 80–81 (1998).

144. Kanstroom, *supra* note 138, at 1891.

law enforcement to control and monitor noncitizens for immigration law violations.¹⁴⁵

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

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

145. Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 639–40 (2003).

146. *Id.* at 617–18.

147. *Id.* at 618.

148. See Stumpf, *supra* note 21, at 376.

149. See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994); Vázquez, *Constructing Crimmigration*, *supra* note 131, at 644.

150. See Eagly, *Prosecuting Immigration*, *supra* note 130, at 1337.

151. See Vázquez, *Constructing Crimmigration*, *supra* note 131, at 644–47.

uating racial disparities.¹⁵² Unlike the criminal justice system, which has historically focused on poor United States citizens of color, specifically poor black males, crimmigration controls the largest minority population in the United States by targeting poor Latino males.¹⁵³

B. *How Does Crimmigration Impact the Criminal Justice System?*

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

152. See *id.* at 617–18, 622–24, 643 (describing how policy and public opinion regarding immigration categorized immigrants as “undesirable” and created a negative effect on their place in society); OMI & WINANT, *supra* note 149, at 12–13 (theorizing the fundamental impact of race as “racial formation” that has shaped and transformed all aspects of society in the United States).

153. See REDUCING RACIAL DISPARITY, *supra* note 17, at 5–9. See also U.S. CENSUS BUREAU, COMPARATIVE DEMOGRAPHIC ESTIMATES: 2015 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (2015), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_CP05&prodType=table (showing that Latinos are approximately 17% of the U.S. population as compared to blacks, who represent approximately 13% of the U.S. population); Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 *LATINO STUD.* 271, 279 (2013); Vázquez, *Constructing Crimmigration*, *supra* note 131, at 608.

154. Vázquez, *Constructing Crimmigration*, *supra* note 131, at 648; see also TRAC IMMIGRATION, IMMIGRATION PROSECUTIONS AT RECORD LEVELS IN FY 2009 (2009), <http://trac.syr.edu/immigration/reports/218> (showing the increasing rate of prosecutions for immigration-related offenses).

155. See JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 1, 12, 16 (Jan. 2010), https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf (discussing the use of *en masse* pleading in federal criminal court prosecutions of immigration violations); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 *UCLA L. REV.* 1543, 1550 (2011) (discussing the role that immigration status has played in shaping issues concerning race, racial profiling, and the Fourth Amendment in the criminal justice system); Chacón, *supra* note 130, at 140–47 (theorizing that criminal prosecutions of immigration offenses are weakening criminal constitutional protections).

As discussed below, regardless of whether immigration enforcement or state and local law enforcement are the first to detect a noncitizen, noncitizens are currently more likely to be prosecuted in the criminal court system before entering into the immigration removal system. Either brought into the federal system by United States Marshalls for federal prosecution for immigration violations, or detected and prosecuted by the federal, state, or local criminal system for nonimmigration crimes, noncitizenship has become a significant factor at all stages of the criminal justice system.

1. Expanding Priorities in Criminal Policing

While the policing and enforcement of immigration laws had historically been left to immigration officials, local, state, and federal law enforcement officers have increasingly become the primary method by which noncitizens are transferred into the custody of Immigration and Customs Enforcement (“ICE”).¹⁵⁶ The federal government, as well as actors within various criminal justice systems across the country, have elected to become active participants in ensuring that noncitizens are brought into the criminal justice system, prosecuted, and then moved into the immigration system for removal as criminal aliens.¹⁵⁷

While the criminal prosecution of immigration violations was first introduced as a criminal offense in 1929, it was rarely used.¹⁵⁸ More often, immigration violators were transferred directly into the immigration system as a civil offense only, and re-

156. U.S. IMMIGRATION AND CUSTOMS ENF'T, U.S. DEP'T HOMELAND SECURITY, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2015 2-4 (2015), <https://www.ice.gov/sites/default/files/documents/Report2016/fy2015removalStats.pdf> (showing that in each year since 2010, 50% or more of ICE removals have been for those labeled criminal aliens, and in fiscal year 2015, 59% of those removed by ICE were convicted of crimes and 91% of those removed from the interior were convicted of crimes).

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

158. See David A. Sklandky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 164 (2012) (noting that there were relatively few prosecutions under early immigration laws until the 1980s). *But see* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 60, 60 n.14 (2004) (describing the implementation of the law criminalizing immigration violations and describing the increased number of deportations); Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65, 71-76 (2012) (explaining how the new law dramatically increased the number of criminal prosecutions for immigration violations).

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

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

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

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

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

161. LYDGATE, *supra* note 155, at 1.

162. *Id.*

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

164. LYDGATE, *supra* note 155, at 1, 3.

165. *Id.*

166. See 8 U.S.C. § 1357(g) (2012) (authorizing state and local law enforcement officers to perform the functions of federal immigration officers).

of law enforcement, appears on a regular basis in local and state jails in an attempt to identify potential noncitizens that may be subject to removal.¹⁶⁷ Programs such as the Agreements of Cooperation in Communities to Enhance Safety and Security (“ACCESS”), 287(g), the Criminal Alien Program (“CAP”), National Fugitive Operations Program (“NFOP”), Secure Communities, and the Priority Enforcement Program (“PEP”) were all put into place so that law enforcement and corrections could assist DHS in locating noncitizens suspected of being removable under immigration law.¹⁶⁸

Operation Streamline has dramatically shifted the focus of federal law enforcement.¹⁶⁹ While the overall number of arrests and bookings through the United States Marshalls has been declining since 2010, the number of immigration offenses has been climbing.¹⁷⁰ In 2012, about 50% of individuals arrested and booked by the United States Marshall Service were charged with immigration offenses.¹⁷¹ This bears a striking contrast to the second most common offense—drugs—which only made up 15% of the arrests in 2012, down by over 4000 individuals since 2011.¹⁷²

DHS’s Priority Enforcement Program (“PEP”) was established in 2014 to take the place of Secure Communities and to lower the number of 287(g) agreements.¹⁷³ Secure Communities and PEP use state and local law enforcement arrest and booking procedures.¹⁷⁴ Everyone who is arrested or booked must have their fingerprints sent to the FBI and ICE to check against the immigra-

167. See IMMIGRATION AND CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SECURITY, ICE ACCESS FACT SHEET (2008), <https://www.ice.gov/doclib/news/library/factsheets/pdf/access.pdf> (discussing the Agreements of Cooperation in Communities to Enhance Safety and Security (“ACCESS”) program that houses various programs that create working relationships between ICE and state and local law enforcement).

168. *Id.*; see, e.g., *Criminal Alien Program*, IMMIGRATION & CUSTOMS ENF’T, DEP’T HOMELAND SEC., <https://www.ice.gov/criminal-alien-program> (last visited Apr. 5, 2017); DEP’T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PRIORITY ENFORCEMENT PROGRAM (PEP), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf (last visited Apr. 5, 2017); *Immigration Enforcement: Fugitive Operations*, IMMIGRATION & CUSTOMS ENF’T, DEP’T OF HOMELAND SEC., <https://www.ice.gov/fugitive-operations> (last visited Apr. 5, 2017).

