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# LESSONS LEARNED, LESSONS LOST: IMMIGRATION ENFORCEMENT'S FAILED EXPERIMENT WITH PENAL SEVERITY

*Teresa A. Miller\**

## ABSTRACT

This article traces the evolution of “get tough” sentencing and corrections policies that were touted as the solution to a criminal justice system widely viewed as “broken” in the mid-1970s. It draws parallels to the adoption some twenty years later of harsh, punitive policies in the immigration enforcement system to address perceptions that it is similarly “broken,” policies that have embraced the theories, objectives and tools of criminal punishment, and caused the two systems to converge. In discussing the myriad of harms that have resulted from the convergence of these two systems, and the criminal justice system’s recent shift away from severity and toward harm reduction, this article suggests that the criminal justice system has been more proactive in compensating for its excesses than the immigration enforcement system and discusses the reasons why.

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## INTRODUCTION

### A. An Immigrant Experience in 1900

Annie Moore, an Irish girl from County Cork arrived in New York City by boat on January 1, 1892. Departing Ireland from Queenstown on December 20, 1891 aboard the *S.S. Nevada*, after twelve days at sea Annie arrived at Ellis Island on Thursday evening, December 31st. She would be processed through Ellis Island the following morning, New Year's Day, which was also Annie's fifteenth birthday. Accompanied by her two younger brothers on a quest to join parents who had already landed in New York, Annie has the distinction of being the first person to pass through the newly opened Ellis Island Immigration Station.<sup>1</sup>

On that Inaugural day, 700 immigrants arriving in three separate ships were processed at Ellis Island.<sup>2</sup> At the time, the federal Treasury Depart-

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1. The fate of Annie Moore—the "rosy, cheeked Irish girl" who was celebrated as the first immigrant to enter the United States through the golden gateway of Ellis Island—was mythologized after history lost track of Annie. For generations, it was popularly believed that the plucky immigrant girl went west to seek her fortune in Texas. However, a genealogical discovery in 2006 exposed the true fate of Annie Moore, the girl who was memorialized by bronze statues in New York Harbor and Ireland, and commemorated in story and song as the first of some twelve million immigrants to arrive at Ellis Island. In reality, three years after arriving in the United States, Annie married an engineer and salesman at the Fulton Fish Market, the son of a German-born baker. They had at least eleven children, only five of whom survived to adulthood. See Sam Roberts, *A Great-Great-Great-Great Day for Ellis Island's Annie*, N.Y. TIMES, Sept. 16, 2006, at B3. She lived the rest of her "hardscrabble, immigrant life" within a few square blocks on Manhattan's Lower East Side and died of heart failure at the age of forty-seven. She was buried with six of her children in a cemetery in Queens. Sam Roberts, *First Through Gates of Ellis I, She Was Lost. Now She's Found*, N.Y. TIMES, Sept. 14, 2006, at A1.

2. *Ellis Island Timeline*, STATUE OF LIBERTY—ELLIS ISLAND FOUNDATION, [http://www.ellisland.org/genealogy/ellis\\_island\\_timeline.asp](http://www.ellisland.org/genealogy/ellis_island_timeline.asp) (last visited Dec. 1, 2010).

ment—home of the newly-created federal Bureau of Immigration—was charged with enforcing a modest set of admission qualifications, including proof that the immigrant was not a criminal, a lunatic, a pauper, or diseased.<sup>3</sup> The ship's captain had supplied to the Collector of Customs a manifest listing the names of all the passengers, and an inspector had collected a federal tax of roughly fifty cents per arriving immigrant to pay into a federal immigrant welfare fund.<sup>4</sup>

The screening process was administrative and extensive. After leaving the ship and entering the inspection station at Ellis Island, Annie, her brothers, and the 700 other new arrivals walked up a steep stairway leading to the Registry Room in the main building, past doctors who looked over each of them and occasionally wrote something in chalk on their coats: "L" for lame, "H" for heart trouble, "E" for eye problems, "K" for hernia, "G" for goiter, and "X" for mental deficiency.<sup>5</sup> Those who were sick were removed from the line and denied entry.<sup>6</sup> The first examination was for lice, and those infested had their heads shaved.<sup>7</sup> Then, each immigrant had to remove his or her clothing to be examined for skin disease.<sup>8</sup> During the eye exam, each immigrant had their upper eyelid flipped back with a hooked instrument to allow a doctor to examine the eyeball for trachoma, a contagious eye disease.<sup>9</sup> After waiting to reach the doctors who did the physical examinations, immigrants underwent mental examinations as

