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Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System

YOLANDA VÁZQUEZ*

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ABSTRACT

Latinos currently represent the largest minority in the United States. In 2009, we witnessed the first Latina appointment to the United States Supreme Court. Despite these events, Latinos continue to endure racial discrimination and social marginalization in the United States. The inability of Latinos to gain political acceptance and legitimacy in the United States can be attributed to the social construct of Latinos as threats to national security and the cause of criminal activity.

Exploiting this pretense, American government, society and nationalists are able to legitimize the subordination and social marginalization of Latinos, specifically Mexicans and Central Americans, much to the detriment of the Latino community. This poisonous social construct has many manifestations—it depicts the Latino as a foreigner, a criminal, an “illegal” and it characterizes the Latino as one who comes to this country to cause social chaos by refusing to follow our country’s

laws, work with authority, or enter with right. These depictions and characterizations instill fear and contempt against the Latino and motivate the creation of harsh immigration laws and enforcement measures. Ironically, these depictions and characterizations are then used as the pretext for legal actions against the Latino community. Currently, the primary vehicle for accomplishing this disguised discrimination has been the incorporation of immigration law into the criminal justice system.

Under the pretext of addressing criminal activity and national security concerns, American law-makers and society use immigration and criminal law to preserve racial inequality and perpetuate the marginalization of Latinos living in the United States. Thus far, these measures have been effective in depriving Latinos of the right to live in this country with rights equal to the majority, and denying them the freedom and privilege of living in the United States without abuse, discrimination, or fear.

This Article will discuss the use of the criminal justice system as the current primary means to stigmatize, punish and remove Latinos, the fallacy of the justifications put forth for this discrimination, and the impact of this governmental course of action on the Latino community. This Article concludes that until the Latino identity is disaggregated from the criminal and immigration contexts, discrimination against all Latinos will persist in a state-sanctioned, society approved and formidable form.

INTRODUCTION

Immigration and criminal law have increasingly become intertwined.¹ During the last fifteen years, the number of immigrants deported due to criminal convictions has increased dramatically. For instance, in 2004, 202,842 individuals were removed from the United States, 88,897 of which were removed for a criminal conviction.² In contrast, in 2009, 393,000 noncitizens were removed from the United

1. The term “cimmigration” has been coined to express this convergence. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481-82 (2010) (acknowledging the enmeshment of immigration and criminal law in the context of deportation); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1890-91 (2000) (stating that immigration “laws have brought about a rather complete convergence between the criminal justice and deportation systems”).

2. MARY DOUGHERTY, DENISE WILSON & AMY WU, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS 2004, at 1 (2005), available at www.dhs.gov/xlibrary/assets/. . ./AnnualReportEnforcement2004.pdf.

States, over 128,000 of which were removed as a result of a criminal conviction.³

Several systemic changes have spurred this increase in removals based on criminal convictions, including: (1) a decrease in the number of remedies available to immigrants convicted of crimes in immigration court, and (2) an increase in the number of criminal convictions that have become removable offenses.⁴

Simultaneously, the criminal justice system has been harnessed to amplify the effects of these immigration law changes, with immigration law increasingly being enforced through the use of the criminal justice system. The criminal justice system has become the primary means to locate, remove, and permanently banish immigrants from the United States. Currently, enforcement, detention, and removal of immigrants pervade every aspect of the criminal justice system. In mass work place raids, immigrants are criminally prosecuted before they are transferred into the custody of Immigration and Customs Enforcement (“ICE”).⁵ ICE is regularly present in local jails.⁶ Probation, the government, local law enforcement, and courts across the country are taking it into their own hands to call ICE on defendants that appear before them.⁷ Section 287(g) Memorandums of Agreement⁸ and Secure Communities⁹ give local law enforcement the power

3. U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2009 ANNUAL REPORT 1, at 4 tbl.4 (2010) [hereinafter 2009 ANNUAL REPORT], available at <http://www.ilw.com/immigrationdaily/news/2010,0819-dhs.pdf>.

4. See *Padilla*, 130 S. Ct. at 1478 (“The landscape of federal immigration law has changed dramatically over the last [ninety] years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.”); see generally Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269 (1997).

5. See Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History: A Personal Account*, June 13, 2008, available at <http://graphics8.nytimes.com/packages/pdf/national/20080711IMMIG.pdf> (discussing his account of the federal prosecution of the immigrants who were apprehended during the Postville Raid and charged with federal criminal charges).

6. See *Fact Sheet: Delegation of Immigration Authority Section 278(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/fact-sheets/287g.htm> (last visited Mar. 19, 2011) [hereinafter *Fact Sheet*] (“Currently ICE has 287(g) agreements with [sixty-nine] law enforcement agencies in [twenty-four] states. Since January 2006, the 287(g) program is credited with identifying more than 200,300 potentially removable aliens—mostly at local jails.”).

7. This writer has systematically witnessed and been involved in cases where probation, courts, prosecution, and government workers have called ICE on noncitizens that have appeared before them.

8. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §287(g), 110 Stat. 3009-546 (1996).

to notify ICE for any immigrant who is processed for state, local, or federal crimes. Immigrants in the court system are being denied bail based on immigration status.¹⁰ Prosecutions are strategically set to ensure that immigrants are prosecuted to secure their deportation and permanent removal from the United States.¹¹

Latinos¹² currently represent the largest minority in the United States.¹³ Latinos simultaneously represent the largest immigrant group population. As the overall number of immigrants of color has drastically increased since the 1970s, Latino immigrants have accounted for the largest proportion of that increase.¹⁴ Unfortunately, the number of Latinos removed from the United States has also dramatically increased. Latinos presently represent over 94% of the total number of noncitizens removed.¹⁵ Even more unfortunate, Latinos currently constitute 94% of the number of noncitizens removed from the United States based on criminal convictions.¹⁶ This implores an examination of whether any connection between Latino immigration and crime exists beyond the increased conjoining of criminal and immigration law to remove Latino immigrants. If not, and as this Article argues, then we might inverse the inquiry and ask if the conjoining of criminal law and immigration law is proper in light of its disparate impact on the Latino community.

9. *Secure Communities*, U.S. DEP'T OF HOMELAND SEC., http://www.ice.gov/secure_communities/ (last visited Apr. 3, 2011).

10. ARIZ. CONST. art. 2, § 22(A)(4) (imposing no bail for defendants accused of a serious felony offense if defendant has "entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge").

11. U.S. ATTY'S MAN. § 9-28.1000(A), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.1000 (stating that "[p]rosecutors may consider the collateral consequences" in determining "whether to charge" and "how to resolve" the case); ROBERT KOULISH, *IMMIGRATION AND AMERICAN DEMOCRACY: SUBVERTING THE RULE OF LAW* 52-53 (2010) (discussing the firing of federal prosecutors for failure to prosecute immigration violations).

12. I use the word "Latino" to identify persons of Mexican, Central and South American, Dominican, Puerto Rican, Cuban, and Spanish descent. However, the terms "Latino" and "Hispanic" are used interchangeably throughout this document based upon others' use of the terms to describe the same group of individuals.

13. U.S. BUREAU OF THE CENSUS, *THE HISPANIC POPULATION: CENSUS 2000 BRIEF 2* (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf> (citing that the U.S. Latino population increased 57.9% between 1990 and 2000 and that Latinos account for more than one in every eight Americans).

14. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 144 nn.5-6 (2006) (discussing the greatest source of demographic change currently to be "the burgeoning Hispanic population").

15. 2009 ANNUAL REPORT, *supra* note 3, at 4.

16. *Id.* at 4 tbl.3.

A particular rhetoric has motivated the convergence of immigration and criminal law and insulated the resulting systematic oppression from criticism. The criminal enforcement measures used in the criminal justice system to locate, detain, and remove immigrants are popularly justified by reference to concerns about national security, protecting communities, and criminal behavior.¹⁷ These justifications have been too easily accepted; government officials and politicians have been allowed to create, pass, and enforce laws that would be given greater scrutiny if allegations of protection and security to our country and its citizens were not used.

The harmful effects of this crimmigration disaster are disproportionately being borne by the Latino community—most acutely by Latino immigrants, their families, and the communities to which they belong. Equally concerning, though more insidious, is the overarching impact of this fiasco on all Latinos living in the United States. As a direct consequence of the criminal justice system being used to enforce immigration law, Latinos as a group are being viewed as criminals, “illegals,” individuals incapable of social assimilation, and instigators of social chaos.

This Article discusses the use of the criminal justice system to enforce immigration laws and its consequences on Latinos living in the United States. Part I of this Article summarizes the historical exclusion and marginalization of Latinos in the United States. Part II of this Article illustrates the incorporation of immigration law into the criminal justice system by providing an overview of criminality-related immigration law changes and criminality-related immigration enforcement programs. Part III of this Article demonstrates that a disconnect between immigration control and “dangerous” crime and terrorism discredits the rhetoric used to enact and sustain these crimmigration measures. Part IV of this Article discusses the harmful effects that crimmigration has had on the Latino population and identity in this country. Finally, this Article concludes that crimmigration has become the modern day apparatus for extending a historical and shameful history of Latino exclusion, discrimination, and marginalization in this country. Further, until the Latino identity is disaggregated from notions of crime, terror, and “illegal” immigration, all Latinos will

17. Jennifer M. Chacón, *Unsecured Borders: Immigration Restriction, Crime Control and National Security*, 39 *CONN. L. REV.* 1827 (2007) (discussing the blurring lines between immigration control, crime control, and national security).

continue to be deprived of the opportunity for fair and just treatment in the United States.

I. HISTORY OF THE EXCLUSION OF LATINOS IN THE UNITED STATES

United States immigration law has consistently worked to prevent Latinos, especially indigent Latinos, from migrating or remaining in this country.¹⁸ Likewise, Latinos who have been able to migrate to the United States have historically been treated very poorly.¹⁹ In this way, immigration law has absorbed and reflected this country's desire to maintain and uphold a "white" national identity, even at the cost of marginalizing Latinos as well as other immigrants of color.²⁰

As a result of ideas of white superiority, Latinos have struggled to obtain full membership and benefits of citizenship in United States history.²¹ From the beginning of United States' history, Latinos have been deemed "unwelcome." Further, like African Americans, Latinos have been seen as inferior to whites.²²

As early as the late 1800s, when white Americans began to have contact with Mexicans in the Southwest, Mexicans were viewed as worthy of discrimination and characterized negatively.²³ Early accounts described Mexicans as "earless and heartless creatures", "semi-

18. See BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 115-54 (2004) (discussing how Mexicans have historically been treated in the United States in order to prevent migration and social equality).

