

# ARTICLE

## “IMMIGRANTS ARE NOT CRIMINALS”: RESPECTABILITY, IMMIGRATION REFORM, AND HYPERINCARCERATION

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### ABSTRACT

Mainstream pro-immigrant law reformers advocate for better treatment of immigrants by invoking a contrast with people convicted of a crime. This Article details the harms and limitations of a conceptual framework for immigration reform that draws its narrative force from a contrast with people—citizens and noncitizens—who have been convicted of a criminal offense and proposes an alternate approach that better aligns with racial and class critiques of the U.S. criminal justice system. Noncitizens with a criminal record are overwhelmingly low-income people of color. While some have been in the United States for a short period of time, many have resided in the United States for much longer. Many are lawful permanent residents with strong family ties, including U.S. citizen children. Convicted noncitizens who have served significant time in our penal system have experienced the well-documented harms associated with both criminal and civil

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incarceration. Despite the significant size of this population and its location at the convergence of two heavily criticized law enforcement regimes, these individuals rarely serve as an example for what is wrong with our immigration system. To the contrary, convicted noncitizens are typically regarded as foils for more deserving immigrants. Immigration reformers are not the first to employ a deserving/undeserving narrative as a means of obtaining political gains for some at the expense of others. Across all areas of law reform, policy makers and advocates have sought to generate empathy for groups of people by invoking a contrast with others. In drawing a contrast between a favored group and others who are degenerate, deviant, or less deserving, the “politics of respectability” depends on a contrast with an “out” or deviant group. Racial justice proponents, much more than immigration reformers, have made significant headway in moving beyond respectability politics, especially when critiquing hyperincarceration. This Article describes a different conceptualization of immigrants and crime as well as examples of how certain immigration reform groups have sought to implement aspects of this alternate frame.

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## I. INTRODUCTION

“Immigrants are not criminals” is a familiar refrain in the pro-immigrant movement for law reform. Whether the issue is legalization of undocumented persons, heavy-handed law enforcement practices, or the escalation in immigration detention, mainstream law reformers often argue for better treatment of immigrants by invoking a contrast with people convicted of a crime.<sup>1</sup> Immigration reformers traditionally have focused on immigrants’ contributions to the nation, seeking to minimize discussion of the percentage of immigrants caught up in the criminal justice system. The picture painted is not one of poor, immigrant neighborhoods besieged by overly aggressive law enforcement tactics, but of immigrants as a model, law-abiding group that largely exists separate and apart from such concerns. Contesting the boundaries of the social construct of the term “criminal,” many reformers object to how activities associated with being undocumented result in this label. Commentators have persuasively illustrated how the increased civil incarceration of undocumented immigrants stigmatizes all immigrants as criminals;<sup>2</sup> immigration law violators have been converted into

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1. See *infra* notes 40–51 and accompanying text; see also Irene Bloemraad, Kim Voss & Taeku Lee, *The Protests of 2006: What Were They, How Do We Understand Them, Where Do We Go?*, in RALLYING FOR IMMIGRANT RIGHTS: THE FIGHT FOR INCLUSION IN 21ST CENTURY AMERICA 3, 7 (Kim Voss & Irene Bloemraad eds., 2011) (discussing large marches in support of immigration reform where immigrants and their supporters carried signs stating “We Are Workers, Not Criminals”); David Bacon, “We Are Workers, Not Criminals,” PROGRESSIVE MEDIA PROJECT (May 1, 2008), <http://dbacon.igc.org/Immigrants/2008workersnotcriminals.html> (endorsing theme of immigrant march where sign said “We are Workers, not Criminals!”); Geoffrey A. Hoffman, *The Border Children—They Are Not Criminals and They Need Counsel*, IMMIGRATIONPROF BLOG (July 21, 2014), <http://lawprofessors.typepad.com/immigration/2014/07/the-border-children-they-are-not-criminals-and-they-need-counsel-by-geoffrey-a-hoffman.html> (arguing that the children crossing the border from Central America are refugees and not criminals); Alicia Maule & Traci G. Lee, *Immigration Advocate: ‘These Children Are Not Criminals’*, MSNBC (Oct. 10, 2014), <http://www.msnbc.com/msnbc/immigrant-advocate-these-children-are-not-criminals> (asking rhetorically, “Is escaping from crime a criminal offense?”); Maria Sacchetti, *Newest Illegal Immigrants Face More Scrutiny than Many Criminals*, BOS. GLOBE (2015), <https://www.bostonglobe.com/metro/2015/07/02/asylum-seekers-often-monitored-immigration-more-strictly-than-criminals/PZ7HOpIWQJdBVh10vU0MAL/story.html> (comparing the scrutiny placed on recent immigrants with dangerous criminals).

2. See, e.g., Daniel I. Morales, *It’s Time for an Immigration Jury*, 108 NW. U. L. REV. COLLOQUY 36, 42 (2013) (“Mass deportation stigmatizes all Latinos in the same way that

criminals through the prosecution of behaviors associated with being undocumented;<sup>3</sup> and civil immigration enforcement has become bound up with criminal enforcement.<sup>4</sup> The connections among the rise of criminal incarceration, the prison industry, and the increase in civil detention of immigrants are well documented.<sup>5</sup>

While plainly correct, these claims implicitly rely upon a sense of injustice that immigrants and our immigration system have become entangled with criminals and our criminal system. The critique risks being understood as legitimizing the category criminal, the stigma it carries, and the use of deportation as a crime control measure. Largely absent is a defense of people regarded as legitimately positioned at the crossroads of our criminal and immigration enforcement systems.

This Article details the harms and limitations of a conceptual framework for immigration reform that draws its narrative force from a contrast between deserving immigrants and people—citizens and noncitizens—who have been convicted of a criminal offense. While acknowledging the difficulties of making political gains in a society that supports harsh penal responses to criminal activity, I argue that immigration reformers should adopt an understanding and portrayal of people convicted of a crime that aligns with the racial and class critique of hyperincarceration. This critique, popularized by Michelle Alexander's *A New Jim Crow*, rejects a view of crime as simply bad acts by pathological individuals and seeks to retool the standard narrative about crime to emphasize the roles of racial and class inequality.

Noncitizens with a criminal record are overwhelmingly low-income people of color. Latinos make up the largest ethnic group in this category, although the percentage of non-Latino

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mass incarceration stigmatizes all African Americans.”); Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT'L L.J. 141, 148 (2015) (discussing the “Mexican-as-criminal narrative”); *The History of Immigration Detention in the U.S.*, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/node/2381> (“The very act of detention attaches the stigma of criminalization to immigrants and enmeshes them in the U.S. criminal justice system.”); see also Nina Bernstein, *In Father's Memory, Fighting to Stay in Britain*, N.Y. TIMES, Aug. 21, 2010, at A1 (explaining how detention and deportation have stigmatized immigrants and facilitated treating them as “scapegoats”).

3. See *infra* notes 159–65 and accompanying text.

4. See *infra* notes 166–70 and accompanying text.

5. See discussion *infra* Part IV; see also César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1350, 1360 (2014) (demonstrating that “the detention framework developed alongside the legislation that permitted the mass incarceration that came to define antidrug policies in the late twentieth century”).

black immigrants is significant.<sup>6</sup> While some have been in the United States for a short period of time, many have resided in the United States for much longer. Many are lawful permanent residents with strong family ties, including U.S. citizen children.<sup>7</sup> While immigrants as a group are less likely to commit crimes than native-born U.S. citizens,<sup>8</sup> time spent in the United States is a

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6. See U.S. DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS: FISCAL YEAR 2015 app. C, at 12–17 (2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf> (showing that in 2015 Latinos constituted 97.6% of all people removed); *id.* fig. 1, at 2 (showing that in 2015 convicted criminals made up 59% of all people removed). While black convicted immigrants from Haiti, Jamaica, Dominican Republic, and Brazil make up only 12% of ICE removals, they typically spend more time in criminal incarceration. Tamara K. Nopper, *Why Black Immigrants Matter: Refocusing the Discussion on Racism and Immigration Enforcement*, in KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY 204, 209–10, 228 (David C. Brotherton & Philip Kretsedemas, eds., 2008) (discussing the patterns of incarceration which “are most intense for black immigrants”). According to the U.S. Government Accountability Office, reporting in 2011, 68% of convicted noncitizens in federal prisons serving criminal sentences were from Mexico, 5% were from the Dominican Republic, 5% were from Colombia, 3% were from Cuba, 2% from Jamaica, 2% from El Salvador, 2% from Honduras, and 1% from Guatemala. The remaining 172 countries accounted for only 10%. U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS 8–9 (Mar. 2011), <http://www.gao.gov/new.items/d11187.pdf> [hereinafter CRIMINAL ALIEN STATISTICS]; see also MARK MOTIVANS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010 (2013) (reporting that the race or ethnicity of offenders charged with criminal immigration offenses in the custody of the Federal Bureau of Prisons are: 91.6% Hispanic or Latino, 6.4% White, 1.8% Black or African American, 0.2% American Indian/Alaska Native, and 0.2% Asian/Native Hawaiian/Other Pacific Islander). As discussed *infra* notes 161–65 and accompanying text, a significant percentage of the convictions of Mexicans and Central Americans stem from the increased criminalization of illegal reentry at the U.S.–Mexico border.

7. JONATHAN BAUM ET AL., IN THE CHILD'S BEST INTEREST?: THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 4 (Laurel E. Fletcher, et al. eds., 2010), [https://www.law.berkeley.edu/files/Human\\_Rights\\_report.pdf](https://www.law.berkeley.edu/files/Human_Rights_report.pdf).

8. See Joanna Almeida et al., *Peer Violence Perpetration Among Urban Adolescents: Dispelling the Myth of the Violent Immigrant*, 26 J. INTERPERSONAL VIOLENCE 2658, 2658, 2665 (2011) (“Recent immigrants had a significantly lower prevalence of peer violence compared to each other generations/time in U.S. group.”); John Hagan & Alberto Palloni, *Sociological Criminology and the Mythology of Hispanic Immigration and Crime*, 46 SOC. PROBS. 617, 620, 630 (1999) (concluding that Latinos born outside the United States are less likely to be imprisoned than Whites); Sergio Herzog, *Ethnic and Immigrant Residential Concentration, and Crime Rates*, 37 J. CRIM. JUST. 427, 432 (2009) (“[R]esearch has consistently found relatively lower crime rates for immigrants than for their native-born counterparts” citing Ramiro Martinez Jr. and Matthew T. Lee, *On Immigration and Crime*, in THE NATURE OF CRIME: CONTINUITY AND CHANGE, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS 485, 496 (2000)); Robert J. Sampson, *Rethinking Crime and Immigration*, CONTEXTS, Winter 2008, at 28, 31 (“Immigrant youths committed less violence than natives.”); Matthew G. Yeager, *Immigrants and Criminality: A Cross-National Review*, 29 CRIM. JUST. ABSTRACTS 143, 147 (1997) (“[I]mmigrants generally have lower propensities for crime than their native-born counterparts.”); Kristin F. Butcher & Anne Morrison

substantial risk factor for committing a crime.<sup>9</sup>

A wide range of criminal convictions trigger deportation, even for people in lawful immigration status. The Anti-Drug Act of 1988 introduced the term “aggravated felony,” the category of crime that carries the most serious immigration consequences.<sup>10</sup> Since that time, Congress has amended the criminal provisions of the Immigration and Nationality Act multiple times, including twice

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Piehl, *Why Are Immigrants' Incarceration Rates so Low? Evidence on Selective Immigration, Deterrence, and Deportation* 24–25 (Nat'l Bureau of Econ. Research, Working Paper No. 13229, 2007), <http://www.nber.org/papers/w13229> (“There is evidence that the process of migration selects individuals who have lower criminal propensity or are more responsive to deterrent effects than the average native.”); Alex R. Piquero et al., *Longitudinal Patterns of Legal Socialization in First-Generation Immigrants, Second-Generation Immigrants, and Native-Born Serious Youthful Offenders* 15 (Aug. 20, 2014) (online first article in CRIM. & DELINQ.), <http://cad.sagepub.com/content/early/2014/08/12/0011128714545830.full.pdf+html> [doi: 10.1177/0011128714545830] (“[F]irst-generation immigrants are significantly less likely to offend compared with second-generation immigrants and native-born youth in general, and offend less chronically and violently as well.”); Walter A. Ewing, Daniel E. Martinez & Ruben G. Rumbaut, *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL (July 8, 2015), <http://immigrationpolicy.org/special-reports/criminalization-immigration-united-states> (reporting that in 2010 1.6% of the foreign-born male population aged 18–39 was incarcerated, as opposed to 3.3% of the native-born).

9. See Almeida et al., *supra* note 8, at 2659, 2671 (“[P]erpetration of violence worsens with increased time in the U.S. [and immigrants] rapidly adopt the U.S. norms and behaviors that support violence and aggression toward peers.”). The crime rate among U.S. citizen children born to immigrants outpaces the rate among immigrants themselves. See Hoan N. Bui & Ornuma Thongniramol, *Immigration and Self-Reported Delinquency: The Interplay of Immigrant Generations, Gender, Race, and Ethnicity*, 28 J. CRIME & JUST. 71, 81 (2005) (demonstrating that children of immigrants are more likely to engage in delinquent behavior than immigrants); Kathleen Mullan Harris, *The Health Status and Risk Behavior of Adolescents in Immigrant Families*, in CHILDREN OF IMMIGRANTS: HEALTH, ADJUSTMENT, AND PUBLIC ASSISTANCE 286, 294 (Donald J. Hernandez ed., 1999) (commenting that children of immigrants are more likely to engage in delinquent behavior than immigrants); Rich Morin, *Crime Rises Among Second-Generation Immigrants as They Assimilate*, PEW RES. CTR. (Oct. 15, 2013), <http://www.pewresearch.org/fact-tank/2013/10/15/crime-rises-among-second-generation-immigrants-as-they-assimilate/>; Ruben G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION POLY INST. (June 1, 2006), <http://www.migrationpolicy.org/article/debunking-myth-immigrant-criminality-imprisonment-among-first-and-second-generation-young> (discussing the first generation of children born to immigrants and concluding that “[i]ncarceration rates increase significantly for all U.S.-born coethnics without exception”); Paul R. Smokowski, Corinne David-Ferdon & Nancy Stroupe, *Acculturation and Violence in Minority Adolescents: A Review of the Empirical Literature*, 30 J. PRIMARY PREVENTION 209, 215 (2009) (children of immigrants are more likely to engage in delinquent behavior than immigrants).

10. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342–7349, 102 Stat. 4469, 4469–73 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii), 1228, 1252(a)(2)(C) (2012 & Supp. II 2015)); NORTON TOOBY & JOSEPH JUSTIN ROLLIN, *EVOLUTION OF THE DEFINITION OF AGGRAVATED FELONY*, <http://nortontooby.com/pdf/FreeChecklists/EvoAggFelonyStatute.pdf>.

in 1996.<sup>11</sup> The definition of aggravated felony now includes crimes that are neither aggravated nor a felony.<sup>12</sup> At the same time, the 1996 amendments largely eliminated the U.S. Attorney General’s authority to grant discretionary relief from deportation, prompting the U.S. Supreme Court to state that “recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offender.”<sup>13</sup>

A large percentage of the people deported from the United States have been convicted of a crime. According to the federal government, “Nearly 60 percent of [Immigration and Customs Enforcement’s] total removals had been previously convicted of a criminal offense, and that number rises to 82 percent for individuals removed from the interior of the U.S.”<sup>14</sup> Some noncitizens’ convictions are the result of civil immigration violations having been criminalized.<sup>15</sup> A significant number of noncitizens deported for a crime have relatively minor records.<sup>16</sup> Other noncitizens, however, have been convicted of more serious

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11. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, §§ 321–34, 110 Stat. 3009-627 to -635 (codified as amended in scattered sections of 8 U.S.C. (2012 & Supp. II 2015)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (codified as amended at 8 U.S.C. § 1101(a)(43) (2012 & Supp. II 2015)). The Antiterrorism and Effective Death Penalty Act of 1996, the Anti-Drug Abuse Act of 1988, the Immigration Act of 1990, the Immigration and Nationality Technical Corrections Act of 1994, and the IIRIRA of 1996 expanded the definition of aggravated felony. See Anti-Drug Abuse Act of 1988, Pub. L. No. 104-690, § 7342, 102 Stat. 4469-70 (codified as amended at 8 U.S.C. § 1101(a)(43) (2012 & Supp. II 2015)); Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 5048 (codified as amended at 8 U.S.C. § 1101(a)(43) (2012 & Supp. II 2015)); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4320-21 (codified as amended at 8 U.S.C. § 1101(a)(43) (2012 & Supp. II 2015)).

12. See, e.g., *Garcia v. INS*, 239 F.3d 409, 411–12 (1st Cir. 2001) (holding misdemeanor attempted theft of rims of tires with suspended sentence of more than a year is “aggravated felony”); *United States v. Holguin-Enriquez*, 120 F. Supp. 2d 969, 971, 973 (D. Kan. 2000) (holding municipal ordinance violation for assault with one year suspended sentence is “aggravated felony”); see also Rob A. Justman, *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an “Aggravated Felony,”* 2004 UTAH L. REV. 701, 706 (“[I]t might be briefer to list all crimes not aggravated felonies than to list the aggravated felonies.”); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1940–41 (2000) (discussing how a crime need not be aggravated or a felony to be defined as an “aggravated felony”).

13. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

14. Bob Fredericks, *68K Undocumented Immigrants with Criminal Records Released in 2013*, N.Y. POST (Mar. 31, 2014), <http://nypost.com/2014/03/31/68k-undocumented-immigrants-with-criminal-records-released-in-2013-report/>; see also U.S. DEPT OF HOMELAND SEC., *supra* note 6, at 4 (noting that the percentage of interior removals that were of convicted criminals “grew from 82 percent in FY 2013 to 91 percent in FY 2015 . . .”).

15. See *infra* notes 159–65 and accompanying text.

16. See *infra* notes 171–75 and accompanying text.

crimes, including violent ones.<sup>17</sup> Some of these noncitizens serve long or multiple criminal sentences, languish in immigration detention, and are then deported without the opportunity to file for discretionary relief from removal.<sup>18</sup>

Convicted noncitizens who have served significant time in both criminal and immigration detention have experienced the well-documented harms associated with our excessively punitive criminal and immigration systems.<sup>19</sup> Despite the significant size of this population and its location at the convergence of two heavily criticized law enforcement regimes, the treatment of these individuals only rarely serves as an example of what is broken in our immigration system. Although pro-immigrant reformers generally embrace the racial critique of hyperincarceration, many hesitate to place noncitizens who have been incarcerated at the center of their political strategies and theories, especially those noncitizens who have been convicted of a serious offense.<sup>20</sup> To the contrary, these convicted noncitizens—defined only by their crime—serve as one-dimensional foils for more respectable immigrants.<sup>21</sup>

Reformers advocate for a legalization program for as many of the eleven million undocumented people as possible.<sup>22</sup> As a secondary goal, some also seek to ameliorate our harsh deportation laws, typically advocating for restoration of pre-1996 law that treated lawful permanent residents with certain criminal convictions more favorably. As a practical matter, however, the push for legalization has not only eclipsed but undermined the movement for expanded defenses for convicted lawful permanent residents. Many mainstream reformers view additional enforcement, including expansion of the criminal deportation grounds, as a regrettable but necessary trade-off to secure

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17. See *infra* notes 171–75 and accompanying text; see also JOHN F. SIMANSKI, U.S. DEPT OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 7, [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf) (enumerating convicted noncitizens who were removed: 10.2% had assault convictions, 2.8% had burglary convictions, 2.7% had larceny offenses, 15% had criminal traffic offenses, 15.4% had dangerous drug offenses, 2.6% had fraudulent activity offenses, and 1.6% had sexual assault offenses).

18. Detained immigrants are often unable to post bond due to mandatory detention. See *infra* notes 92 & 169–70 and accompanying text.

19. See *infra* Part IV.

20. See Tom Barry, *Talking About Criminal Aliens*, BORDER LINES (May 3, 2011), <http://www.borderlinesblog.blogspot.com/2011/05/talking-about-criminal-aliens.html> (discussing the avoidance of discourse about criminal aliens).

21. For a discussion of the limitations of defining people only by the worst thing they have done in their life, see *infra* note 350.

22. Remarks on Immigration Reform, 2013 DAILY COMP. PRES. DOC. (June 11, 2013).



legalization for undocumented immigrants who have no criminal records or only very minor ones.<sup>23</sup>

Reformers widely agree that some convicted noncitizens simply fall outside of the scope of reform efforts due to the serious nature of their convictions. For example, few advocate inclusion of undocumented immigrants like Jose Guerrero in a legalization program.<sup>24</sup> Jose’s parents brought him to the United States from Central America when he was seven years old. He suffers from mental illness and, as a child, was in and out of the foster care mental health system. As a teenager living in a poor neighborhood, Jose was a member of a gang, and he still has a gang tattoo on his face. After pushing a pregnant woman during a dispute, Jose was convicted of aggravated battery and detained by immigration authorities.

Immigration reformers broadly agree that our nation should deport immigrants who constitute the “worst of the worst,” even if they are lawfully present.<sup>25</sup> Although this category has fluid boundaries, many believe that it should include people who have been convicted of a serious violent crime, like Haitian lawful permanent resident Ronald Beauchamp.<sup>26</sup> Ronald was convicted of attempted murder for attacking his ex-girlfriend. After the attack, in an attempt to kill himself, Ronald drank battery acid. The acid destroyed his esophagus and Ronald now survives on a liquid diet delivered to his stomach through a feeding tube. After his prison sentence, Ronald returned to his daughter, grandchildren, and

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23. See Anushka Asthana, *Immigrants Rights Groups Split over Senate Bill*, WASH. POST, July 28, 2006, at A14. Proposed legalization programs in 2005–2007 and 2012–2014 were conditioned on dramatic increases in capacity to detain and deport noncitizens. 109 CONG. REC. 4853–54, 4874 (2006); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

24. Jose Guerrero and Ronald Beauchamp are pseudonyms.

25. Van Le, *Statement from Frank Sharry on President Obama’s Immigration Speech* (May 10, 2011), [http://americasvoice.org/press\\_releases/statement\\_from\\_frank\\_sharry\\_on\\_president\\_obamas\\_immigration\\_speech/](http://americasvoice.org/press_releases/statement_from_frank_sharry_on_president_obamas_immigration_speech/) (arguing for “bold administrative steps that focus enforcement on the ‘worst of the worst’”). The following statement of Peter Schuck reflects the typical view of convicted noncitizens: “It is hard to think of any public policy that is less controversial than the removal of criminal aliens.” Allegra M. McLeod, *The U.S. Criminal–Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107 (2012) (quoting Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 372 (1999)). Justice William Brennan, writing in a U.S. Supreme Court dissent, observed: “Prisoners are persons whom most of us would rather not think about,” he wrote. “Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness.” César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 354–55 (2012) (quoting *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting)).

26. Even prior to 1996, Ronald Beauchamp would have been subject to deportation and ineligible for discretionary relief to stop his deportation. See TOOBY & ROLLIN, *supra* note 10.

sister in New Jersey, became a regular churchgoer, and worked as a cab driver. He faces deportation to Haiti.

The idea that people with serious convictions, like Jose and Ronald, deserve to be deported resonates in part because it taps into our primordial understanding of the world in the simple terms of good versus evil.<sup>27</sup> Emile Durkheim theorized that, at the societal level, we construct the category “criminals” so that “common indignation is expressed” and “honest consciousness” is “draw[n] . . . together.”<sup>28</sup> Social cohesion, in this view, depends on the existence of undesirable “others.”<sup>29</sup> People’s legitimate fear of becoming a victim of crime provides further fuel for this phenomenon, as does the sentiment that immigrants who commit crimes should be deported because they have abused the privilege of residing in this country.<sup>30</sup> “Governing through crime” by tethering immigration policy to crime control appears to be good government.<sup>31</sup> Moreover, in a world of scarce advocacy resources and divisive politics, it seems obvious that immigration reformers should focus on those who have no criminal record, or at least just a minor one. The need for political compromise means that lines must inevitably be drawn. It appears ill-advised, if not downright irresponsible, to sacrifice the possibility of immigration reform for many undocumented people by holding out for gains for people with criminal convictions like Jose and Ronald. Pushing to include

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27. Elizabeth Keyes has explained the multiple psychological reasons why humans favor simple narratives, especially those involving the clear delineation of good from bad. Narratives help us to efficiently process information, make sense of cognitive dissonance, and understand through engaging with what is familiar. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 237–40, 253 (2013); see also McLeod, *supra* note 25, at 123–24, 156–58, 165–67 (demonstrating how the “crime-centered conceptual framework” of immigration law “draws on a stock crime narrative formula developed originally in crime fiction and related imaginative literature” and involves “a pleasurable experience of catharsis”).

28. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 57–58 (1984). Michel Foucault has argued that systems of incarceration create deviants who serve as signals to keep others law-abiding. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 48–49 (Alan Sheridan trans., Pantheon Books 1st ed. 1977) (1975).

29. David Garland suggests that we can understand the demonization of convicted people through “images, archetypes, and anxieties” as the attempt to create an “essentialized difference” between “us” and “criminals.” DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 135 (2002).

30. Adam Cox and Eric Posner argue the merits of an ex post screening system whereby immigrants are assessed for desirability after they have resided in the United States for a period of time, akin to probationary period. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 826 (2007).

31. See generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

immigrants with significant criminal records in reform efforts could trigger a backlash against all immigration reform.<sup>32</sup>

These strongly held views influence how law reformers regard noncitizens convicted of significant crimes, making it difficult to build a theory or political agenda based on a more nuanced understanding of crime and immigration. Despite the many barriers to dismantling the good/bad immigrant narrative, this Article argues for its undoing. Part II discusses popular conceptions of immigrants who have a criminal record, illustrating how they serve as contrasts to justify better treatment of more deserving immigrants. Part III explains the limitations and harms of respectability messaging in social movements, demonstrating that such an approach not only seeks gains for some at the expense of others but also reinforces and reproduces social and economic inequality. Part IV describes the harms of the respectable immigrant narrative, namely the exclusion of convicted noncitizens from pro-immigrant reform efforts and the legitimization of criminal and civil hyperincarceration, as experienced by both citizens and noncitizens. The harms of hyperincarceration are racialized and affect not only individuals and their families but also communities and the nation as a whole. Part V analyzes scholarly critiques of how our immigration and criminal systems have become intertwined and immigrants have been converted into criminals. Part VI describes a conceptualization of immigration reform that rejects respectability messaging, embraces a structural account of crime and illegal border crossings, seeks to delink immigration enforcement from crime control, and encourages coalition building with the racial justice movement to end hyperincarceration. Part VII briefly describes examples of how some immigration reform groups have sought to implement aspects of this alternate approach.