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3. The Immigration Act of 1891 gave the job of processing immigrants to the federal government and created the Bureau of Immigration within the Treasury Department in response to public outcry for greater, more systematic, governmental regulation of the admission and adjustment of "new" immigrant populations. STEPHAN THERNSTROM, HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS 490-91 (1980). The law also barred persons suffering from certain contagious diseases, those convicted of crimes or misdemeanors, polygamists, and persons likely to become "public charges." *Id.* at 491. Those deemed unqualified for admission were deported at the expense of the shipping companies. *Id.* Lastly, the 1891 Act directed that any alien who unlawfully entered the United States be deported. Act of Mar. 3, 1891, ch. 551, § 10, 26 Stat. 1084, 1086.

4. On August 3, 1882, Congress passed an act to regulate immigration that provided for the levying, collection, and payment of a duty of fifty cents for each and every passenger arriving by steam or sail vessel from a foreign port. The Act called for the duty to be paid into the federal Treasury toward a special immigrant welfare fund used "to defray the expenses of regulating immigration under this [A]ct, and for the care of immigrants arriving in the United States, for the relief of such as are in distress, and for the general purposes and expenses of carrying this act into effect." Act of Aug. 3, 1882, ch. 376, § 1, 22 Stat. 214, 214.

5. John Parascandola, *Doctors at the Gate: PHS at Ellis Island*, 113 PUB. HEALTH REP. 83, 84 (1998).

6. *Id.* at 85.

7. *Id.* at 84.

8. *Id.*

9. *Id.*

well.<sup>10</sup> Arriving immigrants who passed health inspection were then interviewed by clerks who recorded vital statistics and background information.<sup>11</sup>

Annie's immigration experience, and that of many other Europeans arriving at Ellis Island near the turn of the century reflected the recent federalization of a nascent immigration system.<sup>12</sup> The examinations took place in a special, centralized receiving station constructed by, and staffed with, federal dollars, and supervised by the Department of the Treasury.<sup>13</sup> The goal of this process was to determine the eligibility of arriving immigrants for admission based upon a limited (although growing) set of exclusion grounds and to efficiently dispatch the new arrivals to their destinations.<sup>14</sup> Those who did not appear to qualify for admission would be identified by inspectors as they wound their way through the long inspection lanes, pulled out for secondary inspection, and possibly held until a return voyage could be arranged.<sup>15</sup>

During this era, even immigrants who were processed through Ellis Island and admitted to the United States could subsequently be deported on the basis of either (1) error during the inspection process (e.g., the arriving immigrant lied about a previous criminal conviction), or (2) the arriving immigrant's violation of the conditions of admission (e.g., becoming a public charge within one year after admission, a ground for deportation under the Immigration Act of 1891).<sup>16</sup> These subsequent deportation proceedings were initiated not as an exercise of social control over individuals long resident in the United States, but as an extension of the power to admit (or refuse admission to) arriving aliens—a power that was an immediate part of the exclusion process.<sup>17</sup> Despite the harsh consequences, these sorts of deportation laws—based upon a contractual model of arriving immigrants agreeing to abide by conditions of admission during a “probationary” pe-

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10. *Id.* at 85-86.

11. THERNSTROM, *supra* note 3, at 491.

12. *Id.* (“In 1891 Congress finally established a permanent administration for the national control of immigration in the form of a superintendent of immigration within the Treasury Department.”).

13. *Id.* (Thernstrom refers to Ellis Island as a “federal station”).