169. LYDGATE, *supra* note 155, at 1.

170. MOTIVANS, *supra* note 25, at 3.

171. *Id.*

172. *Id.*

173. OFFICE OF ENF’T AND REMOVAL OPERATIONS, U.S. DEP’T OF HOMELAND SECURITY, PRIORITY ENFORCEMENT PROGRAM (PEP), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf (last visited Apr. 5, 2017).

174. *Id.*

tion database to determine whether they are one of its priorities.¹⁷⁵ Under PEP, ICE will await the outcome of the noncitizen's case. If the noncitizen is convicted of a crime that falls under its enforcement priority, ICE will seek to have the criminal alien transferred into its custody.¹⁷⁶

State and local criminal justice systems have not limited their role to the neutral transfer of noncitizens convicted of crimes at the request of ICE officials. 287(g) agreements give state and local law enforcement an active role in immigration enforcement, as they are formally authorized to act as immigration officers.¹⁷⁷ In addition, states across the country have enacted their own laws to allow their law enforcement officers to inquire about immigration status, regardless of whether having formally entered into a 287(g) agreement with DHS.¹⁷⁸ As such, many cities have refocused law enforcement efforts on migration control, diverting time and resources away from the investigation of violent crimes and other duties deemed important for public safety, such as responding to 911 calls.¹⁷⁹

2. Shifting Priorities in Criminal Prosecution

Increasing criminal prosecutions of immigration violations over the years has also structurally shifted federal caseloads. In 1993,

175. *Id.*

176. *Id.*

177. Immigration and Nationality Act, Pub. L. No. 104-208, § 287(g), 110 Stat. 3009, 3009-563-64 (1996) (codified at 8 U.S.C. § 1357(g) (2012)) (giving local and state law enforcement authority to act as immigration officials); IMMIGRATION AND CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SECURITY, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, <http://www.ice.gov/factsheets/287g> (last visited Apr. 5, 2017) ("Currently, ICE has 287(g) agreements with 38 law enforcement agencies in 16 states. From January 2006 through September 30, 2015, the 287(g) program is credited with identifying more than 402,079 potentially removable aliens—mostly at local jails.")

178. *See, e.g.*, S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (requiring law enforcement to determine the immigration status of someone arrested or detained when there is "reasonable suspicion" that the individual is not in the United States with authorization).

179. *See* Ryan Gabrielson & Paul Giblin, *Reasonable Doubt*, EAST VALLEY TRIB. (July 9, 2008), www.eastvalleytribune.com/special_reports/reasonable_doubt/ (reporting on its Pulitzer Prize winning five-part series which investigated the hidden impact of the shifting enforcement efforts of Maricopa County law enforcement into immigration enforcement, finding rising levels of violent crime, slower response rates to 911 calls, and uninvestigated sex crimes occurring since law enforcement's shift to immigration enforcement); *40,000 Unserved Felony Warrants in Maricopa County*, AZFAMILY.COM (Mar. 9, 2015), www.azfamily.com/story/28305165/40000-unserved-felony-warrants-in-maricopa-county (noting nearly 40,000 unserved felony warrants in Maricopa County in 2015).

only 5.4% of federal prosecutions were for immigration violations.¹⁸⁰ From 2002 to 2008, criminal prosecutions for unlawful entry increased by more than 330% in federal courts along the U.S.-Mexico border.¹⁸¹ Further, from 2009 to 2015, immigration violations accounted for a large percent of all federal prosecutions.¹⁸² Over the last “24 years, no other category has ever played such a dominant role in overall federal prosecutions.”¹⁸³ Even during the height of the War on Drugs, drug prosecutions accounted for only 37% of federal prosecutions.¹⁸⁴

As immigration violations remain high, drug prosecutions continue to decline with the government citing the reason as a result of focusing on the most “serious defendants.”¹⁸⁵ Drug prosecutions have not been the only declining category of prosecutions—prosecutions for “white collar” crimes, violent crimes, organized crime, weapons, and public corruption have all decreased in federal court while immigration prosecutions continue to be prosecuted by both federal judges and U.S. magistrates.¹⁸⁶ As a result, the percentage of noncitizens prosecuted in federal court rose from 22% in 1992 to 41.5% in 2015.¹⁸⁷

180. See *U.S. District Courts—Criminal Cases Commenced by Major Offense During the Twelve-Month Periods End September 30, 1993 Through 1997*, U.S. COURTS, (Sept. 30, 1997), www.uscourts.gov/statistics/table/d-2-cases/judicial-business/1997/09/30 (reporting 2487 out of 45,902 federal cases were for immigration violations).

181. LYDGATE, *supra* note 155, at 2.

182. See NEW DATA ON FEDERAL COURT PROSECUTIONS, *supra* note 163, at 1 (stating immigration accounted for more than half of all federal criminal prosecutions as of 2010); U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2015 2 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf (citing immigration accounted for approximately 29.3% of the total federal caseload in 2015).

183. NEW DATA ON FEDERAL COURT PROSECUTIONS, *supra* note 163, at 2.

184. *Id.*

185. UNITED STATES SENTENCING COMMISSION, OFFICE OF FEDERAL CRIMINAL CASES, FISCAL YEAR 2015 2 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf (citing that drugs accounted for 31.8% of the cases with immigration accounting for approximately 29% of the total caseload); Press Release, U.S. Dep’t of Justice, New Smart on Crime Data Reveals Federal Prosecutors are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants (Mar. 21, 2016), <https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and> (arguing that prosecutors are focusing on the most “serious defendants” that is in line with the Smart on Crime model).

186. NEW DATA ON FEDERAL COURT PROSECUTIONS, *supra* note 163, at 3 (citing that prosecution of “white collar” crimes decreased by 18%, organized crime by 20%, public corruption by 14%, drugs by 20%, and weapons by 19%).

187. MICHAEL T. LIGHT ET AL., PEW RESEARCH CTR., THE RISE OF FEDERAL IMMIGRATION CRIMES: UNLAWFUL REENTRY DRIVES GROWTH 11 (2014), www.pewhispanic.com.

Increasing prosecutions of noncitizens has not been limited to federal courts. Through the years, many localities and states enacted their own immigration-related offenses in an attempt to regulate migration notwithstanding the fact that immigration law had historically been described as a federal regulation.¹⁸⁸ One such jurisdiction, Arizona, used both its identity theft law and its smuggling law to prosecute noncitizens.¹⁸⁹ Although the smuggling law did “not, on its face, criminalize smuggling one’s self,” Arizona interpreted “the law to criminalize all of those apprehended rather than just the smugglers.”¹⁹⁰

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

org/files/2014/03/2014-03-18_federal-courts-immigration-final.pdf [hereinafter LIGHT ET AL., FEDERAL IMMIGRATION CRIMES]; see U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2015 3–4 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf (noting that Latinos are disproportionately prosecuted for both immigration and drug offenses, approximately 80%).