## II. THE CURRENT FRAME

The association of immigrants and deviancy remains firmly implanted in the American psyche.<sup>33</sup> Our first federal exclusion

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32. On the dangers of triggering backlash in the racial justice context, see generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 16, 157–59 (1998).

33. See, e.g., Hagan & Palloni, *supra* note 8, at 618–20 (discussing mistaken public perception of link between immigration and crime); Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 86 (1998) (“The process of problematizing, demonizing, dehumanizing, and criminalizing renders punishment of aliens a part of the American psyche.”); Weissman, *supra* note 2, at 176–82 (discussing the “subordinating narrative” about Mexican immigrants that “tends to focus on crime, threats to the economy, and racial upheaval”) (citing Gabriel Sanchez et al., *Filling the Void: Factors Leading to Punitive Immigration Policy Across the American States*, W. POL. SCI.

laws were aimed at Asian immigrants, described by U.S. Supreme Court justices as inassimilable and “obnoxious.”<sup>34</sup> Early twentieth century eugenic studies, reflecting the prevailing attitudes of the time, dubbed southern and eastern Europeans “degenera[tes]” because of their alleged “racial inferiority and unassimilability.”<sup>35</sup> After European immigrants were permitted to become “white,” Mexicans became the new “menace.”<sup>36</sup> Haitians arriving on our shores and Central Americans, including women with their children, have been detained in large numbers, ostensibly on national security grounds.<sup>37</sup> Presidential candidates and news sources employ alarmist and hyperbolic rhetoric when discussing immigration and crime.<sup>38</sup> Commentators have analyzed the

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ASS’N, Working Paper, at 5 (2012), <http://wpsa.research.pdx.edu/meet/2012/sanchez-gabriel.pdf>). As Jennifer Chacón observes, “The notion of the outsider as a threat is as old as human history and it transcends national boundaries.” Jennifer Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1835 (2007) [hereinafter Chacón, *Unsecured Borders*].

34. *Fong Yue Ting v. United States*, 149 U.S. 698, 743 (1893) (Brewer, J., dissenting) (referring to “the obnoxious Chinese”); *Chae Chan Ping v. United States*, 130 U.S. 581, 603, 607 (1889) (referring to Chinese immigrants when describing “the presence of foreigners of a different race . . . who will not assimilate with us, [and considered] dangerous to [the nation’s] peace and security”).

35. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 24 (2004).

36. Weissman, *supra* note 2, at 145 (citing 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, 645 (2011)). See generally LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 41–43 (2008) (discussing the exaggerated and alarmist rhetoric about immigrants and immigration); KARTHICK RAMAKRISHNAN ET AL., *ILLEGALITY, NATIONAL ORIGIN CUES, AND PUBLIC OPINION ON IMMIGRATION* (2010), [https://polisci.osu.edu/sites/polisci.osu.edu/files/NebloNatOrgCues063014\\_0.pdf](https://polisci.osu.edu/sites/polisci.osu.edu/files/NebloNatOrgCues063014_0.pdf) (considering the increase in racial prejudice toward Mexican immigrants in the past decade); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 639 (2015) [hereinafter Vázquez, *Constructing Crimmigration*] (noting the popular sentiment that unauthorized migrants come to the United States solely to drain social services).

37. Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 594 (1998) (“Haitians . . . have been hurt by being integrated into the prevailing ideological formations around race in the United States.”); see Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> (discussing the large number of immigrant families detained upon arrival).

38. During his presidential announcement, Donald Trump said: “When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.” Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>. Fox News headlines describe “hordes of dangerous illegals.” Todd Starnes, *Obama Unleashes Hordes of Dangerous Illegals onto American Streets*, FOX NEWS (Mar. 31, 2014), <http://radio.foxnews.com/toddstarnes/top-stories/obama-unleashes-hordes-of-dan>

nativist and racist subtexts to such messages.<sup>39</sup> Although the demonization of noncitizens with criminal records may be most obvious as articulated by the political right, the practice transcends political affiliation. While rejecting the blanket association of immigrants and crime, the mainstream left’s standard narratives in support of immigration reform rely heavily on a stark contrast between worthy immigrants and those who deserve to be deported because of a criminal record. The Obama Administration’s “felons, not families” sound bite regarding deportation policy reflects a simplistic, binary approach that renders invisible those who simultaneously occupy both categories.<sup>40</sup>

The stark good/bad immigrant rhetoric is most obvious when mainstream reformers speak about Dreamers, undocumented immigrant youth who came to the United States at a young age, finished (or are enrolled in) school, and have no serious criminal record.<sup>41</sup> Dreamers occupy the far end of the good side of this spectrum. In President Obama’s words, they are “innocent young kids” because they were too young to have any part in the decision to come to the United States.<sup>42</sup> In a more culpable, middle position, are the parents of Dreamers and others who entered illegally or who overstayed their visa. The federal government does not dub

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gerous-illegals-onto-american-streets.html; see also John Tanton & Wayne Lutton, *Immigration and Crime in the USA*, 18 J. SOC. POL. & ECON. STUD. 217, 217 (1993) (asserting that “frighteningly large numbers of newcomers see crime as their avenue to the American dream”). For a discussion of the linking of immigrants and crime, see Chacón, *Unsecured Borders*, *supra* note 33, at 1837–43.

39. See, e.g., J. David Cisneros, *Contaminated Communities: The Metaphor of “Immigrant as Pollutant” in Media Representations of Immigration*, 11 RHETORIC & PUB. AFF. 569 (2008); Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1569–70, 1576–78 (2011); Hing, *supra* note 33, at 83; Michael Welch, *Trampling Human Rights in the War on Terror: Implications to the Sociology of Denial*, 12 CRITICAL CRIMINOLOGY 1, 5–6 (2004); see also M. Kathleen Dingeman & Ruben G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes In Southern California and El Salvador*, 31 U. LA. VERNE L. REV. 363, 366 (2010) (noting how “media coverage of singular events” and “popular culture” work to “project an enduring image of immigrant communities permeated by criminal elements”). Patricia Hill Collins has analyzed how negative “controlling images” entrench subordination. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 68, 72, 74–78 (1990).

40. Lauren-Brooke Eisen, *Felons, Not Families’ Oversimplifies a Complex Reality*, HUFFINGTON POST (Jan. 24, 2015, 5:59 AM), [http://www.huffingtonpost.com/laurenbrooke-eisen/felons-not-families-overs\\_b\\_6212550.html](http://www.huffingtonpost.com/laurenbrooke-eisen/felons-not-families-overs_b_6212550.html).

41. For a discussion of Dreamers, the Dream Act, and comprehensive immigration reform, see generally Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009).

42. Remarks on Immigration Reform and Exchange with Reporters, 2012 DAILY COMP. PRES. DOC. (June 15, 2012).

these people “criminals” but “rule breakers,” and draws a contrast between these rule breakers and those immigrants who are “looking for . . . trouble.”<sup>43</sup>

The “innocent—rule breaker—criminal” messaging is an expressly political strategy. Despite the unprecedented immigration enforcement of the last seven years, conservatives have successfully portrayed the current Administration as soft on immigration.<sup>44</sup> To counteract this image and to build credibility in the push for comprehensive immigration reform, the White House has kept its foot on the gas of enforcement both at the border and in the interior of the country.<sup>45</sup> The Administration seeks approval for the fact that “deportation of criminals is at its highest level ever,”<sup>46</sup> with deportations reaching 400,000 in 2013.<sup>47</sup> Enforcement practices aimed at people in both federal and state criminal custody have increased, with the express goal of removing immigrant defendants “at the end of their sentences” before they “re-enter[] our communities.”<sup>48</sup> Criminal prosecutions of immigration offenses, like illegal reentry, have increased by 22.6%

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43. *Id.*

44. Andrew Elfenbein, *Deportations Show Obama Can Not Win*, LIBERTY VOICE (Apr. 6, 2014), <http://guardianlv.com/2014/04/deportations-show-obama-can-not-win/comment-page-1/> (“Obama will always be considered soft on immigration by Republicans.”); Alan Gomez, *Deportation Policy Could Define Obama Legacy*, USA TODAY (July 30, 2014, 8:32 PM), <http://www.usatoday.com/story/news/nation/2014/07/30/voices-gomez-obama-immigration-legacy/13287195/> (“Everywhere you turn, President Obama is getting beaten up over immigration. . . . One day, someone’s telling me he’s been too soft on the nation’s 12 million undocumented immigrants. The next, someone calls him the ‘deporter in chief.’”).

45. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 236 (2014) (“The Obama administration has justified its tough-on-immigration stance in the name of creating fertile political space for comprehensive immigration reform legislation.”); Guy Adams, *Obama Goes on Offensive Over Immigration World*, INDEPENDENT (U.K.) (Oct. 25, 2011, 9:51 AM), <http://www.independent.co.uk/news/world/americas/obama-goes-on-offensive-over-immigration-2282690.html> (“[T]he President launched an uncharacteristically aggressive attack on Republicans who call him ‘soft’ on immigration, saying that since taking office he has ‘strengthened border security beyond what many believed was possible.’”). The Obama Administration’s pressure to push forward with heavy handed enforcement in order to maintain credibility on immigration reform is not unlike the pressure felt by liberals in the 1960s who were forced to agree with a strong crime control approach in order to not appear as if they were excusing mob violence. See Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. IN AM. POL. DEV. 230, 237 (2007), [http://www.ebonterr.com/site\\_editor/assets/EBONTERR\\_41.pdf](http://www.ebonterr.com/site_editor/assets/EBONTERR_41.pdf).

46. Remarks on Immigration Reform, *supra* note 22.

47. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RES. CTR. (Oct. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/>.

48. WHITE HOUSE OFFICE OF THE PRESS SECRETARY, FACT SHEET: FIXING OUR BROKEN IMMIGRATION SYSTEM SO EVERYONE PLAYS BY THE RULES (Jan. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules>.

in the last five years.<sup>49</sup> In ratcheting up immigration enforcement, the White House has made crime-control even more salient to immigration policy and deepened the hold on our collective imagination of the over-simplified categories of “criminal” as bad and “noncriminal” as good.

Mainstream immigration reformers, interested in workable, compromise solutions, have largely endorsed the tethering of immigration policy to crime control. The American Immigration Lawyers Association, the largest immigration bar association, has sanctioned the Administration’s agenda of fighting crime through immigration policy, stating that “[a] more effective program would concentrate solely on apprehended persons who are in fact serious and dangerous criminals.”<sup>50</sup> The American Immigration Council similarly claims that “most of the people being deported are not dangerous criminals,” such that the Administration is not really deporting the “worst of the worst.”<sup>51</sup>

Framing the problem as the fact that immigrants are criminalized for minor infractions, however, suggests that the solution is simply for immigration enforcement officers to stop targeting immigration law violators and return to legitimate targets, the “worst of the worst” immigrants. The punishment of deportation, in this view, can be an appropriate mechanism for crime control, as long as it has the right focus.<sup>52</sup> This approach characterizes the core problems as poor calibration (i.e., deportation for minor crimes) and doublespeak (i.e., contradiction between what the Administration says and what immigration

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49. *Obama Admin Hits All-Time High on Prosecutions for Nonviolent Immigration Offenses*, RUSSELL TIMES (Nov. 27, 2013, 12:38 AM), <http://rt.com/usa/prosecution-immigration-offenses-record-351/>; *Written Statement to Senate Judiciary Committee on “Immigration Enforcement Policies”*, HUMAN RIGHTS WATCH (July 21, 2015), <https://www.hrw.org/news/2015/07/21/written-statement-senate-judiciary-committee-immigration-enforcement-policies>. Presiding over illegal entry cases for ten years has left one U.S. District Judge in New Mexico feeling like he oversees “a process that destroys families every day and several times each day.” *Id.*

50. AM. IMMIGRATION LAWYERS ASSOC., TESTIMONY OF THE WASHINGTON, D.C. CHAPTER OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION: “IS SECURE COMMUNITIES KEEPING OUR COMMUNITIES SECURE?” 2 (2011), <http://www.aila.org/content/default.aspx?docid=37773>.

51. AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., MISPLACED PRIORITIES: MOST IMMIGRANTS DEPORTED BY ICE IN 2013 WERE A THREAT TO NO ONE (2014), <http://www.immigrationpolicy.org/just-facts/misplaced-priorities-most-immigrants-deported-ice-2013-were-threat-no-one>; *see also* HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 32 (2009), <http://www.hrw.org/en/reports/2009/04/15/forced-apart-numbers> (reporting that, since 1996, only 14% of deportations for crimes have been for offenses involving violence against people).

52. *Le, supra* note 25 (arguing for “bold administrative steps that focus enforcement on the ‘worst of the worst’”).

enforcement officials do). Left unchallenged are the assumptions that deportation is justified for noncitizens convicted of an ill-defined category of major crimes and that deportation is an appropriate tool in crime control.

### III. THE LIMITS OF RESPECTABILITY MESSAGING

Immigration reformers are not the first to employ a deserving/undeserving narrative as a means of obtaining political gains for some at the expense of others. Across all areas of law reform, policy makers and advocates have sought to generate empathy for groups of people by invoking a contrast with others. This Part discusses the downsides of this approach.

In 1993, Evelyn Brooks Higginbotham used the phrase “politics of respectability” to describe the way in which the women’s movement of the Black Baptist Church sought political gains for black people from 1880 to 1920.<sup>53</sup> She describes how black Baptist women opposed white supremacy by “claiming respectability through . . . manners and morals, poor black women boldly asserted the will and agency to define themselves outside the parameters of prevailing racist discourses.”<sup>54</sup> Cognizant that nonthreatening collaborations with whites were the most successful, leaders “focused on behavior modification or self-help strategies on the part of African Americans, not on demands for structural changes in American laws and institutions.”<sup>55</sup> In so doing, however, the women failed to challenge, and thereby perpetuated, “the hegemonic values of white America” and the “prevalent stereotypical images of blacks.”<sup>56</sup> Without diminishing the sophisticated, strong, and strategic political voice of the Baptist women’s movement, Higginbotham concluded that “the politics of respectability” “served inevitably to blame blacks for their victimization.”<sup>57</sup>

Respectability messaging has appeared throughout the movement for racial justice. Khalil Gibran Muhammad has traced how “black elites” at the turn of the twentieth century, such as W.E.B. Du Bois, often employed the language of “racial uplift” in addition to “root-cause solutions” to black criminality.<sup>58</sup> Today,

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53. See EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH 1880–1920*, at 185–86 (1993).

54. *Id.* at 192.

55. *Id.* at 197.

56. *Id.* at 187–88, 194–95.

57. *Id.* at 202.

58. KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 9–10* (2010) (internal quotation marks and citations omitted).



Randall Kennedy argues that black people must adopt the politics of respectability in order to achieve gains in white-dominated society.<sup>59</sup>

The “politics of respectability” suffers from at least two major limitations. First, claims to respectability depend on a contrast with an “out” or deviant group. People are respectable by virtue of not having certain characteristics possessed by others.<sup>60</sup> By definition, attaining gains for the “respectable” leaves others out. Respectability is a moral claim of being better, and thus more deserving, than others.<sup>61</sup> The claim of who counts as respectable is ideological and therefore malleable. In the context of racial justice, Regina Austin has explained, “[T]he politics of distinction [have] intensifie[d] divisions within ‘the [Black] community’” by favoring the middle class and “the most exceptional.”<sup>62</sup>

Second, any claim to respectability reinforces and reproduces existing social and economic inequalities in our society. Because a person is respectable by virtue of complying with hegemonic norms, any claim of respectability legitimizes and perpetuates these norms. Respectability narratives not only “reflect[]” “social realit[y]” but are “constructive” of it.<sup>63</sup> If limited to helping respectable people, reforms will never fully address societal inequalities that inevitably surface where the less favored are

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59. KENNEDY, *supra* note 32, at 17 (arguing that Blacks must show they “are capable of meeting the established moral standards of white middle-class Americans”). For critiques of Kennedy’s argument, see Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1285 (1998); David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy’s “Politics of Distinction,”* 83 GEO. L.J. 2547, 2558, 1269–71 (1995); Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619, 2631 (1998) (reviewing KENNEDY, *supra* note 32). Others have commented on the perils of respectability messaging as it relates to racial justice. See, e.g., CATHY J. COHEN, *DEMOCRACY REMIXED: BLACK YOUTH AND THE FUTURE OF AMERICAN POLITICS* 48 (2010); Jody Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 14–15 (2014); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 966, 1013–14, 1042, 1043 (2002).

60. See KENNEDY, *supra* note 32, at 18 (explaining how the politics of respectability has caused some blacks to “shun anything that might remotely be associated with ‘bad Negroes’”).

61. See HIGGINBOTHAM, *supra* note 53, at 188, 195 (describing how the Black Baptist Church promoted respectability through emphasis on manners and morals with the ultimate goal of constructing a “Public Negro Self” worthy of respect).

62. Regina Austin, *“The Black Community,” Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1773 (1992) (commenting on the “politics of distinction” theory of racial justice).

63. Weissman, *supra* note 2, at 149 (citing Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 232 (1983) (discussing how law is “constructive of social realities rather than merely reflective of them”). See generally CLARISSA RILE HAYWARD, *HOW AMERICANS MAKE RACE: STORIES, INSTITUTIONS, SPACES* 177, 183–84 (2013) (demonstrating how narratives of racial identity become institutionalized and reproduced).

located.<sup>64</sup> In this way, invocation of the deserving/undeserving distinction prevents more fundamental, structural change in our society. In the context of racial justice, the focus on respectability has encouraged calls for individual reformation based on culture and values and thwarted policy changes grounded in an understanding of the connections among criminality, racism, and social and economic inequality.

The politics of respectability lurk in every movement for social change. In the welfare rights arena, lines are drawn between the “deserving” poor (for example, the disabled, blind, and elderly) and the “undeserving” poor (able-bodied people viewed as employable, including single mothers).<sup>65</sup> The deserving poor, as Joel Handler has observed, “possess attributes which could readily justify public protection and care without challenging dominant cultural, economic, and political norms.”<sup>66</sup> In contrast, the “undeserving poor . . . challenge such norms.”<sup>67</sup>

The phenomenon also exists in the movement against gender violence. Over the last four decades, the anti-violence movement unquestionably has succeeded in important ways.<sup>68</sup> Law enforcement authorities no longer view domestic violence as a

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64. See ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* 60–62 (2004) (describing how American society has shaped welfare policy to address the problems of individuals with characteristics deemed deserving of help while ignoring or excluding the claims of black, single mothers who are perceived as abusive of the system and thus undeserving of help).

65. See generally MICHAEL B. KATZ, *THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY* 3 (2d ed. 2013); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 810–16 (2007) (arguing that the distinction between the deserving and undeserving poor is based on race and class); Richard Hardack, *Bad Faith: Race, Religion and the Reformation of Welfare Law*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 539, 616 (2006) (citing William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1492 (1986)) (describing the “deserving poor” as “the sexually ascetic, monogamous, frugal, tidy, and white”); see also Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 5 (1996) (noting that “debates about welfare policy in America . . . focus on which of the poor are deserving and which are not”); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1505–08 (1991) (discussing the “deserving” versus the “undeserving” poor).

66. Joel F. Handler, “*Constructing the Political Spectacle*”: *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 944 (1990).

67. *Id.*

68. Leigh Goodmark notes that “[n]ot until the 1970s did the criminal system begin to treat assaults committed by intimate partners in the same way that it handled assaults committed by strangers.” Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 13 (2004); see also Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 9–13 (1999) (describing the history of the domestic violence movement and gains in enforcement of domestic violence laws).

private matter insulated from state intervention.<sup>69</sup> Domestic violence rates and intimate partner homicides have followed a pronounced downward trend since the mid-1970s when federal programs aimed at curbing intimate partner violence were enacted.<sup>70</sup> At the same time, high levels of violence persist and the movement has failed to adequately improve the lives of certain overlapping classes of women, including women of color, women who have criminal convictions, immigrants, and poor women.<sup>71</sup> By

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69. Goodmark, *supra* note 68, at 13.

70. See STOP ABUSIVE & VIOLENT ENVIRONMENTS (SAVE), HOW EFFECTIVE ARE DOMESTIC VIOLENCE PROGRAMS IN STOPPING PARTNER ABUSE? (2010), <http://www.save.services.org/reports/>; BUREAU OF JUSTICE STATISTICS, NONFATAL DOMESTIC VIOLENCE 2003–2012, at 3–4 (2014), <http://www.bjs.gov/content/pub/pdf/ndv0312.pdf>.

71. See, e.g., ANANNYA BHATTACHARJEE, AM. FRIENDS SERV. COMM., WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 26–27 (2001) (explaining how the movement against gender violence has failed to improve the lives of women of color and uneducated women immigrants); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 69–70 (2000) (positing the need to expand the definition of domestic abuse beyond the “traditional heterosexual framework” in order for the anti-violence movement to reach the lesbian community); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 808–12 (2001) (criticizing domestic violence researchers’ disproportionate focus on the experiences of economically advantaged women and white women); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1255 (1991) (commenting how “patriarchal ideas about gender and power” have caused politicians to exclude domestic violence as “another compelling incidence of Black-on-Black crime”); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 618–26 (2009) (“Victims’ right rhetoric . . . does not tolerate victims who are criminals . . .”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 601 (1990) (“Black women have simultaneously acknowledged their own victimization and the victimization of black men by a system that has consistently ignored violence against women while perpetrating it against men.”); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 9–12 (2002) (criticizing the violence against women campaign’s failure to understand how—in addition to gender—race, religion, and class mediate women’s lives); Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2218–20 (2000) (arguing for expanded legal protections against violence and inequality); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 281–82, 289–90 (2005) (noting that criminal prosecution of the offender is the only recourse available to victims of domestic violence, which ignores the economic needs of low-income women who may have just lost a significant source of income); Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 SIGNS 1133, 1135–36 (2000) (explaining how the “assumed race and class neutrality of gender violence led to the erasure of low-income women and women of color” from domestic violence discourse); Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL. 463, 508–09 (1996) (proposing a “fair-share” approach to distribution requirements under anti-violence legislation where funding distributed to victims of domestic violence is proportionate to the amount of violence experienced by the particular sub-group’s race, ethnicity, and immigration status); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 576–77 (1990) (noting that not every state affords legal protection to lesbians involved in violent relationships); Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women’s Movement and the*

framing gender violence as affecting equally women from all economic classes, the movement has ignored the reality that intimate partner violence disproportionately affects poor communities and has distanced itself from the anti-poverty movement.<sup>72</sup> Women with criminal convictions and sex workers, among others, fall outside the mainstream movement's focus of concern.<sup>73</sup>

Similarly, in the anti-human trafficking and international human rights antiviolence movements, critics have called into question the use of innocent victims as exemplars, thereby "assert[ing] respectability at the price of other less respectable women."<sup>74</sup> The practice of placing only women deemed respectable by mainstream society at the center of the antiviolence movement not only leaves other women more vulnerable to harm, but it shifts the focus away from remedying the underlying conditions in which

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*Asian American Community*, 3 ASIAN L.J. 151, 153–54 (1996) ("American society and laws, which are constructed largely along binary lines . . . have great difficulty recognizing intersectionalities and effectively ignore those—such as battered Asian American women—who exist at intersections of identity."). See also Mark Matthew Graham, *Domestic Violence Victims and Welfare "Reform": The Family Violence Option in Illinois*, 5 J. GENDER RACE & JUST. 433, 470, 476 (2002) (observing that advocates against domestic violence "garner support . . . by unfortunately appealing to the ideology of the 'deserving poor' and the 'victim'" and that "[s]uch tactics may be a concession to political reality, but political expediency may come at the price of eroding a broader coalition working for true welfare reform, which tackles the problem of poverty").

72. See Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 LAW & POL'Y 205, 223–24 (1997) (contrasting the approaches of the movement to end gender violence and that to end poverty); Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL'Y 221, 237, 243 (2013) (criticizing the dominant approach to ending violence against women and calling for a structural, economic analysis of gender-based violence); Deborah M. Weissman, *The Personal Is Political—and Economic: Rethinking Domestic Violence*, 2007 B.Y.U. L. REV. 387, 390 [hereinafter Weissman, *The Personal Is Political*] (arguing that "domestic violence is better understood by theorizing household relationships in the context of the communities in which they live" and that there is a "correlation between economic strain and an increase in incidents of intimate partner violence").

73. Beverly Balos and Mary Louise Fellows have described how "reformers . . . portray the victims of violence as respectable women," thereby preventing the reform of prostitution laws and perpetuating inequality. Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1273, 1291 (1999). Balos and Fellows argue that law reformers have mistakenly sought to "distance the dynamics of domestic abuse from prostitution." *Id.* at 1242; see also Pooja Gehi & Soniya Munshi, *Connecting State Violence and Anti-Violence: An Examination of the Impact of VAWA and Hate Crimes Legislation on Asian American Communities*, 21 ASIAN AM. L.J. 5, 5 (2014) (examining how certain "legislative acts exclude, neglect, and punish survivors who deviate from the parameters of the 'model minority victim'").

74. Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH & HUM. RTS. 16, 36–37 (2004); see also Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 195–97 (2007) (discussing the difference between real and ideal survivors).

violence occurs.<sup>75</sup> Thus, the downside of respectability messaging is that it not only limits the benefits of social change to a favored class, but it legitimizes the status quo economic, political, and social arrangements, making it less likely that more fundamental change will occur.

#### IV. RESPECTABLE IMMIGRANTS AND THE CARCERAL STATE

When immigration reformers focus solely on immigrants without criminal records (or just minor ones), they perpetuate the respectable immigrant narrative. They reduce noncitizens with significant criminal records to irredeemable others—legitimate targets for enforcement.<sup>76</sup> The focus on respectability makes it extremely difficult, if not impossible, to argue that immigrants with a significant criminal record should be given an opportunity to remain in the United States. But the harms extend beyond the effect on excluded individuals. The respectable immigrant narrative deepens the link between crime control and immigration enforcement, reifies our carceral state, and endorses extant societal inequalities that foster criminal activity.<sup>77</sup> The failure to challenge overly punitive practices directed at immigrants with significant criminal convictions perpetuates the individual, familial, community, monetary, and structural harms of our massive criminal and immigration enforcement systems. Because immigrants with criminal records lie at the intersection of our criminal and immigration enforcement systems, they experience the individual and collective harms of both regimes.<sup>78</sup>

The considerable harms of our carceral nation are discussed in detail elsewhere but bear mention here.<sup>79</sup> Per capita, the U.S.

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75. Kimberlé Crenshaw argues that “[t]he structural and political dimensions of gender violence and mass incarceration are linked in multiple ways.” Kimberlé Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1418 (2012).

76. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 397–402 (2006) [hereinafter Stumpf, *The Crimmigration Crisis*].