19. See JOSE LUIS MORIN, *LATINO/A RIGHTS AND JUSTICE IN THE UNITED STATES* 51-83 (2009) (outlining historical discrimination of Latinos in the United States).

20. See Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 *STAN. L. & POL'Y REV.* 111, 113-16 (1995) (discussing opposition to current immigration laws on the basis of race and a need for homogeneity); see also George A. Martínez, *Immigration: Deportation and the Pseudo-Science of Unassimilable Peoples*, 61 *SMU L. REV.* 7, 10-13 (2010) (arguing the popular fear that immigrants constitute a major threat to national identity has led to harsh immigration practices); see, e.g., PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995) (providing a nativist perspective on immigration control, viewed by many as racist).

21. MORIN, *supra* note 19; see HING, *supra*, note 18, at 133 (discussing how Mexicans have come to be defined as Non-Americans); see also REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* 208-48 (1981) (describing historical subordination of Mexicans).

22. KEVIN R. JOHNSON, "THE HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 29 (2004) ("The historical relationship between subordination of Mexican Americans, viewed as a "foreign" minority, and African Americans, viewed as a domestic minority, is telling."); Karla McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 *HARV. J. RACIAL AND ETHNIC JUST.* 164 (2010) (arguing that state and local anti-immigrant laws lead to the segregation, exclusion and degradation of Latinos from American society in the same way that Jim Crow laws marginalized African Americans from society).

23. MORIN, *supra* note 19, at 51-52.

barbarians”, who were “only interested in satisfying their animal wants.”²⁴ A traveler on the Texas-Santa Fe expedition stated that “[t]here are no people . . . more miserable in condition or despicable in morals than the mongrel race inhabiting New Mexico.”²⁵ Mexicans were also labeled “lazy, ignorant, and, of course, vicious and dishonest.”²⁶

This initial view of Mexicans held by Anglo-Saxon Americans laid the foundation for a discriminatory disposition by the United States “majority” toward Latinos that continues today.²⁷ The persistence of this disposition is apparent from various episodes of this country’s history. Although many examples exist that demonstrate the perpetual discriminatory treatment and exclusion of Latinos in the United States, the following examples are used because of their blatant anti-Latino justifications and their particularly marginalizing consequences for Latinos in this country.

A. Denial of the Full Benefits of Citizenship

Since at least the mid-1800s, full citizenship rights have been denied to Latino populations.²⁸ After the Mexican-American War, Mexico lost approximately 55% of its territory as well as thousands of its nationals that were living in those areas at the time.²⁹ The Mexican nationals gained United States citizenship in the Treaty of Guadalupe Hidalgo in 1848.³⁰ However, whether or not a Mexican national could actually enjoy the full benefits of citizenship was ultimately left to the individual states during that time.³¹

24. HORSMAN, *supra* note 21, at 211 (citing nn. 6, 7).

25. *Id.* (citing FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 72 (David J. Weber ed. 1973)).

26. *Id.* at 212 (citing Waddy Thompson, RECOLLECTIONS OF MEXICO 6, 23, 187, 239 (1847)).

27. The Latino identity encompasses a diverse group of individuals from different countries. The historical experiences of the diverse groups involved would be too numerous to include in this Article. Because Mexicans represent the largest Latino population in the United States and their historical experience and treatment has affected the treatment of the majority of Latinos living in the United States, I will use their experiences to demonstrate the marginalization of all Latinos.

28. MORIN, *supra* note 19 at 51-56.

29. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. V, IX, Feb. 2, 1848, 9 Stat. 922, 930 [hereinafter Treaty of Guadalupe Hidalgo].

30. *Id.* at art. IX.

31. JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 265-70 (2000) (stating that Mexicans were generally considered an inferior race unless they could show they were “white” instead of from indigenous ancestry).

State laws determined whether or not a Mexican individual could enjoy the full benefits of citizenship, such as voting, maintaining property rights, or holding political office in the jurisdiction where he lived in the United States.³² Under United States law, only “free white persons”³³ could be United States citizens. Therefore, despite the Treaty of Hidalgo, whether or not a Mexican national could be a citizen of an individual state or enjoy the full benefits of citizenship in most instances focused on the state government’s assessment of whether a Mexican could be classified as white.³⁴ The wording used by the state laws exemplified this differential treatment. For example, California extended voting rights to white male citizens of the United States and “*every white male citizen of Mexico, who elected to be a United States citizen under the Treaty of Guadalupe Hidalgo . . .*”³⁵

The determination of whether or not a Mexican was “white” under the law turned on Anglo-American perceptions of the race of particular Mexicans.³⁶ Generally, Mexicans could only be citizens if they descended from white countries.³⁷ Therefore, Mexicans of white descent were viewed as being entitled to white status and, therefore, granted citizenship.³⁸ However, Mexicans who descended from Indian, Black, or a “mixed” race were not granted citizenship or the rights that were enjoyed with that status.³⁹ This determination was typically one of perception—how the Mexican looked.⁴⁰ If the Mexican did not appear or could not pass as being white, he was denied equal status to Anglo-Americans citizens.⁴¹

32. See, e.g., *People v. De La Guerra*, 40 Cal. 311 (1870).

33. Naturalization Act of 1790; see generally *Immigration Law: An Overview*, LEGAL INFO. INST., CORNELL U. L. SCH., <http://topics.law.cornell.edu/wex/immigration> (last visited Mar. 23, 2011) (“This Act restricted naturalization to ‘free white persons’ of ‘good moral character’ and required the applicant to have lived in the country for two years prior to becoming naturalized.”).

34. See ROBERT F. HEIZER & ALAN F. ALMQUIST, *THE OTHER CALIFORNIANS* 96 (1971), reprinted in RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, *LATINOS AND THE LAW: CASES AND MATERIALS* at 21-22 (2008) [hereinafter *CASES AND MATERIALS*].

35. CA. CONST. art. II, § 1 (1849) (emphasis added), reprinted in *CASES AND MATERIALS*, *supra* note 34, at 21-22.

36. Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 AM. ETHNOLOGIST 583, 584 (1993).

37. See generally NICHOLAS DE GENOVA & ANA Y. RAMOS-ZAYAS, *LATINO CROSSINGS: MEXICANS, PUERTO RICANS, AND THE POLITICS OF RACE AND CITIZENSHIP* 12 (2003).

38. Menchaca, *supra* note 36, at 587-89.

39. E.g., CA. CONST. art. II § 1 (1849); see also *id.* at 589.

40. Menchaca, *supra* note 36, at 587-89.

41. *Id.*; see DE GENOVA & RAMOS-ZAYAS, *supra* note 37.

B. Denial of Entry into the United States as a Legal Immigrant

Prior to 1965, citizens from countries in the Western Hemisphere were not subject to the national origin quota system.⁴² Latinos, however, were systematically denied legal entry.⁴³ The enforcement of laws on the books such as the head tax, visa fee, literacy requirement, and various types of medical examinations were strictly enforced so that many Latinos from the Southern Border were forced to enter the country without authorization.⁴⁴

Traditionally, Mexicans have been used in the United States for unskilled labor.⁴⁵ The denial of legal entry coupled with a lack of border enforcement allowed the United States to satisfy their desire for temporary Mexican labor.⁴⁶ “Permitting” illegal entry was an effective way to ensure that Mexicans would not permanently remain in the United States because it helped to ensure that they did not achieve legal status.⁴⁷ Therefore, Mexican immigrants were “allowed” into the United States in an undocumented status as a method to ensure that their stay in the country could only be temporary.

Additionally, when Latinos were allowed into the United States legally, such as during the Bracero Program, their status in the United States was still temporary.⁴⁸ The Bracero Program allowed Latino immigrants to work in the United States but did not allow Bracero work-

42. MAE M. NGAI, IMPOSSIBLE SUBJECTS: IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 94 (2004); JOHNSON, *supra* note 22, at 25.

43. ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929-39, at 32 (1974) (discussing the systematic denial of visas to most Mexicans beginning in August 1928); JOHNSON, *supra* note 22, at 25.

44. NGAI, *supra* note 42, at 67-68, 71 (“Although Mexicans did not face quota restrictions, they nevertheless faces myriad entry requirement, such as the head tax and visa fee, which impelled many to avoid formal admission and inspection.” Also, discussing that race and socioeconomic status dictated the procedures at the Mexican border. This included “degrading procedures of bathing, delousing, medical-line inspection, and interrogation.”); MARK REISLER, BY THE SWEAT OF THEIR BROW, MEXICAN IMMIGRANT LABOR IN THE UNITED STATES 1900-1940, at 24 (1976); GEORGE J. SÁNCHEZ, BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE, AND IDENTITY IN CHICANO LOS ANGELES, 1900-1945, at 57 (1993); see DANIEL KANSTROOM, DEPORTATION NATION 158-59 (2007) (discussing the creation of undocumented immigration at the Southern Border); see generally JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.-MEXICO BOUNDARY (2002) (discussing the rise in “illegal” at the Southern Border).

45. NGAI, *supra* note 42, at 67, 71.

46. *Id.* at 70.

47. See JONATHAN XAVIER INDA, TARGETING IMMIGRANTS: GOVERNMENT, TECHNOLOGY, AND ETHICS 67, 70-71 (2006).

48. NGAI, *supra* note 42, at 70 (discussing Mexicans entry as “temporary visitors” as well as other “irregular” and “unstable” forms of temporary but lawful entry).

ers to bring their families with them during their stay.⁴⁹ This approach further entrenched the idea that Latino immigrants could be tolerated for their labor, but would not be welcome as permanent members of American society.

C. Lynching

Another example of the contempt that Anglo-Saxon Americans felt towards Latinos is the prevalence of lynching incidents in the United States between 1848 and 1928. While historically left out of United States' history books, the lynching of Latinos, mainly Mexicans, occurred in the Southwest at the same time that Blacks were being lynched in the South.⁵⁰ During this time, it is estimated that 597 Latinos were lynched in the Southwest.⁵¹

Lynching of Latinos in the Southwest occurred as a method to maintain racial hierarchy and social control as well as a way to gain economic resources.⁵² Anglo-Saxon Americans believed that Mexicans, like Blacks, were inferior and less than human—deeming Mexicans, therefore, unworthy of humane treatment.⁵³

Latinos were lynched or murdered for many of the same reasons that the lynching and murdering of Blacks was prevalent in the South. Mexicans were lynched for allegations of being “uppity,” making advances towards white women, cheating at cards, and refusing to leave land that whites wanted.⁵⁴ However, Latinos were also lynched for being “too Mexican,” speaking Spanish loudly or displaying their

49. See Leo R. Chavez, *Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge*, in *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 61, 72 (Juan F. Perea ed., 1997) (“The Commission’s advocacy of single male workers allowed to work on a temporary basis—without their families accompanying them—was institutionalized in contract labor programs during the 1910s and later during the Bracero Program, which lasted from 1942 to 1964.”).