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

189. See ARIZ. REV. STAT. ANN. § 13-2008 (2014); see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1575 n.50 (2010) [hereinafter Chacón, *A Diversion of Attention?*]; see also Eagly, *Local Immigration Prosecution*, *supra* note 32, at 1809 (analyzing Arizona’s smuggling statute, concluding that state criminal laws that regulate immigration have been responsible for the shift in immigration enforcement from federal to state governments).

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

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

192. For an in-depth explanation on the impact of criminal convictions on the availability of relief from removal, see DAN KESSELBRENNER & LORY D. ROSENBERG, *IMMIGRATION LAW AND CRIMES* (2016).

193. See Eagly, *Local Immigration Prosecution*, *supra* note 33, at 1812 n.386 (quoting Joe Arpaio, *Joe Arpaio and Andrew Thomas Press Conference*, YOUTUBE (May 18, 2010), <https://www.youtube.com/watch?v=aPp3Oy-8rE4>).

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

195. Eagly, *Criminal Justice*, *supra* note 22, at 1130–31 (discussing the realities that “immigration enforcement is now deeply intertwined with the local enforcement of crimi-

The end result can be the same. When immigration status is used in determining the plea offer and the procedural rights afforded in criminal proceedings, the noncitizen's fate in immigration court is also determined.¹⁹⁶

3. Increasing Rates of Detention & Incarceration of Nonviolent Offenders

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

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

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

nal law").

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

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

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

199. See, e.g., S.C. CODE ANN. § 17-15-30(B)(4) (2016) (requiring courts to consider alienage when assessing flight risk); Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 *CARDOZO L. REV.* 1751, 1791 (2013) [hereinafter Cade, *The Plea-Bargain Crisis*].

200. See, e.g., VA. CODE ANN. § 19.2-120.1(A) (2015) (requiring denial of bail if noncitizen is found to be in the United States without authorization and charged with one of the

dition to legislative enactments, federal and state courts across the country have held that immigration status should be a factor in deciding whether to grant bond to a criminal defendant.²⁰¹

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

b. Severity in Sentencing: Increasing Incarceration Rates for Noncitizens

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

listed crimes); Cade, *The Plea-Bargain Crisis*, *supra* note 199, at 1791–92 (stating that Alabama requires “courts setting bail to make ‘a reasonable effort’ to determine the noncitizen’s immigration status” and if the person is determined to be unlawfully present, he or she will remain “detailed until the prosecution is complete”).

201. See Cade, *The Plea-Bargain Crisis*, *supra* note 199, at 1791 n.238 (2013) (citing federal district court cases in D.C., Wisconsin, and the Tenth Circuit); Chin, *Illegal Entry as Crime*, *supra* note 198, at 1424 (citing case law in California, Florida, Georgia, Kentucky, New Jersey, New York, Ohio, and Texas).

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

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

204. See Michael T. Light et al., *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 AM. SOC. REV. 827, 843 (2014) [hereinafter Light et al., *Citizenship and Punishment*]; cf. Light, *The New Face of Legal Inequality*, *supra* note 26, at 448 (discussing that “Hispanics receive more severe punishment than both white and black defendants”).

205. Light et al., *Citizenship and Punishment*, *supra* note 204, at 827–28.

206. *Id.* at 839.

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

III. THE SHIFT TO THE SMART ON CRIME AGENDA

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

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

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

207. *Id.*

208. *Id.* at 839–40.

209. *Id.* at 840.

210. See Fairfax, *From “Overcriminalization” to “Smart on Crime,” supra* note 8, at 610–11.

211. *See id.*

212. For example, Detroit, Michigan, and Stockton, California, filed for federal bankruptcy in 2013, and others may follow. See Gary Cameron, *Fed Official Hints Many Cities to Follow Detroit Bankruptcy Road*, RT (Apr. 14, 2015), <http://www.rt.com/usa/249693-detroit-municipal-bankruptcy-filings/>.

efforts, federal, state, and local municipalities and coalitions have created mechanisms for reducing the total number of individuals impacted, as well as looked at the system's disparate impact on individuals and communities of color.

B. *Goals of the Smart on Crime Agenda*

The Smart on Crime agenda has been largely based on ways to reduce costs. Campaigns have touted the line of initiating policy that keeps crime rates low and maintains public safety, while still reducing costs.²¹³ Since the cost of corrections programs has by far been the highest and most widely publicized category in spending, downsizing prisons has become a major goal in the Smart on Crime movement.²¹⁴ At its most basic, a smaller prison population is much less expensive.²¹⁵ At its most complex, a smaller prison population helps to alleviate the moral consequences associated with the criminal justice system.²¹⁶ As such, the Smart on Crime movement has focused on three words: efficiency, effectiveness, and fairness.

1. Creating an Efficient, Effective, and Fair System

Efficiency has been defined as “whether a policy delivers a desired outcome at the lowest possible cost to society[.]”²¹⁷ The questions reformers ask when thinking about whether a policy is effective are: Does the proposed policy achieve the desired outcome;

213. See, e.g., BRYANT JACKSON-GREENE ET AL., ILL. POL'Y INST., MAKING ILLINOIS SMART ON CRIME: FIRST STEPS TO REDUCE SPENDING, EASE OFFENDER RE-ENTRY AND ENHANCE PUBLIC SAFETY 1 (2015), https://files.illinoispolicy.org/wp-content/uploads/2015/08/CrimJustice_Report-1.pdf.

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

215. See generally PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION (Tara Herivel & Paul Wright eds., 2007) (highlighting the practice of funding private prisons through state bonds and the creation of prison jobs in otherwise jobless local economies); Thierry Godard, *The Economics of the American Prison System*, SMART ASSET (Feb. 3, 2017), <https://smartasset.com/insights/the-economics-of-the-american-prison-system> (highlighting the billions of dollars in state funds directed to private prison operators); Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC (Dec. 1998), <https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/> (explaining that a growing prison population creates year-round employment opportunities).

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

217. *Id.* at 18.

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

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

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

2. The Focus of Criminal Justice Reform Efforts

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

218. *Id.*

219. *See id.*

220. *See id.* at 19–20.

221. *See id.* at 9.

not an exhaustive list, the consequences discussed below represent those that create the biggest savings to society, by reducing costs, reducing the moral consequences, and giving more legitimacy to the criminal justice system.