77. For a parallel analysis of how hate crime legislation intended to protect the gay community may perpetuate inequality and violence, see Dean Spade, *Their Laws Will Never Make Us Safer*, in *AGAINST EQUALITY: PRISONS WILL NOT PROTECT YOU* 1, 6–7 (Ryan Conrad ed., 2012).

78. Stumpf, *Crimmigration Crisis*, *supra* note 76, at 380–81 (highlighting the overlap between criminal and immigration laws).

79. See, e.g., Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1169 (2004) (discussing the harms of criminal disenfranchisement); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1028 (2010) (describing the racial dimension of mass incarceration); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was A “War on Blacks”*, 6 J.

criminal and immigration enforcement systems detain more people for longer periods of time than any other country in the world.<sup>80</sup> On any given day, we have approximately 2,200,000 people in our criminal jails and prisons and 6,900,000 under some form of adult correctional supervision.<sup>81</sup> Seven-and-a-half percent of our adult population are felons or ex-felons.<sup>82</sup> Our criminal incarceration rate is comparable only to Russia.<sup>83</sup> We criminally incarcerate over five times more people per capita than the United Kingdom, Canada, France, Germany, and other similar countries.<sup>84</sup> One of every nine individuals incarcerated is

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GENDER RACE & JUST. 381, 386 (2002) (arguing that the policies implemented in the name War on Drugs were a way for certain races to express dominance over others); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 490 (2010) (offering examples of collateral harms suffered by individuals in the United States with criminal records, including exclusion from public or government-assisted housing, employment-related legal barriers, ineligibility for public benefits, and felon disenfranchisement); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1012 (2001) (explaining the relationship between incarceration and damage to child welfare); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–91 (2004) (explaining how mass imprisonment damages social networks, distorts social norms, and destroys social citizenship).

80. See CONNIE DE LA VEGA ET AL., CTR. FOR LAW & GLOB. JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 9 (2012), <http://fair-sentencingofyouth.org/wp-content/uploads/2013/01/Cruel-And-Unusual-2.pdf>; ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (10th ed. 2013), [http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_10.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf); see also Kevin R. Reitz, *Sentencing*, in CRIME AND PUBLIC POLICY 467, 469 (James Q. Wilson & Joan Petersilia eds., 2011) (“[T]he United States [has] the largest per capita confinement population in the world . . .”); Trevor Rosson, Booknote, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* by James Q. Whitman, 31 AM. J. CRIM. L. 317, 317 (2004); *United States Detention Profile*, GLOBAL DETENTION PROJECT, <http://www.globaldetentionproject.org/countries/americas/united-states/introduction.html> (last updated Mar. 2009) (“The United States maintains the largest immigration detention infrastructure in the world. . . An official Immigration and Customs Enforcement database, obtained under the Freedom of Information Act, showed a U.S. detainee population of exactly 32,000 on the evening of [January 25, 2009].” (alteration in original) (internal quotation marks omitted)).

81. DANIELLE KAEBLE ET AL., BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 2 (2015), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>; Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2015*, PRISON POLICY INITIATIVE (Dec. 8, 2015), <http://www.prisonpolicy.org/reports/pie2015.html>.

82. GOTTSCHALK, *supra* note 45, at 1.

83. LEADERSHIP CONFERENCE EDUC. FUND, A SECOND CHANCE: CHARTING A NEW COURSE FOR RE-ENTRY AND CRIMINAL JUSTICE REFORM 1, 6 (2013), [http://civilrightsdocs.info/pdf/reports/A\\_Second\\_Chance\\_Re-Entry\\_Report.pdf](http://civilrightsdocs.info/pdf/reports/A_Second_Chance_Re-Entry_Report.pdf) [hereinafter A SECOND CHANCE] (“[A]fter America surpassed Russia in 1991, no other country has had a higher rate of incarceration.”); Charles Patton III, *Incarceration Data: Selected Comparisons*, 2 RACE/ETHNICITY: MULTIDISCIPLINARY GLOB. CONTEXTS 151, 154 (2008).

84. Patton III, *supra* note 83, at 154. See generally JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND

erving a life sentence.<sup>85</sup> The United States is regarded “as the most punitive nation in the world with moderate crime rates.”<sup>86</sup> In particular, the United States punishes drug offenders and property offenders much more harshly than similarly situated countries.<sup>87</sup> Penal controls extend well beyond prison and jail and include an extensive system of state controls like probation.<sup>88</sup>

In parallel to the rise in criminal incarceration, civil immigration enforcement has steadily increased over the last twenty years and is now far more expansive than that of any other country. In 1996, the United States held approximately 6,600 people in immigration detention on any given day.<sup>89</sup> Today, we hold over 26,000 immigrants in jails and jail-like detention centers.<sup>90</sup> In 2013, the United States detained a total of 440,000 people in over 250 facilities.<sup>91</sup> U.S. detention policy is so sweeping that people who pose neither security nor flight risks are detained, often for over four months to well over a

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EUROPE 56–57 (2003) (discussing how the growth in American prison populations is a result of American convicts serving sentences roughly five to ten times longer than similarly situated French convicts).

85. GOTTSCHALK, *supra* note 45, at 170.

86. James P. Lynch & William Alex Pridemore, *Crime in International Perspective*, in CRIME AND PUBLIC POLICY 5, 7 (James Q. Wilson & Joan Petersilia eds., 2011).

87. *Id.* at 38 (“The United States imposes prison and jail sentences in 67 percent of drug cases” and “imposes much longer sentences than any of the other nations studied.”). In Western European countries, the commission of nonviolent property offenses generally does not lead to incarceration. James Q. Whitman, *The Comparative Study of Criminal Punishment*, 1 ANN. REV. L. & SOC. SCI., Dec. 2005, at 17, 31.

88. One in twenty-three adults are under state control of some kind. GOTTSCHALK, *supra* note 45, at 1.

89. See Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Detention*, 65 HASTINGS L.J. 363, 365 (2014).

90. The L.A. Times reports that the “average daily detainee population is 26,374 for fiscal year 2015.” Kate Linthicum, *ICE Opens 400-bed Immigrant Detention Center near Bakersfield*, L.A. TIMES (Mar. 24, 2015, 10:01 AM), <http://www.latimes.com/local/lanow/la-me-ln-ice-immigration-detention-mcfarland-20150323-story.html>; see also NAT’L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 1–3 (2013), <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>. Congress issued a “bed mandate” in 2014 in the Consolidated Appropriations Act of 2014 requiring the Department of Homeland Security to “maintain a level of not less than 34,000 detention beds.” Consolidated Appropriations Act of 2014, Pub. L. No. 113–76, 128 Stat. 251. Although Secretary of Homeland Security Jeh Johnson has stated that the bed mandate does not require that the detention beds be filled, detention levels remain high. See Esther Yu-Hsi Lee, *Homeland Security Head Insists ‘Bed Mandate’ Is Not a Quota to Fill Detention Centers*, THINKPROGRESS (Mar. 12, 2014, 4:42 PM), <http://thinkprogress.org/immigration/2014/03/12/3391911/jeh-johnson-bed-mandate-quota/>.

91. SIMANSKI, *supra* note 17, at 1; Migration & Refugee Servs. et al., *Human Dignity: A Plan to Transform the Immigrant Detention System*, 3 J. ON MIGRATION & HUM. SOC’Y 159, 162, 169 (2015).

year.<sup>92</sup> Immigration detention began to escalate in the 1980s after officials began large-scale enforcement actions, including in the interior of the country, and abandoned a policy under which people were released while awaiting their immigration court hearings.<sup>93</sup>

This colossal carceral system comes with a high price tag. State and local governments spend approximately \$80 billion a year imprisoning people charged with or convicted of a crime.<sup>94</sup> The federal government spends about \$6.5 billion on criminal incarceration<sup>95</sup> and \$1.84 billion a year on immigration detention, approximately \$159 a day per detained noncitizen.<sup>96</sup> According to a study by a former Commissioner of the U.S. Immigration and

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92. See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 48 (2010) (noting the lack of individual bond hearings has led to detention of people who are not security or flight risks). The federal government argues that 8 U.S.C. § 1226(e) requires indefinite mandatory detention of noncitizens, including lawful permanent residents, without individual custody determinations. *Id.* at 45. Each year, 19,000 are held for over four months and 2,100 for over a year. *Id.* at 49 (citing DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POL'Y INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 16–20 (2009), <http://www.migrationpolicy.org/research/immigrant-detention-can-ice-meet-its-legal-imperatives-and-case-management-responsibilities>). For further discussion of mandatory detention, see *infra* notes 169–70 and accompanying text.

93. OFFICE OF THE INSPECTOR GEN., DEP'T HOMELAND SEC., OIG-09-52, IMMIGRATION AND CUSTOMS ENFORCEMENT DETENTION BEDSPACE MANAGEMENT 2 (2009), [http://www.oig.dhs.gov/assets/Mgmt/OIG\\_09-52\\_Apr09.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_09-52_Apr09.pdf) (citing poor attendance rates at immigration court hearings). Immigration officials began routinely detaining people instead of using alternatives to detention, like reporting on supervision. NAT'L IMMIGRATION FORUM, *supra* note 90, at 11 (arguing detention costs could be reduced by 80% with the use of alternatives to detention); see also LUTHERAN IMMIGRATION & REFUGEE SERV., UNLOCKING LIBERTY: A WAY FORWARD FOR U.S. IMMIGRATION DETENTION POLICY 14, 16 (2012), <http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf>.

94. U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013), <http://www.justice.gov/ag/smart-on-crime.pdf> [hereinafter SMART ON CRIME]. In 2009, the Pew Center reported \$52 billion. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 11 (2009), [http://www.pewtrusts.org/~media/Assets/2009/03/02/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3\\_2609.pdf](http://www.pewtrusts.org/~media/Assets/2009/03/02/PSPP_1in31_report_FINAL_WEB_3_2609.pdf); see also TRACY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, STATE CORRECTIONS EXPENDITURES, 1982–2010, at 1 (rev. 2014), <http://www.bjs.gov/content/pub/pdf/scefy8210.pdf>. The Attorney General has reported that “[a]t the state level, costs for running corrections facilities have roughly tripled in the last three decades . . . [and] [a]t the federal level, the Bureau of Prisons comprises one-third of the Justice Department’s budget.” SMART ON CRIME, *supra* note 94, at 2–3.

95. BUREAU OF PRISONS, FY 2014 BUDGET REQUEST AT A GLANCE 1, <http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/26/bop.pdf> (last visited Feb. 6, 2016).

96. NAT'L IMMIGRATION FORUM, *supra* note 90, at 1 (“This funding level would amount to \$5 million per day spent on immigration detention . . . [or] \$159 per day [per person].”); see also DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 10 (2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (reporting that the Office of Detention and Removal Operations operating budget in 2009 was \$2.6 billion); SIMANSKI, *supra* note 17, at 6 (“ICE detained 440,557 aliens during 2013 . . .”).



Naturalization Service, the United States “spends more on immigration enforcement agencies than on all its other principal criminal federal law enforcement agencies combined.”<sup>97</sup> The upshot of the United States’ criminal and civil enforcement practice has been a boon like no other for the prison industry.<sup>98</sup> Counties throughout the country have signed lucrative contracts to hold immigrants in their empty beds, often mixed in with pretrial criminal detainees.<sup>99</sup> Corrections Corporation of America, the private prison leader, expressly links its profitability to both immigration and the war on drugs.<sup>100</sup> In the immigration context, private prison companies have contracted with the federal government to build new facilities, often in remote areas and with poor conditions.<sup>101</sup>

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97. DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 9 (2013), <http://migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

98. Michael Welch, *The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex*, 27 SOC. JUST. 73, 82 (2000); Gretchen Gavett, *Map: The U.S. Immigration Detention Boom*, PBS (Oct. 18, 2011, 7:54 PM), <http://pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>; see also Judith A. Greene, *Entrepreneurial Corrections: Incarceration As a Business Opportunity*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 95, 99–100, 111 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing the history of the prison-industrial complex).

99. OFFICE OF THE INSPECTOR GEN., *supra* note 93, at 2 (noting that ICE contracts with “more than 350 state and local government facilities through intergovernmental service agreements,” or detention of “approximately 52 % of the detainee population annually”); Schriro, *supra* note 96, at 10 (describing where immigration detainees are held and stating that approximately 240 “shared-use” county jails “also house county prisoners and sometimes, other inmates”).

100. See CODY MASON, SENTENCING PROJECT, DOLLARS AND DETAINEES: THE GROWTH OF FOR-PROFIT DETENTION 4–5, 13 (2012), [http://sentencingproject.org/doc/publications/inc\\_Dollars\\_and\\_Detainees.pdf](http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf) (explaining how ICE’s increased use of private prisons for immigration detention created opportunities for private prison companies); see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59 (2010) (attributing the recent incarceration rate explosion to the War on Drugs). The Detention Watch Network reports that “[i]n its 2007 Security and Exchange Commission filing, CCA acknowledged” that it was “dependent on government appropriations” and that “[t]he demand for [their] facilities and services could be adversely affected by the relaxation of enforcement efforts or through decriminalization of certain activities that are currently proscribed by our criminal laws.” *A Brief History of Private Prisons in Immigration Detention*, DET. WATCH NETWORK (internal quotations omitted), [http://detentionwatchnetwork.org/privateprisons\\_note2](http://detentionwatchnetwork.org/privateprisons_note2) (last visited Feb. 6, 2016). The Network reports that CCA spent over 18 million on lobbying the federal government from 1999 to 2009. *The Influence of the Private Prison Industry in Immigration Detention*, DET. WATCH NETWORK, <http://detentionwatchnetwork.org/privateprisons> (last visited Feb. 6, 2016).

101. Spencer Bruck, *The Impact of Constitutional Liability and Private Contracting on Health Care Services for Immigrants in Civil Detention*, 25 GEO. IMMIGR. L.J. 487, 489 (2011) (arguing that the interplay of private contracting and public detention-center standards results in unconstitutionally poor conditions for detainees); Stephen Raheer, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*,

Hyperincarceration has a disturbing racial dimension.<sup>102</sup> People of color, primarily Latinos, make up the vast majority of detained and deported immigrants, including both documented and undocumented immigrants.<sup>103</sup> With respect to criminal incarceration, white people make up 77% of the U.S. population, but 47% of those jailed or imprisoned in 2014.<sup>104</sup> Latinos constitute 17% of the population and approximately 15% of the prison population.<sup>105</sup> Black people make up 13% of the U.S. population, but 35% of the criminal inmate population.<sup>106</sup> One in three black men and one in six Latino men born today are likely to be incarcerated in their lifetime, compared to one in 17 white men.<sup>107</sup> Although women make up only 6.6% of inmates, the rate at which women are imprisoned is rising while the rate for men is falling.<sup>108</sup>

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13 RICH. J.L. & PUB. INT. 209, 229–47 (2010) (discussing lack of accountability for poor conditions in private prisons); Chris Kirkham, *Private Prisons: Immigration Convictions in Record Numbers Fueling Corporate Profits*, HUFFINGTON POST (Sept. 27, 2012), [http://www.huffingtonpost.com/2012/09/27/private-prisons-immigration\\_n\\_1917636.html](http://www.huffingtonpost.com/2012/09/27/private-prisons-immigration_n_1917636.html) (reporting that immigrants convicted of immigration crimes like re-entry started to be held in “private prisons operated by multibillion-dollar corporations that contract with the government”). For a discussion of the conditions of immigration detention, see *infra* notes 142–48 and accompanying text.

102. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 36–37 (2009); GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 49 (1998); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited* 64 U. COLO. L. REV. 743, 750–51 (1993); Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185, 1191 (2013); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the ‘War on Drugs’ was a ‘War on Blacks,’* 6 J. GENDER RACE & JUST. 381, 391–92 (2002); Michael Tonry & Matthew Melewski, *The Malign Effects of Drugs and Crime Control Policies on Black Americans*, in THINKING ABOUT PUNISHMENT: PENAL POLICY ACROSS SPACE, TIME AND DISCIPLINE 81, 81–82 (Michael Tonry ed., 2009).

103. See *supra* note 6.

104. TODD D. MINTON & ZHEN ZENG, U.S. DEP’T OF JUSTICE, JAIL INMATES AT MIDYEAR 2014, at 1 (2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf>; *Quickfacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/00> (last visited Feb. 6, 2016).

105. MINTON & ZENG, *supra* note 104, at 1; *Quickfacts*, *supra* note 104.

106. MINTON & ZENG, *supra* note 104, at 1; *Quickfacts*, *supra* note 104.

107. 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](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf) (deducing that given “current trends” “one of every three black American males born today can expect to go to prison in his lifetime”); Vijay Prashad, *From Plantation to Penal Slavery*, 30 ECON. & POL. WKLY. 2237, 2241 (1995) (“The figures for incarcerated black males are remarkable: 23 per cent of all black males between the ages of 20 and 29 are in jail and there are more black men in jail than in college.”) (citing MARC MAUER, SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (1990)); see also David D. Cole, *Turning the Corner on Mass Incarceration?* 9 OHIO ST. J. CRIM. L. 27, 29 (2011) (noting that our society would change the law if one third of young white men were in the criminal justice system).

108. *BOP Statistics: Inmate Gender*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp) (last updated Dec. 26, 2015). Kimberlé W.

The racial disparity with respect to women is even more pronounced than it is for men. One in 18 black women and one in 45 Latina women are likely to be imprisoned at some point in their life, compared to one in 111 white women.<sup>109</sup> Our system of criminal hyperincarceration imposes permanent disadvantage on people involved in it and stigmatizes all young black men as potential law-breakers.<sup>110</sup> As a result, we tolerate hyper-surveillance of young black men.

It is far from clear that the demographics of incarcerated people accurately reflect who actually commits crime. Commentators point to the role of “conscious and unconscious racial discrimination” in law enforcement and sentencing practices.<sup>111</sup> The 2015 U.S. Department

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Crenshaw cautions against a male-centric view of the problem of hyperincarceration. See Kimberlé Crenshaw, *From Private Violence to Mass Incarceration*, *supra* note 54, at 1422–24; see also Allison S. Hartry, *Gendering Crimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System*, 27 BERKELEY J. GENDER L. & JUST. 1, 14 (2012) (“Immigration and crime are both often examined as male issues . . .”). The population of incarcerated women increased 10.9% between mid-2010 and 2013, while the population of men fell by 4.2%. MINTON, *supra* note 104. A study found that most women who had been convicted of felony drug offenses had no priors, their crimes were for small amounts of drugs, and that they used drugs to cope with having been physically and sexually abused. Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in INVISIBLE PUNISHMENT, *supra* note 98, at 37, 40. Government surveys have documented that over half of female state prisoners report prior sexual or physical abuse. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, in INVISIBLE PUNISHMENT, *supra* note 98, at 79, 83.

109. *Racial Disparity*, SENTENCING PROJECT tbl. 1, <http://www.sentencingproject.org/template/page.cfm?id=122> (last visited Feb. 6, 2016).

110. See Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 678 (1998) (clarifying that “the disproportionate involvement of minorities (African Americans in particular) in the criminal justice system generally stigmatizes all minorities, whether they are categorized as law breakers or law abiders”). African American men are given the binary choice of being a criminal or not. Randall Kennedy has described the phenomenon of requiring more of Blacks than Whites to be accepted into society a “racial tax.” KENNEDY, *supra* note 32, at 158–59.

111. Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2240 n.9 (2013); see also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 5 (1999) (arguing that there are two criminal justice systems, one for the rich and one for the poor); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5, 16–17, 21–41 (1997) (observing that “the consideration of class- and race-neutral factors in the prosecutorial process often produced disparate results among race and class lines”); Irene V. Blair, Charles M. Judd & Kristine M. Chappleau, *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 678 (2004) (describing how inmates with more Afrocentric features received harsher sentences than those with less Afrocentric features); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes* 17 PSYCHOL. SCI. 383, 385 & fig. 2 (2006) (finding that the more stereotypically Black features possessed by a criminal defendant the longer the sentence given by judges and that the chance of a death sentence, particularly in cases involving white victims, more than doubles); Randall Kennedy, *Race and the Administration of Criminal Justice in the United States*, in CRIME AND PUBLIC POLICY 237, 244–51 (James Q. Wilson & Joan Petersilia eds., 2011) (discussing the presence of racial discrimination in determining sentencing and punishment); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. &

of Justice report on the Ferguson Police Department after the 2014 shooting death of Michael Brown “revealed a pattern or practice of unlawful conduct,” including “clear racial disparities.”<sup>112</sup> According to statistics, “African Americans are more likely to be cited and arrested following a stop regardless of why the stop was initiated and are more likely to receive multiple citations during a single incident.”<sup>113</sup> Racial profiling is also prevalent in immigration enforcement.<sup>114</sup>

White-collar crime, committed disproportionately by white people, is under-enforced in comparison to street crime.<sup>115</sup> When enforcing drug laws, police often bypass college campuses and wealthy neighborhoods.<sup>116</sup>

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ECON. 285, 301, 312 (2001) (“Income had a significant impact on the sentence length. . . . Blacks and males not only receive longer sentences but also are less likely to receive no prison term when that option is available.”); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795, 806, 824 (2012) (examining how and when implicit bias affects prosecutorial decision-making and designing ways to reduce these biases); Sara Steen, Rodney L. Engen & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 436 (2005) (observing that “linking race-ethnicity to criminality results in more punitive treatment of minority defendants than white defendants”); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 1091, 1091 (2008) (“[S]ubconscious racial biases lead decision makers . . . in the processing of a criminal case to view racial minorities, especially African-Americans, as more dangerous and less credible than whites.”).

112. U.S. DEPT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1–2 (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

113. *Id.* at 4. The report found that the Ferguson police department “appears to bring certain offenses almost exclusively against African Americans. For example, from 2011 to 2013, African Americans accounted for 95% of Manner of Walking Roadway charges, and 94% of all Failure to Comply charges.” *Id.* Moreover, “[n]early 90% of documented force used by FPD officers was used against African Americans.” *Id.* at 5. The investigations further found “substantial evidence of racial bias among police and court staff in Ferguson,” including “emails circulated by police supervisors and court staff that stereotype racial minorities as criminals.” *Id.* One of these emails “joked about an abortion by an African-American woman as being a means of crime control.” *Id.*

114. LEADERSHIP CONFERENCE, RESTORING A NATIONAL CONSENSUS: THE NEED TO END RACIAL PROFILING IN AMERICA 15–17 (2011), [http://www.civilrights.org/publications/reports/racial-profiling2011/racial\\_profiling2011.pdf](http://www.civilrights.org/publications/reports/racial-profiling2011/racial_profiling2011.pdf); MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 39 (2011), <https://fas.org/sgp/crs/homesec/R42057.pdf>; Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 677–78 (2000); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 654 (2011); Daniel Robelo, *The Drug War—Mass Deportation: 250,000 Deported for Drug Offenses in Last 6 Years*, DRUG POLY ALLIANCE (Apr. 10, 2014), <http://www.drugpolicy.org/blog/drug-war-mass-deportation-250000-deported-drug-offenses-last-6-years>.

115. ROBERT J. BRYM & JOHN LIE, SOCIOLOGY: POP CULTURE TO SOCIAL STRUCTURE 100 (3d ed. 2013).

116. *Cf.* Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445, 451 (2006) (explaining how disadvantaged, poor neighborhoods are one of police enforcement's easy

The conditions of many of our nation’s jails and prisons impose lasting harm.<sup>117</sup> Long criminal sentences without rehabilitation result in the warehousing of people in what may be a breeding ground for criminality.<sup>118</sup> When incarcerated people are released, we shun them and create obstacles to their reentry into society. They remain outcasts as they become trapped in a web of restrictions that preclude their reintegration, leading to “perpetual punishment.”<sup>119</sup> Formerly incarcerated people cannot qualify for certain types of jobs or licenses or obtain some types of federal entitlements, housing, and student loans.<sup>120</sup> People deemed sexual offenders might have no place to live due to post-release living restrictions.<sup>121</sup> The disenfranchisement of

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targets to show progress on the “War on Drugs”); Tracey Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 699 (1998) (discussing strict enforcement of certain laws in poor neighborhoods but arguing that this not a rational basis for objecting to the laws).

117. See Richard D. Nobleman, *Wilson v. Seiter: Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L.J. 275, 276 (1992) (“As of January 1, 1990, forty-one states and the District of Columbia had some or all of their prisons operating under court order due to unconstitutional conditions of confinement.”). The U.S. Supreme Court recently held that California’s prison system violates the Eighth Amendment’s protection against cruel and unusual punishment, ordering the state to reduce its population by a third. See *Brown v. Plata*, 131 S. Ct. 1910, 1922, 1944, 1947 (2011). California’s prisons were rated for 79,858 people but were holding 143,000 at the time of the U.S. Supreme Court’s decision. A SECOND CHANCE, *supra* note 83.

118. Alexander, *supra* note 100, at 237; see also Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1089, 1092–93 (concluding that “we may now be at or near a tipping point where prison is causing a net increase in crime”).

119. A SECOND CHANCE, *supra* note 83, at 8.

120. Jeremy Travis has described this phenomenon as the experience that “one’s debt to society is never paid” and notes “[o]thers liken [the stigma of being a criminal] to ‘the mark of Cain.’” Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT*, *supra* note 98, at 15, 19–20. Federal law permits states to deny food stamps and other federal entitlements to people convicted of a drug felony. 21 U.S.C. § 862(a) (2012). People with certain drug and other convictions can be denied Section 8 housing. 42 U.S.C. § 13662(a). More than 90% of jobs require a background check. A SECOND CHANCE, *supra* note 83, at 16. Only about 50% of formerly incarcerated people are able to find work within a year of being released from jail or prison. *Id.* at 8 (citing Steven Greenhouse, *States Help Ex-Inmates Find Jobs*, N.Y. TIMES (Jan. 24, 2011), [http://www.nytimes.com/2011/01/25/business/25offender.html?\\_r=0](http://www.nytimes.com/2011/01/25/business/25offender.html?_r=0)). For a long list of collateral consequences of crimes, which number in the hundreds, see the *ABA National Inventory of the Collateral Consequences of Conviction*, ABA COLLATERAL CONSEQUENCES, <http://abacollateralconsequences.org/map/> (last visited Feb. 6, 2016).