50. Richard Delgado, *The Law of the Noose: The History of Latino Lynching*, 44 *HARV. C.R.-C.L. REV.* 297, 298 (2009) (examining the history of Latino lynching in the United States).

51. *Id.* at 299 (citing William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 *J. SOC. HIST.* 411, 413 (2003)).

52. PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987); William D. Carrigan & Clive Webb, “A *Dangerous Experiment*”: *The Lynching of Rafael Benavides*, 80 *N.M. HIST. REV.* 265, 271 (2005).

53. William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 *J. SOC. HIST.* 411, 416-17 (2003) [hereinafter *Mexican Origin*] (explaining how racial prejudice was the sentiment behind these acts of anti-Latino vigilantism).

54. *Id.* at 418-22.; Carrigan & Webb, *A Dangerous Experiment*, *supra* note 52, at 271.

“Mexicanness” too proudly for the comfort of Anglo society.⁵⁵ Mexican women were lynched for rebuffing the advances of white men.⁵⁶

In addition to the lynching, lands were taken and property was confiscated throughout the region.⁵⁷ Anglo-Saxon Americans reasoned that Mexicans were uncivilized due to their inferiority and, therefore, incapable of properly caring for their property.⁵⁸ Rationalizing that their treatment of Mexicans was justified by Mexican inferiority, Anglo-Saxon Americans seized Mexicans’ land and property.

D. The Bisbee Deportation of 1917

Although most deportations purport to target undocumented immigration, the Bisbee deportation⁵⁹ illustrates how many instances of mass deportation have actually stemmed from a refusal by Anglo-Saxon Americans to view Latinos as equals and a desire to maintain a status quo of inequality.

In 1917, a mass deportation of mine workers occurred in Bisbee, Arizona. The impetus for this deportation can be traced to a history of discriminatory treatment of foreign and Mexican, both citizen and noncitizen, workers in the city. As of 1881, more than half of Bisbee’s residents were foreign born.⁶⁰ Despite this, mine workers in the city were treated differently based on race, citizenship, and the belief in Anglo-American superiority.⁶¹ For example, compensation was directly correlated to one’s race and/or citizenship status. White miners received the highest pay, followed by “foreign” workers, and Mexican workers received the least.⁶²

By 1917, Mexican and “foreign” workers began to demand better wages and treatment. In response, Anglo-Saxon Americans attempted to enact anti-immigrant and anti-Mexican labor barriers such as the Alien Labor Act, which would have required that four out of five employees in any workplace be native-born or naturalized Americans.

55. Carrigan & Webb, *Mexican Origin*, *supra* note 53, at 420.

56. KEN GONZALES-DAY, *LYNCHING IN THE WEST: 1850-1935* (2006).

57. Carrigan & Webb, *A Dangerous Experiment*, *supra* note 52, at 271.

58. HORSMAN, *supra* note 21, at 210.

59. KATHERINE BENTON-COHEN, *BORDERLINE AMERICANS: RACIAL DIVISION AND LABOR WAR IN THE ARIZONA BORDERLANDS 198-238* (2009) (supplying a historical account of the Bisbee Deportation).

60. *Id.* at 81.

61. *Id.* at 199 (stating that the events that occurred in Bisbee in 1917 were shaped by historical assumptions concerning the rights and responsibilities of “white manhood”).

62. *Id.* at 101 (stating that in 1898, white miners earned \$3.50 a day, “foreign” workers earned \$2.00 per day, and Mexicans earned \$1.50 per day).

Another proposal would have required 80 percent of workers “in underground or other hazardous occupations” to be English-speaking.⁶³ On or around June 27, 1817, tensions between White, foreign and Mexican workers came to a peak and a mine worker strike began.

During the two week strike, the town was crippled.⁶⁴ The turmoil culminated on July 12, 1917, when a mass deportation of “undesirables” occurred in Bisbee, Arizona.⁶⁵ Two thousand vigilantes of Bisbee as well as local law enforcement rounded up and arrested two thousand people, the majority Mexican and Mexican Americans.⁶⁶ Approximately thirteen hundred mine workers were forcibly deported from Bisbee, Arizona to Columbus, New Mexico in cattle cars without food or water for the twelve hour trip and left there without money or transportation.⁶⁷

There was no contradiction that the strike was peaceful.⁶⁸ However, the deportation of the strikers was justified as being a measure of security for the city and being in defense of American citizens. Many argued the deportation was necessary to defend against enemy aliens, agitators, non-Americans, and those incapable of patriotism.⁶⁹ In reality, meeting the demands of the workers would have meant racial equality and the end of racial hierarchy in Bisbee’s miner camp.⁷⁰

E. Mexican Repatriation

October 29, 1929, referred to as Black Tuesday, for many marks the day when the Great Depression hit the world with the U.S. stock market crash.⁷¹ The ensuing Great Depression marked a time of severe economic depression in the United States and around the world.⁷² During this time, unemployment in the United States rose to

63. *Id.* at 201 (noting that both bills were defeated).

64. James Byrkit, *The Bisbee Deportation*, in *AMERICAN LABOR IN THE SOUTHWEST: THE FIRST ONE HUNDRED YEARS* 88 (James C. Foster ed. 1982).

65. *Id.*

66. BENTON-COHEN, *supra* note 59, at 208 nn.25-28.

67. See VERNON H. JENSON, *HERITAGE OF CONFLICT, LABOR RELATIONS IN NONFERROUS METALS INDUSTRY UP TO 1930*, at 405-06 (1950).

68. BENTON-COHEN, *supra* note 59, at 212 (stating that one U.S. Marshall described it as the most peaceful and orderly strike he had ever seen).

69. *Id.* at 220-21; see CHRISTOPHER CAPOZZOLA, *UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN* 128-30 (2008).

70. *Id.* at 211 (“For white workers and managers to admit the equal manhood of Mexican workers would be to topple the teetering racial hierarchy of the white man’s camp.”).

71. HOFFMAN, *supra* note 43, at 33.

72. *Id.*

approximately 25%.⁷³ Joblessness affected both the rich and the poor, and many saw the economic disaster as a condition of the economy that would not end.⁷⁴

This economic crisis resulted in the persecution of those perceived to be Mexican immigrants.⁷⁵ Although the alleged motive behind the actions taken during the time span of 1929-1939 was to remove all unauthorized immigrants, no other racial or ethnic group was subjected to the harsh treatment that the Mexican community endured.⁷⁶ Indeed the mass deportation of immigrants during this period was later named the Mexican Repatriation.⁷⁷ Violence and scare tactics were used to push Mexicans out of the United States, and mass deportations through roundups and repatriation drives abounded.⁷⁸

During the Mexican Repatriation period, it is estimated that approximately one million individuals of Mexican descent were forcibly removed from the United States and sent to Mexico.⁷⁹ Across the United States, entire neighborhoods disappeared as the Mexican occupants were forced from their homes.⁸⁰ Although the rhetoric focused on the use of Mexican Repatriation as a method to target unauthorized immigration and open up jobs for the employment of United States citizens, thousands of those forcibly removed from the United States to Mexico were United States citizens.⁸¹

F. Operation Wetback

Another government program that targeted Latinos was Operation Wetback. Operation Wetback occurred in 1954 and was a method used to enforce the deportation of undocumented Mexican

73. ROBERT H. FRANK & BEN S. BERNANKE, *PRINCIPLES OF MACROECONOMICS* 286 tbl.10.1 (4th ed. 2009).

74. *Id.*

75. See generally FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930s* (2006) (describing the injustice and discrimination that the Mexican community experienced in 1930s America).

76. HOFFMAN, *supra* note 43, at 33; BALDERRAMA & RODRÍGUEZ, *supra* note 75, at 147.

77. Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 *PACE L. REV.* 1, 4 (2005).

78. BALDERRAMA & RODRÍGUEZ, *supra* note 75, at 1.

79. *Id.* at 3, 9.

80. *Id.* at 2.

81. Paul Gilbert Carrasco, *Latinos in the United States: Invitation and Exile*, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 190, 194 n.26 (Juan F. Perea ed., 1997).

laborers.⁸² However, as with the Mexican Repatriation, the net was cast much wider.⁸³

The then Commissioner of U.S. Immigration and Nationalization Service, General Joseph Swing, coordinated with state and local officials and local law enforcement to locate and deport “illegal” Mexican immigrants.⁸⁴ The name of the program made obvious its targets, given that “wetback” is a derogatory term used for individuals from Mexico. True to its name, Operation Wetback targeted Mexican nationals.⁸⁵ Police enforcement focused predominately on Latino neighborhoods in the Southwestern states.⁸⁶ Regardless of where police enforcement occurred, officers looked for “Mexican-looking” individuals and asked those individuals for identification of their immigration status.⁸⁷ Fear of violence, unemployment and the potential militarization of their neighborhoods and homes caused many Mexicans to flee regardless of their immigration or citizenship status.⁸⁸

Approximately 3.7 million Mexicans were deported during Operation Wetback.⁸⁹ As with Mexican Repatriation, United States citizens of Mexican descent as well Mexican nationals were forcibly removed from the United States.⁹⁰ While many recognized Operation Wetback as a xenophobic and discriminatory act against Mexicans, many applauded the program.⁹¹ Those individuals and organizations stated that Operation Wetback helped to eradicate the presence of “illegal” aliens in United States, who damaged the health of the American people, displaced American workers, and harmed American retailers. Further they argued that the open-border policy of the American government posed a threat to the security of the United States.⁹²

82. See JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954*, at 228 (1980); see also IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* 83 (2003).

83. Carrasco, *supra* note 81, at 197.

84. See ARTSIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 320–21 (2006); Eleanor M. Hadley, *A Critical Analysis of the Wetback Problem*, 21 *LAW & CONTEMP. PROBS.* 334, 351 (1956).

85. HING, *supra* note 18, at 133; GARCÍA, *supra* note 82, at 172.

86. GARCÍA, *supra* note 82, at 183.

87. *Id.* at 143.

88. *Id.*

89. Carrasco, *supra* note 81, at 197.

90. *Id.*

91. Hadley, *supra* note 84, at 355 (1956) (citing *AM. G.I. FORUM OF TEX. & TEX. STATE FED'N OF LABOR, WHAT PRICE WETBACKS?* (1953)).