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

One method of ensuring success is to focus on nonviolent offenders, since, as reported by the DOJ in 2004, only about one in five nonviolent releases was arrested for a violent crime within three years of discharge.²²² In addition, because of the severity of sentencing for drug-related crimes, many of those incarcerated are older than fifty years old.²²³ There are two arguments for the regular release of these older prisoners. First, release will reduce costs to the system because medical issues among the older population are more common and more expensive.²²⁴ Second, older prisoners are less likely to recidivate or return to prison for new crimes than their younger counterparts.²²⁵

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

222. BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, PROFILE OF NONVIOLENT OFFENDERS EXITING STATE PRISONS 2 (2004), <http://www.bjs.gov/content/pub/pdf/pnoesp.pdf>.

223. See Carrie Abner, COUNCIL OF STATE GOV'TS, *Graying Prison: States Face Challenges of an Aging Inmate Population*, 49 ST. NEWS 8, 9 (2006).

224. See, e.g., *id.* at 10; Jean Mikle, *Health Care Costs for Older Inmates Skyrocket*, USA TODAY (Mar. 31, 2013 12:43 AM), <http://www.usatoday.com/story/news/nation/2013/03/31/health-care-costs-for-older-inmates-skyrocket/2038633/>.

225. INIMAI CHETTIAR ET AL., AM. CIVIL LIBERTIES UNION, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY vii (2012), https://www.aclu.org/files/assets/elderly-prisonreport_20120613_1.pdf; JAMIE FELLNER, HUM. RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 81 (2012), https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0_0.pdf; see also TINA CHIU, VERA INST. OF JUSTICE, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 2 (2010), <http://archive.vera.org/sites/default/files/resources/downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf> (discussing that fifteen states and the District of Columbia have geriatric release programs).

mental illness, drug and alcohol abuse, and lack of employable skills.²²⁶ In addition, nonviolent offenders are being diverted from incarceration to alternative courts that help them combat their issues and avoid the ramifications of a conviction or the further inequality of incarceration.²²⁷

A third area of reform includes combating the racial disparities that exist in the criminal justice system. Racial disparities in the system have been a source of disillusionment, because many believe that the system is neither fair nor effective.²²⁸ Because this dissatisfaction is linked to higher crime rates, social unrest, and political disengagement, combating racial disparities is an important component of criminal justice reform.²²⁹ Efforts to ensure the system is “fair” and “effective” include targeting racial profiling and disparities in sentencing. With that goal in mind, in 2010, President Obama signed the Fair Sentencing Act.²³⁰ The Act was aimed at reducing the racial disparities that have been occurring since Congress adopted the thresholds in the Anti-Drug Abuse Act of 1986.²³¹ In addition, U.S. Attorney General Eric Holder announced new guidelines in an effort to combat racial profiling.²³²

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

226. U.S. CONFERENCE OF MAYORS, STATUS OF EX-OFFENDER REENTRY EFFORTS IN CITIES 2 (2009), <http://www.mayors.org/pressreleases/uploads/reentryreport09.pdf>; see also Cynthia Caporizzo, *Prisoner Reentry Programs: Ensuring a Safe and Successful Return to the Community*, WHITE HOUSE BLOG (Nov. 30, 2011, 1:09 PM), <https://obamawhitehouse.archives.gov/blog/2011/11/30/prisoner-reentry-programs-ensuring-safe-and-successful-return-community>.

227. See RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 3 (2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Drug-Courts-A-Review-of-the-Evidence.pdf>.

228. See Jeffrey Fagan, *Introduction*, 6 OHIO ST. J. CRIM. L. 123, 123 (2008).

229. See *id.* at 124–26.

230. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.); Jesse Lee, *President Obama Signs the Fair Sentencing Act*, WHITE HOUSE BLOG (Aug. 3, 2010, 4:58 PM), <https://obamawhitehouse.archives.gov/blog/2010/08/03/president-obama-signs-fair-sentencing-act>.

231. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2–3207-3 (codified as amended at 21 U.S.C. § 841 (2012)); see also DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW i–ii (2006), <http://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law?redirect=cpreirect/27181>.

232. See Press Release, Dep’t of Justice, Office of Pub. Affairs, Attorney Gen. Holder Announces Fed. Law Enf’t. Agencies To Adopt Stricter Policies to Curb Profiling (Dec. 8, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-announces-federal-law-enforcement-agencies-adopt-stricter-policies-0> [hereinafter Dep’t of Justice, Stricter Policies].

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

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

233. See generally Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17 (1968) (describing “the perils of overcriminalization”).

234. See Kat Aaron, *Courts Explore New Ways to Deal with Heavy Caseloads, Overflowing Jails*, INVESTIGATIVE REPORTING WORKSHOP (July 23, 2013), <http://americawhatwentwrong.org/story/changing-courts/> (discussing the effects of too many cases).

235. See Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214 (2010).

236. See Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 590, 593 (2006).

237. See *id.* at 590, 595–97; see also *infra* Part IV.

238. See Pinard & Thompson, *supra* note 236, at 598–99.

239. See *id.* at 599.

well as the other costs associated with family separation, violence, drug addiction, etc. Alternatives to incarceration also help lessen the disproportionate impact that collateral consequences have on poor people of color.²⁴⁰

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

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

A. *The Fiscal Cost*

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

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

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

242. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (2012), <http://archive.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

tion enforcement system.²⁴³ In 2012, the federal criminal enforcement of immigration law alone cost taxpayers approximately \$18 billion—more than all other federal criminal law enforcement agencies combined.²⁴⁴ For CAP, 287(g), NFOP, and Secure Communities, Congress appropriated \$608 million to ICE in 2012.²⁴⁵ For Operation Streamline, the cost for 2010 was close to \$232 million, and included a request for new federal attorneys, new United States Marshals, and construction of new federal courthouses.²⁴⁶ State and local jurisdictions that are required to enforce migration control also cost their cities millions, due to rising lawsuits, lost revenue, and increasing costs of corrections.²⁴⁷

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

1. Prosecuting Nonviolent and Nondangerous Individuals

Paralleling the overall discontent between incarceration rates and crime, the prosecution and expulsion of criminal aliens has received criticism over the years for its inability to support DHS's claim that its program "should continue to prioritize threats to national security, public safety, and border security."²⁴⁸ First, the majority of individuals removed from the country in 2011 had either no criminal conviction or had been convicted of minor crimes

243. MEISSNER ET AL., *supra* note 25, at 3.

244. *Id.* at 9.