121. See *Exile v. Miami-Dade Cty.*, 35 So. 3d 118 (Dist. Ct. App. 2010) (describing an unsuccessful challenge of a municipal code provision that forbade sexual offenders from living within 2500 feet of a school, even though a less restrictive state statute set a 1000 feet restriction); see also Greg Allen, *Sex Offenders Forced to Live Under Miami Bridge*, NAT’L PUB. RADIO (May 20, 2009), <http://www.npr.org/templates/story/story.php?storyId=104150499> (describing the growing encampment of tents, which—as a result of the local ordinance prohibiting their residence within 2500 feet of a location where children gather—may be the only option for sex offenders who want to reside in Miami).

people with felony convictions carries its own set of harms and may even have resulted in Al Gore losing the 2000 presidential election.<sup>122</sup>

Hyperincarceration also inflicts collateral consequences on the families and communities of those incarcerated.<sup>123</sup> Prisons are often built far from population centers, placing formidable roadblocks in the way of family members trying to maintain relationships.<sup>124</sup> Phone calls are prohibitively expensive.<sup>125</sup> One in fourteen black children has a parent who is incarcerated.<sup>126</sup>

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122. Approximately 6 million U.S. citizens cannot vote or run for office because they have been convicted of a felony. See CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA, SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 1 (2012), [http://www.sentencingproject.org/doc/publications/fd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf). In Florida, more than 10% of people eligible to vote are disenfranchised. GOTTSCHALK, *supra* note 45, at 245. According to sociologists Christopher Uggen and Jeff Manza, the 2000 presidential election in Florida was so close that “it would almost certainly have been reversed had voting rights been extended to any category of disenfranchised felons.” Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792 (2002), <http://www.asanet.org/images/members/docs/pdf/featured/uggen.pdf>. Studies demonstrate that people who vote after being released from jail or prison are less likely to reoffend. A SECOND CHANCE, *supra* note 83, at 19 (citing FLA. PAROLE COMM’N, STATUS UPDATE: RESTORATION OF CIVIL RIGHTS CASES GRANTED 2009 AND 2010, at 12–13 (2011)).

123. See generally TODD R. CLEAR, IMPRISONING COMMUNITIES 9–10 (2007). See also Roberts, *supra* note 79, at 1009 (explaining that incarceration results in disproportionate economic instability and separation of black families).

124. SARAH LAWRENCE & JEREMY TRAVIS, URBAN INST. JUSTICE POLICY CTR., THE NEW LANDSCAPE OF IMPRISONMENT: MAPPING AMERICA’S PRISON EXPANSION 33 (2004), [http://www.urban.org/UploadedPDF/410994\\_mapping\\_prisons.pdf](http://www.urban.org/UploadedPDF/410994_mapping_prisons.pdf); see also Marc Mauer & Meda Chesney-Lind, *Introduction*, in INVISIBLE PUNISHMENT, *supra* note 98, at 1, 6 (“In New York State, forty of the forty-one new prisons built since 1983 have been located in rural upstate communities.” (citing LISA FREEMAN & ROBERT GANGI, FOLLOWING THE DOLLARS: WHERE NEW YORK STATE SPENDS ITS PRISON MONEY, CITY PROJECT 4 (2000))); PRISON COMMUNITIES: FROM LOW-INCOME URBAN TO LOW-INCOME RURAL—AND BACK, ADLER SCH., INST. ON PUB. SAFETY & SOC. JUSTICE, ILL. COAL. FOR IMMIGRANT & REFUGEE RIGHTS (2012), [http://www.adler.edu/resources/content/4/1/documents/Adler\\_White-Paper\\_IPSSJ\\_ICIRR\\_Prison-Communities\\_FINAL.pdf](http://www.adler.edu/resources/content/4/1/documents/Adler_White-Paper_IPSSJ_ICIRR_Prison-Communities_FINAL.pdf).

125. The Leadership Conference Education Fund calls the high prison phone rates “predatory.” A SECOND CHANCE, *supra* note 83, at 4. The Fund notes that “regulatory agencies . . . have tended to turn a blind eye to the high prices charged to incarcerated people” because “[f]or every dollar spent by incarcerated people on phone calls, the companies give a payment to the correctional system or the local sheriff’s department.” *Id.* at 9. These payments can be as much as 50%. *Id.* On February 11, 2014, new Federal Communications Commission regulations governing interstate calls went into effect, capping the rate for prison phone rates at 25 cents per minute for collect calls and 21 cents per minute for debit or pre-paid calls. INMATE TELEPHONE SERVICE, FED. COMM’NS COMM’N, [www.fcc.gov/guides/inmate-telephone-service](http://www.fcc.gov/guides/inmate-telephone-service) (last visited Feb. 6, 2016). The new rate caps do not affect rates for intrastate calls, however. *Id.*

126. Mauer & Chesney-Lind, *supra* note 124, at 1, 4. One in ten children has had an incarcerated parent. GOTTSCHALK, *supra* note 45, at 1.

Children with a parent behind bars are more likely than their peers to be impoverished, put into foster care, and arrested themselves.<sup>127</sup> The effects include financial and emotional impact from severed relationships, resulting in “reshaping family and community across generations” such that “social bonds” are “corro[ded].”<sup>128</sup> Although women make up a much smaller percentage of our prison population, they may disproportionately suffer the consequences of hyperincarceration.<sup>129</sup> Two thirds of incarcerated women have at least one minor child.<sup>130</sup> Locking up so many men, particularly black men, has distorted the male–female ratio, resulting in a shortage of heterosexual black men and distorting the allocation of power in male–female intimate relationships.<sup>131</sup>

Communities suffer from large numbers of their members cycling in and out of prison.<sup>132</sup> Removing large numbers of people from communities that already suffer from high levels of incarceration causes residential destabilization that may result in increased crime.<sup>133</sup> Data tracking vital statistics like poverty, employment, and health are distorted because the imprisoned population is not counted.<sup>134</sup> Hyperincarceration may also lead to the under-deterrence of crime because people

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127. A SECOND CHANCE, *supra* note 83, at 6 (citing *Statistics Concerning Children of Prisoners*, DEMOSS (2015), <http://demoss.com/newsrooms/at/background/statistics-concerning-children-of-prisoners>; CRENIE F. HAIRSTON, PRISONERS AND FAMILIES: PARENTING ISSUES DURING INCARCERATION 4 (2001)).

128. Donald Braman, *Families and Incarceration*, in INVISIBLE PUNISHMENT, *supra* note 98, at 117, 118, 135. For a discussion of the collateral costs of incarceration on imprisoned people, their families, and their communities, see John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 122–23 (1999).

129. Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in INVISIBLE PUNISHMENT, *supra* note 98, at 136, 136–49.

130. Mauer & Chesney-Lind, *supra* note 124, at 1, 4.

131. Braman, *supra* note 128, at 128 (discussing the problem of “male shortage” and how women must “lower their standards to find a man to date or marry”).

132. Todd Clear et al., *Coercive Mobility and Crime: Incarceration and Social Disorganization*, 20 JUST. Q. 56, 58 (2003). Donald Braman concludes from a study of the effects of incarceration levels on the District of Columbia that “the dramatic increase in the use of incarceration over the last two decades has in many ways missed its mark, injuring the families of prisoners often as much as and sometimes more than criminal offenders themselves.” Braman, *supra* note 128, at 117.

133. Todd R. Clear, *The Problem with “Addition by Subtraction”: The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT, *supra* note 98, at 181, 182–83 (explaining that “the effects of imprisonment undermine the building blocks of social order” creating “a kind of double whammy” when people are removed from the community and then return). For a discussion of the neighborhood level causes of crime, see *infra* notes 253–59 and accompanying text.

134. GOTTSCHALK, *supra* note 45, at 242.

believe there is no escape from it.<sup>135</sup> By calling into question the legitimacy of law enforcement, hyperincarceration may even undermine allegiance to the law by those who are committed to it.<sup>136</sup>

Many of the harms of criminal incarceration parallel those caused by civil immigration detention and deportation. Immigration detention and deportation separates people from their families, communities, and support networks.<sup>137</sup> Our nation loses workers and parents, placing children at increased risk of poverty, poor school performance, and foster care.<sup>138</sup> Most individuals deported on account of a criminal history have been in the United States for a long period of time and many have multiple and deep ties to the United States.<sup>139</sup> The impact of deportation of a parent on children left behind is well documented. Children suffer from long-term effects such as anxiety, depression, and decreased school performance.<sup>140</sup> At least 5,100 children are in

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135. As Randall Kennedy has noted, Blacks are the primary victims of crime. KENNEDY, *supra* note 32, at 17, 158. To critique hyperincarceration is not to argue that crimes go unpunished, only that sanctions be reduced and law enforcement operate without bias. See GOTTSCHALK, *supra* note 45, at 176–77 (observing that “the certainty of punishment is a far greater deterrent to crime than the severity of punishment”); see also Marie Gottschalk, *Bring It on: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 568 (2015) (studies of mandatory sentencing regimes show they are not major deterrents to crime).

136. Meares, *supra* note 110, at 678.

137. See SETH FREED WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 3 (2011) (stating the United States deported “397,000 people and detained nearly that many . . . shatter[ing] families”); see also Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), [http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?\\_r=0](http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0) (providing anecdotes that illustrate the disruption deportations cause on communities, support systems, and family units).

138. AJAY CHAUDRY ET AL., *FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT* 27, 51 (2010); HUMAN RIGHTS WATCH, *JAILING REFUGEES: ARBITRARY DETENTION OF REFUGEES IN THE U.S. WHO FAIL TO ADJUST TO PERMANENT RESIDENT STATUS* 36 (2009); WESSLER, *supra* note 137, at 4; Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCI. 341, 352–53 (2010).

139. Beth Caldwell, *Excluding ‘Criminals’ from Comprehensive Immigration Reform*, UNHCR (May 13, 2013), <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=52fc6fbd5&id=5191cb785>; see also HUMAN RIGHTS WATCH, *Border Enforcement Policies Ensnare Parents of US Citizen Children*, <https://www.hrw.org/news/2015/01/08/border-enforcement-policies-ensnare-parents-us-citizen-children> (last visited Feb. 6, 2016) (reporting that 24% of “criminal aliens” had illegal entry or similar crimes as their most serious offense and that one in five immigrants charged with the crime of illegal entry or re-entry stated their child was a U.S. citizen).

140. BAUM ET AL., *supra* note 7, at 5, 9; Kalina M. Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 497–98 (2014) (summarizing research in this area); Robert T. Muller,



foster care due to the deportation of at least one parent.<sup>141</sup> Society at large must bear the lasting costs of this family separation.

The conditions of immigration detention are often abysmal.<sup>142</sup> Immigrants are held in jails and jail-like facilities, often in remote areas of the country, isolated from their families, lawyers, and support networks.<sup>143</sup> Unlike people accused of a crime, people in immigration proceedings are not entitled to a lawyer at government expense. Having a lawyer significantly increases a noncitizen’s chances of prevailing in court.<sup>144</sup> Detainees lack

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*The Traumatic Effects of Forced Deportation on Families*, PSYCHOL. TODAY (2013), <http://www.psychologytoday.com/blog/talking-about-trauma/201305/the-traumatic-effects-forced-deportation-families>.

141. WESSLER, *supra* note 137, at 23. An estimated additional 15,000 children in the next five years “will face these threats to reunification with their detained and deported mothers and fathers.” *Id.*; see also Trang Bui, *Battle Scars from the Fight Between Family Law and Immigration Law: Incarcerated Immigrant Parents and Missouri’s Response*, 81 UMKC L. REV. 183, 186 (2012) (concluding that the estimated total number of children in foster care is much higher than 5,100).

142. DORA SCHIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 (2009); Lara Yoder Nafziger, *Protection or Persecution?: The Detention of Unaccompanied Immigrant Children in the United States*, 28 HAMLINE J. PUB. L. & POLY 357, 379–85 (2006); Dora Schiro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1442, 1446–47, 1449–51 (2011); Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT’L L. & DISP. RESOL. 270, 294–95 (2008); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1113–26 (1995); Note, *Improving the Carceral Conditions of Federal Immigrant Detainees*, 125 HARV. L. REV. 1476, 1476, 1479–81 (2012); Kelsey E. Papst, Note, *Protecting the Voiceless: Ensuring ICE’s Compliance with Standards that Protect Immigration Detainees*, 40 MCGEORGE L. REV. 261, 276–80 (2009).

143. DETENTION WATCH NETWORK, EXPOSE AND CLOSE: EXECUTIVE SUMMARY 1, 3 (2012), <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose-executivenov12.pdf>; see also AMNESTY INT’L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 30 (2009), <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>.

144. See Ingrid V. Eagly & Steven Shafter, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 49 (2015) (reporting the results of a study that found “representation was associated with a nineteen to forty-three percentage point boost in rate of case successes”); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (observing that a lawyer increases an asylum applicant’s chances of winning by a factor of three); THE STUDY GROUP ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 1, 11–12 (2012) (noting that immigrants facing deportation in New York immigration courts with a lawyer are 500% as likely to win their cases as those without representation; detained immigrants in New York immigration courts are unrepresented in 78% of deportation cases); see also EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2014 STATISTICAL YEARBOOK (2015), <http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/1> (finding that 45% of all persons facing removal proceedings did so without counsel); THE N. CAL. COLLABORATIVE FOR IMMIGRANT JUSTICE, ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES 9 (2014), <http://www.lccr.com/wp-content/uploads/NCCIJ-Access-to-Justice-ReportOct.-2014.pdf> (roughly two-thirds of detained immigrants had no legal representation at any point in their removal proceedings).

adequate access to self-help legal materials and other services.<sup>145</sup> Jailers impose prohibitive rates on phone calls and restrict family visitation time.<sup>146</sup> Reports of substandard medical care are commonplace.<sup>147</sup> Since 2003, 141 people have died while in immigration detention.<sup>148</sup> The harms of our harsh deportation

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145. AMNESTY INT'L, *supra* note 143, at 32; APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 29 (2009), <http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf>; Steven Neeley, *Immigration Detention: The Inaction of the Bureau of Immigration and Customs Enforcement*, 60 ADMIN. L. REV. 729, 736–37 (2008); *see also* COMM'N ON IMMIGRATION, AM. BAR ASSOC., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5–10 (2010) (“[M]any unrepresented noncitizens in the immigration system are unable to determine what, if any, relief is available to them or to otherwise navigate our immigration adjudication system effectively.”).

146. *Phone Justice for Immigrants in Detention*, NATION INSIDE, <http://nationinside.org/campaign/endisolation/facts/> (last visited Feb. 6, 2016) (detailing the high cost of calls from detention centers); *see, e.g.*, RUBEN LOYO & CAROLYN CORRADO, IMMIGRANT RIGHTS CLINIC, LOCKED UP BUT NOT FORGOTTEN: OPENING ACCESS TO FAMILY AND COMMUNITY IN THE IMMIGRATION DETENTION SYSTEM 23 (2010) (documenting prohibitively high rates for phone calls at ICE contract facilities in and near New York). The February 2014 Federal Communications Commission caps on interstate calls will apply to facilities that detain people for immigration authorities. *See* A SECOND CHANCE *supra* note 83. The caps, however, do not apply to intrastate calls. Some detention facilities only permit video visits between detainees and their family members. DETENTION WATCH NETWORK, *supra* note 143. A Government Accounting Office report found chronic problems with immigration detention center phone systems. *See* Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 159–60 (2008) (citing GOV'T ACCOUNTABILITY OFFICE, GAO-07-875, ALIEN DETENTION STANDARDS: TELEPHONE ACCESS PROBLEMS WERE PERVASIVE AT DETENTION FACILITIES 1 (2007), <http://www.gao.gov/new.items/d07875.pdf>).

147. HUMAN RIGHTS WATCH, U.S.: IMMIGRATION DETENTION NEGLECTS HEALTH (2009), <http://www.hrw.org/news/2009/03/17/us-immigration-detention-neglects-health> (describing detention facilities' failure to provide basic health care to women with medical issues). U.S. Representative Zoe Lofgren, chair of the House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, stated that the Washington Post obtained a document that “lists the amount of money ICE saved by denying requests for treatment . . . for such things as tuberculosis, pneumonia, bone fractures, head trauma, chest pain, and other serious complaints.” *Problems with Immigration Detainee Medical Care: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 3–4 (2008) (statement of Rep. Lofgren, Member, H. Comm. on the Judiciary), <http://www.gpo.gov/fdsys/pkg/CHRG-110hrg42722/html/CHRG-110hrg42722.htm>; *see also* *Improving the Carceral Conditions of Federal Immigrant Detainees*, *supra* note 142, at 1476 (“[R]ecent federal immigration policy has led to widespread maltreatment of federal immigrant detainees.”); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 602–03, 622 (2010) (describing examples of poor medical care during prolonged immigration detention resulting in serious health problems for immigrants).

148. LIST OF DEATHS IN ICE CUSTODY: OCTOBER 2003–DECEMBER 2, 2013, <http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf>. *See generally* Kate Bowles, *Is the Doctor In? The Contemptible Condition of Immigrant Detainee Healthcare in the U.S. and the Need for a Constitutional Remedy*, 31 J. NAT'L ASS'N

system extend beyond our borders, generating externalities for sending countries. The deportation of people with criminal convictions shifts the burden of post-jail reintegration to other countries, often countries less well positioned than the United States to cope with people making this transition.<sup>149</sup> If criminal behaviors by immigrants were largely imported, such a focus might make sense. But the majority of immigrants who have criminal records began their offending behavior only after having lived in the United States.<sup>150</sup>

At the most fundamental level, criminal and civil hyperincarceration intensifies the divides between classes of people, including along racial, ethnic, and class lines.<sup>151</sup> As Marie Gottschalk has observed, “The carceral state has helped to legitimize the idea of creating a highly distinct political and legal universe for numerous categories of people.”<sup>152</sup> The Leadership Conference Education Fund has concluded that “the economic and political marginalization of formerly incarcerated people now stand[s] as among our era’s most critical civil and human rights concerns” and “come[s] with distinct racial and economic justice implications.”<sup>153</sup> Mass criminal and civil incarceration is not a sustainable approach to societal control and stands in tension with

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ADMIN. L. JUDICIARY 169 (2011) (describing deaths of immigration detainees and arguing for better medical treatment); Lisa A. Cahan, *Constitutional Protections of Aliens: A Call For Action To Provide Adequate Health Care For Immigration Detainees*, 3 J. HEALTH & BIOMEDICAL L. 343 (2007) (reporting about immigration detainee deaths and advocating for improvements in the medical care of people in immigration detention).

149. Alejandro Portes has documented how U.S. attempts to control the flow of unauthorized migration across its border leads to permanent settlement of immigrants and an increased risk that their children will assimilate “downward” as a reaction to “hostility and limited opportunity” and engage in criminal activity that results in deportation. Upon return to their home country, these young people “transfer deviant styles of life learned abroad to their home communities.” Alejandro Portes, *Migration, Development, and Segmented Assimilation: A Conceptual Review of the Evidence*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 73 (2007); see also M. Kathleen Dingeman & Ruben G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En / countering Stereotypes in Southern California and El Salvador*, 31 U. LA. VERNE L. REV. 363, 394 (2010) (“Migration scholars have frequently observed that voluntary and forced-return migrants often experience prejudice and discrimination in their home societies.” (citing Jean-Pierre Cassarino, *Theorising Return Migration: The Conceptual Approach to Return Migrants Revisited*, 6 INT’L J. MULTICULTURAL SOC’Y 253, 262, 264 (2004); Rued Ruben et al., *What Determines the Embeddedness of Forced-Return Migrants? Rethinking the Role of Pre- and Post-Return Assistance*, 43 INT’L MIGRATION REV. 908, 912–13 (2009))).

150. See *infra* note 268 and accompanying text.

151. See GARLAND, *supra* note 29, at 204 (“[A] reliance upon penal mechanisms” results in “hardening of social and racial divisions, the reinforcement of criminogenic processes; the alienation of large social groups; the discrediting of legal authority; a reduction of civic tolerance; [and] a tendency towards authoritarianism . . .”).

152. GOTTSCHALK, *supra* note 45, at 242.

153. A SECOND CHANCE, *supra* note 83, at 4.

fundamental principles of democracy. This grim reality must inform the critiques, messages, and strategies of immigration reformers.

## V. SCHOLARLY CRITIQUES

A rich and growing body of scholarship documents and criticizes the myriad ways in which our criminal and immigration enforcement systems have become intertwined, such that immigration enforcement “appears to be the most recent iteration of the war on crime.”<sup>154</sup> These “cimmigration” commentaries have taken a variety of forms. Some trace the historical origins of the rise in immigration detention, the militarization of immigration enforcement, and the expansion of criminal grounds of removal, relating these phenomena to the rise of the carceral state, racism against Latinos, and our nation’s increasing commitment to neoliberalism.<sup>155</sup> Others discuss the importance of membership

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154. Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1602 (2010) [hereinafter Chacón, *Diversion of Attention*]. Literature in this area includes: Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL’Y REV. 429, 440–41 (2011); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137–39 (2009) [hereinafter Chacón, *Managing Migration*]; Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. OF CRIM. L. AND CRIMINOLOGY 613, 614 (2012); Jennifer M. Chacón, *Unsecured Borders*, *supra* note 33, at 1827, 1830, 1843–44, 1846, 1848; Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1059 (2002); Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1326–27, 1330–31 (2010); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law”*, 29 N.C. J. INT’L L. & COM. REG. 639, 640 (2004) [hereinafter Kanstroom, *Criminalizing the Undocumented*]; Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 133 HARV. L. REV. 1889, 1891 (2000) [hereinafter Kanstroom, *Deportation*]; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471–72 (2007); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 113–21 (2012); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11*, 25 B.C. THIRD WORLD L.J. 81 (2005) [hereinafter Miller, *Blurring the Boundaries*]; Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 619–20 (2003); Stumpf, *The Cimmigration Crisis*, *supra* note 76, at 376; Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1591–94 (2008); Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 63 (2010); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1131, 1134–38 (2002); 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, 655–60 (2011).

155. See, e.g., César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 B.Y.U. L. REV. 1457, 1515; Teresa A. Miller, *A New Look at Neo-Liberal Economic Policies and the Criminalization of Undocumented Migrants*, 61 S.M.U. L. REV. 171, 180–85 (2008) (analyzing the connection between neoliberal economic policies and the criminalization of

theory, demonstrating how criminal and immigration law have become intertwined because they both involve questions of inclusion in, or exclusion from, our society, as well as the limitations of this approach.<sup>156</sup> The rise of national security discourse and legislation has prompted some commentators to situate crimmigration in the “war on terror.”<sup>157</sup>

This Part focuses on three claims of the crimmigration commentary: immigrants have been converted into criminals through the prosecution of behaviors associated with being undocumented; civil immigration enforcement has become bound up with criminal enforcement such that the institutional norms and actors are often the same; and immigration enforcement has focused on people with minor criminal histories. The analysis of how immigrants have been inappropriately criminalized focuses in part on how current enforcement and prosecutorial practices at the state and federal level transform undocumented immigrants into criminals and how the jail-to-deportation pipeline targets low-level violators.<sup>158</sup>

#### A. *Converting Immigrants into Criminals*

At the state level, undocumented immigrants are precluded from obtaining drivers licenses and are then prosecuted criminally for driving without a license and related offenses, like possession of false documents and identity theft.<sup>159</sup> Criminal traffic violations account for 14% of offenses committed by people dubbed “criminal

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immigrants); Yolanda Vázquez, *Constructing Crimmigration*, *supra* note 36, at 606 (arguing that racism explains why Latinos are “detained and removed from the United States at exponentially higher rates than other racial groups” despite the fact that they “do not commit ‘dangerous’ crimes nor pose a serious threat to national security”).

156. See, e.g., McLeod, *supra* note 154, at 130–45; Stumpf, *The Crimmigration Crisis*, *supra* note 76, at 377.

157. Chacón, *Unsecured Borders*, *supra* note 33, at 1855; Demleitner, *supra* note 154, at 1059, 1062–63; Kanstroom *Criminalizing the Undocumented*, *supra* note 154; Miller, *Blurring the Boundaries*, *supra* note 154, at 87–90; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1577–79 (2002).

158. For a discussion of the literature in this area, see Chacón, *Managing Migration*, *supra* note 154, at 627–29, 635, 638–39 (describing increased immigration enforcement efforts by both the federal and state governments). A related claim is that deportation now constitutes punishment. See Hernández, *supra* note 5, at 1356; Kanstroom, *Deportation*, *supra* note 154, at 1892–94; Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1339, 1349–50 (2011); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 332–36 (2000). Relatedly, Anil Kalhan has argued that “excessive immigration detention practices have evolved into a quasi-punitive system of *immcarceration*.” Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010).

159. See Chacón, *Unsecured Borders*, *supra* note 33, at 1885–86.

aliens.”<sup>160</sup> At the federal level, U.S. Attorney Offices have shifted their prosecutorial priorities away from drug enforcement and toward the prosecution of criminal immigration violations, like illegal entry and reentry.<sup>161</sup> Expedited removal—the deportation of arriving or recently arrived noncitizens by low-level immigration officials rather than immigration judges—increased the number of people subject to criminal prosecution upon reentry. The expedited removal statute was enacted in 1996 and expanded twice in 2004 and 2006, such that it now covers individuals apprehended within 100 miles of the border.<sup>162</sup> In 2013, approximately 193,032 people were ordered removed under this procedure, accounting for 44% of all removals.<sup>163</sup> As a result of the skyrocketing number of people with prior removal orders, many people caught reentering the United States are now criminally prosecuted for illegal reentry. In 2006, almost 26% of all federal prosecutions were related to illegal reentry and other types of immigration violations. That number rose to 49.9% by 2012.<sup>164</sup> After being convicted, these individuals are turned over to immigration authorities for detention and deportation as “criminal aliens.”<sup>165</sup>

### B. Institutional Entanglement

The criminalization critique also demonstrates how our criminal and immigration systems of enforcement and incarceration have become enmeshed in numerous respects. Immigration and criminal law enforcement authorities have constructed a vast jail-to-deportation pipeline. Local police participate in immigration enforcement by engaging in joint enforcement operations; forwarding fingerprints and other information to federal authorities; detaining immigrants suspected of immigration violations, either lawfully

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160. CRIMINAL ALIEN STATISTICS, *supra* note 6, at 21.

161. Michael T. Light, Mark Hugo Lopez & Ana Gonzalez-Barrera, *The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth*, PEW RES. CTR.: HISP. TRENDS (Mar. 18, 2014), <http://pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/> (noting that between 1992 and 2012, “the number of unlawful reentry convictions increased 28-fold” while the overall number of “offenders sentenced in federal courts more than doubled”).

162. Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L. 165, 173 (2007).

163. SIMANSKI, *supra* note 17, at 5.

164. MARK MOTIVANS, U.S. DEP’T OF JUSTICE, NCJ 248470, FEDERAL JUSTICE STATISTICS, 2012, at 4 (2015), <http://www.bjs.gov/content/pub/pdf/fjs12st.pdf>; U.S. SENTENCING COMM’N, ILLEGAL REENTRY OFFENSES 1 (2015), [http://ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015\\_Illegal-Reentry-Report.pdf](http://ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf).

165. See *Enforcement and Removal Operations*, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFT, <http://www.ice.gov/ero> (last visited Feb. 6, 2016).