92. *Id.*

G. Chandler Roundup

In a more recent historical episode of Latino discrimination and social exclusion, police officers in cooperation with Border Patrol agents targeted individuals in Chandler, Arizona whom enforcement suspected of being “illegal” immigrants.⁹³ During the five days that police and federal officers engaged in this program, also referred to as “Operation Restoration,” police officers and Border agents walked through town asking anyone they suspected of being “illegal” to prove citizenship.⁹⁴ In their search for “illegal” immigrants, local police and federal agents targeted anyone who was suspected of being Mexican.⁹⁵ As a result, many United States citizens and legal residents were stopped because they spoke Spanish or looked Mexican.⁹⁶ Mayor Boyd Dunn acknowledged that officers did engage in racial profiling, and the city settled a lawsuit against them as a result of their behavior.⁹⁷

II. THE INTERTWINED RELATIONSHIP BETWEEN IMMIGRATION LAW AND THE CRIMINAL JUSTICE SYSTEM

During the last thirty years, immigration law has become increasingly intertwined with the criminal justice system. This phenomenon has resulted from a rhetoric that immigrants have increasingly been responsible for crime and terror that is occurring within our borders. This Part will overview the creation and expansion of the “criminal alien” through immigration reforms in the last three decades, the corresponding increased use of criminal enforcement measures to target this “criminal alien,” and the resulting increase in “criminal alien” expulsions.

93. See generally Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 (2005) (discussing urban policy and practice in constructing citizenship).

94. Anna Gorman, *Arizona Immigration Law an Unpleasant Reminder of Chandler's Past*, L.A. TIMES, June 6, 2010, at A1, available at <http://articles.latimes.com/2010/jun/06/nation/la-na-chandler-20100606>.

95. Louis Sahagun, *Immigration Sweep Stirs Cloud of Controversy Residents Sue Arizona Town, Saying Crackdown on Illegal Workers Led to Harassment of U.S. Citizens*, L.A. TIMES, Sept. 1, 1997, at A5, available at <http://articles.latimes.com/1997/sep/01/news/mn-27943>.

96. Gorman, *supra* note 94.

97. *Id.*

A. Immigration Reform and the Expansion of the “Criminal Alien”

Immigration reforms since the late 1980s have increased the number of removals based upon immigration consequences of a criminal conviction, expanding the category of the “criminal alien.” They have done so in two ways: (1) by increasing the number of criminal convictions that have become removable offenses, and (2) by decreasing the number of relief remedies available to immigrants who have been convicted of crimes in immigration court. Currently, immigration law has made noncitizens increasingly more likely to be convicted of a crime that will result in deportation and has restricted the ability of immigration courts to prevent this removal.

Prior to the late 1980s, the exclusion and removal of immigrants was more limited and immigration enforcement officials had broad discretion in their decision to admit and remove noncitizens convicted of crimes.⁹⁸ However, beginning in the late 1980s, the climate towards immigrants began to change and subsequent immigration reform legislation began to reflect an increasing desire to remove noncitizens from the United States.⁹⁹ Much of the immigration legislation enacted after the late 1980s increased the number of noncitizens removable based on criminal activity by increasing the amount of crimes that made noncitizens subject to immigration consequences, either by lowering the sentence required to trigger removability or by adding certain conduct to the list of already established removable offenses.¹⁰⁰ For example, in 1988, Congress passed the Anti-Drug Abuse Act (“ADAA”).¹⁰¹ Under the ADAA, the category “aggravated felony” was first introduced, which at that time included three crimes: murder,

98. *I.N.S. v. St. Cyr.*, 533 U.S. 289, 294-96 (2001); see Yolanda Vázquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 43-44 (2010).

99. 533 U.S. at 294-96; Vázquez, *supra* note 98, at 44-46.

100. Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat 3009-546, 3009-597 (1996) (codified at 8 U.S.C. § 1101(a) (LexisNexis 2006 & Supp. 2011)). For example, a conviction under INA § 101(a)(43)(D), prior to IIRIRA, could only be considered an aggravated felony if the amount of the funds exceeded \$100,000. A conviction under INA § 101(a)(43)(M) could only be considered an aggravated felony and subject to deportation if the loss to the victim exceeded \$200,000. After IIRIRA, the loss to the victim in each section was lowered to \$10,000 for the conviction to be considered an aggravated felony. In addition, INA § 101(a)(43)(F), (G), (N), and (P), changed from “is at least [five] years” and replaced by “at least one year,” thereby, decreasing the sentence of a conviction to qualify for deportation under each section.

101. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4469-70 (codified as amended at 21 U.S.C. § 1501 (LexisNexis 2006 & Supp. 2011)).

drug trafficking, and illegal trafficking in firearms or explosive devices.¹⁰² Currently, however, there are twenty-one categories in the INA that enumerate crimes that qualify as aggravated felonies.¹⁰³ While the term “aggravated felony” gives the perception that those who are convicted in this category are dangerous criminals, crimes that would be defined under this category often are neither “aggravated” nor a “felony.”¹⁰⁴ The aggravated felony category, with its expansion, now includes: a “theft offense (including receipt of stolen property) or burglary offense . . . for which the term of imprisonment [is] at least one year,”¹⁰⁵ as well as “an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of [two] years’ imprisonment or more may be imposed.”¹⁰⁶

Later, legislative acts continued this trend of labeling noncitizens as “criminal aliens,” and subjecting noncitizens to deportation for criminal convictions. The Immigration and Nationality Act of 1990 (“The Act”) and the Immigration and Nationality Technical Corrections Act of 1994 (“INTCA”) both increased the number of crimes that became removable offenses while curtailing the remedies available to those noncitizens convicted of crimes to prevent removal.¹⁰⁷ As a result of these measures, many noncitizens became ineligible to stay in the United States as they no longer were eligible for immigration relief such as asylum, voluntary departure, registry, naturalization, withholding, or suspension of deportation.¹⁰⁸

Then in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (“IIRIRA”).¹⁰⁹ As two of the most sweeping immigration acts in history, they further

102. *Id.*

103. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (LexisNexis 2006 & Supp. 2011).

104. Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 477 (2001).

105. INA § 101(a)(43)(G).

106. *Id.* § 101(a)(43)(T).

107. Immigration and Nationality Technical Corrections Act (“INTCA”) of 1994, Pub. L. No. 103-416, §224, 108 Stat. 4305, 4322-24 (codified as amended at 8 U.S.C. § 1252(a) (1994 ed.) (transferred to § 1228(c) (1996))); Immigration Act of 1990 (“The Act”), Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101 (LexisNexis 2006 & Supp. 2011)).

108. The Act §§ 509, 515(a).

109. IIRIRA, Pub. L. No. 104-208, § 304(b), 110 Stat 3009-546, 3009-597 (1996) (codified at 8 U.S.C. § 1101(a) (LexisNexis 2006 & Supp. 2011)); Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1276-77 (codified as amended at 8 U.S.C. § 1105a (2006)); see Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

increased the number of crimes that became removable offenses and severely limited the relief available to noncitizens.¹¹⁰ The acts increased the number of noncitizens who could be classified as aggravated felons, increased the number of crimes that made a person removable, severely restricted judicial review of administrative removal orders, limited remedies for relief from deportation, limited ability for admission into the United States by aggravated felons, and limited the discretionary relief from deportation available by the Attorney General.¹¹¹ One specific example of AEDPA and IIRIRA's effects was the repeal of INA §212(c) relief from deportation.¹¹² Prior to 1996, more than half of the applications under § 212(c) received relief from deportation in immigration court.¹¹³

B. The Use of the Criminal Justice System to Assist in Locating and Expelling the "Criminal Alien"

While reforms in immigration law have broadened the category of removable "criminal aliens" and decreased their ability to remain in this country through the criminal court system, enforcement of immigration law through the criminal justice system has also assisted in the intertwined relationship of immigration and criminal law that currently exists as well as the increase in the number of noncitizens removed.

The Department of Homeland Security ("DHS") implemented the Agreement of Cooperation in Communities to Enhance Safety and Security ("ACCESS"). ACCESS houses a series of programs that depend on state and local cooperation with federal agents to enforce federal immigration law, including the 287(g) Memorandum of Understanding program and Secure Communities program.¹¹⁴ Under these programs, local and state police officers are used to enforce immigration law for purposes of locating and deporting "dangerous" criminals in order to maintain our national security and keep the country's neighborhoods safe.¹¹⁵ ACCESS is operated by ICE.¹¹⁶

110. See IIRIRA § 304(b); AEDPA § 440(d).

111. *Id.*

112. *I.N.S. v. St. Cyr.*, 533 U.S. 289, 296 n.5 (2001).

113. *Id.*

114. See *ICE ACCESS*, U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/access/> [hereinafter *ICE ACCESS*] (last visited Apr. 3, 2011).

115. Julia Preston and Kirk Semple, *Taking a Hardline: Immigrants and Crime*, N.Y. TIMES, Feb. 17, 2011, at A20, available at <http://www.nytimes.com/2011/02/18/us/18immigration.html> ("The Secure Communities program connects the state and local police to Department of Homeland Security databases, allowing them to use fingerprints to check the immigration history, as

While there are many programs that have been implemented, 287(g), Secure Communities as well as Operation Streamline, a program that prioritizes the federal prosecution of immigration violations, are more recent examples of how the criminal justice system currently is used to enforce immigration law in the United States.

1. 287(g) Memorandum of Understanding

One aspect of the enactment of IIRIRA was its addition of section 287(g) to the INA.¹¹⁷ This amendment to the INA allowed for state services to carry out immigration enforcement under agreement with the federal government.¹¹⁸ It was enacted as a mechanism to assist federal immigration officers in locating and removing noncitizens who pose a threat to national security and public safety.¹¹⁹ Under 287(g) Memorandum of Understanding agreements, local law enforcement are permitted to perform immigration functions concerning identification, processing, and detention of immigrants.¹²⁰ This includes the ability for local authority to arrest and transfer immigrants, to investigate immigration violations, to collect evidence, and to assemble an immigration case for prosecution or removal.¹²¹

Although 287(g) agreements were previously available, it was not until after the September 11, 2001 attacks when they began to be used.¹²² Currently, ICE has agreements with seventy-one law en-

well as the criminal record, of anyone booked after arrest. If a fingerprint match shows that the suspect is subject to deportation, both the immigration agency and the police are notified.”).

116. *ICE ACCESS*, *supra* note 114.