245. See ROSENBLUM & KANDEL, *supra* note 202, at 1.

246. NEW DATA ON FEDERAL COURT PROSECUTIONS, *supra* note 163, at 3.

247. See, e.g., Mahwish Khan, *Report: The Notorious Record of Maricopa County, AZ's Sheriff Joe Arpaio*, AMERICA'S VOICE (July 16, 2010), http://americasvoice.org/research/the_notorious_record_of_maricopa_county_azs_sheriff_joe_arpaio/ (asserting that Maricopa County, Arizona, Sheriff Joe Arpaio's migration control tactics have "resulted in higher crime rates, thousands of lawsuits, millions of dollars in unnecessary expenses and a reversal of the community-policing strategies that have proved successful to police across the nation"); Stephen Lemons, *Arpaio Costs County More Than \$44 Million in Melendres Expenses*, PHX. NEW TIMES (May 18, 2015, 5:24 PM), <http://www.phoenixnewtimes.com/news/arpaio-costs-county-more-than-44-million-in-melendres-expenses-7341280> (discussing Maricopa County, Arizona, allocating \$44.5 million for costs associated with a federal civil rights lawsuit against Sheriff Joe Arpaio regarding racial profiling in the name of criminal and immigration enforcement); David Schwartz, *Judge Awards \$4.4 Million to Lawyers in Arizona Racial Profiling Case*, REUTERS (Sept. 11, 2014, 11:33 PM), <http://www.reuters.com/article/us-usa-sheriff-arizona-idUSKBN0H707E20140912>.

248. U.S. Dep't of Homeland Sec., Memorandum from Jeh Johnson on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

for which the sentence was less than one year.²⁴⁹ Second, immigrants are less likely to commit crimes.²⁵⁰ Third, there is no correlation between immigration prosecution and deterrence.²⁵¹

2. Hyperincarceration with a “New” Focus

Despite Smart on Crime measures and decreasing crime rates, empty bed space in penitentiaries and jails has not become a thing of the past. On the contrary, not only have these institutions remained, but more have been built to accommodate a growing number of new inmates—the criminal aliens.²⁵²

a. Increasing Numbers of Noncitizens in Federal and State Prison

As a consequence of the current focus on immigration violations in federal court, the number of immigrants detained in federal detention facilities for immigration violation crimes has increased significantly in the past twenty-four years.²⁵³ “The Bureau of Justice Statistics reports that from 1995 to 2003, the number of

249. Michele Waslin, AM. IMMIGRATION COUNCIL, THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS 3 (Nov. 2011), <https://www.immigrationpolicy.org/research/secure-communities-fact-sheet> (citing DHS 2011 statistics on Secure Communities).

250. RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POL'Y CTR., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 4 (2007), http://www.researchgate.net/publication/237563250_The_Myth_of_Immigrant_Criminality_and_the_Paradox_of_Assimilation_Incarceration_Rates_Among_Native_and_Foreign-Born_Men. See generally Lesley Williams Reid et al., *The Immigration-Crime Relationship: Evidence Across U.S. Metropolitan Areas*, 34 SOC. SCI. RES. 757 (2005) (finding that after controlling for demographic and economic factors, immigrants are less likely to commit crimes, and crime rates have decreased as immigration rates increased); Jacob I. Stowell et al., *Immigration and the Recent Violent Crime Drop in the United States: A Pooled, Cross-Sectional Time-Series Analysis of Metropolitan Areas*, 47 CRIMINOLOGY 889 (2009) (finding that increasing immigration rates in neighborhoods tends to decrease violent crime, especially robbery); Tim Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration On Changes in Violent Crime Between 1990 and 2000*, 91 SOC. SCI. Q. 531 (2010) (finding that “cities with the largest immigration increases between 1990 and 2000 experienced the largest decreases in homicide and robbery during the same time period.”).

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

252. See Melanie Diaz & Timothy Keen, *How US Private Prisons Profit from Immigrant Detention*, COUNCIL ON HEMISPHERIC AFF. (May 12, 2015), <http://www.coha.org/how-us-private-prisons-profit-from-immigrant-detention/>.

253. See NEW DATA ON FEDERAL COURT PROSECUTIONS, *supra* note 163, at 2.

people in prison who were sentenced for immigration offenses grew 394% from 3420 to 16,903.”²⁵⁴ The number of immigration violations has assisted in the federal prison population growth over the last fifteen years.²⁵⁵ Federal inmates charged with immigration crimes make up the third highest category of the detained population and approximately 22% of the federal prison population is composed of noncitizens.²⁵⁶ While numbers vary amongst local and state jurisdictions, noncitizens make up an average of 12% of the state prison and jail populations, although in Arizona approximately 21% of the prison population are noncitizens.²⁵⁷

b. Increasing Numbers of Noncitizens in Civil Detention

For decades, immigration detention had been vehemently held to be a civil “penalty,” completely outside the purview of the criminal justice system.²⁵⁸ In recent years, however, scholars and advocates have pushed back on the civil/criminal distinction.²⁵⁹ Katherine Beckett and Naomi Murakawa have referred to immi-

254. 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).

255. See *Statistics: Inmate Offenses*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Apr. 5, 2017); *A Storied Past*, FED. BUREAU OF PRISONS, <https://www.bop.gov/about/history/> (last visited Apr. 5, 2017) (stating that during the 1990s, the prison population more than doubled).

256. See *Statistics: Inmate Offenses*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Apr. 5, 2017) (listing the following order for those detained in Federal Prison on specific charges: Drug Offenses (46.4%), Weapons (16.8%), Immigration (8.5%), Sex Offenses (8.6%), and Extortion, Fraud, and Bribery (6.5%); *Statistics: Inmate Citizenship*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_citizenship.jsp (last visited Apr. 5, 2017); see also W. Gardner Selby, *Mostly False: Lamar Smith Claim That One Third of Federal Inmates are ‘Illegal’ Immigrants*, POLITIFACT, (Aug. 25, 2016), <http://www.politifact.com/texas/statements/2016/aug/25/lamar-smith/mostly-false-lamar-smith-claim-one-third-federal-i/>.

257. See ROSENBLUM & KANDEL, *supra* note 193, at 6–7 (finding that, in 2009, noncitizens represented approximately 4.5% of the overall state prison and 7.8% of the overall local jail population); Eagly, *Local Immigration Prosecution*, *supra* note 32, at 1753 n.20 (stating that “21% of individuals sentenced for felonies” in Maricopa County, Arizona, were noncitizens in 2008).

258. See, e.g., *Zadyvdas v. Davis*, 533 U.S. 678, 690 (2001); *Wong Wing v. United States*, 163 U.S. 228, 234 (1896).

259. See, e.g., César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1356 (2014) (concluding that immigration detention is punishment and largely connected to the criminal justice system). See generally César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449 (2015); Anita Sinha, *Ending Mass Incarceration, But Not for Immigrants: A Tale of Two Policies*, HUFFINGTON POST (July 27, 2015, 5:41 PM), http://www.huffingtonpost.com/anita-sinha/ending-mass-incarceration-but-not-for-immigrants_b_7874750.html.

gration detention as the “shadow carceral state.”²⁶⁰ The shadow carceral state has been recognized as an expansion of punitive power that occurs through the relationship between civil and criminal law.²⁶¹ This expansion into the area of law legally recognized as civil, however, still functions to punish and to control groups of people—it mimics and is dependent on the criminal justice system to function.²⁶²

Therefore, immigration detention must be understood as part of the moral cost, as well as the fiscal cost, of the criminal justice system because the majority of those detained are fed into immigration detention through the criminal justice system.²⁶³ Immigration detention has expanded as a direct result of the implementation of mandatory detention for criminal aliens.²⁶⁴ Criminal aliens are subject to mandatory detention on the automatic presumption of danger to the community and flight risk, regardless of the actual criminal offense for which they were convicted or their ties to the community.²⁶⁵ Operation Streamline has been largely responsible for the 49% increase in the detainee population since 2005.²⁶⁶ Since 1996, the number of individuals detained on immigration violations has tripled.²⁶⁷ From 2011 to 2014, over 427,000 individuals were detained each year, with almost 50%

260. Beckett & Murakawa, *supra* note 28, at 222 (suggesting that because civil detention, although not technically defined as punishment because it is part of the civil system, mimics traditional punishment and comes from the carceral state; therefore, we should rethink of this as punishment part of the carceral state).