(when they have been deputized to act as federal immigration officers) or unlawfully (if they act without authority); and, in some jurisdictions, prolonging the detention of noncitizens in criminal custody so that immigration officers can pick them up.<sup>166</sup> The ways in which the lines have blurred between immigration and criminal enforcement is evident from the following candid statement of a high level ICE officer: “If you don’t have enough evidence to charge someone criminally but you think he’s illegal, we [ICE] can make him disappear.”<sup>167</sup> Some noncitizens are deported while still serving their sentences and others are deported without ever having seen a judge.<sup>168</sup> Those entitled to a hearing before a judge are often held in mandatory detention, even if bond was available in the underlying criminal case.<sup>169</sup> Only recently have courts begun to place restraints on the length of time that immigration authorities can hold noncitizens while they are fighting their cases.<sup>170</sup>

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166. Several federal law enforcement programs have targeted noncitizens in the criminal justice system, including Secure Communities, the Criminal Alien Program, and Priority Enforcement Program. See *Criminal Alien Program*, U.S. DEPT OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFT, <https://ice.gov/criminal-alien-program> (last visited Feb. 6, 2016); *Secure Communities*, U.S. DEPT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFT, [http://ice.gov/secure\\_communities#tab1](http://ice.gov/secure_communities#tab1) (last visited Feb. 6, 2016); *Statement from U.S. Immigration and Customs Enforcement’s (ICE) Director Sarah R. Saldana*, U.S. DEPT OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFT (Mar. 20, 2015), <https://ice.gov/news/releases/statement-us-immigration-and-customs-enforcement-ice-director-saldana>; see also Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 203–07 (2013) (discussing history of immigration detainers). See generally Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1266–68, 1271–72, 1281 (2015) (describing the rise and fall of Secure Communities and its replacement with the Priority Enforcement Program). Local and state officers lack authority to enforce civil immigration law unless deputized under 8 U.S.C. § 1357(g). See *Arizona v. United States*, 132 S. Ct. 2492, 2506–07, 2532–33 (2012) (holding that state officers cannot make a “unilateral decision . . . to arrest an alien for being removable”).

167. The quote is from James Pendergraph when he was executive director of ICE’s Office of State and Local Coordination. See AMNESTY INT’L, *supra* note 143, at 4 (quoting James Pendergraph, speaking at the Police Foundation National Conference, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, Washington, D.C.); see also DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 22–35 (2003) (discussing how law enforcement authorities after 9/11 targeted Muslim noncitizens alleging visa violations as a proxy for national security grounds).

168. Administrative removal permits immigration enforcement authorities to deport without a hearing a person who is not a lawful permanent resident if they believe that the noncitizen has an aggravated felony conviction. See 8 U.S.C. § 1228(b) (2012); ROSENBLUM & KANDEL, *supra* note 114, at 14–15.

169. Under § 1226(c), the “Attorney General shall take into custody any alien who” is inadmissible pursuant to any criminal ground or deportable pursuant on most criminal grounds “when the alien is released.” 8 U.S.C. § 1226(c)(1). The federal government takes the position that this provision authorizes prolonged detention without a bond hearing. See generally Anello, *supra* note 89 (discussing case law about the permissible length of detention of noncitizens).

170. See, e.g., *Rodriguez v. Robbins*, 715 F.3d 1127, 1137–38 (9th Cir. 2013) (finding that § 1226(c) should be interpreted as implicitly containing a reasonable time limitation);

*C. Deportation for Minor Crimes*

A high percentage of people caught up in the jail-to-deportation pipeline were convicted of only relatively minor crimes.<sup>171</sup> Analyzing government statistics, Transactional Records Access Clearinghouse concluded that convictions “for the petty offense of illegal entry continue to dominate the criminal enforcement of federal immigration laws,” finding that during “the first six months of fiscal year 2014, . . . two out of three immigration convictions . . . were for this offense.”<sup>172</sup> In the ten-year period from fiscal year 2004 to fiscal year 2013, illegal entry convictions accounted for 65% of all immigration-related convictions.<sup>173</sup> As mentioned above, state and local criminal traffic offenses accounted for 14% of the crimes of “criminal aliens.”<sup>174</sup> ICE reports that, in 2014, roughly half of the convicted noncitizens who were deported were Level 2 (one felony or three or more misdemeanors) or Level 3 (one misdemeanor) offenders, and about half of this group had only been convicted of a single misdemeanor.<sup>175</sup>

These insights about how immigrants have been criminalized are integral to understanding how U.S. policy decisions have created criminals out of people who were previously civil law violators, how immigration enforcement policies target low-level criminal law violators, and how our civil and immigration systems

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*Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011) (“[T]he statute implicitly authorizes detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary . . .”); *Ly v. Hansen*, 351 F.3d 263, 269–70 (6th Cir. 2003) (reasoning that a reasonable time limitation abides by constitutional requirements and Congress’s intent).

171. According to the Transactional Records Access Clearinghouse, in 2013 “only 12 percent of all deportees [apprehended through the Secure Communities program] had been found to have committed a serious or ‘Level 1’ offense” based on ICE definitions. *Secure Communities and ICE Deportation: A Failed Program?*, TRAC IMMIGRATION (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349/>.

172. *Despite Rise in Felony Charges, Most Immigration Convictions Remain Misdemeanors*, TRAC IMMIGRATION (June 26, 2014) (citation omitted), <http://trac.syr.edu/immigration/reports/356/>.

173. *Id.*

174. CRIMINAL ALIEN STATISTICS, *supra* note 6, at 21.

175. ICE reported that 43,897 of the convicted criminals removed were Level 1 offenders, 22,191 were Level 2 offenders, and 20,835 were Level 3 offenders. U.S. DEPT OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014, at 10 (2014), <https://ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf>. Level 2 offenders include any person convicted of a felony or three or more misdemeanors and Level 3 offenders include any person convicted of any crime punishable by less than a year imprisonment. MICHELE WASLIN, AM. IMMIGRATION COUNCIL, ICE’S ENFORCEMENT PRIORITIES AND THE FACTORS THAT UNDERMINE THEM 9 (2010), [http://immigrationpolicy.org/sites/default/files/docs/ICE\\_Enforcement\\_Priorities\\_110910.pdf](http://immigrationpolicy.org/sites/default/files/docs/ICE_Enforcement_Priorities_110910.pdf).



have become entangled. At the same time, the critique risks being understood as a claim to respectability, namely that it is unjust to treat civil law violators and minor criminal law violators as if they were real criminals. A narrow focus on how immigrants have been criminalized could be interpreted as endorsing the claim that law enforcement’s only mistake is applying this label to undocumented immigrants and low-level violators—a view that reinforces the categories of “criminal” and “criminal alien” and the stigma associated with them. As with mainstream reform efforts, a limited criminalization critique could be understood as accepting that immigration enforcement can be tethered to crime control (as long as it has the right focus) and leaving unchallenged the edifice of the carceral state.

Broader criminalization critiques have analyzed the relationship between criminal and immigration enforcement and structural features of our society, including racial and class inequalities. U.S. policy choices are responsible for increasing the number of convicted noncitizens.<sup>176</sup> As Yolanda Vázquez has pointed out, the “United States’ prosecution and removal of individuals is derived from political choices and cultural norms,” and these choices and norms are used “to enforce racial hierarchies.”<sup>177</sup> Similarly, César Cuauhtémoc García Hernández has observed that the “markers of potential undesirability are no different than those we have used for decades to build the mass shadow world of penal imprisonment—race and class.”<sup>178</sup> The insight that racialized policy choices construct crime, detention, and deportation rates, together with an analysis of how social and economic inequality leads to crime and unauthorized migration, suggests a more inclusive framework for immigration reform.

## VI. AN ALTERNATE FRAME

An alternate vision for immigrant justice reflects an understanding of how racial and class inequalities and U.S. policy choices drive mass criminal and immigration incarceration and shape behavior that results in crime and unauthorized migration. In this view, immigrant justice is inexorably linked to the racial justice movement to dismantle the carceral state.<sup>179</sup> The contrast between immigrants and criminals (and between the immigration and criminal systems) falls away as an organizing and rhetorical

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176. See Chacón, *Diversion of Attention*, *supra* note 154, at 1575 & n.50; Chacón, *Unsecured Borders*, *supra* note 33, at 1885–86.

177. Vázquez, *Constructing Crimmigration*, *supra* note 36, at 606.

178. García Hernández, *supra* note 25, at 359.

179. Some reformers and advocates already take this approach. See *supra* Part IV.

device and immigration enforcement is delinked from crime control. Every iteration of the distinction between immigrants and criminals and between minor and major criminals is understood as distancing the immigrant rights movement from the racial justice movement to end hyperincarceration and furthering the harms of our carceral nation.

A. *The Salience of Race*

The racial justice critique of hyperincarceration suggests a framework for immigration reform that moves beyond seeking gains for respectable immigrants. The movement for racial justice, unlike the mainstream movement for immigration reform, has made significant headway in moving beyond respectability politics and the focus on middle class issues. In particular, Michelle Alexander's *The New Jim Crow* has helped to popularize the movement against criminal hyperincarceration.<sup>180</sup> Shifting the focus away from narratives involving respectable black people, Alexander has put forth a compelling account of how it has come to be that one-third of young black men will likely be jailed in their lifetime. She describes a trajectory from slavery to Jim Crow to hyperincarceration, locating the origin of hyperincarceration in the post-Reconstruction strategy of white elites to drive a wedge between poor Blacks and Whites. Alexander makes a powerful case for how our nation's system of incarceration has instituted a racialized caste system that appears colorblind.<sup>181</sup> Although our society largely rejects overt racism, she argues, we are still permitted to "hate criminals."<sup>182</sup>

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180. ALEXANDER, *supra* note 100, at 217–24.

181. *Id.* at 57–58. Others have made similar claims. See, e.g., Mauer & Chesney-Lind, *supra* note 124, at 1, 5 (“[I]t is understood that crime has become a code word for race in American political life, and therefore ‘tough’ talk on crime is a proxy for criminal justice policies that disproportionately control and police African-American communities.”); Brooks Berndt, *Ritual and Racism: A Social-Historical Analysis of the Crack Sentencing Guidelines*, 39 CRIME L. & SOC. CHANGE 175, 177 (2003) (noting how the practice of demonizing and imprisoning black people has reinserted them back into the economic order as slaves); see also MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 167–70 (1995) (discussing the detrimental cultural effects stemming from the arrest and imprisonment of African Americans); Carroll Seron & Frank Munger, *Law and Inequality: Race, Gender . . . and, of Course, Class*, 22 ANN. REV. SOC. 187, 207 (1996) (emphasizing the continuing importance of class and its potential use in contemporary sociological research). The link between slavery and criminals was expressly present in the Thirteenth Amendment, which outlawed slavery but sanctioned it for those convicted of a crime. See Spearlt, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1, 19–20 (2013) (discussing U.S. CONST. amend. XIII, § 1). For a discussion of the link between prisoners and slaves, see WHITMAN, *supra* note 84, at 173–77.

182. ALEXANDER, *supra* note 100, at 199. As Khalil Bibran Muhammad has shown in his detailed historical account of late nineteenth century discussions of crime and race, “the

Alexander’s analysis encompasses a class critique that borrows from Loïc Wacquant’s account of the relationship between class and the carceral state.<sup>183</sup> Hyperincarceration of black people, Wacquant argues, is a result of the “obsolescence of the ghetto as a device for caste control and the . . . need for a substitute apparatus for keeping (unskilled) African Americans ‘in their place.’”<sup>184</sup> Our criminal justice system, in this view, is a mechanism for controlling the inevitable social deviancy that flows from the marginalization of poor people under neoliberal social and economic policies.<sup>185</sup>

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statistical rhetoric of the ‘Negro criminal’ became a proxy for a national discourse on black inferiority.” MUHAMMAD, *supra* note 58, at 8, 16–21, 45–46.

183. LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 41–44 (2009). Alexander cites to Wacquant in *A New Jim Crow*. ALEXANDER, *supra* note 100, at 219. Ahmed A. White similarly argues “the whole enterprise of criminal justice must be understood above all in its relationship to the economic structures of society.” Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 791 (2005); see also David E. Barlow, Melissa Hickman Barlow & W. Wesley Johnson, *The Political Economy of Criminal Justice Policy: A Time-Series Analysis of Economic Conditions, Crime, and Federal Criminal Justice Legislation, 1948–1987*, 13 JUST. Q. 223 (1996) (exploring the relationship between economic conditions, crime rates, and the federal legislative response). See generally STEVEN BOX, RECESSION, CRIME AND PUNISHMENT 30–33 (1987) (explaining the connection between recession, class, and crime). Similarly, Frances Fox Piven and Richard Cloward have argued that the social welfare system expands and contracts as needed to exert social control over those engaged in menial work for low wages. Richard A. Cloward & Frances Fox Piven, *The Weight of the Poor: A Strategy to End Poverty*, NATION (May 2, 1966), <http://thenation.com/article/weight-poor-strategy-end-poverty/>; see also Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43, 44 (2001) (discussing the use of the welfare system and the criminal justice system to govern “social marginality”); Avi Brisman, *Ritualized Degradation in the Twenty-first Century: A Revisitation of Piven and Cloward’s Regulating the Poor*, 10 SEATTLE J. SOC. JUST. 793, 801 (2012) (arguing that undocumented immigrants are degraded as a group as a form of social control); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 715 (2009) (“The criminalization of poverty highlights economically and legally institutionalized ideologies of neo-liberalism, racism, sexism, and the dehumanization of the poor.”).

184. Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 97 (2001).

185. Marie Gottschalk defines neoliberalism as “an ideology and package of policies that deify low taxes, macroeconomic stabilization (through low inflation and low public debt), financial and trade deregulation, privatization of public assets and services, and the retrenchment of the welfare state.” GOTTSCHALK, *supra* note 45, at 11. See generally DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005). For a discussion of the link between neoliberalism and the carceral state, see generally NICOLA LACEY, THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES 44–46 (2008); Barlow, Barlow & Johnson, *supra* note 183, at 239 (discussing the correlations between economic conditions, crime rates, and federal criminal justice legislation); White, *supra* note 183, at 778, 794 (arguing that capitalism generates marginalized people and “unemployment necessitate[s] more frequent and intensive use of incarceration in order to maintain constant levels of social control”). For an analysis of the connection between neoliberal economic policies and the criminalization of immigrants, see Miller, *supra* note 155 (arguing that neo-liberal economic policies both encourage undocumented migration and also facilitate the criminalization of these unauthorized border crossers).

The thesis that our overly punitive law enforcement system is a strategy of social control over low-income black people and other people of color has affinities with other accounts of how the rehabilitative focus of our criminal system was undermined and replaced with a punitive one.<sup>186</sup> David Garland attributes the shift not only to the conservative backlash against civil rights successes but to the scathing critiques of the rehabilitative model (including by progressives) as well as multiple social, economic, and political factors.<sup>187</sup> He argues that the increase in crime rates and corresponding punitive shift correlated with both a severe economic recession and rapid social changes, including alterations in family structure, a large baby boomer cohort of young males, increased mobility, and the influence of television.<sup>188</sup> A reactionary response to these conditions of late modernity, in Garland's account, converted a view of offenders as "needy delinquent[s]" to one involving "threatening" and "racialized" images of "career criminals, crackheads, thugs, and predators."<sup>189</sup> The new paradigm rests on the view that a "dependency culture" of the "underclass" causes crime, "fuel[ing] public debates about the supposed links between race and crime."<sup>190</sup>

Jonathan Simon, presaging some of Alexander's insights, has described how "racist narratives of exclusion" have been replaced with "new and seemingly ethical narratives of crime or terrorism."<sup>191</sup> Our nation has become one that "govern[s] through crime."<sup>192</sup> For Simon, preoccupation with crime control influences

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186. See, e.g., MARY BOSWORTH, EXPLAINING U.S. IMPRISONMENT 124–26 (2010); GARLAND, *supra* note 29, at 41; MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 33–34 (2006); SIMON, *supra* note 31, at 52; BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 52–58 (2006); Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787, 1793–94 (2006).

187. GARLAND, *supra* note 29, at 97 ("Televised images of urban race riots, violent civil rights struggles, anti-war demonstrations, political assassinations, and worsening street crime reshaped the attitudes of the middle-American public in the late 1960s . . ."). Garland argues that the post-war, welfare-based criminal justice system was conceptually undermined by a challenge from the left. Progressives allied with the prisoners' rights movement to question the characterization of prisoners as victims of deprivation or pathology, as opposed to rational actors. *Id.* at 55–56. The "individualized treatment model" was viewed as "discriminatory," and prison was "a tool to repress blacks, the poor, the young and various cultural minorities." *Id.* at 55 (citing HILL & WANG, STRUGGLE FOR JUSTICE 12 (1971)). Because the state was viewed as suspect, critics preferred uniform, as opposed to discretionary, sentencing. *Id.* at 60–61. Garland argues that this progressive critique created an "ideological vacuum" that was then filled by the right. *Id.* at 62–63.

188. *Id.* at 90–92.

189. *Id.* at 102.

190. *Id.* at 136.

191. SIMON, *supra* note 31, at 274.

192. *Id.* at 4.

not only our approach to law enforcement and the threat of terrorism but all aspects of our life, including our neighborhoods and schools.<sup>193</sup> Alexander, Wacquant, Garland, Simon, and others have thus sought to shift the focus of the criminal justice reform discussion toward a historical and structural understanding of criminality and hyperincarceration.

These racial and class accounts of the carceral state support a new conceptual framing for immigration reform. In this vision, harsh criminal and immigration law enforcement practices are understood as related means of social control over marginalized communities, including poor black citizens and immigrants. Yolanda Vázquez has argued that U.S. immigration detention and deportation policy is a “tactic needed to . . . maintain racial inequality and ‘colorblind white dominance.’”<sup>194</sup> This understanding of the relationship between criminal and immigration enforcement demands a more inclusive approach to immigration reform—one that seeks broad remedies for noncitizens with criminal convictions, both documented and undocumented. Under this approach, social change movement actors recognize that the deviant/respectable distinction perpetuates a racialized system of control that affects not only immigrants but Blacks and other marginalized groups. Reformers proceed on the understanding that “a claim for respectability is . . . a claim for dominance.”<sup>195</sup> They refrain from seeking a “toehold of respectability” by invoking a dichotomy between criminals and immigrants and they minimize distinctions between types of convicted noncitizens.<sup>196</sup>

Criminal justice advocates and organizers have worked for decades to improve public perception of incarcerated, and formerly incarcerated, people. Attempts to inject humanity into the discussion of people with criminal records have included jettisoning dehumanizing rhetoric like “drug offender” and “ex-con” and educating the public about the ways in which privilege, law enforcement choices, and socioeconomic policies

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193. Foucault also saw a connection between punishment in schools and prisons. See FOUCAULT, *supra* note 28, at 227–28. For a discussion of how the criminal justice system is used to control homeless people in a futile attempt “to solve a set of entrenched social problems,” see KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* 21–22 (2010).

194. Vázquez, *Constructing Crimmigration*, *supra* note 36, at 606–07 (quoting IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 147–48 (2006)).

195. Balos & Fellows, *supra* note 73, at 1296 (addressing the challenge of coalition building for social change in the context of the movement to end gender violence).

196. See Mary Louise Fellows & Sherene Razack, *The Race to Innocence: Confronting Hierarchical Relations Among Women*, 1 *J. GENDER RACE & JUST.* 335, 336–37 (1998) (addressing the difficulties faced by marginalized groups when trying to organize).

have resulted in higher arrest rates in impoverished communities of color.<sup>197</sup> Simplistic counterposing of immigrants against people with criminal records undermines these efforts.

Moreover, there will always be people viewed as legitimately occupying both categories of criminals and immigrants. It seems unlikely that the public could maintain the prevalent, overly punitive attitude toward people convicted of a crime and, at the same time, support halting the deportation of individuals who have serious convictions but robust membership claims due to strong U.S. ties (like Ronald described in the Introduction). As crimmigration scholar Juliet Stumpf has argued, both our criminal and immigration systems have become intertwined precisely because they both involve membership claims.<sup>198</sup> The ability of reformers to rollback punitive deportation practices and secure legalization for the broadest group of undocumented immigrants as possible depends on the movement for immigrant justice aligning its messaging and politics with those of the racial justice movement to end hyperincarceration.<sup>199</sup> Following in the footsteps of the racial justice movement, the immigration reform movement could “choose[] to identify itself with its lawbreakers.”<sup>200</sup>

### B. Coalition

The salience of the racial justice critique of hyperincarceration to the immigrant rights movement reflects deep connections between racism and nativism. Kevin Johnson has mapped the “deeply complicated, often volatile, relationship . . . between racism directed toward citizens and that aimed at noncitizens,” demonstrating how historically the two have been intertwined.<sup>201</sup> In the nineteenth century, before federal

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197. See Jag Davies, *We Are People—Not Addicts, Criminals, Inmates, and Convicts*, DRUG POL’Y ALLIANCE (Oct. 20, 2014), <http://drugpolicy.org/blog/we-are-people-not-addicts-criminals-inmates-and-convicts> (“Media coverage of drugs and drug policy has grown much more sophisticated in the past few years. . . . [Although some] still often use inaccurate, offensive, or just plain absurd language that would be considered unthinkable when covering other issues.”).

198. Stumpf, *The Crimmigration Crisis*, *supra* note 76, at 396–97.

199. See Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona’s S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 358 (2012) (criticizing the fact that race is usually “buried in the discussion” on immigration reform); see also Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 528–29 (discussing the lack of consideration of race in modern immigration legal scholarship).

200. Austin, *supra* note 62, at 1774.

201. Kevin R. Johnson, *Immigration, Civil Rights, and Coalitions for Social Justice*, 1 HASTINGS RACE & POVERTY L.J. 181, 181 (2003) [hereinafter Johnson, *Immigration, Civil Rights, and Coalitions for Social Justice*].

immigration laws, the racial composition of frontier territories and states was shaped by racist, local exclusion laws and federal incentives for white people to move West.<sup>202</sup> Mae N. Ngai has charted how the United States has historically constructed non-European immigrants, particularly undocumented Mexican immigrants, as racialized “others,” even lynching them and subjecting them to Jim Crow laws.<sup>203</sup> Contemporary studies show that racism and anti-immigrant sentiment are linked when it comes to crime.<sup>204</sup> Attitudes of Whites towards Blacks pattern very closely their views of immigrants.<sup>205</sup> Support for harsh crime control responses correlates with the view that people of color, including immigrants, are disproportionately responsible for crime.<sup>206</sup>

In light of these and other connections, Kevin Johnson and others have called for immigrant rights and racial justice advocates to work together.<sup>207</sup> Viewing immigrant and racial

202. See Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1387–88, 1401 (2009).

203. NGAI, *supra* note 35, at 7, 50–55, 95, 132; see also Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1273–75 (1992) (noting how otherness is perpetuated in many ways, including by nuances and microaggressions).

204. See, e.g., Kelly Welch et al., *The Typification of Hispanics as Criminals and Support for Punitive Crime Control Policies*, 40 SOC. SCI. RES. 822 (2011) (discussing how the association of Blacks and Hispanics with crime correlates with belief in punitive criminal justice policies); THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES (2014), [http://sentencingproject.org/doc/publications/rd\\_Race\\_and\\_Punishment.pdf](http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf) (same).

205. Commentators have analyzed the ways in which attitudes towards immigrants have a racial dimension. See, e.g., JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925*, at 132 (2d ed. 1988) (providing a historical account of the relationship between nativism and racism); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1400–01 (1997) (discussing examples to demonstrate “how the ‘problem’ of legal and illegal immigration is colored in the national imagination: fear over immigration is not articulated solely around foreignness per se; it includes a strong racial dimension”); Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1616–17 (1996) (“[R]efusing an explicit consideration of ‘race’ or ‘culture’ within our legal system will not result in ‘colorblind’ and ‘cultureblind’ meritocratic justice, but in a replication of dominant patterns of dispersal of power.”). Research from the 1970s and 1980s demonstrated that anxiety about the economy resulted in both racism and more restrictive attitudes toward immigrants. George E. Higgins, Shaun L. Gabbidon & Favian Martin, *The Role of Race/Ethnicity and Race Relations on Public Opinion Related to the Immigration and Crime Link*, 38 J. CRIM. JUST. 51, 52 (2010).

206. Welch et al., *supra* note 204, at 822 (“[P]erceptions of Hispanics as criminals do increase support for punitive crime control measures . . .”). A study found that “Blacks and Hispanics, in support of . . . minority group threat theory, were less likely than Whites to believe that immigration made crime worse.” Higgins, Gabbidon & Martin, *supra* note 205, at 55. This study also found that “the perception of bad race/ethnic relations [is] associated with the belief that immigration makes crime worse.” *Id.*

207. Johnson, *Immigration, Civil Rights, and Coalitions for Social Justice*, *supra* note 201, at 183; Kevin R. Johnson, *The Case for African American and Latina/o Cooperation*

justice as distinct perpetuates the very lack of solidarity that immigrant reformers must move beyond. At the same time, coalition building does not come without challenges.<sup>208</sup> As Johnson and Bill Ong Hing have noted, “historically,” immigration has “divid[ed] African Americans, Latina/os, and Asian Americans.”<sup>209</sup> Competition for jobs and political power has strained relationships between immigrants and U.S.-born Blacks.<sup>210</sup> Critical race scholars and racial justice social movement actors point to the tension between the impetus to build a broad-based, unified movement for people of color and the need to prevent the erasure of the distinct identity and issues of “legacy” Blacks.<sup>211</sup> Immigrants’ claim that the United States is a nation of immigrants leaves out the experience of people descended from slaves.<sup>212</sup> Moreover, the movement for immigrant justice is not free

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*in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 357–58 (2003); see also Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 828 (1995) (discussing how building multiracial coalitions is most important in the fight against racism); Francisco Valdes, *Foreword: Under Construction—LatCrit Consciousness, Community, and Theory*, 85 CALIF. L. REV. 1087, 1120 (1997) (“[C]areful, sophisticated coalition-building, which includes rejecting all forms of junior partnership within a coalitional agenda, can provide substantive and political benefits that atomized anti-subordination projects are more likely to forego.”).

208. See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007) (“[There are] many formidable hurdles before the emergence of a new, multiracial civil rights movement.”).

209. Johnson & Hing, *supra* note 208, at 101–02, 105–07.

210. NICOLÁS C. VACA, *THE PRESUMED ALLIANCE: THE UNSPOKEN CONFLICT BETWEEN LATINOS AND BLACKS AND WHAT IT MEANS FOR AMERICA* 49–52, 57–61 (2004) (citing Kenneth J. Meier & Joseph Stewart, Jr., *Cooperation and Conflict in Multiracial School Districts*, 53 J. POL. 1123 (1991)); Mark Sawyer, *Racial Politics in Multiethnic America: Black and Latina/o Identities and Coalitions*, in *NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS* 265, 266–67 (Anani Dzidzienyo & Suzanne Oboler eds., 2005).

211. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1158–59, 1177, 1183, 1199, 1203, 1213, 1227, 1231 (2007); Haunani-Kay Trask, *Coalition-Building Between Natives and Non-Natives*, 43 STAN. L. REV. 1197, 1209 (1991); see also Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855, 858 (2003) (reviewing LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002); and ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999), both of which discuss “the power of [racial] coalitions to effect change”); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1600–02 (1997) (discussing how the “paradigmatic image of the racial Other in American life has been the black body”); William R. Tamayo, *When the “Coloreds” Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 1, 8, 11–14 (1995) (discussing “the mutual misunderstandings which have arisen between Blacks and the newer ‘coloreds,’” and arguing “that these prejudices have prevented the formation of a multiracial civil rights coalition”).

212. Anna Williams Shavers, *The Invisible Others and Immigrant Rights: A Commentary*, 45 HOUS. L. REV. 99, 111 (2008).



from racism.<sup>213</sup> Immigrants have sought gains by laying express claims to whiteness.<sup>214</sup> In his detailed account of how blackness became tethered to criminality, Khalil Gibran Muhammad demonstrates how Progressive era “statistical comparisons between the Foreign-born and the Negro were foundational to the emergence of distinctive modern discourses on race and crime.”<sup>215</sup> Statistics and “environmental theories of crime and delinquency [were used] to demonstrate the assimilability of the Irish, the Italian, and the Jew by explicit contrast to the Negro,” who was viewed as pathologically “savage[.]”<sup>216</sup> If “criminal” is code for “Black,” as Muhammad and Alexander contend, we can understand the contemporary immigrant/criminal distinction as yet another immigrant claim to whiteness.<sup>217</sup>

213. MUHAMMAD, *supra* note 58, at 54 (“[A]s black migration to Chicago gradually increased [in the early twentieth century], ‘Chicagoans of European extraction, including both recent migrants and old-stock native-born Americans, often felt a powerful bond of racial solidarity,’ including a shared fear of blacks as criminals.” (quoting JEFFREY S. ADLER, *FIRST IN VIOLENCE, DEEPEST IN DIRT: HOMICIDE IN CHICAGO, 1875–1920*, at 319 n.10 (2006))); Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005) (discussing how assimilation into U.S. society includes becoming racially classified); Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense*, 42 HARV. C.R.-C.L. L. REV. 259, 268 (2007) (discussing the entrenchment of racism in Latin America and the Caribbean due to the legacy of slavery); Tanya Katerí Hernández, *Too Black to Be Latino/a: Blackness and Blacks as Foreigners in Latino Studies*, 1 LATINO STUD. 152 (2003) (discussing racism of Latina/os toward Blacks); Toni Morrison, *On the Backs of Blacks*, in ARGUING IMMIGRATION: THE DEBATE OVER THE CHANGING FACE OF AMERICA 97 (Nicolaus Mills ed., 1994) (discussing how assimilation into U.S. society includes becoming racist).

214. Immigrants from India, Japan, Syria, and Mexico, among other countries, argued that they were white to obtain more favorable treatment under immigration and naturalization law. See NGAI, *supra* note 35, at 38–46, 50–54 (discussing lawsuits involving claims to whiteness); Ariela J. Gross, *Texas Mexicans and the Politics of Whiteness*, 21 LAW & HIST. REV. 195, 197–98 (2003) (some Mexicans claimed to be white to evade Jim Crow segregation); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 322–23 (1997) (discussing phenomenon of seeking to pass as white); Shavers, *supra* note 212, at 116–17 (discussing immigrants’ claims to whiteness or status as not black). See generally NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (2008); DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* (2005).

215. MUHAMMAD, *supra* note 58, at 6 (emphasis omitted). For a social theory account how blackness has become imbued with negative and durable social meaning, see GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 67–73 (2002). For a general theory of racial formation, see MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S*, at 57–69 (1986).

216. MUHAMMAD, *supra* note 58, at 7, 34. As a result, “European immigrants—the Irish and the Italians and the Polish, for example—gradually shed their criminal identities while blacks did not[.]” *Id.* at 5.

217. Discussing the development of how criminality became associated with blackness, Khalil Gibran Muhammad has observed that at “its worst, the stigma of criminality was an intellectual defense of lynching, colonial-style criminal justice practices, and genocide.” *Id.* at 11. The immigrant advocacy and organizing group Families for Freedom states on its

Assuming that these challenges to coalition building can be navigated, now is an opportune time for immigrant justice reformers to work in concert with those interested in ending hyperincarceration in the criminal justice system. Due in part to Alexander having popularized the racial account of the carceral state, policymakers have begun taking a hard look at our bloated criminal justice system, a move facilitated by fiscal concerns, the shortcomings of the war on drugs, and falling crime rates. The last ten years have seen a shift in public opinion about mass criminal incarceration. In 2001, the Pew Research Center reported that roughly half of the public supported the move away from mandatory minimum sentences for drug offenses; that percentage is now up to 63%.<sup>218</sup> Today, 67% of the public favors a focus on treatment rather than prosecution for use of drugs such as heroin and cocaine.<sup>219</sup> In the four-year span of 2009 to 2013, forty states rolled back the punitiveness of their drug laws.<sup>220</sup>

The U.S. Department of Justice has embarked on what promises to be at least a small course correction in the federal criminal system with the “Smart on Crime” initiative.<sup>221</sup> The initiative reduces sentences for minor, nonviolent drug offenses and refocuses resources on diversion and reentry programs. It further seeks to limit the collateral consequences of convictions as formerly incarcerated people reenter our communities.<sup>222</sup> Moving away from a focus on individual character traits and community culture, the initiative promises to keep people safer by focusing on the social and economic factors that correlate with crime.<sup>223</sup> Endorsing a structural critique of hyperincarceration, U.S. Attorney General Eric Holder pointed to the “vicious cycle of

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website that the phrase “We’re not criminals!” is “probably the most embarrassing, anti-criminal justice, anti-black mantra of the mainstream movement.” Mónica Novoa, *Letter to the Movement: Inciting Love & Casting out Shame in 2015*, FAMILIES FOR FREEDOM (Jan. 15, 2015), <http://familiesforfreedom.org/news/letter-movement-inciting-love-casting-out-shame-2015-mónica-novoa>.

218. PEW RESEARCH CTR., AMERICA’S NEW DRUG POLICY LANDSCAPE: TWO-THIRDS FAVOR TREATMENT, NOT JAIL, FOR USE OF HEROIN, COCAINE 1, 7 (2014), [http://people-press.org/files/legacy-pdf/04-02-14 Drug Policy Release.pdf](http://people-press.org/files/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf).

219. *Id.* at 8.

220. Medical marijuana is legal in twenty-three states and is entirely legal in Alaska, Colorado, Oregon, Washington, and the District of Columbia. See 23 *Legal Medical Marijuana States and DC*, PROCON, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Jan. 7, 2016).

221. SMART ON CRIME, *supra* note 94.

222. *Id.* at 3, 5.

223. Eric Holder, U.S. Attorney General, Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), <http://justice.gov/iso/opa/ag/speeches/2014/ag-speech-140211.html> (“[M]aintaining family connections, developing job skills, and fostering community engagement can reduce the likelihood of re-arrest.”).

poverty, criminality, and incarceration [that] traps too many Americans and weakens too many communities.”<sup>224</sup> A central focus of “Smart on Crime” is a program to commute long sentences and ease reentry of formerly incarcerated people through restoration of voting and other civic rights.<sup>225</sup> Employing a racial justice lens, the Attorney General observed that felony disenfranchisement “echo[es] policies during a deeply troubled period in America’s past—a time of post-Civil War repression” when “many Southern states enacted disenfranchisement schemes to specifically target African Americans and diminish the electoral strength of newly-freed populations.”<sup>226</sup>

Several federal legislative changes aimed at reducing hyperincarceration have been implemented or are in the works.<sup>227</sup> The Fair Sentencing Act of 2010 reduced the gross disparity in sentences between powder and crack cocaine.<sup>228</sup> The Second Chance Act provides millions in funding every year for reentry programs at the state and local level.<sup>229</sup> The Smarter Sentencing Act puts discretion back into the hands of judges.<sup>230</sup> The Senate Judiciary Committee has expressed bipartisan support for reducing mandatory minimums for federal drug offenses and shortening the sentences for inmates who attend rehabilitation programs.<sup>231</sup> The U.S. Sentencing Commission has voted to reduce federal sentences for drug traffickers.<sup>232</sup>

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224. Eric Holder, U.S. Attorney General, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

225. Holder, *supra* note 223.

226. *Id.*

227. For a discussion of initiatives and proposed legislation to curb hyperincarceration, see Héctor L. Ramos-Vega, *Proposed Legislation and Other Initiatives to Reduce Prison Terms for Nonviolent Drug Offenders: A Great Step Toward Curbing Mass Incarceration, but Is It Enough?*, FED. LAW., Aug. 2014, at 4, 4–6.

228. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.); Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS. 27, 30 (2013).

229. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified as amended in scattered sections of 18 and 42 U.S.C.); *Reentry and Community Corrections Committee: Second Chance Act*, ASS’N ST. CORRECTIONAL ADMINISTRATORS, <http://asca.net/projects/13/pages/139> (last visited Feb. 6, 2016).

230. See Smarter Sentencing Act of 2013, S. 1410, 113th Cong. § 3 (2014); see also Justice Safety Valve Act of 2015, S. 353, 114th Cong. § 2.

231. *Senate Judiciary Committee Approves Smarter Sentencing Bill*, ABA WASH. LETTER, Feb. 2014, at 3, 3, [http://www.americanbar.org/content/dam/aba/publications/GAO/2014/2014feb\\_wl\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/GAO/2014/2014feb_wl_authcheckdam.pdf).

232. News Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences, (Apr. 10, 2014), [http://ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410\\_Press\\_Release.pdf](http://ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf). It

The support for prison reform is bipartisan.<sup>233</sup> Kentucky is one of a number of conservative states to have passed bipartisan legislation to reduce incarceration, largely for cost saving reasons.<sup>234</sup> Kentucky Republican Senator Rand Paul is co-sponsoring with a Democrat the REDEEM Act, which would incentivize states to make eighteen the age of criminal responsibility, among other reforms.<sup>235</sup> Kansas now requires that many drug offenders convicted of simple possession enter drug treatment.<sup>236</sup> In addition to reducing incarceration rates for drug possession, probation revocations went from 25% to 12% and parole violations reduced by 44%.<sup>237</sup>

The strange bedfellows for criminal justice reform include Tea Party billionaires Charles and David Koch, who have joined liberal politicians and organizations like the ACLU “to reduce incarceration by 50 percent in eight years.”<sup>238</sup> Prominent

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is estimated that 70% of defendants convicted of drug trafficking offenses stand to benefit from the amendment. *Id.*

233. For example, Republican Senator Rand Paul from Kentucky supports sentencing and prison reform measures put forth by Attorney General Eric Holder. Paul Steinhauser, Ashley Killough & Greg Clary, *Rand Raul: 'Fight for Justice Now' on Unfair Sentencing*, CNN (July 25, 2014, 12:41 PM), <http://cnn.com/2014/07/25/politics/paul-urban-league/>.

234. Kentucky projects a cost savings of over \$400 million. See AM. CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 17–51 (2011), <https://aclu.org/files/assets/smartreform/isspossible.pdf> (profiling Texas, Kansas, Mississippi, South Carolina, Kentucky, and Ohio). The cost of treatment averages \$3,422 per person, whereas the cost of imprisonment is \$24,970. Jennifer Roth, *Kansas Featured in Smart Reform Report*, BENDS TOWARD JUST. (Aug. 19, 2011), <http://rothjennifer1.typepad.com/bendstowardjustice/2011/08/kansas-reco-gnized-for-smart-on-crime-measures.html>. California, New Jersey, and New York have reduced their inmate populations by 20% in the last ten years. Marc Mauer, *Why Prison Populations Are Shrinking and How to Shrink Them More*, GOVERNING (Mar. 20, 2014), <http://governing.com/gov-institute/voices/col-states-how-shrink-prison-population-costs-in-carceration.html>. Other states like Georgia, Michigan, South Carolina, and Texas are on a similar path. *Id.*

235. Press Release, Rand Paul, Sens. Paul and Booker Re-Introduce the REDEEM Act (Mar. 9, 2015), <http://paul.senate.gov/news/press/sens-paul-and-booker-re-introduce-the-redeem-act>.

236. For criticism of some reentry programs, see generally Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1 (2014).

237. Roth, *supra* note 234. As further proof of the effectiveness of treatment programs, Kansas subsequently rolled back some of its programs and saw an increase in parole violations. *Id.*

238. Erik Eckholm, *A.C.L.U. in \$50 Million Push to Reduce Jail Sentences*, N.Y. TIMES, Nov. 7, 2014, at A14. The Koch brothers have identified five goals for reform, including “fair treatment under the law; competent and fair representation; mandatory minimum reforms; and restoration of rights.” Dana Liebelson, *Inside the Koch Campaign to Reform Criminal Justice*, HUFFINGTON POST (Feb. 9, 2015, 2:42 PM), [http://huffingtonpost.com/2015/02/09/koch-brothers\\_n\\_6646540.html](http://huffingtonpost.com/2015/02/09/koch-brothers_n_6646540.html).

conservative Newt Gingrich supported the passage of California’s Proposition 47.<sup>239</sup> This ballot initiative redesignates some nonviolent felony offenses as misdemeanors and provides that the resulting financial savings be used for programs aimed at keeping people out of the criminal justice system.<sup>240</sup>

The extent of the turning tide is limited, however. Current prison reforms are modest and usually aimed at the most politically palatable group of formerly incarcerated people, namely men and women convicted of low-level, nonviolent drug offenses.<sup>241</sup> Much criminal justice reform rhetoric perpetuates the deserving/undeserving narrative, drawing a bright line between minor drug offenders and others, usually described as serious drug dealers or violent offenders.<sup>242</sup> The next frontier of criminal justice reform—one that more significantly rejects respectability messaging—would involve expanding the category of crimes to which a less punitive approach should apply.<sup>243</sup> Widening the ambit of concern would have the most impact in state prison systems, where, in 2012, 54% of incarcerated people were serving time for a violent offense, compared to 16% for a drug crime.<sup>244</sup>

Moreover, cost savings, rather than concerns about racial impact, human dignity, or the harms of hyperincarceration, are what drive bipartisan alliances in the criminal justice arena. As Marie Gottschalk and others have cautioned, the “cost-benefit language is problematic,” as it “constricts the political space to

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239. Gary Cohn, *Newt Gingrich and Jay-Z Find Common Cause in a Prison Reform Proposition*, HUFFINGTON POST (Oct. 23, 2014, 6:15 PM), [http://huffingtonpost.com/2014/10/23/proposition-47\\_n\\_6038310.html](http://huffingtonpost.com/2014/10/23/proposition-47_n_6038310.html); Newt Gingrich & B. Wayne Hughes Jr., Opinion, *What California Can Learn from the Red States on Crime and Punishment*, L.A. TIMES (Sept. 16, 2014, 5:27 PM), <http://latimes.com/opinion/op-ed/la-oe-0917-gingrich-prop-47-criminal-justice-20140917-story.html> (commenting on the benefits of Proposition 47 and urging voters to support it).

240. *Proposition 47*, LEGIS. ANALYST’S OFF. (Nov. 4, 2014), <http://lao.ca.gov/ballot/2014/prop-47-110414.aspx>.

241. See MARC MAUER & NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES (2014), [http://sentencingproject.org/doc/publications/inc\\_Fewer\\_Prisoners\\_Less\\_Crime.pdf](http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf).

242. See Andrea Roth, Opinion, *Let’s Consider Leniency for Many ‘Violent’ Offenders Too*, L.A. TIMES (July 24, 2015, 5:00 AM), <http://latimes.com/opinion/op-ed/la-oe-roth-non-violent-prison-clemency-20150724-story.html>.

243. See Marc Mauer & David Cole, Opinion, *How to Lock up Fewer People*, N.Y. TIMES, May 24, 2015, at SR6 (urging those concerned about mass incarceration to look beyond convicted of “low-level drug crimes and other non-violent offenses” to people convicted at violent crimes).

244. E. ANN CARSON, U.S. DEPT OF JUSTICE, NCJ 247282, PRISONERS IN 2013, at 2, 15 (2014), <http://bjs.gov/content/pub/pdf/p13.pdf>. As Marie Gottschalk points out, the focus on violent crime is important because of “disproportional representation of blacks ‘among the more serious versions within each of the offense types.’” GOTTSCHALK, *supra* note 45, at 125–26 (emphasis omitted) (quoting Alfred Blumstein, *On the Racial Disproportionality of United States’ Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1268 (1982)).

challenge penal policies and practices on social justice or human rights grounds” and fails to challenge the political and economic interests responsible for the carceral state.<sup>245</sup> Moreover, much of the money saved has been funneled into law enforcement programs rather than poor communities.<sup>246</sup> “[L]eft–right” coalitions on criminal justice reform are thus “fraught with [both] possibility and peril.”<sup>247</sup>

Despite their limitations, reforms in the criminal justice system contrast starkly with our nation’s persistently punitive immigration practices. Deportation laws continue to make virtually all drug-related offenses a trigger for removal. The distribution of even a small amount of drugs results in the “aggravated felony” label.<sup>248</sup> Now more than ever, immigration reformers have both philosophical and strategic reasons to ensure that their politics and analyses line up with those of the progressive movement to end hyperincarceration.

### C. *The Causes of Crime*

The respectable-immigrants-only vision of immigration reform rests on the dominant view of criminal behavior as simply a product of bad choices by discrete individuals.<sup>249</sup> An alternate framework for immigration reform understands our criminal justice regime as a race- and class-based system of control in which crime rates are a function of policy choices.<sup>250</sup> Of course, crime

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245. GOTTSCHALK, *supra* note 45, at 17; *see also* Sonja B. Starr, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to The Prisoner’s Dilemma*, 98 IOWA L. REV. BULL. 97 (2013).

246. GOTTSCHALK, *supra* note 45, at 99. Gottschalk describes how Texas has been “hailed . . . as a model” on prison reform but at the same time has been “energetically disinvesting” from disadvantaged communities. *Id.* at 108, 111.

247. *Id.* at 16. Gottschalk provocatively asks: “[I]s it truly possible to make serious reductions in the size and gross inequities of the carceral state through a largely top-down process that is ostensibly non-partisan and politically bloodless?” *Id.* at 100.

248. 8 U.S.C. § 1101(a)(43) (2012). *See supra* notes 10–12 and accompanying text for a discussion of the “aggravated felony” definition. The only exception is social sharing of a small amount of marijuana. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693–94 (2013).

249. Marie Gottschalk has observed that individual “explanations that stress personal responsibility have continued to trump structural ones in discussions of crime, punishment, and penal reform, thus reinforcing the neoliberal slant in penal policy.” GOTTSCHALK, *supra* note 45, at 15; *see also* Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961, 1017–18 (2014) (discussing how tough-on-crime ideology views criminal behavior as “internal to the individual”); D. Marvin Jones, “*He’s a Black Male . . . Something Is Wrong with Him!*” *The Role of Race in the Stand Your Ground Debate*, 68 U. MIAMI L. REV. 1025, 1037 (2014) (“While the reasons for blacks’ relatively marginalized economic status are deeply associated with structural factors, the overwhelming mainstream view is that people become a part of this group basically through bad choices.”).

250. *See supra* notes 183–85 and accompanying text (discussing the role of neoliberal economic and social policies).

rates relate not only to enforcement decisions about whom, and what types of activity, to target, but also to the levels of unlawful activity. Criminologists do not agree on precisely what causes people to engage in criminal activity. Individual characteristics, such as gender, genetics, mental illness, and conditions in the brain, may make people more prone to commit crime.<sup>251</sup> Although some people break the law even while living under ideal social and economic conditions, a growing consensus points to how structural features of our society influence behavior leading to criminal activity.<sup>252</sup>

Historical and neighborhood-level factors have strong explanatory power, at least with respect to street and violent crime.<sup>253</sup> The legacy of slavery and segregation as well as

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251. For a summary of the evidence that genetic markers are associated with certain types of crime, see Terrie E. Moffitt, Stephen Ross & Adrian Raine, *Crime and Biology*, in CRIME AND PUBLIC POLICY, *supra* note 80, at 53, 53. For a discussion of how brain functioning influences behavior, see *infra* note 283 and accompanying text. See also David Eagleman, *The Brain on Trial*, ATLANTIC, July–Aug. 2011, at 112. Young men may be more vulnerable to structural effects than young women. Moffitt, Ross & Raine, *supra* note 80, at 53, 53–54 (“[I]n almost all mammalian species, . . . males begin to seek novelty, search for stimulation, roam afar from family, and engage in risk-taking around the age of reproductive maturity. This phenomenon [is] called ‘dispersal’ . . . Evolutionary psychologists think that dispersal has intriguing implications for our understanding of the adolescent peak of the age-crime curve.” (citations omitted)). In 2003, Human Rights Watch reported that one in six people in jail or prison are mentally ill, and that there are three times more mentally ill people in prisons than in hospitals. SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1, 18 (Joseph Saunders & James Ross eds., 2003), <https://hrw.org/reports/2003/usa1003/usa1003.pdf>. Some individuals become mentally ill after being incarcerated due to the conditions of their confinement. See *id.* at 149–50.

252. White, *supra* note 183, at 794–95 (“[S]ocial structure plays a key role in conditioning more conscious behaviors within the criminal justice system.”).

253. Street crime typically refers to “murder, assault, robbery, rape, burglary, and larceny.” John Hagan & Ruth D. Peterson, *Criminal Inequality in America: Patterns and Consequences*, in CRIME AND INEQUALITY 14, 15 (John Hagan & Ruth D. Peterson eds., 1995) [hereinafter Hagan & Peterson, *Criminal Inequality in America*]. The contention that crime rates are based on structural factors rather than individual population attributes finds support in research showing that socially and economically disadvantaged neighborhoods in twenty-one U.S. cities had high crime rates over the course of many years notwithstanding racial and ethnic changes in population. See *id.* at 14 (citing CLIFFORD R. SHAW & HENRY D. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS 14, 315–19 (1942)); see also *id.* at 3, 7 (“[G]roups that are economically deprived—particularly young, disadvantaged minority males—are . . . heavily involved in serious criminal offenses, especially violent street crime. . . . [M]acrosocial patterns of residential inequality give rise to the social isolation and ecological concentration of the truly disadvantaged in ghetto communities[, which] leads to structural barriers and cultural adaptations that undermine social organization and hence the control of crime.”); Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in CRIME AND INEQUALITY, *supra*, at 37, 39 (certain characteristics of communities lead to a high crime rate). The causes of white-collar crime might be different. See EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 5–7 (1983) (criticizing theories of crime which blame illegal behavior on poverty, broken homes, and Freudian fixations and noting that healthy upbringings and intact psyches have not served to deter lawbreaking by persons in positions of power).

neoliberal economic and political choices have resulted in urban areas of concentrated poverty and disadvantage, the sites of the highest rates of reported crime.<sup>254</sup> Much contemporary thinking about the structural causes of crime points to how economic and social forces break down social structure and “community-based social controls” that keep crime rates low.<sup>255</sup> Income inequality, unemployment, and the lack of education and community resources are linked to high crime rates, and, conversely, the infusion of resources and institution building correlates with a reduction in crime.<sup>256</sup> “Building social capital,” not additional law enforcement and incarceration, may be the best crime prevention.<sup>257</sup> Stabilizing and spreading out new public housing among different communities can also reduce crime.<sup>258</sup> Increasing education

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254. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 57–58 (1987) (discussing the cause of concentrated poverty and its effects on communities, including increasing reported crime rates); Martha A. Gephart, *Neighborhoods and Communities as Contexts for Development*, in *1 NEIGHBORHOOD POVERTY: CONTEXT AND CONSEQUENCES FOR CHILDREN* 1, 1 (Jeanne Brooks-Gunn et al. eds., 1997) (“During the past several decades, poverty in the United States has become more urban, spatially concentrated, and clustered with other indicators of disadvantage.”).

255. The “social disorganization” theory of Shaw and McKay, first developed in the 1940s, has gained popularity again. See Hagan & Peterson, *Criminal Inequality in America*, *supra* note 253, at 14; Scot Wortley et al., *The Root Causes of Youth Violence: A Review of Major Theoretical Perspectives*, in *THE REVIEW OF THE ROOTS OF YOUTH VIOLENCE* 1, 54–55 (Roy McMurtry & Alvin Curling eds., 2008). For discussion of the social disorganization theory of Shaw and McKay, see *supra* note 253.

256. GOTTSCHALK, *supra* note 45, at 82 (“The chronically marginalized and the chronically disadvantaged are the people most likely to end up in jail or prison.”); Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis*, 66 N.Y.U. ANN. SURV. AM. L. 641, 659 (2011) (citing RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* 190–96 (2009)) (stating that nations with higher income inequality have the greatest prevalence of social ills); Pablo Fajnzylber, Daniel Lederman & Norman Loayza, *Inequality and Violent Crime*, 45 J.L. & ECON. 1, 1 (2002) (“Crime rates and inequality are positively correlated within countries and, particularly, between countries, and this correlation reflects causation from inequality to crime rates . . . .”); Matthew Freedman & Emily G. Owens, *Low-Income Housing Development and Crime*, 70 J. URB. ECON. 115, 115 (2011) (“[L]ow-income housing development in the poorest neighborhoods brings with it significant reductions in violent crime.”); John Hagan & Ruth D. Peterson, *Introduction to CRIME AND INEQUALITY*, *supra* note 253, at 1, 4 (“[G]laring social and economic inequalities in our society impose correspondingly high costs in the form of street crime.”).

257. Ichiro Kawachi, Bruce P. Kennedy & Richard G. Wilkinson, *Crime: Social Disorganization and Relative Deprivation*, 48 SOC. SCI. & MED. 719, 729 (1999). “Social capital is the capacity of a person to accomplish important personal aims through that person’s connections to others.” Clear, *supra* note 133, at 185 (emphasis omitted).