117. IIRIRA, Pub. L. No. 104-208, §287(g), 110 Stat. 3009-546 (1996).

118. *Id.*

119. *See Fact Sheet*, *supra* note 6 (“Terrorism and criminal activity are most effectively combated through a multi-agency/multi-authority approach that encompasses federal, state and local resources, skills and expertise. State and local law enforcement play a critical role in protecting our homeland because they are often the first responders on the scene when there is an incident or attack against the United States. During the course of daily duties, they will often encounter foreign-born criminals and immigration violators who pose a threat to national security or public safety.”).

120. KOULISH, *supra* note 11, at 134.

121. *Id.*

122. ELENA LACAYO, NAT’L COUNCIL OF LA RAZA, THE IMPACT OF SECTION 287(G) OF THE IMMIGRATION AND NATIONALITY ACT ON THE LATINO COMMUNITY 2 (2010); BLAS NUNEZ-NETO ET AL., CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 17 (2007) (“IIRIRA amended the INA by authorizing the AG (now the Secretary of Homeland Security) to enter into written agreements with states or political subdivisions of a state so that qualified officers could perform specified immigration-related duties. This authority was given new urgency following the terrorist attacks in September 2001. In 2002, the AG proposed an initiative to enter into such agreements in an effort to carry out the country’s anti-terrorism mission.”).

forcement agencies in twenty-five states.¹²³ Since January 2006, ICE states that the programs are “credited with identifying more than 200,300 potentially removable aliens—mostly at local jails.”¹²⁴

2. Secure Communities

Another program used by ICE to locate and remove immigrants is the Secure Communities program.¹²⁵ Secure Communities establishes the use of biometrics to share information on everyone who is booked into law enforcement custody between the FBI, DHS, and local law enforcement. By DHS’s own mission statement, Secure Communities was created “to identify, detain and remove from the United States aliens who have been convicted of a serious criminal offense and are subject to removal.”¹²⁶ The program has also described its targets as “high-threat” criminal immigrants.¹²⁷ Currently, eleven hundred jurisdictions in forty states are part of Secure Communities.¹²⁸ ICE plans for all jurisdictions to participate in Secure Communities by 2013.¹²⁹ Between October 2008 and February 28, 2011, over sixty thousand noncitizens were identified and removed through Secure Communities.¹³⁰

123. See *Fact Sheet*, *supra* note 6.

124. *Id.*

125. See generally *Secure Communities: A Fact Sheet*, AM. IMMIGR. COUNCIL, <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet> (last visited Apr. 3, 2011).

126. CTR. FOR CONSTITUTIONAL RIGHTS, BRIEFING GUIDE TO “SECURE COMMUNITIES”—ICE’S CONTROVERSIAL IMMIGRATION ENFORCEMENT PROGRAM NEW STATISTICS AND INFORMATION REVEAL DISTURBING TRENDS AND LEAVE CRUCIAL QUESTIONS UNANSWERED, *available at* http://www.cardozo.yu.edu/uploadedfiles/Cardozo/Profiles/immigrationlaw_741/NDLON_FOIA_Briefing%20guide.Final.pdf (last visited Mar. 19, 2011) [hereinafter BRIEFING GUIDE]; MEMORANDUM OF AGREEMENT BETWEEN U.S. DEPARTMENT OF HOMELAND SECURITY IMMIGRATION AND CUSTOMS ENFORCEMENT AND STATE IDENTIFICATION BUREAU 1, [hereinafter MEMORANDUM OF AGREEMENT] *available at* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf; see generally NAT’L IMMIGRATION LAW CTR., DHS’S “SECURE COMMUNITIES”: NO RULES OF THE ROAD (2011), [hereinafter NILC SECURE COMMUNITIES] *available at* www.nilc.org/immlawpolicy/LocalLaw/scomm-no-rules-of-road-2011-03-04.pdf (last visited Mar. 19, 2011) (discussing how “[a]lthough the program purportedly targets ‘criminal aliens’ who have been convicted of serious offenses, secure communities applies to immigrants regardless of guilt or innocence, how or why they were arrested, and whether their arrests were based on racial or ethnic profiling or were just a pretext for checking immigration status”).

127. See MEMORANDUM OF AGREEMENT, *supra* note 126, at 1.

128. NILC SECURE COMMUNITIES, *supra* note 126, at 3.

129. See U.S. DEP’T OF HOMELAND SEC. IMMIGR. AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: ACTIVATED JURISDICTIONS 1 (2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

130. BRIEFING GUIDE, *supra* note 126, at 2, n.7 (citing Immigration and Customs Enforcement, Secure Communities State Identification Deployment Briefing, New York State, June 17, 2009, ICE FOIA 10-267-000800).

3. Operation Streamline

In recent years, federal prosecutors have focused on prosecuting federal immigration violations.¹³¹ These recently high numbers of federal prosecutions can be attributed to Operation Streamline.¹³² Operation Streamline focuses on arresting, prosecuting and removing undocumented immigrants for immigration violations.¹³³ The program was developed by the Bush Administration in 2005.¹³⁴ It has been described as a means to deter unlawful immigration from the Southern Border through mandatory federal prosecution of all immigration violations, including unlawful entry and unlawful reentry. Prior to Operation Streamline, most apprehended undocumented immigrants were subject only to civil process and possible penalties.¹³⁵

C. Increasing Expulsion of the “Criminal Alien”

The programs above and the immigration reforms of the last thirty years have led to an increase in the total number of individuals removed from the United States as well as the total number of individuals actually removed based upon criminal convictions. For instance, in 1988, the United States removed 25,829 noncitizens, 5,956 of which were removed based on their criminal or narcotics violations, approximately 23.1% of the total removals.¹³⁶ In 1996, just ten years later, the United States removed 68,657, with 36,909 noncitizens removed for criminal convictions, accounting for 53.8% of the total re-

131. See TRANSACTION RECORDS ACCESS CLEARINGHOUSE, SURGE IN IMMIGRATION PROSECUTIONS CONTINUES (2008), available at <http://trac.syr.edu/immigration/reports/188/> (highlighting a surge in immigration-related prosecutions from the previous year).

132. JOANNA LYDGATE, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 1 (2010); see also KOULISH, *supra* note 11, at 44-47.

133. Julia Preston, *More Illegal Crossings Are Criminal Cases, Group Says* the New York Times, N.Y. TIMES, June 18, 2008, at A14, available at <http://www.nytimes.com/2008/06/18/us/18immig.html> (“Criminal prosecutions of immigrants by federal authorities surged to a record high in March, as immigration cases accounted for the majority—57 [%]—of all new federal criminal cases brought nationwide that month . . .”), see Spencer S. Hsu, *Immigration Prosecutions Hit New High*, WASH. POST, June 2, 2008, at A1, available at <http://www.washingtonpost.com/wpdyn/content/article/2008/06/01/AR2008060102192.html> (“Federal law enforcement agencies have increased criminal prosecutions of immigration violators to record levels, in part by filing minor charges against virtually every person caught illegally crossing some stretches of the U.S.-Mexico border, according to new U.S. data.”).

134. KOULISH, *supra* note 11, at 44.

135. *Id.*

136. U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 1996 STATISTICAL YEARBOOK, CHPTR. VI: ENFORCEMENT, 1715 (1996), available at <http://www.dhs.gov/files/statistics/publications/archive.shtm#1>.

movals.¹³⁷ In 2004, the number rose to 202,842 noncitizens removed, 88,897 of which were removed for a criminal conviction.¹³⁸ Most recently, in 2009, 393,000 total persons were removed from the United States.¹³⁹ Of the 393,000 noncitizens removed, approximately 128,000 were removed as a result of a criminal conviction.¹⁴⁰

III. DISCONNECT BETWEEN IMMIGRANTS, ENFORCEMENT AND “DANGEROUS” CRIME

As this Part will discuss, ICE’s local enforcement programs and increased federal prosecutions of immigration violations under Operation Streamline have done little to locate and remove serious criminals who pose a threat to national security or public safety. In fact, these programs have done little more than to remove noncitizens guilty of drug crimes and traffic offenses.

Nevertheless, the rhetoric used to justify these programs has solidified the belief that immigrants cause more crime and threaten our nation and community. It is now a commonplace belief that noncitizens, especially Latinos, are removed from the United States because they are “dangerous criminals” who threaten the national security and public safety.

A. 287(g) MOAs Fail to Target Dangerous Crimes or Terrorism

ICE maintains as part of their reasoning for 287(g) agreements that:

Terrorism and criminal activity are most effectively combated through a multi-agency/multi-authority approach . . . State and local law enforcement officers play a critical role in protecting our homeland because they are often the first responders on the scene when there is an incident or attack against the United States. During the course of daily duties, they will often encounter foreign-born criminals and immigration violators who pose a threat to national security or public safety.¹⁴¹

It also states,

The cross designation between ICE and state and local patrol officers, detectives, investigations and correctional officers allows

137. *Id.*

138. *See supra* note 2.

139. 2009 ANNUAL REPORT, *supra* note 3.

140. *Id.* at 4 tbl.4.

141. *See Fact Sheet, supra* note 6.

these local and state officers necessary resources and latitude to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smugglings and money laundering.¹⁴²

Based on ICE's promotion, dangerous crime was, and is, a top priority for this program. However, when looking at the data for the specific types of crimes that noncitizens apprehended had committed, the actual information confirms that noncitizens deported under these agreements, are not the dangerous criminal felons and terrorists that American society believes them to be. Instead, they are typically those who have the misfortune of "driving while brown," since many detained under this program were charged with minor traffic offenses were Latinos.

For example, in 2008, North Carolina placed three thousand noncitizens in removal proceedings as a result of their 287(g) agreements.¹⁴³ However, of the three thousand noncitizens placed in removal, 23% were charged with a DWI and 33% were charged with violations of motor vehicle laws other than DWI, such as driving without a license.¹⁴⁴ The information was the same in Montgomery County, Maryland.¹⁴⁵ Out of the 221 noncitizens arrested, 117 were originally charged with driving without a license and twenty-four others were charged with other traffic offenses.¹⁴⁶ In Cobb County, Georgia and Frederick County, Maryland, approximately 80% of the individuals they have detained through 287(g) were individuals who committed Level 3 offenses, which are defined as crimes punishable by less than one year, or traffic offenses.¹⁴⁷

The unequal levels of crime enforcement under 287(g) and the impact on Latinos is most drastically seen in Alabama. In Alabama, it was revealed that 58% of motorist stopped by a specific police officer based upon 287(g) were Latinos, although Latinos make up less than

142. *Id.*

143. MARTY ROSENBLUTH, SOUTHERN COALITION FOR SOCIAL JUSTICE, 287(g) AND OTHER ICE ACCESS PROGRAMS IN 2008, at 2, [hereinafter NCSA PRESENTATION] available at http://www.southerncoalition.org/documents/287g_and_ICE_Access.pdf.