261. *Id.* at 222–23.

262. *Id.* at 222.

263. Isabel Ricupero et al., *Immigration Detention and the Law: U.S. Policy and Legal Framework* 8, 16 (Global Detention Project, Working Paper, Aug. 2010).

264. See 8 U.S.C. § 1226(c)(1) (2012) (requiring the Attorney General to take into custody criminal aliens); see also *Priority Enforcement Program*, IMMIGRATION AND CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., <https://www.ice.gov/pep> (last visited Apr. 5, 2017) (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 its systems to determine whether or not an ICE detainer should be put on a booked individual).

265. See 8 U.S.C. § 1226(c)(1) (2012) (discussing the mandatory detention of criminal aliens).

266. 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> (discussing the billion dollar industry that has reshaped the private prison corporations).

267. DET. WATCH NETWORK, THE INFLUENCE OF THE PRIVATE PRISON INDUSTRY IN THE IMMIGRATION DETENTION BUSINESS 1 (2011) [hereinafter DET. WATCH NETWORK THE INFLUENCE OF PRIVATE PRISON INDUSTRY], <http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Private%20Prison%20Influence%20Report.pdf>.

classified as criminal aliens.²⁶⁸ Almost 4 million individuals were detained in immigration detention facilities in the United States from 2003 to 2014, many of them because of their “criminal alien” status.²⁶⁹

To put the exorbitant level of immigration detainees in perspective, a comparison to the federal prison population may be in order. In 2014, the number of individuals detained exceeded 425,700, down from over 470,000 in 2012.²⁷⁰ The current number of individuals detained in the United States on immigration violations each year represents more than twice as many individuals than are housed annually in the Federal Bureau of Prisons.²⁷¹ The United States now has the largest immigration detention system in the world.²⁷²

c. Racial Disparities in Incarceration Rates Shifting to Latinos

From 1980 to 1998, the number of Latinos incarcerated in the United States more than quintupled.²⁷³ Estimates state that in 2011, Latinos represented the largest increase to the incarcerated population.²⁷⁴ “Hispanics are now the most disadvantaged group within the [criminal] courts.”²⁷⁵

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

268. See BRYAN BAKER AND CHRISTOPHER WILLIAMS, ANNUAL REPORT: DEPT OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2014 5, 6 (2016) [hereinafter IMMIGRATION ENFORCEMENT ACTIONS: 2014], https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2014.pdf.

269. See DET. WATCH NETWORK, THE INFLUENCE OF PRIVATE PRISON INDUSTRY, *supra* note 267, at 1; see also BAKER & WILLIAMS, *supra* note 268, at 6.

270. See BAKER & WILLIAMS, *supra* note 268, at 6.

271. *About Our Agency*, FED. BUREAU OF PRISONS, <https://www.bop.gov/about/agency/> (last visited Apr. 5, 2017) (“Our agency is responsible for the custody and care of [189,302] federal inmates.”).

272. *Detention Quotas*, DET. WATCH NETWORK, <http://www.detentionwatchnetwork.org/issues/detention-quotas> (last visited Apr. 5, 2017).

273. CURRIE, *supra* note 31, at 14.

274. Garance Burke, *Hispanics New Majority Sentenced to Federal Prison*, SAN DIEGO UNION-TRIB. (Sept. 6, 2011), <http://www.sandiegouniontribune.com/sdut-hispanics-new-majority-sentenced-to-federal-prison-2011sep06-story.html>.

275. Light, *The New Face of Legal Inequality*, *supra* note 27, at 448 (noting that although discussing their treatment in federal court, other evidence exists concerning their treatment in several state jurisdictions); cf. Eagly, *Criminal Justice*, *supra* note 22, at 1196–1214 (describing the many reasons for the criminalization of immigration).

those prosecuted in 1992.²⁷⁶ However, by 2007, the number had risen to 40%.²⁷⁷ In the fiscal year 2015, Latinos represented the largest group prosecuted under federal immigration violation crimes at 95.4%.²⁷⁸ For Latino noncitizens, those numbers are also great. While in 1992, Latino noncitizens represented only 16% of all offenders; Latino noncitizens now make up 37% of offenders sentenced in federal court, by far the largest demographic group.²⁷⁹ While state incarceration rates remain low on average for Latinos, many jurisdictions, especially those with growing numbers of immigrants, have also experienced growing numbers of incarcerated Latinos.²⁸⁰ State incarceration has seen a browning effect. Stark racial disparities exist in immigration detention as well, with approximately 92.8% of the 425,728 detainees classified as Latino in 2014.²⁸¹

3. Increased Racial Profiling of Latinos

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

276. LIGHT ET AL., FEDERAL IMMIGRATION CRIMES, *supra* note 187, at 11.

277. MARK HUGO LOPEZ & MICHAEL T. LIGHT, PEW RESEARCH CTR., A RISING SHARE: HISPANICS AND CRIME 1 (2009), <http://www.pewhispanic.org/2009/02/18/a-rising-share-hispanics-and-federal-crime/>.

278. U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2015 9 (2016), www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf.

279. LIGHT ET AL., FEDERAL IMMIGRATION CRIMES, *supra* note 187, at 12.

280. See generally LATINOS AND CRIMINAL JUSTICE: AN ENCYCLOPEDIA (José Luis Morín ed., 2016) (surveying criminal justice and incarceration in Latino communities); José Luis Morín, *Latinas/os and US Prisons: Trends and Challenges*, 6 LATINO STUD. 11 (2008) (discussing recent trends of mass imprisonment and the growing incarceration rate of immigrants and Latinos).

281. See BAKER & WILLIAMS, *supra* note 268, at 6.

282. See Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1075 (2010). See generally Garrine P. Laney, CONG. RESEARCH SERV., RL32231, RACIAL PROFILING: ISSUES AND FEDERAL LEGISLATIVE PROPOSALS AND OPTIONS (2004) (discussing the Congressional debates on racial profiling and the appropriate role of race in federal law enforcement agencies).