258. Robert J. Sampson, *The Community*, in *CRIME AND PUBLIC POLICY*, *supra* note 80, at 210, 226–28; see also Adam Bickford & Douglas S. Massey, *Segregation in the Second Ghetto: Racial and Ethnic Segregation in American Public Housing, 1977*, 69 SOC. FORCES 1011, 1035 (1991) (explaining how the U.S. public housing system currently operates as a publically funded system to isolate people by race and class).



and employment opportunities has been shown to have a similar effect.<sup>259</sup>

Peer and family influences also may play a role, as well as violence in the home.<sup>260</sup> Approximately 63% of imprisoned young men, aged eleven to twenty, who were convicted of homicide had killed the batterer of their mothers.<sup>261</sup> More controversially, some have pointed to the negative influence of a “ghetto culture” that gained influence after the middle class moved out of urban centers in the 1970s.<sup>262</sup> As explained by William Julius Wilson, “instead of focusing on the changing situational and structural factors that accompanied the black middle- and working-class exodus from the inner city,” some have pointed to “a ghetto culture of poverty.”<sup>263</sup> Rejecting this focus on culture, Wilson suggests that the structural “concentration effects” of poverty more accurately explain inner city crime rates.<sup>264</sup> In particular, unemployment due to “social isolation . . . from the job network system” better explains the phenomenon of how “welfare and the underground economy” became regarded “as a way of life.”<sup>265</sup> As Regina Austin has commented, some view “straight life [as] ‘filled with drudgery and

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259. Lance Lochner, *Non-Production Benefits of Education: Crime, Health, and Good Citizenship* 27–30 (Nat’l Bureau of Econ. Research, Working Paper No. 16722, 2011) (finding that improvements in education can lower crime and other social benefits); see also Price V. Fishback, Ryan S. Johnson & Shawn Kantor, *Striking at the Roots of Crime: The Impact of Welfare Spending on Crime During the Great Depression*, 53 J.L. & ECON. 715, 733 (2010) (discussing how New Deal spending reduced the crime rate).

260. A study found that “exposure to violence had a negative effect on parenting, . . . reduc[ing] parents’ ability to properly monitor their children.” See Wesley G. Jennings et al., *A Multi-Level Approach to Investigating Neighborhood Effects on Physical Aggression Among Urban Chicago Youth*, 36 AM. J. CRIM. JUST. 392, 395 (2011) (citing Richard Spano, Alexander T. Vazsonyi & John Bolland, *Does Parenting Mediate the Effects of Exposure to Violence on Violent Behavior? An Ecological-Transactional Model of Community Violence*, 32 J. ADOLESCENCE 1321 (2009)).

261. Crenshaw, *supra* note 71, at 1255.

262. WILSON, *supra* note 254, at 55–56.

263. *Id.* at 55. Wilson identifies the “popular media” as primarily responsible for attributing crime to culture. *Id.* Theorists, however, have also endorsed this view. See John Hagan & Ruth D. Peterson, *Introduction to CRIME AND INEQUALITY*, *supra* note 253, at 1, 4 (citing to theorists who contend that “the greater involvement of have-nots in crimes of violence has a cultural foundation”).

264. WILSON, *supra* note 254, at 58 (emphasis omitted). Khalil Gibran Muhammad, discussing late nineteenth and early twentieth century discourse on crime, documents how a focus on black culture replaced a prior focus on biology. MUHAMMAD, *supra* note 58, at 99.

265. WILSON, *supra* note 254, at 57; see also John Hagan & Ruth D. Peterson, *Introduction to CRIME AND INEQUALITY*, *supra* note 253, at 1, 7 (culture is an “adaptation[]” to structural forces); Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime and Urban Inequality*, in *CRIME AND INEQUALITY*, *supra* note 253, at 37, 41 (“[I]f cultural influences exist, they vary systematically with structural features of the urban environment. . . . The sources of violent crime appear to be remarkably invariant across race and rooted instead in the structural differences among communities, cities, and states in economic and family organization.”).

disappointment” because the available jobs are “restricted and tedious.”<sup>266</sup>

Crime, especially violent crime, reflects the health of a society and is thus best regarded as “a social mirror.”<sup>267</sup> A focus on immigrants and crime diverts much needed attention away from our attempts to understand the ways in which our society’s economic and social policies breed criminality. Crime is typically not imported but homegrown.<sup>268</sup> Although the United States has experienced episodes of groups of people seeking entry having already been convicted of a crime, the Mariel boatlift being the most prominent example, the vast majority of convicted noncitizens accrued their criminal record subsequent to entry.<sup>269</sup> Statistics show that “the longer immigrants . . . reside[] in the United States, the higher [are] their incarceration rates.”<sup>270</sup> Addressing differences in how ethnic communities fare in the United States, Alejandro Portes has illustrated how “labor” and

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266. Austin, *supra* note 62, at 1796 (first quoting Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* 188 (Frédérique Delacoste & Priscilla Alexander eds., 1987); and then quoting ELEANOR M. MILLER, *STREET WOMAN* 148 (1986)).

267. Kawachi, Kennedy & Wilkinson, *supra* note 257, at 719 (demonstrating that “crime—especially violent crime—is a sensitive indicator of social relations in society”); see MUHAMMAD, *supra* note 58, at 69 (“[Crime is] a symptom of countless wrong social conditions.” (quoting W.E.B. DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* 242 (Univ. of Pa. Press ed. 1996) (1899))).

268. See Ben Feldmeyer, *Immigration and Violence: The Offsetting Effects of Immigrant Concentration on Latino Violence*, 38 *SOC. SCI. RES.* 717, 719 (2009) (“Latino immigrants are not a particularly crime-prone group and generally do not have criminal motives when they enter the country.”); *supra* note 8 and accompanying text.

269. But see Dingeman & Rumbaut, *supra* note 39, at 382–83 (citing 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* 13 (2007)) (stating that contrary to popular opinion, Marielitos “were not overrepresented among either homicide victims or offenders”). An important exception to the general rule that crime is not imported is the phenomenon of transnational gang activity. Commentators have pointed out, however, that the origin of transnational gangs can be traced to the United States’ deportation of gang members to Central America and Mexico. See DOUGLAS FARAH, WOODROW WILSON INT’L CTR. FOR SCHOLARS, *ORGANIZED CRIME IN EL SALVADOR: THE HOMEGROWN AND TRANSNATIONAL DIMENSIONS* 12 (2011), <http://wilsoncenter.org/sites/default/files/Farah.FIN1.pdf>; see also Jonah M. Temple, Note, *The Merry-Go-Round of Youth Gangs: The Failure of the U.S. Immigration Removal Policy and the False Outsourcing of Crime*, 31 *B.C. THIRD WORLD L.J.* 193, 193 (2011) (“The United States’ policy of deporting noncitizen criminals to their countries of origin is fueling a proliferation of gang membership both in Central America and in the United States. Deportation does not deter gang activity but instead helps to facilitate the transnational movement of youth gangs.”). For a discussion of how gang violence in El Salvador is now attributable to local youth rather than deportees, see Dingeman & Rumbaut, *supra* note 39, at 396. For a discussion of how U.S. rhetoric about Mexican gang violence and the transnational threat is exaggerated, see Weissman, *supra* note 2, at 164–67.

270. Dingeman & Rumbaut, *supra* note 39, at 377 (emphasis omitted) (citing to 2000 Census data).

“professional” immigrants possess different human capital and are received differently by host communities.<sup>271</sup> It is these “structural features” that determine whether immigrant groups will become part of “high-status model groups poised to be integrated promptly into the American mainstream or into caste-like, impoverished minorities.”<sup>272</sup>

An accurate analysis of the causes of crime would focus on the larger economic and social forces in play, resisting the temptation to understand crime control as a simple matter of deporting or locking up certain groups of people.<sup>273</sup> Deporting convicted noncitizens, like an overly punitive approach to criminal law enforcement, fails to engage with the structural causes of crime.<sup>274</sup> A more inclusive vision of immigration reform takes a big picture view of crime, casting it as largely a function of economic and social forces for which we as a nation bear collective responsibility.<sup>275</sup>

#### D. *The Free Will Trap*

The moral culpability of committing a crime impedes efforts to advocate for better treatment of convicted noncitizens, both documented and undocumented.<sup>276</sup> Those who support immigration reform are more willing to forgive the transgressions of people who cross the border without permission than those who commit crimes after entry. What I will call the “free will trap”

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271. Portes, *supra* note 149, at 94. For a critique of how the segmented assimilation theory relies upon the model-minority narrative, cultural explanations for crime, and a corresponding “antiblack ideology,” see Tamara K. Nopper, *Asian Americans, Deviance, Crime, and the Model Minority Myth*, in 1 COLOR BEHIND BARS: RACISM IN THE U.S. PRISON SYSTEM 207, 208, 235–36 (Scott Wm. Bowman ed., 2014).

272. Portes, *supra* note 149, at 94. Commentators have pointed to the myth of immigrant upward mobility in U.S. society. See Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879, 882, 901–02 (2007). These insights are a response to Adam Cox and Eric Posner’s argument that we should judge immigrants by their post-entry conduct. See Cox & Posner, *supra* note 30, at 836–40.

273. As Jennifer Chacón has discussed, “[T]here is little reason to believe that [the recent] expansion in the removal of non-citizens will serve as an effective or efficient means of decreasing domestic crime or preventing undocumented migration.” Chacón, *Unsecured Borders*, *supra* note 33, at 1832.

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

275. For a related analysis of how gender violence must be understood in the context of the political economy and how the movement to end gender violence should work in coalition with the anti-poverty movement, see Weissman, *The Personal Is Political*, *supra* note 72, at 428–30. See also *infra* note 280.

276. Marie Gottschalk has observed, “Issues of crime and punishment are so vexing because they are inextricably bound up with judgments about morality, how social benefits and burdens should be allocated, the proper reach of the government, and what kind of democratic society the United States is, was, and will be.” Gottschalk, *supra* note 135, at 564 (citing IAN LOADER & RICHARD SPARKS, PUBLIC CRIMINOLOGY? 108 (2011)).

thwarts dismantling the view that deportation is appropriately used for crime control. The free will trap is the idea that, while structural forces might place a person at risk of engaging in criminal activity, people exercise their free will when they choose whether to commit a crime.<sup>277</sup> Supporting the free will trap is the observation that the majority of people considered “at risk” for committing a crime do not do so.<sup>278</sup> Because violent offenders create victims, the free will trap is particularly acute as it relates to them.

The free will objection flows from the prevailing criminological paradigm that criminal activity stems from bad choices by individuals.<sup>279</sup> If crime is simply the exercise of free will, an unforgiving immigration system based on crime control appears justified. The recognition that criminal conduct is driven at least in part by economic and social forces, the legacy of slavery and racial segregation, and discriminatory enforcement practices, however, complicates this view and suggests that society at large is at least partially responsible.<sup>280</sup>

Rather than regard criminals as unredeemable others, a structural view suggests that not very much apart from circumstances of birth separates those who have never been convicted from those who have.<sup>281</sup> One provocative attempt to turn

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277. For an analogous discussion of how homelessness is viewed as “an individual choice,” see BECKETT & HERBERT, *supra* note 193, at 25.

278. Terrie E. Moffitt, Stephen Ross & Adrian Raine, *Crime and Biology*, in CRIME AND PUBLIC POLICY, *supra* note 80, at 53, 56 (“Most people who are socially disadvantaged do not become involved in an antisocial, criminal lifestyle, and many wealthy people do commit crimes.”). Prosecutors make this argument in opposition to mitigation in death penalty cases. However, the U.S. Supreme Court has stated that capital sentencing can be based on “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

279. GARLAND, *supra* note 29, at 185; Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 309–11 (2005). As discussed *supra* note 30, this view of criminal activity undergirds the argument of Adam Cox and Eric Posner in favor of post entry population selection criteria.

280. Ahmed White argues that “structure and [individual] agency represent complementary dynamics” and that “social structure plays a key role in conditioning more conscious behaviors within the criminal justice system.” White, *supra* note 183, at 794. Glenn C. Loury argues that society should “recognize a kind of social responsibility, even for the wrongful acts freely chosen by individual persons.” GLENN C. LOURY ET AL., RACE, INCARCERATION, AND AMERICAN VALUES 32–33 (2008) (“[Although] individuals always have choices . . . [s]ociety at large is implicated in an individual person’s choices because we have acquiesced in—perhaps actively supported, through our taxes and votes, words and deeds—social arrangements that work to our benefit and his detriment, and which shape his consciousness and sense of identity in such a way that the choices he makes, which we may condemn, are nevertheless compelling to him—an entirely understandable response to circumstance.”).

281. See ALEXANDER, *supra* note 100, at 215 (“All people make mistakes. All of us are sinners.”).

the criminal/noncriminal binary on its head appears in the work of the group “We Are All Criminals,” a project that “seeks to challenge society’s perception of what it means to be a criminal” by telling the stories of people who committed crimes but were never arrested.<sup>282</sup> The project maintains a website of video confessions by people who committed crimes but who never had to live with the stigma of being arrested, usually because their race or class protected them from arrest.

In addition to a focus on the structural causes of crime and crime rates, advances in science may also help dispel the view that crime is simply the product of people opting to act in a wicked or antisocial manner. Neuroscience supplies scientific explanations of how decision-making is shaped in many ways by social forces and conditions in the brain.<sup>283</sup> While these findings may be compatible with a belief in free will, they may moderate our collective views on what degree of punishment is warranted in any given case.<sup>284</sup> Some contend that when people are informed about the science of decision-making they become less punitive.<sup>285</sup> With

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282. See WE ARE ALL CRIMINALS, <http://weareallcriminals.org/about/> (last visited Feb. 6, 2016).

283. For an introduction to the emerging field of law and neuroscience, see Owen D. Jones & Matthew Ginther, *Law and Neuroscience*, in 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 489 (2d ed. 2015); Stephen J. Morse, *Criminal Law and Neuroscience: Present and Future*, 65 NILQ 243 (2014); see also Gideon Yaffe, *Neurological Disorder and Criminal Responsibility*, in 118 HANDBOOK OF CLINICAL NEUROLOGY: ETHICAL AND LEGAL ISSUES IN NEUROLOGY 345, 346 (James L. Bernat & Richard Beresford eds., 2013) (discussing ways in which neurological disorders are relevant to determining criminal culpability); Adrian Raine, *Biosocial Studies of Antisocial and Violent Behavior in Children and Adults: A Review*, 30 J. ABNORMAL CHILD PSYCHOL. 311 (2002) (summarizing research documenting social and biological risk factors for criminal activity and documenting 39 examples of how social and biological risk factors interact).

284. An ongoing debate exists about whether neuroscience has established that there is no free will and a scientific basis for determinism. Compare Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC’Y B 1775, 1776 (2004) (arguing that science debunks free will), with Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 402–03 (2006) (arguing that neuroscience and free will can coexist).

285. See, e.g., Emad H. Atiq, *How Folk Beliefs About Free Will Influence Sentencing: A New Target for the Neuro-Determinist Critics of Criminal Law*, 16 NEW CRIM. L. REV. 449, 476–77 (2013) (“[T]hose who view crime as mostly caused by deeply rooted character traits that are not shaped or influenced by biological, neuropsychological, environmental, and other situational factors, are regularly found to be more punitive . . . .”); Joshua Greene, *From Neural ‘Is’ to Moral ‘Ought’: What Are the Moral Implications of Neuroscientific Moral Psychology?*, 4 NATURE REVIEWS NEUROSCIENCE 847 (2003) (arguing that advances in neuroscience call into question our current understanding of morality); Gerald Harrison, *Hooray! We’re Not Morally Responsible!*, THINK, Autumn 2009, at 87, 93–94 (explaining why understanding of humans as “biological machines” should moderate our criminal justice views); Nick Trakakis, *Whither Morality in a Hard Determinist World*, SORITES, Dec. 2007, at 14, 26–27 (discussing how determinism could lead to less retribution). But see R. George Wright, *Criminal Law and Sentencing: What Goes with Free Will?* 5 DREXEL L. REV.

respect to the punishment of juveniles, for example, the U.S. Supreme Court has relied upon scientific findings regarding impulse control and risk assessment.<sup>286</sup>

Criminal and immigration policy must reflect what we know about human behavior writ large. The focus on free will is a trap because it obscures the critical observation that, in the aggregate, people act according to the viable options available to them.<sup>287</sup> While it is true that people choose whether to commit a crime, this focus ignores the harsh reality of the diminished choices facing many. Sole reliance on solutions that correlate with the free will analysis—for example, cultural interventions with “at risk” youth—is problematic for this reason, as others have noted.<sup>288</sup> Rather than avoid discussing violent crime, we must reframe its relevancy as an important indicator of the severity of structural issues needing attention. Violent crime, in other words, is a marker for just how deep of an institutional intervention is needed.

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1 (2012) (arguing that a view of crime that diminishes the role of free will would lead to more, not less, punitive practices).

286. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 n.5 (2012) (citing Brief for the Am. Psychological Ass’n et al. as Amici Curiae in Support of Petitioners at 3, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646, 10-9647), 2012 WL 174239); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (noting that “psychology and brain science” establish “fundamental differences between juvenile and adult minds”); see also Alexandra O. Cohen & B.J. Casey, *Rewiring Juvenile Justice: The Intersection of Developmental Neuroscience and Legal Policy*, 28 *TRENDS COGNITIVE SCI.* 63 (2014) (discussing developments in the neuroscientific study of juveniles and how they relate to law and policy); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *DEVELOPMENTAL REV.* 78 (2008) (noting how risk taking increases when a child becomes an adolescence due to the brain’s “socio-emotional system”). See generally NAT’L RESEARCH COUNCIL COMM. ON ASSESSING JUVENILE JUSTICE REFORM, *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* (Richard J. Bonnie et al. eds., 2013).

287. See CLEAR, *supra* note 123, at 186 (finding mass incarceration diminishes human and social capital, reducing the choices available to people); Richard Delgado, *“Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 *LAW & INEQ.* 9, 9–10, 76 (1985) (considering whether socioeconomic deprivation can ever constitute a criminal defense); White, *supra* note 183, at 797–98 (“[C]rime presents a real alternative to unemployment, underemployment, and relentless poverty—an alternative made all the more appealing by recent, deleterious changes in the structure of work, the availability of welfare, and the overall condition of the lower class.”).

288. Kimberlé Crenshaw explains, “Under [the ‘at risk’] frame, the journey from underachievement to jail is preventable not through active lobbying against the carceral state and its many tributaries, but through the embrace of behavioral modifications designed to bring ‘at risk’ individuals into compliance.” Crenshaw, *supra* note 75, at 1466. The “at risk” frame helps lead to the “subtle erasure of the structural and institutional dimensions of social justice politics.” *Id.* at 1465–66. The exclusive focus on reentry programs suffers from the same critique. See GOTTSCHALK, *supra* note 45, at 87 (“The focus on improving the human capital of returning citizens through a work-first approach to reentry ignores these larger structural forces that have been remaking the labor market and altering the contours of inequality, especially for African Americans but also for poor whites and members of other disadvantaged groups.”).

Racial justice proponents, much more so than those on the forefront of the immigrant justice movement, have been better at avoiding the free will trap. Michelle Alexander cites to studies showing that “joblessness—not race or black culture—explains the high rates of violent crime in poor black communities.”<sup>289</sup> She warns that the “genius of the current caste system, and what most distinguishes it from its predecessors, is that it appears voluntary.”<sup>290</sup> Immigration reformers might borrow from this analysis when constructing their narratives about immigrants and crime.

### *E. Managing Migration, Not Crime*

As Jennifer Chacón has observed, immigration enforcement “has morphed from a small and border-centered endeavor into a huge effort involving a network of law enforcement agencies operating throughout the country.”<sup>291</sup> Immigration law and policy should return to a focus on the management of the flow of people into our nation, rather than post-entry crime control. Support for this view stems from the reality that U.S. society fosters criminal activity as well as the historical fact that the first permanent federal immigration restrictions applied only to people seeking entry into the United States.<sup>292</sup> General laws deporting people from the interior were not put in place until the Immigration Act of 1917.<sup>293</sup> The original, regulatory view of federal immigration law

289. ALEXANDER, *supra* note 100, at 210. See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

290. ALEXANDER, *supra* note 100, at 215.

291. Chacón, *Diversion of Attention*, *supra* note 154, at 1571.

292. The first groups excluded by the federal government from the United States were convicts and prostitutes. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974). This law was followed by 1882 legislation excluding “convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.” General Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214. One of the earliest pieces of legislation was the expressly nativist and racist Chinese Exclusion Act, which was upheld as constitutional and remained in force until it was repealed in 1943. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943); see also *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). Prior to the enactment of federal border restrictions, towns and other localities created border restrictions of their own to keep out or banish citizens and noncitizens considered undesirable. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1908–09 (2000); Kunal M. Parker, *Citizenship and Immigration Law, 1800–1924: Resolutions of Membership and Territory*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 168, 170–75 (Michael Grossberg & Christopher Tomlins eds., 2008).

293. *Padilla v. Kentucky*, 559 U.S. 356, 361 (2010). Although early immigration legislation in 1798 involved deporting noncitizens deemed dangerous, there was no political will to reenact it after it expired after two years. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 14 (5th ed. 2009); see also *Padilla*, 559 U.S. at 360 (citing Act of June 25, 1798, ch. 58, 1 Stat. 570) (describing the “early effort to empower the President to order . . . deportation” as “short lived and unpopular”).

and policy focused on managing the flow of people into our country rather than expulsion for post-entry undesirable behaviors. It reflected a notion that the government could legitimately prevent initial entry but, once a person was living among us, the government could not uproot them from their families and communities.<sup>294</sup>

In 1875, Congress passed the first general immigration statute aimed at preventing the entry of prostitutes and people convicted of certain crimes.<sup>295</sup> With the exception of overtly racist laws targeting Chinese people, the federal government did not deport people from the interior. While the law expanded in 1891 to provide expulsion from the interior of anyone who had been excludable at entry, the focus remained on people returning from a trip abroad who were not entitled to enter in the first place.<sup>296</sup> Moreover, the law had a time limitation of one year, although this limitation was later expanded to three.<sup>297</sup> Over time, the restriction on deportation for post-entry behavior eroded. By 1907, the law permitted the deportation of noncitizen women and girls who were determined to be prostitutes within three years of entry, and, three years later, Congress removed the time limitation.<sup>298</sup> In 1917, Congress passed the first immigration act to establish general criminal grounds of deportation from the interior.<sup>299</sup> Even then, there was a statute of limitations of one to five years for deportable offenses.<sup>300</sup>

U.S. immigration enforcement has become punitive rather than regulatory, focusing resources on fighting crime through deportation rather than managing migratory flows. Allegra McLeod has critiqued the use of crime control as a “proxy” for immigration regulation and the determination of membership

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294. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 125 (2007) (“People were excluded for pre-entry crime, not generally deported for post-entry crime.”); Mae M. Ngai reports that in “the first decades of the 20th century, it was considered unconscionable to expel . . . people,” as epitomized by the statement of Judge Learned Hand of New York “that deportation, especially when it tore people from their homes and families, was ‘barbarous and cruel.’” Mae M. Ngai, *We Need a Deportation Deadline: Statute of Limitations on Unlawful Entry Would Humanely Address Illegal Immigration*, WASH. POST, June 14, 2005, at A21.

295. Act of Mar. 3, 1875, ch. 141, §§ 3–5, 18 Stat. 477, 477–78 (repealed 1974).

296. Act of Mar. 3, 1891, ch. 551, §§ 1, 10, 26 Stat. 1084, 1084, 1086.

297. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900, *amended by* Act of Mar. 26, 1910, ch. 128, 36 Stat. 263, 265 (repealed 1917).

298. *Id.*

299. Act of Feb. 5, 1917, Pub. L. No. 301, ch. 25, § 19, 39 Stat. 874, 889.

300. *Id.* The statute of limitations was later repealed. See *Immigration and Nationality Act of 1952*, Pub. L. No. 414, ch. 477, tit. IV, § 403 (a)(13), (23), 66 Stat. 163, 279 (repealing Act of Feb. 5, 1917, § 19).



claims.<sup>301</sup> She argues that we should seek to return to a state of affairs in which our immigration and criminal systems are distinct.<sup>302</sup> Rather than use deportation as a crime control tool, McLeod suggests that we should deploy our resources to understand, and intervene in, what drives migration (for example, by assisting “sending” countries).<sup>303</sup> A return to the untethering of immigration and crime control would reflect our nation’s original conception of immigration law as properly focused on managing flows across the border. Such a return would also correspond to the reality that the story of crime committed by immigrants is not about immigrants or immigration, but about the root causes of crime in the United States.

#### *F. Understanding Mobility*

A vision of immigration reform that seeks to dissolve the deserving/undeserving immigrant distinction takes a big picture view not only of crime, but also unauthorized immigration. Like criminal behavior, mobility across national boundaries is best understood as a multilevel and complex universal phenomenon driven by political, economic, and social forces. As Mae M. Ngai has illustrated, the category of “illegal aliens” is a construct that has been made and unmade by U.S. policy choices.<sup>304</sup> This view of migration softens the distinction between legal and unauthorized immigrants, supporting a more inclusive approach to legalization for undocumented immigrants who have committed a crime while in the United States.

Popular discourse typically portrays undocumented immigration to the United States as simply people choosing to transgress our border laws in order to seek a better life. We subscribe to the myth of “liberal consensual citizenship,” in which immigrants are “still-enchanted newcomers” who, by choosing to come, “reenact[] liberalism’s . . . fictive foundation in individual acts of uncoerced consent.”<sup>305</sup> This account is far too simple. While there is little consensus on what drives people to cross national borders, theorists broadly agree that both macro and micro factors

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301. McLeod, *supra* note 25, at 113–14.

302. *Id.* at 178. McLeod’s observations parallel those made in the juvenile justice context. Prior to the rise of punitive strategies in the 1970s, juveniles were not given the same procedural protections as adults on the theory that they were subject to treatment, not a criminal process.

303. *Id.* at 174–75.

304. NGAI, *supra* note 35; see also Nicholas De Genova, *The Legal Production of Mexican/Migrant “Illegality,”* 2 *LATINO STUD.* 160, 177–78 (2004).

305. NGAI, *supra* note 35, at 5 (quoting BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 75 (2001)).

come into play.<sup>306</sup> The first models of migration theory focused on the microeconomics of mobility, concluding that people moved in the direction of less populated, wealthier, and higher-wage areas.<sup>307</sup> Theorists focused on “push” factors in sending countries and “pull” factors in receiving countries. Supporting this view is the reality that when poor people from developing countries come to the United States, their wage potential increases far beyond what is possible in their home country.<sup>308</sup> No action besides migration is capable of having as much of an impact on wages. According to the World Bank, migration of people seeking work is increasing and will continue to do so in the foreseeable future.<sup>309</sup> The remittances sent by immigrants to family in their home country play a substantial role in the economic stability of sending countries.<sup>310</sup>

But theorists question whether migration can be fully understood in microeconomic terms alone and have broadened the scope of inquiry to include a wide range of other variables, such as

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306. For a summary of the evolution of theories of migration, see ROBIN COHEN, *THEORIES OF MIGRATION* (1996) (summarizing migration theories); Michael S. Tietelbaum, *Demographic Analyses of International Migration*, in *MIGRATION THEORY: TALKING ACROSS DISCIPLINES* 51, 59 (Caroline B. Brettell & James F. Hollifield eds., 2d ed. 2008) (contending that “there are at least seven . . . schools of migration theory, five from economics, the remainder from sociology and political science”).

307. See, e.g., E. G. Ravenstein, *The Laws of Migration* (pts. 1 & 2), 48 *J. STAT. SOC'Y LONDON* 167 (1885), 52 *J. ROYAL STAT. SOC'Y* 241 (1889), reprinted in E. G. RAVENSTEIN, *THE LAWS OF MIGRATION* (1976).