144. *Id.*

145. Jeremy Hauck & Sebastian Montes, *Casa de Maryland Sues Frederick County Sheriff's Office*, GAZETTE.NET, Nov. 25, 2009, available at http://www.gazette.net/stories/11252008/frednew181637_32489.shtml.

146. *Id.*

147. RANDY CAPPES ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(g) STATE AND LOCAL IMMIGRATION ENFORCEMENT 2 (2010), available at <http://www.migrationpolicy.org/pubs1287-divergence.pdf>.

2% of Alabama's population.¹⁴⁸ When asked about his ability to make immigration enforcement decisions, the officer stated, "I may be able to take out a terrorist before he does something else to us."¹⁴⁹ There were no records to verify that any of the Latino immigrants that were stopped by this police officer had any connection to terrorism.

In spite of the rhetoric that the program is used to combat threats to public safety and national security, jurisdictions' statistics vary significantly.¹⁵⁰ Still, it is estimated that only 50% of the noncitizens apprehended have been defined as convicted of serious crime.¹⁵¹ Therefore, although the 287(g) program may have been intended to target noncitizens who pose a risk to national security and public safety, there is currently little connection between acts of terrorism or serious crime and the immigrants who are being apprehended under the 287(g) agreements.

B. Secure Communities Fails to Target Dangerous Criminals

In looking at the statistics on the type of offenses for which noncitizens are being put into the criminal justice system through Secure Communities, we again see the lack of nexus between dangerous crime and immigrants removed.

In 2009, 22% of individuals transferred into ICE custody through Secure Communities were non-criminals.¹⁵² In 2010, the number had risen to at least 32%.¹⁵³ When one includes the numbers of both non-criminals or those who were picked up for low level offenses, such as traffic offenses or petty juvenile mischief, the numbers rise to 79% since the program's inception.¹⁵⁴

In Maricopa County, Arizona, home to Sheriff Joe Arpaio, ICE categorizes more than half (54%) of people deported through Secure Communities as non-criminals. Not surprising, the vast majority, if not all, have been Latinos.¹⁵⁵

148. Daniel C. Vock, *Police Join Feds to Tackle Immigration*, STATELINE.ORG., Nov. 27, 2007, available at <http://www.stateline.org/live/details/story?contentId=259949>.

149. *Id.*

150. CAPPS ET AL., *supra* note 147, at 2.

151. *Id.*

152. BRIEFING GUIDE, *supra* note 126, at 2.

153. *Id.*

154. *Id.*

155. *Id.* at 3.

C. Operation Streamline Fails to Target Dangerous Criminals

What has arisen from Operation Streamline's "zero-tolerance" attitude has been an increase in the prosecution of nonviolent immigration crimes while at the same time a decrease in the number of prosecutions for federal weapons, drugs, smuggling, organized crime, corruption, and "white collar" crimes.¹⁵⁶

Prior to the implementation of Operation Streamline, federal prosecutions of immigration violations were normally used for individuals with previous criminal records.¹⁵⁷ Today, the majority of federal prosecutions are against those apprehended attempting to cross the border for the first time, many with no prior criminal history or offense for entering the United States.¹⁵⁸ Currently, 54% of all federal prosecutions are for immigration violations, the majority have been against Mexican and Central American immigrants.¹⁵⁹

While DHS continues to state that Operation Streamline has been a success, many disagree. Most attribute any decline in the number of immigrants arrested at the border for unlawful entry to several other factors: the decline in the economy, the increased costs of immigration, the increased use of professional smugglers, and false documents.¹⁶⁰

In defense of the implementation of Operation Streamline, ICE states that they put a high priority on "illegal" immigration, which includes targeting illegal aliens with criminal records who pose a threat to public safety.¹⁶¹ However, as the statistics show, most prosecuted under Operation Streamline have done no more than attempt to cross the border for the first time without authorization and have no prior criminal record.

156. LYDGATE, *supra* note 132, at 2; see also *New Data on Federal Court Prosecutions Reveal Non-Violent Immigration Prosecutions Up*, IMMIGR. POL'Y CENTER, <http://www.immigrationpolicy.org/just-facts/new-data-federal-court-prosecutions-reveal-non-violent-immigration-prosecutions> (last visited Apr. 2, 2011) (hereinafter *New Data on Federal Court Prosecutions*) (stating that between 2003 and 2008, prosecutions fell for weapons by 19%, organized crime by 20%, public corruption by 14%, drug prosecution by 20%, and "white collar" crimes fell by 18%).

157. LYDGATE, *supra* note 132, at 1.

158. *Id.* at 3.

159. *New Data on Federal Court Prosecutions*, *supra* note 156.

160. LYDGATE, *supra* note 132, at 10.

161. See, *Fact Sheet: Criminal Alien Program*, U.S. DEPARTMENT OF HOMELAND SEC. IMMIGR. AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/cap.htm> (last visited Mar. 31, 2011).

D. Drug Offenses, Traffic Offenses, and Immigration Violations
Constitute the Majority of Immigration Removals Based
Upon Criminal Conduct from the United States

In 2009, the three actual leading causes of immigrants being removed from the United States based upon what DHS categorized as criminal convictions were for drug crimes, traffic offenses, and immigration related violations. These three categories accounted for 61% of all noncitizens removed that year.¹⁶² Drug crimes, although categorized as “Dangerous Drugs” crimes in DHS’s Annual Report, included simple possession as well as manufacturing of any drug deemed to be illegal.¹⁶³ Traffic offenses, the second largest criminal removal category, were not defined at all.¹⁶⁴ The third highest category of removal, immigration violations, included unlawful entry, re-entry, false claims to citizenship, as well as alien smuggling. No statistics were available for the percentages of each crime that made up each removable criminal category.

As for crimes that might truly be considered violent or dangerous, such as terrorism, murder or sexual assault, none appear to be a leading or even considerable cause of removal. Sexual assault offenses accounted for only 2.2% of the total number of immigrants removed for criminal violations. Terrorism and murder did not appear anywhere on the list of leading causes.¹⁶⁵

IV. CRIMMIGRATION’S PRESENT-DAY
IMPACT ON LATINOS

While the enmeshment of immigration law into the criminal justice system has failed to address or reduce dangerous or terrorist crime, it has had an incredibly detrimental impact on the Latino community.¹⁶⁶ In this way, crimmigration has become the current mechanism used to extend the longstanding subordination and marginalization of Latinos in the United States that was discussed in Part I of this Article. Unfortunately, discussion of this harmful impact

162. 2009 ANNUAL REPORT, *supra* note 3, at 4 tbl.4.

163. *Id.*

164. *Id.* It is worth noting that 2009 was the first year that the DHS Annual Enforcement Report listed traffic offenses. This is surprising since the category managed to be the second leading type of crime that caused a noncitizen to be removed, but not surprising in light of statistical outcomes for 287(g) and Secure Communities programs.

165. *Id.*

166. See JOHNSON, *supra* note 22, at 30 (“With race remaining central to modern immigration enforcement, persons of Mexican ancestry have experienced its detrimental impacts.”).

has been obscured by society's focus on the social construct of the dangerous "criminal alien" who threatens national security and public safety.¹⁶⁷

This section aims to discuss the impact that crimmigration has had on Latinos. The impact is not only on the noncitizen Latinos who face removal but on their family, friends, and the community in which they live.

A. The Number of Latinos Removed from the United States

Latinos currently represent the largest minority in the United States, representing approximately 15.8% of the total United States population.¹⁶⁸ Latinos also reflect the largest group of immigrants living in the United States, approximately 53.1%.¹⁶⁹

The staggering number of individuals removed from the United States each year, including for criminal violations, most greatly affects Latinos. The majority of noncitizens being removed are from five Latin American countries: Mexico, El Salvador, Honduras, Guatemala, and the Dominican Republic.¹⁷⁰ In fact, in fiscal year 2009, Latinos accounted for approximately 94% of the total number of removals as well as the total number of noncitizens removed for criminal violations.¹⁷¹ Further, in the criminal justice system, over 80% of the individuals prosecuted are poor.¹⁷² Therefore, the largest group of individuals affected by removal from the United States based on criminal convictions is poor Latino immigrants.

B. Impact of Crimmigration Removals on Latino Individuals

In a 1945 decision Justice Murphy stated that "[t]he impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose

167. *Id.* at 121-23 ("Often overlooked in the study of 'criminal aliens' is the impact of racially skewed U.S. law enforcement on the deportation of immigrants.").

168. U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS (Nov. 4, 2010), <http://quickfacts.census.gov/qfd/states/00000.html> (The data is "derived from Population Estimates, Census of Population and Housing, Small Area Income and Poverty Estimates, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits, Consolidated Federal Funds Report.").

169. U.S. CENSUS BUREAU, PLACE OF BIRTH OF THE FOREIGN-BORN POPULATION: 2009, at 2 (2010), available at <http://www.census.gov/prod/2010pubs/acsbr09-15.pdf>.

170. See 2009 ANNUAL REPORT, *supra* note 3, at 4.

171. See *id.* at 4 tbl.3.

172. STEVEN K. SMITH & CAROL J. DEFANCES, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE 1 (1996), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/id.pdf>.

his family, his friends, and his livelihood forever. Return to his native land may result in poverty, persecution, and even death.”¹⁷³ Sixty-six years later, his statement remains true.

The detrimental impact of removal is acutely born by Latino individuals who are at risk of being removed or have been removed.¹⁷⁴ The immigration consequences of criminal convictions affect an individual’s immigration status, his or her ability to naturalize, and his or her ability to remain in the United States with family and friends. Many individuals that have been removed had been in the United States for many years.¹⁷⁵ Once removed, they are forced to go to a country that they do not know and where they are without family or friends.¹⁷⁶ They may not know the culture, speak the language of that country and may not be able to obtain employment.¹⁷⁷ The citizens of the country they return to may find them “foreign” and treat them differently.¹⁷⁸

The ability of a deportee to work or earn a living is difficult in countries that are already struggling with issues of poverty and unemployment.¹⁷⁹ Since many that are deported are poor, they arrive to their country with only the clothes on their back. Lawful permanent residents who are removed lose all Social Security benefits they had

173. *Bridges v. Wixon*, 326 U.S. 135, 164 (1945).