283. Dep't of Justice, *Stricter Policies*, *supra* note 232.

investigative efforts, waste precious resources and, ultimately, undermine the public trust.”²⁸⁴

Yet, the use of the criminal justice system to assist in the enforcement of immigration law has had problematic results that cannot be curtailed because they have been legitimized by law.²⁸⁵ For the last forty years, the policing of immigration offenses has repeatedly allowed race to play an overt and dominant role.²⁸⁶ By allowing state and local governments to be the pipeline through which federal immigration law is enforced, racial bias can manipulate the overall outcomes of those that are removed.²⁸⁷

The overt use of race when enforcing immigration was solidified by the Supreme Court in 1975 in *United States v. Brignoni-Ponce*²⁸⁸ and in 1976 in *United States v. Martinez-Fuerte*.²⁸⁹ In immigration law and its enforcement, race can sometimes be the only factor used to stop an individual.²⁹⁰ 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.”²⁹¹ Even if police officers unlawfully stop an individual, the Supreme Court ruled in *INS v. Lopez-Mendoza*,

284. *Id.*

285. See AARTI KOHLI ET AL., *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS*, CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY 13 (2011), http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf; see also AM. CIVIL LIBERTIES UNION, *THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES, A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION* 41–43 (2009), http://www.aclu.org/files/pdfs/humanrights/cerd_finalreport.pdf [hereinafter ACLU, *ETHNIC PROFILING IN THE U.S.*] (discussing Sheriff Joe 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 unauthorized Latino migrants); Katarina Ramos, Comment, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317, 317–18 (2012) (discussing the use of Secure Communities to racially profile Latinos, specifically in Illinois).

286. See Carbado & Harris, *supra* note 148, at 1545–59 (discussing the role that immigration status has played in shaping issues concerning race, racial profiling, and the Fourth Amendment in the criminal justice system).

287. See ACLU, *ETHNIC PROFILING IN THE U.S.*, *supra* note 285, at 41–43; Julia Preston, *Opposing Immigration Program*, N.Y. TIMES (Aug. 27, 2009), http://www.nytimes.com/2009/08/28/us/28brfs-opposingimmi_br.html (noting that despite advocates urging for the abolishment of 287(g) on the basis of its use in the discriminatory practices of law enforcement, Homeland Security Secretary in 2009, Janet Napolitano, praised the program as a “force multiplier” for immigration agents).

288. 422 U.S. 873, 886–87 (1975).

289. 428 U.S. 543, 563–64 (1976).

290. *Id.* at 563.

291. *Brignoni-Ponce*, 422 U.S. at 886–87. It is worth noting that *Brignoni-Ponce* is Puerto Rican, and, therefore, neither “alien” nor Mexican.

that if a violation of the Fourth Amendment does occur, a noncitizen may be entitled to the exclusionary rule in criminal court, but a noncitizen could not exclude the unlawfully obtained evidence in a civil removal proceeding.²⁹² Therefore, even if police engage in racial profiling, noncitizens will still be subject to removal.

Federal programs developed to allow state and local law enforcement to assist in immigration enforcement have all been linked to rampant racial profiling abuses, with increasing racial profiling complaints coming from states that have growing numbers of Latinos.²⁹³ The 287(g) Memorandum of Understanding Agreements offered to train officers in immigration enforcement, but the program was criticized for racial profiling by many of these officers.²⁹⁴ On November 20, 2014, the administration announced that the Priority Enforcement Program (“PEP”) replaced Secure Communities amid similar concerns of its use as a mechanism of racial profiling by law enforcement.²⁹⁵ Even the administration is not immune from assumptions of a connection between race and criminality. As research has shown, Secure Communities’ roll out began in jurisdictions with large numbers of Latinos and disconnected from areas with high crime rates, unauthorized populations, or even jurisdictions that had an interest in the program.²⁹⁶

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

292. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984); see also Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481, 499–501 (2015).

293. See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1084–85, 1104–05 (2004).

294. AM. CIVIL LIBERTIES UNION, EXAMINING 287(G): THE ROLE OF STATE AND LOCAL ENFORCEMENT IN IMMIGRATION LAW 2 (Mar. 4, 2009), https://www.aclu.org/files/images/asset_upload_file717_39062.pdf.

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

296. See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 134 (2013) (finding that the Secure Communities roll out was done in jurisdictions with high numbers of Latinos and not related to crime, unauthorized populations, or interest); see also AARTI KOHLI ET AL., *supra* note 285, at 2 (showing that Secure Communities disproportionately impacted Latino males as a group, as they comprised 93% of those arrested though only making up 77% of the noncitizen population).

miles of the border and other ports of entry.²⁹⁷ Laws, policies, and programs allow for separate and distinct applications between Latinos and others seized, legalizing racial profiling against them—continuing racial disparities within the criminal justice system, but shifting it to focus on Latinos.²⁹⁸

4. Reinforcing Social Inequality of Latinos

As discussed earlier in this article, the criminal justice system deepens social inequality and forecloses upward mobility to individuals, their families, and their communities.²⁹⁹ In fact, more often than not, those who are touched by the criminal justice system are more likely to be worse off than before. However, for those who are labeled criminal aliens, they, as well as their families and communities, face an even bleaker future than those labeled as “criminals.”

Why? Because many criminal aliens will never have a second chance. And absent criminal justice reform efforts that take immigration into account, they will continue to be deprived of one. They may never be able to reunite with their families or reenter their communities.³⁰⁰ They will have little chance of becoming gainfully employed after incarceration.³⁰¹ Even if they are eventually reunited with their families, their overall time away from their jobs, families, and communities is longer, as noncitizens are

297. Dep’t of Justice, Stricter Policies, *supra* note 232; U.S. DEPT OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (2014) (stating that the “Guidance does not apply to interdiction activities in the vicinity of the border”). “Vicinity,” as referred to in the Guidance, encompasses “100 miles from any external land or sea boundary.” Carlos Torres et al., *Indiscriminate Power: Racial Profiling and Surveillance Since 9/11*, 18 U. PA. J. L. & SOC. CHANGE 283, 298 (2015).

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

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

300. See Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1818–19 (2010).

301. *Finding Jobs an Uphill Battle for Deportees*, JAMAICA OBSERVER (July 16, 2006), www.jamaicaobserver.com/pfversion/109137_Finding-jobs-an-uphill-battle-for-deportees (“Most of the time, as a deportee, it is not clear that we can trust you enough and that is a barrier for employment, so they are not getting jobs in their area of training.”); Tim Johnson, *For Deportees to El Salvador, Call Centers Become a Refuge*, MCCLATCHY (June 11, 2015, 12:41 PM), <http://www.mcclatchydc.com/news/nation-world/world/article24785590.html> (discussing the difficulties deportees face in trying to obtain a job after being deported from the United States).

more likely to be detained pending their criminal sentences, to receive a harsher sentence, and to be transferred into the custody of ICE for removal proceedings, where they will be subject to mandatory detention during the pendency of their cases.³⁰²

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

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

302. See 8 U.S.C. § 1226(c)(1) (2012) (subjecting criminal aliens to mandatory detention).

303. 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, 668–71 (2011).