308. Michael Clemens, Claudio E. Montenegro & Lant Pritchett, *The Place Premium: Wage Differences for Identical Workers Across the U.S. Border* 1–5, 13, 42, 45–48, 53–54, 56 (Ctr. for Global Dev., Working Paper No. 148, 2008), [http://cgdev.org/files/16352\\_file\\_CMP\\_place\\_premium\\_148.pdf](http://cgdev.org/files/16352_file_CMP_place_premium_148.pdf) (arguing that migration ameliorates poverty more effectively than any other policy because wages in the United States are so comparatively high). Lant Pritchett argues that permitting people from developing countries to work in the United States is the best development policy because a low-wage worker from a developing country would only have to work a few weeks in the United States to increase the money he would earn in a lifetime in which he was able to access financing for small business activities in his home country. LANT PRITCHETT, *LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON INTERNATIONAL LABOR MOBILITY* 2 (2006); Lant Pritchett, *The Cliff at the Border*, in *EQUITY AND GROWTH IN A GLOBALIZING WORLD* 263, 274–76 (Ravi Kanbur & Michael Spence eds., 2010).

309. The World Bank stated in a recent annual report that worldwide labor mobility trends will lead migration to remain at the center of contentious political debates worldwide. Paul Wolfowitz, *Foreword* to WORLD BANK, *GLOBAL ECONOMIC PROSPECTS: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION*, at vii (2006), <https://openknowledge.worldbank.org/bitstream/handle/10986/7306/343200GEP02006.pdf?sequence=1>.

310. According to a Pew Research report, the United States is the most important source of money sent home by migrants from seventeen Latin-American nations. U.S. remittances accounted for three-quarters of the total in 2012—\$41 billion out of \$52.9 billion—according to World Bank data. D'Vera Cohn, Ana Gonzalez-Barrera & Danielle Cuddington, *Remittances to Latin America Recover—but Not to Mexico*, PEW RES. CTR.: HISP. TRENDS (Nov. 15, 2013), <http://www.pewhispanic.org/2013/11/15/remittances-to-latin-america-recover-but-not-to-mexico/>.

“geographical distance between origin and destination, . . . political barriers, . . . gender, age, class, and education.”<sup>311</sup> Some point to the role of family and community networks and the prevalence of industries, such as smuggling operations, to help people migrate.<sup>312</sup> Demographics also help to explain migratory patterns. The U.S. population is rapidly aging, due to low death and birth rates and a large population of aging baby boomers. Immigration supplies us with the young workers our economy requires.<sup>313</sup> As reported by the Congressional Research Service, undocumented workers satisfy certain labor needs of our country.<sup>314</sup>

Migration to the United States from Central America and Mexico must also be understood in the context of post-colonialism and U.S. political and economic interventions. As Americans, “we resist examining the role that American world power has played in the global structures of migration.”<sup>315</sup> Nicaragua, for example, was a U.S. battlefield in the Cold War. After the left-leaning Sandinistas took control, President Reagan, acting through an executive order, intervened to try and restore President Somoza to power, triggering a flow of people fleeing the violence.<sup>316</sup> In El

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311. KAREN O'REILLY, INTERNATIONAL MIGRATION AND SOCIAL THEORY 42 (2012) (summarizing the 1966 work of Everett Lee).

312. The migration business theory is dominant in analyses of smuggling, but some analysts are looking at the role of family members and social networks. See UNITED NATIONS OFFICE ON DRUGS & CRIME, SMUGGLING OF MIGRANTS: A GLOBAL REVIEW AND ANNOTATED BIBLIOGRAPHY OF RECENT PUBLICATIONS 7–8 (2011) (citing SHELDON X. ZHANG, CHINESE HUMAN SMUGGLING ORGANIZATIONS: FAMILIES, SOCIAL NETWORKS, AND CULTURAL IMPERATIVES 7–11 (2008)); Emma Herman, *Migration as a Family Business: The Role of Personal Networks in the Mobility Phase of Migration*, INT'L MIGRATION, Oct. 2006, at 191, 217.

313. RAKESH KOCHHAR, PEW RESEARCH CTR., THE DEMOGRAPHICS OF THE JOBS RECOVERY: EMPLOYMENT GAINS BY RACE, ETHNICITY, GENDER AND NATIVITY 9–13 (2012), [http://www.pewhispanic.org/files/2012/03/PHC-Labor-report-FINAL\\_3-21-12.pdf](http://www.pewhispanic.org/files/2012/03/PHC-Labor-report-FINAL_3-21-12.pdf) (finding that immigrants are increasingly more likely to be employed because their working age population is growing at a faster rate than that of the native population); RAKESH KOCHHAR, ROBERTO SURO & SONYA TAFOYA, PEW RESEARCH CTR., THE NEW LATINO SOUTH: THE CONTEXT AND CONSEQUENCES OF RAPID POPULATION GROWTH 16–18 (2005), <http://www.pewhispanic.org/files/reports/50.pdf> (noting that the median age of Hispanics is twenty-seven, and the increase in population and the growth of local economies in the U.S. South “have acted as a magnet to young, male, foreign-born Latinos migrating in search of economic opportunities”).

314. LINDA LEVINE, CONG. RESEARCH SERV., RL30395, FARM LABOR SHORTAGES AND IMMIGRATION POLICY 1, 13 (2009) (stating that because “perishable crop growers have rarely, if ever, had to operate without unauthorized aliens,” it is difficult to know whether “there would be an adequate supply of authorized U.S. farm workers”). The Department of Labor estimated that in FY1999–FY2000, foreign-born persons in the country illegally accounted for 55% of the domestic crop workforce. *Id.* at 3.

315. NGAI, *supra* note 35, at 11.

316. James M. Scott, *Interbranch Rivalry and the Reagan Doctrine in Nicaragua*, 112 POL. SCI. Q. 237, 243 (1997).

Salvador and Guatemala, the United States funded and trained military regimes battling guerilla groups, contributing to years of protracted violence that claimed the lives of 200,000 people.<sup>317</sup> These actions of the United States also generated a refugee flow of nearly one million and contributed to the political and economic instability of these countries that endures to this day.<sup>318</sup>

At the most macro level, migration can be viewed as a necessary feature of global capitalism—a system in which poor countries supply cheap labor to rich countries.<sup>319</sup> Undocumented immigrants play a vital role in this scheme. Mexico, for example, has increasingly become open to foreign investment, which has resulted in displaced workers and the removal of price regulations that formerly protected local industries.<sup>320</sup> NAFTA has been criticized for displacing people out of their normal labor activities, pushing them to migrate to the United States.<sup>321</sup> Free trade now permits large U.S. growers to flood the Mexican market with corn, putting small Mexican corn farmers out of work.<sup>322</sup> After NAFTA was implemented in 1994, more people migrated from Mexico to the United States than during any other period of time.<sup>323</sup>

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317. Kevin Sullivan & Mary Jordan, *In Central America, Reagan Remains a Polarizing Figure*, WASH. POST (June 10, 2004), <http://washingtonpost.com/wp-dyn/articles/A29546-2004Jun9.html>.

318. Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL'Y INST. (Apr. 1, 2006), <http://migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>. For a discussion of the political and economic causes of drug violence in Mexico, see Deborah M. Weissman, *Remaking Mexico: Law Reform as Foreign Policy*, 35 CARDOZO L. REV. 1471 (2014). See also *supra* note 269 (discussing how U.S. deportations of gang members fostered the emergence of gangs in Central America and Mexico).

319. Isabella Bakker & Stephen Gill, *Global Political Economy and Social Reproduction*, in POWER, PRODUCTION AND SOCIAL REPRODUCTION 3, 5 (Isabella Bakker & Stephen Gill eds., 2003) (discussing how current global governance facilitates transnational corporations); Aristide R. Zolberg, *The Next Waves: Migration Theory for a Changing World*, 23 INT'L MIGRATION REV. 403, 404–05 (1989) (proposing a migratory theory grounded in the fact of inequality). See generally TANYA MARIA GOLASH-BOZA, DEPORTED: POLICING IMMIGRANTS, DISPOSABLE LABOR, AND GLOBAL CAPITALISM (2015).

320. David Bacon explains, “Beginning around 1980, the World Bank and the IMF [International Monetary Fund] began imposing a one-size-fits-all formula for development, called structural adjustment programs. These required borrowing countries to adopt a package of economic reforms, such as privatization, ending subsidies and price controls, trade liberalization, and reduced worker protections.” DAVID BACON, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS 60 (2008).

321. See DAVID BACON, THE RIGHT TO STAY HOME: HOW US POLICY DRIVES MEXICAN MIGRATION 11 (2013); ARIADNA ESTÉVEZ, HUMAN RIGHTS AND FREE TRADE IN MEXICO: A DISCURSIVE AND SOCIOPOLITICAL PERSPECTIVE 7 (2008).

322. BACON, *supra* note 320, at 25 (“[O]nce the [free trade] agreement went into effect it became cheaper for large Mexican corn growers to buy U.S. corn and resell it than to grow corn themselves. For the vast majority, however, like . . . small farmers, the price for yellow corn . . . simply couldn’t cover the cost of growing it.”).

323. *Id.* at 51.

The movement for immigrant justice stands to gain from the narrative of mobility as a natural feature of human existence and a product of U.S. policy abroad. Immigration reformers should seek to replace the mainstream view of why people come to the United States with a more accurate narrative that emphasizes the policy level explanations for migration.<sup>324</sup> In this picture, unlawful migration becomes an inevitable consequence of larger forces instead of simple rule-breaking activity by individuals. Such a move might facilitate keeping the immigration debate focused on policy rather than the retributivist impulse to withhold legal status from those who crossed the border without permission. This shift in thinking could also help erode the distinction between undocumented people with criminal convictions and those who are in lawful status.

### G. *The Victim Narrative*

Reframing immigration reform discourse requires careful attention to the labeling of certain classes of immigrants as victims or innocents. In parallel to the rise in punitiveness that started in the 1970s, the crime victim has “emerge[d] as an idealized political subject.”<sup>325</sup> The immigrant-as-victim narrative is potent, enabling powerful messaging that has resulted in entire new categories of immigration remedies.<sup>326</sup> The most prominent example is the broad set of remedies for immigrant victims of violent crimes, including intimate partner violence.<sup>327</sup> The crime victim legislative gains have been so significant that advocates now routinely screen

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324. See Weissman, *supra* note 2, at 202–03 (discussing the need “to shift the narrative [to] address[] the larger context for drug cartel violence and the root causes of migration”).

325. SIMON, *supra* note 31, at 8. For a discussion of the movement against gender violence’s “appeal[] to the ideology of the ‘deserving poor’ and the ‘victim,’” see Mark Matthew Graham, *Domestic Violence Victims and Welfare “Reform”: The Family Violence Option in Illinois*, 5 J. GENDER RACE & JUST. 433, 470 (2002) (citing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935* (1994)); see also *id.* at 476 (discussing advocates who lobby on behalf of abused women utilizing the “deserving poor” and “victim” rhetoric, and how this is damaging to the societal image of abused women).

326. See Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 922–25 (2015) (discussing immigration remedies for victims of crime).

327. See, e.g., Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV (codified in scattered sections of 42 U.S.C.); 8 U.S.C. § 1229b(b)(2)(A) (2012); 8 C.F.R. § 204.2(c)(1)(vi) (2015). The Violence Against Women Act (VAWA), in providing that the Attorney General may grant status to noncitizens who have been domestically battered or subjected to extreme cruelty in the United States, provides protection not only to those presently experiencing battery, but also to those who experienced battery in the past. Immigration law also provides remedies for victims of sex and labor trafficking and enumerated violent crimes. For an overview of the relief available to immigrant victims, see PENN STATE LAW’S CTR. FOR IMMIGRANTS’ RIGHTS & CTR. CTY. WOMEN’S RES. CTR., *IMMIGRATION RELIEF FOR VICTIMS OF ABUSE AND DOMESTIC VIOLENCE: PRACTITIONERS’ GUIDE TO SERVING NON-CITIZENS* (2012), [https://law.psu.edu/\\_file/Immigrants/toolkit2012/Handbook.pdf](https://law.psu.edu/_file/Immigrants/toolkit2012/Handbook.pdf).

for victim status and a large percentage of direct service resources are dedicated to helping people access relief under these laws.<sup>328</sup>

Without diminishing the importance of the life-saving remedies now available to immigrant victims, it is critical to understand the limitations of the framing of immigrants as victims for the purposes of immigration reform. First and foremost, such messaging relies on an implicit contrast with several groups of people, including immigrants who are not victims and immigrants and citizens who create victims by committing crimes.<sup>329</sup> The category of immigrant victim, like the broader category of victim, connotes a bright line, good/bad distinction between victims and lawbreakers, whereas reality is much more nuanced.<sup>330</sup> A significant number of victims have themselves been convicted of crimes, including violent ones.<sup>331</sup> Moreover, the perpetrator/victim distinction itself can be complicated, as some situations involve mutual aggression, such that the person who calls the police first often receives the victim status. The fluid boundaries of the concept of a victim detract from its usefulness as a basis for drawing distinctions between people.

Immigrant-as-victim messaging constructs a category of undocumented immigrants whose sin of being unlawfully present is outweighed by their victim status. But this messaging also makes it difficult to argue for humane and proportionate responses to immigrants who are convicted of a crime. If only immigrant victims are worthy, logic dictates that we should deport as unworthy immigrants who are convicted of a crime. In the simple world of victim and perpetrator, there is no room for the latter.

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328. Rocio Molina et al., *Screening for Victims Who Qualify for Immigration Protective Relief: Eligibility Questions for Protective Relief*, BUREAU JUST. ASSISTANCE, <http://iwp.legalmomentum.org/reference/additional-materials/iwp-training-powerpoints/March-24-2015-Use-of-T-visa/Bluecard%20for%20Law%20Enforcement.pdf> (last visited Feb. 6, 2016).

329. Other stereotypes might also be in play, such as the portrayal of victims of domestic violence as passive and lacking agency. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 24–30 (1991); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1024 (1997).

330. For a discussion of how our human trafficking laws should recognize the reality of trafficking survivors' lives, see Srikantiah, *supra* note 74, at 191–92, 211.

331. Domestic violence victimization or fighting back accounts for some, but not all, of these crimes. See SHERYL KUBIAK ET AL., BEST PRACTICE TOOLKIT FOR WORKING WITH DOMESTIC VIOLENCE SURVIVORS WITH CRIMINAL HISTORIES 14 (2011), [http://communitysolutionsva.org/files/PREA-Toolkit\\_Working\\_with\\_Survivors\\_w\\_Criminal\\_Histories.pdf](http://communitysolutionsva.org/files/PREA-Toolkit_Working_with_Survivors_w_Criminal_Histories.pdf) (detailing the common profile of women involved in the criminal legal system, including survivors of domestic and/or sexual violence).

The temptation, of course, is to use victim messaging precisely because it is so very effective. The public has been trained to take a reductive view of the categories of victim and perpetrator. Reformers, however, should not ignore the downsides of invoking the victim narrative in the cause of immigrant justice. As a version of respectability politics, the victim narrative not only makes it harder to advocate for noncitizens and citizens convicted of a crime (and other people not dubbed victims), but it reinforces the underlying economic and social policies that drive crime rates and migratory flows.

## VII. REFRAMING IN ACTION

Strategic reframing away from the immigrant/criminal dichotomy and toward a new discourse that reflects a structural understanding of crime and unauthorized migration is already taking place in some immigrant justice circles, although truly inclusive messaging is extremely difficult in the current political climate.<sup>332</sup> It is not easy to craft an effective message for immigration reform that resonates but refrains from tapping into the deserving/undeserving immigrant narrative.

Like many in the movement for racial justice, progressive reformers have become increasingly aware of the downsides of respectability messaging. Some advocates for legalization of the undocumented have come to understand that members of this group share the status of “undesirable others” with people convicted of a crime, and that women, men, and children who are members of both groups are worth including in reform efforts. Groups that initially relied on contrasting immigrants and criminals have now jettisoned this rhetoric, adopting a more inclusive vision of reform.<sup>333</sup>

Many in the Dreamer movement have adopted a messaging campaign aimed at disrupting the worthy immigrant narrative. Although the Administration and other mainstream reformers portray Dreamers as innocent victims, Dreamers themselves have typically aligned themselves with their parents, refusing to seek legitimacy at their expense.<sup>334</sup> Much of the Dreamer messaging

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332. *The Fight of Our Lives* (Families for Freedom, New York, N.Y.), Fall 2013, at 1, <http://issuu.com/andalusiafff/docs/fffnewsletterfallissuu2013#embed>; *General Messaging for Fair and Inclusive Reform*, IMMIGRANT JUST. NETWORK, <http://immigrantjusticenet.org/wp-content/uploads/2013/06/IJNmessagingAugust.pdf> (last visited Feb. 6, 2016); IMMIGRANT DEF. PROJECT, <http://immigrantdefenseproject.org> (last visited Feb. 6, 2016).

333. Novoa, *supra* note 217 (calling for support of immigrants with criminal convictions or drug dependencies); *The Fight of Our Lives*, *supra* note 332, at 1–2.

334. Deferred Action for Childhood Arrivals (DACA) relief is the temporary status accorded to certain young people who meet certain conditions and who arrived before they

avoids the criminal-immigrant dichotomy and Dreamers conduct campaigns to stop deportation of people with criminal convictions.<sup>335</sup> Movement actors are aware that arguing for lawful status for Dreamers makes it harder to argue for more inclusive reform.

Many Dreamers know what it is like to be part of the informal economy and to spend one's formative years in neighborhoods with substandard schools, low social capital, a heavy law enforcement presence, and high levels of street crime. At the same time, Dreamers are generally accepted as part of respectable society.<sup>336</sup> They act as what Regina Austin has termed "bridge people" because they span the gap between members of respectable society and outcasts, including convicted noncitizens.<sup>337</sup> Dreamers can be understood as leveraging their perceived status as innocents to call that category into question. Even as the Administration and mainstream reformers engage in line-drawing between Dreamers and others, many Dreamers resist.<sup>338</sup>

Similarly, the New York-based group Families for Freedom rejects "the legalization of our daughters and sons in exchange for the banishment of our mothers [and] fathers."<sup>339</sup> The group is "an organizing center against deportation" that runs campaigns for people facing deportation, including people with criminal convictions. The organization consciously tries to avoid rhetoric that contrasts immigrants with people convicted of a crime. In an article posted on the group's website, the phrase "We're not criminals!" is described as "probably the most embarrassing, anti-criminal justice, anti-black mantra of the mainstream movement."<sup>340</sup>

Nonexclusionary messaging also appears in core principles for immigration reform endorsed by the groups that make up the

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were sixteen. As noted above, President Obama and others have justified this program of according temporary status through the victim narrative. *See supra* notes 41–42 and accompanying text.

335. Prominent Dreamer activist Gaby Pacheco, for example, understands "that portraying the dreamers as deserving implicitly casts others—including their parents—as undeserving lawbreakers." MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA*, at xxvii (Princeton Univ. Press 2014) (2004). As a result, many Dreamers "fight[] for legalization for all unauthorized migrants." *Id.*

336. Amanda Sakuma, *Obama: DREAMers Are 'Americans, Just Like Us'*, MSNBC (Feb. 20, 2015, 3:15 PM), <http://msnbc.com/msnbc/obama-dreamers-are-americans-just-us>.

337. Austin, *supra* note 62, at 1799.

338. Walter Nicholls & Tara Fiorito, *Dreamers Unbound: Immigrant Youth Mobilizing*, NEW LAB. F. (Jan. 19, 2015) <http://newlaborforum.cuny.edu/2015/01/19/dreamers-unbound-immigrant-youth-mobilizing/> (explaining the difference between "bounded" and "unbounded" Dreamers).

339. *The Fight of Our Lives*, *supra* note 332.

340. Novoa, *supra* note 217.



coalition Immigrant Justice Network. This group describes their guiding principles as based on “Fair and Inclusive Reform that Restores Discretion and Curbs Criminalization.”<sup>341</sup> The groups who are part of this network consciously refrain from drawing contrasts between groups of immigrants and endorse generous immigration reform that restores discretion of judges to stop deportations.<sup>342</sup>

Some reform groups expressly link immigrant justice to the racial justice movement to end hyperincarceration. For example, the Black Alliance for Just Immigration (BAJI), founded in 2006, is “an education and advocacy group comprised of African Americans and black immigrants from Africa, Latin America and the Caribbean.”<sup>343</sup> Opal Tometi, BAJI’s Executive Director, is a cofounder of Black Lives Matter, a group that has called for criminal justice reforms in the wake of police killings of Michael Brown and Eric Garner. The group “links the interests of African Americans with those of immigrants of color [and] emphasizes the impact of racism and economic globalization on African American and immigrant communities as a basis for forging alliances across these communities.”<sup>344</sup> Other groups make the same connections.<sup>345</sup>

Seeking to reframe the debate on immigration reform, these groups have jettisoned the narrative of respectable immigrants in favor of more inclusive messaging.<sup>346</sup> Their rhetoric and actions focus on structural change, including investment in communities, divestment from prisons and detention centers, and ending government corruption, corporate welfare, social control, and impunity. For these groups, safety is not a function of locking

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341. *General Messaging for Fair and Inclusive Reform*, *supra* note 332.

342. The Immigrant Justice Network includes organizations like the National Immigration Project of the National Lawyers Guild and the Immigrant Defense Project. *See* IMMIGRANT DEF. PROJECT, *supra* note 332 (“[The group promotes] fundamental fairness for immigrants accused or convicted of crimes by working to transform unjust deportation laws and policies and educating and advising immigrants, their criminal defenders, and other advocates.”). Even this progressive coalition, however, has found it effective to illustrate its positions by giving examples of people who were “brought to the U.S. as a child, . . . served in the U.S. military, or committed a minor crime.” *General Messaging for Fair and Inclusive Reform*, *supra* note 332. The principles also invoke images of immigrants as hard workers and “contributing members of our community,” implying that immigrants who might require public entitlements are not as deserving. *Id.*

343. *About Us*, BLACK ALLIANCE FOR JUST IMMIGR., <http://idealist.org/view/nonprofit/35PFjkMpMnWmD/> (last visited Feb. 6, 2016).

344. *Id.*

345. *See, e.g.*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited Feb. 6, 2016).

346. Examples include the slogans: “Not One More [Deportation],” “System Change Not Prison Chains,” and “Divest From Prisons, Invest in Communities.”

people up for long periods of time or deporting them, but flows from investing in communities that create economic opportunities and protective social networks.<sup>347</sup> Undocumented immigration is understood in the context of globalization and U.S. economic and political policies abroad.<sup>348</sup>

Although the goal is system change, individual stories play a role in the political strategies of these organizations. Unlike mainstream respectability narratives, however, the stories told by these groups feature a much wider cross-section of immigrants, including people with significant criminal convictions. People like Jose and Ronald, discussed above, fall within the scope of their concern.<sup>349</sup> These progressive reformers portray convicted noncitizens as multidimensional human beings rather than as deviant contrasts for more respectable immigrants.<sup>350</sup>

### VIII. CONCLUSION

The demonization of convicted noncitizens is not only convenient and effective, at least in the short term, but it appears morally justified. What could be less controversial than proposing that immigrants with criminal convictions, especially violent ones, be denied, or stripped of, lawful status and deported? I have sought to complicate the answer to this question, arguing that reformers and theorists must retool the standard tropes regarding noncitizens with criminal convictions.

The downside of seeking reform for only immigrants without criminal histories, or only minor records, is not only that convicted noncitizens are left out. Rather, the fear is that the immigration reform movement is legitimizing and perpetuating the crime

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347. Novoa, *supra* note 217 (describing how drug dependencies require public health solutions and calling for a resistance to policies that create distance between families and communities rather than supporting them).

348. See *supra* Part VI.F (explaining the political and economic forces behind migration).

349. See *supra* notes 24–32 and text accompanying.

350. For discussion of the limitations of viewing people solely by the worst thing that they have done in their life, see GOTTSCHALK, *supra* note 45, at 165–66, 184 (characterizing as “misleading” the “view that offenders should be defined forever by the seriousness of the offense that initially sent them away” and noting that most “people sentenced to life or the death penalty are not ‘monstrous others’ who pose infinite threats to public safety”) (quoting CATHERINE A. APPLETON, *LIFE AFTER IMPRISONMENT* 76 (2010)); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 *UCLA L. REV.* 1705 (2011) (“Th[e] extraordinary focus on the moment of the crime conflicts with the fundamental notion of the individual as a collection of many moments composing our experiences, relationships, and circumstances. It frames out circumstances, conduct, experiences, or relationships that tell a different story about the individual, closing off the potential for redemption and disregarding the collateral effects on the people and communities with ties to the noncitizen.”).

control agenda and attendant harms of hyperincarceration in the same way that other movements have in the past.<sup>351</sup> Seeking reform within the ideology of crime control leaves unchallenged the deeper structures that give rise to hyperincarceration and other excesses of civil and criminal law enforcement.<sup>352</sup>

A reconceived approach would place convicted noncitizens at the center of analysis. Rather than serve as foils for “better” immigrants who deserve membership, these individuals would be subjects situated at the intersection of our criminal and civil immigration systems of hyperincarceration. To resist this reframing is to perpetuate incoherence in how we analyze law enforcement in the criminal and immigration contexts. One cannot accept the racial and class critique of hyperincarceration and continue to treat convicted noncitizens as outsiders in the immigration reform agenda.

The challenge ahead is to work toward aligning a theory of immigrant justice with the well-developed, and now popularized, racial and class analysis of criminal hyperincarceration. Of course, charting such a course is easier said than done. Success depends on the ability to popularize a structural view of the causes of crime and unauthorized migration. Such a move requires dialing back personal reactions to crime and unauthorized border crossings, reactions that may be deeply rooted in the human psyche. Particularly challenging is popularizing the narrative of how violent crime calls not for excessively punitive law enforcement, but increased attention to the material conditions of people’s lives. The proper, bird’s eye view looks at conditions not only nationally but globally.

Immigration reformers may never fully conform their movement to the critique of hyperincarceration, but such alignment must remain as an ultimate goal. Truly inclusive messaging may exist as an unattainable, infinite horizon, always balanced with a pragmatic approach that draws upon examples of worthy immigrants. In Durkheim’s terms, we may never entirely eliminate the criminal other as a way of cohering society through “common indignation.”<sup>353</sup> Even if reformers must accede to discrete political compromises of the moment, the benchmark against which progress is judged must include reform for convicted noncitizens, including those convicted of more serious crimes.

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351. See McLeod, *supra* note 25, at 178 (describing how immigration reform based on the criminal law undermines preferable immigration regulatory regimes).

352. *Id.*

353. DURKHEIM, *supra* note 28, at 58.