174. I am focusing on the detrimental impact experienced by removed Latino immigrants, but Latino Americans also are affected by increased crimmigration removals. For example, Latino Americans face increased racial profiling by law enforcement. One in ten Latino adults in the United States reported that they had been asked by police or other authorities about their immigration status in 2009. LACAYO, *supra* note 122, at 2 (discussing the 2009 Pew Hispanic Center survey of Latinos).

175. See, e.g., Karen Branch-Brioso & Peter Shinkle, *Longtime Legal Residents Face Deportation for Minor Crimes*, ST. LOUIS POST-DISPATCH, May 3, 2004, at A1, available at LEXIS (search for source); Elena Shore, *Don't Pee in Public: Petty Crimes Can Get Immigrants Deported*, NEW AMERICA MEDIA, Jan. 28, 2005, available at http://infowire.newamericamedia.org/news/view_article.html?article_id=2c2dc92abd5d9dd37a92d273a06f1f00.

176. See, e.g., Alex DiBranco, *San Francisco College Student Faces Unexpected Deportation*, CHANGE.ORG (Nov. 4, 2010), <http://news.change.org/stories/san-francisco-college-student-faces-unexpected-deportation>.

177. See Charlie Pearl, *Friends Drum Up Support for Honduran Facing Deportation*, STATE-JOURNAL.COM (Mar. 30, 2010), available at http://www.state-journal.com/news/printer_friendly/4799402.

178. See La Gringa, *Hard Life in Honduras for One Deportee*, LA GRINGA'S BLOGICITO (Mar. 28, 2010), <http://lagringasblogicito.blogspot.com/2010/03/hard-life-ahead-in-honduras-for-one.html#>.

179. For instance, Nicaragua is the second poorest country in the Western Hemisphere and Honduras is the third. U.S. DEPT. OF STATE, BUREAU OF WESTERN HEMISPHERE AFFAIRS, BACKGROUND NOTE: NICARAGUA (2011), <http://www.state.gov/r/pa/ei/bgn/1850.htm#econ>; *Honduras: 2.5 Million Benefit from Social Investment Fund*, WORLD BANK, INT'L DEV. ASS'N (2008), available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21940442~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>.

earned while working in the United States.¹⁸⁰ Many deportees have few opportunities for employment.¹⁸¹

C. Impact of Crimmigration Removals on Latino Families

Removal affects not only the individual removed, but also the families they leave behind. It is estimated that nearly 10% of families with children in the United States live in a “mixed status” household.¹⁸² Mixed status is defined as a family that has both citizen and noncitizen members.¹⁸³ From 1996 to 2007, it is estimated that 1.6 million families in the United States were separated in some form by removals.¹⁸⁴ Involuntary and unexpected removal of a family member has particularly severe and long-lasting effects on the socioeconomic status and emotional well-being of a family.¹⁸⁵

Financially, removal severely diminishes the resources available to the remaining U.S. household.¹⁸⁶ The removed family member, is in many instances the primary wage earner in the family. When his or her income is terminated by removal, many families left in the United States risk homelessness because they are unable to pay rent or mortgage payments.¹⁸⁷ Affected families often must seek the help of relatives, friends, outside organizations or public assistance programs for basic necessities such as shelter, clothing, and food.¹⁸⁸

180. 42 U.S.C. § 402(n) (2006) (discussing an immigrant’s inability to collect Social Security benefits if he is removed from the United States and the conditions by which his noncitizen or U.S. citizen family members may be able to receive benefits).

181. See Jacqueline Hagan & Nestor Rodriguez, *Resurrecting Exclusion: The Effects of 1996 U.S. Immigration Reform on Communities and Families in Texas, El Salvador, and Mexico*, in *LATINOS REMAKING AMERICA* 190, 196 (Marcelo M. Suárez & Mariela M. Páez eds., University of California Press 2009) (2002) (discussing the poor opportunities for employment in El Salvador); see generally *NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS, DEPORTADO, DOMINICANO, Y HUMANO: THE REALITIES OF DOMINICAN DEPORTATIONS AND RELATED POLICY RECOMMENDATIONS* 27-30 (discussing the inability for deportees to obtain employment due the stigma of deportation).

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

183. *Id.*

184. *Id.*

185. Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 *N.C. L. REV.* 1799, 1818-1820 (2010).

186. *Id.* at 1819-20. Removal also affects any family members in the country of origin who were dependent on remittances regularly sent from the removed person. *Id.*

187. Hagan & Rodriguez, *supra* note 181, at 198; see also Karen Olsson, *Before and After: What Happens When an Immigration Raid Tears a Family Apart?*, *TEX. MONTHLY*, Dec. 1, 2008, at 156, available at <http://www.texasmonthly.com/preview/2008-12-01/feature5>.

188. See Perla Trevizo, *Chattanooga: Feed the Children Aids 400 Local Families*, *CHATTANOOGA TIMES*, June 21, 2008, at B2, available at <http://www.timesfreepress.com/news/2008/jun/21/chattanooga-feed-children-aids-400-local-families/?local>; see Hagan et al., *supra* note 185, at 1819-20.

The emotional suffering of the family is also significant.¹⁸⁹ Although the removal is physical, the loss of a family member can have long-lasting and traumatic emotional effects.¹⁹⁰ The emotional suffering caused by removal of family members has been most studied in regards to its effect on children.

Approximately five million children living in the United States are cared for by undocumented immigrant parents and three million of these children are U.S. citizens.¹⁹¹ Between 1998 and 2007, more than one hundred thousand parents of United States citizen children were removed.¹⁹² It is estimated that for every two undocumented workers detained by ICE, one child is left without a caretaker.¹⁹³ However, the actual statistics may be higher since many detained parents do not provide any information regarding their children, or may provide misleading or incomplete information about them, for fear that government authorities may apprehend their children as well as other family members.¹⁹⁴ In recent years, an increasing number of women have been detained and removed from the United States; the vast majority have children under the age of ten.¹⁹⁵

When parents are removed, families must decide whether the children of the family will depart with their removed parent(s) or remain in the United States, under the supervision and care of individuals who are not their parents.¹⁹⁶ For children who remain in the United States, the permanent separation from their parents can be

189. Hagan et al., *supra* note 185, at 1820.

190. *Id.*

191. JEFFREY S. PASSEL, PEW HISPANIC CENTER, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 8 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

192. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., *REMOVAL INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 1* (2009) [hereinafter *REMOVAL INVOLVING ILLEGAL ALIEN PARENTS*], available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_09-15_Jan09.pdf.

193. See RANDY CAPPS ET AL., THE URBAN INST., *PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN* 15 (2007), available at http://www.urban.org/publications/411566.html_immigration_raids.pdf.

194. *Id.* at 2; *REMOVAL INVOLVING ILLEGAL ALIEN PARENTS*, *supra* note 192, at 1; Marcela Mendoza & Edward M. Olivos, *Advocating for Control with Compassion: The Impacts of Raids and Deportations on Children and Families*, 11 *OR. REV. INT'L L.* 111, 117 (2009).

195. Karla McKanders, *The Unspoken Voices of Indigenous Women in Immigration Raids*, 14 *J. GENDER, RACE & JUST.* 1, 2 n.2 (2010); see RANDY CAPPS ET AL., *supra* note 193, at 2; Mendoza & Olivos, *supra* note 194, at 118 (citing NINA RABIN, *SOUTHWEST INST. FOR RESEARCH ON WOMEN, UNSEEN PRISONERS, A REPORT ON WOMEN IN IMMIGRATION DETENTION FACILITIES IN ARIZONA* 14-16 (2009) available at <http://sirow.arizona.edu/files/UnseenPrisoners.pdf>).

196. Alison M. Osterberg, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 *LEWIS & CLARK L. REV.* 751, 754-55 (2009).

emotionally traumatic and crippling. Children left behind often display severe mental health issues, start to perform poorly in school, display behavioral problems, and have feelings of abandonment as well as resentment.¹⁹⁷ Separation and dismantlement of the familial structure may result in long-term emotional, financial, and psychological damage to the children left behind.¹⁹⁸ Children who return with their parents to their removed parent's country of origin do not fair much better.¹⁹⁹ United States citizen children experience multiple traumas as they attempt to integrate into a country, culture, and society that they do not know.²⁰⁰ They also face economic disadvantages and may face inadequate living conditions.²⁰¹ In addition, children who wish to come back to the United States may face problems of reintegration due to barriers with language, education, cultural acclimation and job skills, ending up in poverty.²⁰²

When parents are suddenly detained, the ability to seek alternative forms of child care may not be possible. Therefore, many children might become wards of the state and placed into the foster care system.²⁰³ Children who grow up in the foster care system are, unfortunately, less likely to be active contributors to society because they are more likely to rely on public assistance and have severe educational deficiencies.²⁰⁴ They also suffer higher rates of homelessness,

197. See RANDY CAPPS ET AL., *supra* note 193; Nina Bernstein, *A Mother Deported and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9E03E5DB143EF937A15752C1A9629C8B63&pagewanted=all>; Ana Tintocali, *Students Suffer When Deportation Tears Families Apart*, KPBS (May 17, 2010), <http://www.kpbs.org/news/2010/may/17/the-impact-of-deportation-on-students/>.

198. See generally Jacqueline Hagan et al., *U.S. Deportation Policy, Family Separation, and Circular Migration*, 42 INT'L MIGRATION REV. 64 (2008); Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 320-22 (2009-2010).

199. Osterberg, *supra* note 196, at 755.

200. See Eunice Moscoso, *Who's Watching Deportees' Kids?*, ATLANTA J. CONST., Aug. 18, 2006, at C1 (detailing the consequences to citizen children who return to their parent's country of origin).

201. Osterberg, *supra* note 196, at 755.

202. See Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 535 (1995).

203. See Julianne Ong Hing & Seth Wessler, *When an Immigrant Mom Gets Arrested*, COLORLINES, July-Aug. 2008, at 22, available at http://colorlines.com/archives/2008/07/when_an_immigrant_mom_gets_arrested.html; Constantino Diaz-Duran, *They Stole My Baby*, THE DAILY BEAST, Nov. 16, 2010, available at <http://www.thedailybeast.com/blogs-and-stories/2010-11-16/adoption-nightmare-for-a-guatemalan-immigrant-and-missouri-couple/#> (discussing a mother's fight to gain her child back after he was adopted while she was apprehended in a worksite raid).