304. *Facts for Families: Mental Illness in Families*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (last visited Apr. 5, 2017), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-Of-Parents-With-Mental-Illness-039.aspx.

305. See Vázquez, *supra* note 303, at 665–73 (discussing the impact of immigration on Latinos, their families, and the communities in which they live); see also JOANN DREBY, CTR. FOR AM. PROGRESS, *HOW TODAY’S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES: A VIEW FROM THE GROUND 21* (2012), <http://www.americanprogress.org/issues/immigration/report/2012/08/20/27082/how-todays-immigration-enforcement-policies-impact-children-families-and-communities/>.

306. Weston & Pettit, *supra* note 94, at 21.

307. *Falling Through the Cracks: The Impact of Immigration Enforcement on Children Caught Up in the Child Welfare System*, IMMIGRATION POL’Y CTR. (Dec. 2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/falling_through_the_cracks_3.pdf.

308. 20 C.F.R. § 404.464(a) (2016) (stating that old-age or disability insurance benefits

dition, even if the “criminal alien” is not subject to removal, as stated above, the individual will most likely be incarcerated for a longer time than his United States citizen counterpart, causing a longer period of absence and greater ramifications for the individual, his family, and his community.³⁰⁹

State and local enforcement of immigration violations only exacerbates the problem, as families are more likely to be separated in jurisdictions where law enforcement aggressively targets noncitizens.³¹⁰ In jurisdictions that entered into 287(g) agreements, children in foster care were 29% more likely to have detained or deported parents.³¹¹ As removals have increased, a higher number of children have entered foster care.³¹² Over 5000 children were placed in foster care due to the detention or deportation of their noncitizen parents.³¹³ Estimates foresee that this number will rise by 15,000 in the next five years.³¹⁴ Additionally, courts have been found to have a bias against reunifying children with parents who are in removal proceedings or lack immigration authorization.³¹⁵ As a result, noncitizens face increasing termination of their parental rights so their children can be adopted.³¹⁶

During the Obama Administration, over one million individuals were deported from the United States for their label as a “criminal alien.”³¹⁷ In 2016, although the total number of individuals removed decreased, those classified as criminal aliens increased to 92% of the total number of interior removals.³¹⁸ Those

will not be received if deported under INA § 241(a)).

309. See Francesca Brody, Note, *Extracting Compassion from Confusion: Sentencing Noncitizens after United States v. Booker*, 79 FORDHAM L. REV. 2129, 2153 (2011).

310. SETH FREED WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 4 (2011).

311. *Id.*

312. See Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 645 (2014) (discussing the increasing termination of parental rights of Latino noncitizens in immigration proceedings).

313. WESSLER, *supra* note 310, at 4.

314. *Id.*

315. *Id.* at 6; see also Ginger Thompson, *After Losing Freedom, Some Immigrants Face Loss of Custody of their Children*, N.Y. TIMES (Apr. 22, 2009), <http://www.nytimes.com/2009/04/23/us/23children.html?>

316. See, e.g., Maddali, *supra* note 312, at 644–45.

317. See U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2014 YEARBOOK OF IMMIGRATION STATISTICS tbl. 41 (2016), https://www.dhs.gov/sites/default/files/publications/ois_yb_2014.pdf.

318. IMMIGRATION & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., FISCAL YEAR 2016 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2016), <https://www.ice.gov/sites/>

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

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

default/files/documents/Report/2016/removal-stats-2016.pdf.

319. Michael Fix & Wendy Zimmermann, *All Under One Roof: Mixed-Status Families in an Era of Reform*, 35 INT'L MIGRATION REV. 397, 397 (2001).

320. JEFFEY S. PASSEL & PAUL TAYLOR, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN 4 (2010), <http://www.pewhispanic.org/files/reports/125.pdf>.

321. HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 44 (2007), <http://www.hrw.org/reports/2007/us0707/us0707web.pdf>; *Border Enforcement Policies Ensnare Parents of US Citizen Children*, HUMAN RIGHTS WATCH (Jan. 8, 2015), <https://www.hrw.org/news/2015/01/08/border-enforcement-policies-ensnare-parents-us-citizen-children>.

322. Seth Freed Wessler, *U.S. Deports 46k Parents with Citizen Kids in Just Six Months*, COLORLINES (Nov. 3, 2011, 9:30 AM) <http://www.colorlines.com/articles/us-deports-46k-parents-citizen-kids-just-six-months>.

323. HUMAN IMPACT PARTNERS, FAMILY UNITY, FAMILY HEALTH i (2013), <http://www.familyunityfamilyhealth.org/uploads/images/familyunityfamilyhealth.pdf>.

324. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2016 ICE ENFORCEMENT REMOVAL OPERATIONS REPORT 12 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf> (adding together the number of criminal removals from Latino countries and dividing by total number of removals results in approximately 96.15%).

325. ELIZABETH WILDSMITH ET AL., NAT'L RESEARCH CTR. ON HISPANIC CHILDREN & FAMILIES, A NATIONAL PORTRAIT OF HISPANIC CHILDREN IN NEED 2 (2016), <http://www.childtrends.org/wp-content/uploads/2016/02/2016-15HispanicChildrenInNeed.pdf> (noting that

poverty—more than all other racial groups.³²⁶ Therefore, continuing to allow for systematic criminal enforcement of criminal aliens through the criminal justice system will only exacerbate the problems described here, and it will have a profound impact on Latinos in the United States and across the globe, as well as on the United States as a whole.

CONCLUSION

United States Attorney General Eric Holder announced that “[b]y targeting the most serious offenses, prosecuting the most dangerous criminals, directing assistance to crime ‘hot spots,’ and pursuing new ways to promote public safety, deterrence, efficiency, and fairness—we . . . can become both smarter and tougher on crime.”³²⁷ Despite the vast ways in which crimmigration negatively impacts the criminal justice system—having the precise effects that U.S. Attorney General Holder, President Obama, and other advocates of criminal justice reform have committed to combat—crimmigration’s impacts are largely absent from the dialogue of the criminal justice reform movement. If criminal justice reformers are serious about ensuring that the criminal justice system is effective, efficient, and fair, their efforts must begin to take a closer look at the way in which crimmigration increases cost, decreases fairness, and fails to make society safe. Otherwise, reform efforts will be unlikely to make a significant impact and will, in fact, sustain and exacerbate the criminal justice system’s financial and moral costs.

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

326. *Id.* at 1.

327. *Attorney General Eric Holder Delivers Remarks at Annual Meeting of the American Bar Association’s House of Delegates*, U.S. DEP’T OF JUSTICE (Aug. 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.