204. See U.S. GEN ACCT. OFFICE, FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN 4 (1999), available at <http://www.gao.gov/new.items/he00013.pdf>.

unemployment, and pregnancy and may be more likely to be incarcerated as an adult.²⁰⁵

Sadly the financial and emotional devastation to families caused by removal of family members is often never alleviated. Many families are never reunited under one roof and do not recover from the devastating effects of a family member's removal.²⁰⁶

D. Impact of Removals of Latinos on Their Communities

The negative effects of Latino removals are also experienced by the communities from which Latino immigrants are removed or targeted.²⁰⁷ While the consequences of removals for the community are diverse, four categories of repercussions are often apparent: psychological effects, economic effects, increased mistrust in local law enforcement, and increased strain on civil society resources, community services and local charities.

The psychological trauma inflicted on the community by mass Latino removals alters the culture of the remaining community. Communities are typically enveloped by widespread feelings of immense and constant fear.²⁰⁸ Social isolation often develops.²⁰⁹ Community-wide depression has been observed.²¹⁰ Anecdotal evidence shows that uncertainty about the future results in community paralysis as individu-

205. *Id.*; see also R. COOK, A NATIONAL EVALUATION OF TITLE IV-E FOSTER INDEPENDENT LIVING PROGRAMS FOR YOUTH: PHASE I FINAL REPORT (1990) & PHASE II FINAL REPORT (1991); MARK E. COURTNEY ET AL., FOSTER YOUTH TRANSITIONS TO ADULTHOOD: A LONGITUDINAL VIEW OF YOUTH LEAVING CARE 80 CHILD WELFARE 685, 713 (2001).

206. See generally Danny Postel, "I'm Not Dangerous": Immigrants Treated Like Criminals, COMMONWEALTH MAG., Jan. 31, 2009, available at <http://www.alternet.org/story/123906/> (describing immigration raids and their effects on families).

207. Hing, *supra* note 198, at 322 ("ICE raids and increased enforcement have caused severe social and civic damage and major set backs for many communities.").

208. See Bethany Mowry, *Aftermath Effects of Immigration Raid Felt in Community*, HAMILTON COUNTY NEWS, Apr. 17, 2008, available at http://www.wdef.com/news/aftermath_effects_of_immigration_raid_felt_in_community/04/2008; see also Daniel J. Wakin & Julia Preston, *Speaking up for Immigrants, Pontiff Touches a Flash Point*, N.Y. TIMES, Apr. 20, 2008, at A1, available at <http://www.nytimes.com/2008/04/20/us/20catholics.html?fta=Y> (quoting the opinion of the archbishop of Los Angeles, the nation's largest Roman Catholic diocese and one with many Hispanics, that employment raids "simply create fear and uncertainty in our communities").

209. Mendoza & Olivos, *supra* note 194, at 118 ("The long-term impacts on immigrant communities . . . are less understood, but scholars point to enduring mistrust of law enforcement and child welfare agencies, development of a 'culture of fear,' and social isolation."); see also Hagan et al., *supra* note 185, at 1815-16 (noting that in one county in North Carolina, immigrants reported they no longer attended community events or went to public places like parks because of a fear of apprehension).

210. Orlan Love, *Religious Leaders Urge Officials to Visit Postville*, GAZETTE, Dec. 11, 2008.

als become fearful to leave their homes,²¹¹ community businesses cease their operations,²¹² and necessary future community planning stops.²¹³

Second, the economic effects of removals have the potential to financially ruin entire communities. This phenomenon was perhaps best documented in Postville, Iowa, where hundreds of immigrant workers, mostly Mexican and Guatemalan, were detained during a 2008 ICE raid.²¹⁴ The raid was described as nothing short of a man-made disaster and had many adverse economic consequences.²¹⁵ The raid took place at an Agriprocessors Inc. Meatpacking Company plant, which was the county's largest employer.²¹⁶ As a result of the raid, the company declared bankruptcy and virtually closed within six months, leaving behind hundreds of unemployed workers.²¹⁷ In a domino effect, several other local businesses closed.²¹⁸ Within approximately eighteen months, the town's population had depleted by half.²¹⁹ Abandoned housing units deteriorated.²²⁰ In addition to these troubles, bank foreclosures,²²¹ slumping retail sales,²²² and un-

211. See Dianne Solis & Alejandro Martinez, *Agents Target ID Theft: More Than 280 Arrested, Including 45 at Pilgrim's Pride Plant in Mount Pleasant*, DALLAS MORNING NEWS, Apr. 17, 2008, at A1, available at <http://www.allbusiness.com/crime-law-enforcement-corrections/law-arrests/14756653-1.html> (quoting one community member, "Many people don't want to go outside their homes"); see Antonio Olivio, *Immigration Raid Roils Iowa Melting Pot*, CHI. TRIB., May 18, 2001, at C1, available at http://articles.chicagotribune.com/2008-05-19/news/0805190026_1_immigration-raid-meatpacking-northeastern-iowa-town (discussing the devastating effect on Postville, Iowa, after one of the largest immigration raids to date in May of 2008).

212. Erin Segroves, *Hispanic Community Rocked by Plant Raid*, CHATTANOOGA TIMES, Apr. 17, 2008, available at <http://www.timesfreepress.com/news/2008/apr/17/hispanic-community-rocked-plant-raid/> (stating that fear following an enforcement raid in Chattanooga caused many businesses to close their doors).

213. See Olsson, *supra* note 187 ("No one has a project or a plan for the future anymore, because you don't know what's going to happen. There's not any more 'tonight,' there's not any more 'in the morning' or 'next week' or 'next month.' You're just in between. This is not our community anymore, not the one we used to have before all these things.").

214. See KOULISH, *supra* note 11, at 47 (calling the Postville raid "perhaps one of the most egregious examples of the Bush era criminalization on immigration").

215. See Orlan Love, *Rebounding: Growing Work Force Needs Housing*, GAZETTE, May 12, 2010.

216. Sharon Drahn, *Immigration Officials Conduct Raid on Agriprocessors, Inc. Plant in Postville*, STANDARD, May 18, 2008, available at <http://www.waukonstandard.com/main.asp?SectionID=24&SubSectionID=103&ArticleID=43678&TM=52684.81>.

217. Ruben Rosario, *A Wake up Call, One Year After Immigration Raid in Postville, Iowa*, ST. PAUL PIONEER PRESS, May 12, 2009, at B1, available at 2009 WLNR 9150903.

218. *Id.*

219. *Id.*

220. Orlan Love, *Bleak House: Hurt Remains Fresh for Residents*, GAZETTE, May 10, 2009, available at <http://www.allbusiness.com/society-social-assistance-lifestyle/religion-spirituality/12449054-1.html>.

221. Orlan Love, *Two Years After Agriprocessors Raid, Postville Is Flush with New Optimism*, GAZETTE, May 12, 2010, available at <http://thegazette.com/2010/05/12/two-years-after->

paid tax bills²²³ drained local government revenues to the point that the town's council attempted to have Postville declared a federal disaster zone.²²⁴

Third, involvement of members of local law enforcement agencies in the removals leads to mistrust of law enforcement and damaged rapport between the police and the community in general.²²⁵ Section 287(g) programs have been particularly noted to prevent important community and local law enforcement actions.²²⁶ Crime in affected communities has been reported to increase as residents lose trust in the police and do not report general criminal activity.²²⁷ Individuals fear reporting crimes committed against them because they fear either they or someone they know may be removed.²²⁸ Some commentators fear that the use of local law enforcement in immigration enforcement will not only jeopardize future crime prevention but also retard previous gains in crime reduction.²²⁹

Last, removals strain community resources to the detriment of the general welfare of the affected communities.²³⁰ As discussed earlier, removals impoverish numerous individuals and families.²³¹ Community volunteer groups, social service organizations, and public aid resources have been taxed to provide livelihood necessities- such as rent and utility payments, as well as basic necessities such as food and diapers.²³² Many affected individuals must resort to public assistance like Medicaid and food stamps for the first time in their lives.²³³ Schools, early childhood centers, child welfare agencies, churches, and community-based organizations are left to play the role of first responder in helping with the fallout. Community resources are de-

agriprocessors-raid-postville-is-flush-with-new-optimism/ ("Banks have foreclosed on hundreds of houses once owned by Gal Investments and the Rubashkin family, which also owned Agriprocessors.").

222. *Id.*

223. Love, *Bleak House*, *supra* note 220.

224. See Rosario, *supra* note 217.

225. See Hagan et al., *supra* note 185, at 1815; see also Mendoza & Olivos, *supra* note 194, at 118.

226. See KOULISH, *supra* note 11, at 134-39.

227. *Id.* at 137.

228. *Id.*

229. *Id.*

230. See Betsy Rubiner, *After Immigrant Raid, Iowans Ask Why*, TIME, May. 27, 2008, available at <http://www.time.com/time/nation/article/0,8599,1809727,00.html>.

231. See discussion *infra* Part IV.B-C.

232. Rubiner, *supra* note 230.

233. Olsson, *supra* note 187.

pleted as these institutions are forced to absorb the aftershocks of crimmigration removals.

CONCLUSION

Latinos, both citizen and noncitizen alike, have consistently been marginalized in the United States. The historical experience of Latinos in this country is one composed of multiple episodes of discrimination and exclusion. Latinos have been refused citizenship and its benefits, repeatedly denied legal or permanent entry, violently lynched, and openly targeted for deportation because of their Latino identity.

Most of these historical episodes were blatantly justified by references to the inferiority of the Latino race. In the mid 1800s, Mexicans following the Mexican War could often not become citizens unless they could be deemed “white.” From 1850 to 1935, Latinos could be lynched for being “too Mexican” or speaking Spanish too loudly. From 1929-1939, Mexicans were specifically scapegoated for the country’s economic woes. Mexican Repatriation began the perpetual hunt for “Mexican-looking” individuals in 1929.

In more recent decades, marginalizing measures based on overt Latino prejudice have been challenged. While the 1917 Bisbee deportation was tolerated and even applauded in its era, a successful racial profiling lawsuit followed the Chandler Roundup in 1997. Unfortunately, although overt Latino prejudice is no longer usually tolerated as a proper basis for legal measures, the marginalization of Latinos continues in this country.

Currently, the incorporation of immigration law into the criminal justice system serves to extend and solidify the longstanding marginalization of Latinos to present day. Crimmigration has proven to be an effective vehicle for modern Latino oppression. It has expanded and entrenched a “criminal alien” social construct that both legitimizes and increases the harsh measures against Latinos. Simultaneously, it relies on a national security and safety rhetoric that prevents criticism and examination of the detrimental impact on the Latino population. As the failure of crimmigration measures to address national security threats or dangerous crime becomes apparent, the most successful consequence of crimmigration should be addressed—the continuation of a history of marginalization of Latinos in this country. This is the only solution that will ensure justice and equality for the millions of Latinos living in the United States.