14. VINCENT CANNATO, *AMERICAN PASSAGE: THE HISTORY OF ELLIS ISLAND* 60 (2010).

15. Roughly twenty percent of immigrants arriving at Ellis Island were set aside for further inspection. Vincent Cannato, *Coming to America: Ellis Island and New York City, HISTORY NOW* (Mar. 2007), available at [http://www.gilderlehrman.org/historynow/03\\_2007/historian2.php](http://www.gilderlehrman.org/historynow/03_2007/historian2.php).

16. Act of Mar. 3, 1891, ch. 551, §§ 1-11, 26 Stat. 1084.

17. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 5-6 (2007).

riod of one year (later expanded to three years in 1903)—were nevertheless consistent with traditional civil and regulatory models.<sup>18</sup>

### B. An Immigrant Experience in 2000

Consider the experience of Luis Quezada nearly 100 years later. Mr. Quezada had already crossed the border into the United States and was residing in Colorado.<sup>19</sup> Like Annie Moore, Quezada came to the United States to reunite with family members. One Saturday afternoon, Mr. Quezada was taken into custody on a criminal arrest warrant for failure to appear in court on a traffic violation.<sup>20</sup> That same day the Jefferson County Jail received an immigration detainer stating that Mr. Quezada was being investigated by Immigration and Customs Enforcement (ICE) to determine whether he was subject to removal for unlawful presence in the United States and that the jail was required to detain Quezada for forty-eight hours.<sup>21</sup> The following Tuesday, Quezada appeared before a judge who sentenced him to time served and ordered him released from custody.<sup>22</sup> Shortly after the judge ordered Quezada released, the jail notified ICE by fax that Quezada was “ready for pick-up.”<sup>23</sup> By that Friday, Quezada maintains, the county’s state criminal and federal statutory authority to continue detaining him had expired,<sup>24</sup> yet officials at the Jefferson County jail did not release him until forty-seven days later despite repeated protests from Quezada and his family members.<sup>25</sup> The ACLU is now suing Jefferson County on constitutional grounds as well as state tort law grounds for Quezada’s wrongful imprisonment.<sup>26</sup>

Contrast the experiences of Annie Moore and Luis Quezada. Whereas Annie was screened for admissibility upon arrival at Ellis Island, where a deportation would be initiated through direct contact with federal immigration authorities, Quezada came to the attention of immigration authorities

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18. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1909-10 (2000).

19. Second Amended Complaint and Demand for Jury Trial at 2, *Quezada v. Mink*, No. 1:10CV00879 (D. Colo. Apr. 21, 2010) [hereinafter Second Amended Complaint].

20. *Id.* at 1.

21. *Id.* at 5; see also Felisa Cardona, *ACLU Sues Jeffco Sheriff Over ICE Hold*, DENVER POST, Apr. 22, 2010, at B2.

22. Second Amended Complaint, *supra* note 19, at 5.

23. *Id.* at ¶ 17.

24. *Id.* at ¶¶ 19, 21. Immigration regulations provide for the initiation or continuation of custody of an alien against whom an ICE detainer has been lodged for a maximum of forty-eight hours, not including weekends. 8 C.F.R. § 287.7(d) (2010).

25. Second Amended Complaint, *supra* note 19, at ¶ 21; Cardona, *supra* note 21.

26. Cardona, *supra* note 21.

indirectly through contact with local law enforcement in a criminal matter. As a criminal offender, Quezada was afforded Due Process of law, and the matter of the unanswered court summons that triggered Quezada's initial detention was processed in a timely fashion. However, the matter of Quezada's immigration status—treated as a quasi-criminal matter—subjected him to lengthy, and arguably unlawful incarceration. Authorities operating within the idiom of criminal law enforcement misused a civil immigration law tool (i.e., immigration detainer) to exercise custody over an individual absent the customary checks on the discretionary actions of law enforcement agents. Despite repeated requests by family members and the detainee himself, Quezada was denied release from custody, opportunity to post bail, and a fair and prompt hearing.<sup>27</sup>

The contrast between these two stories demonstrates that immigration law, a set of rules designed in part as a civil and federal means of regulating the inclusion, exclusion and expulsion of non-citizens has, in the twenty-first century, imported many of the theories, methodologies, and most significantly, objectives of criminal law enforcement. This has occurred despite of important distinctions between a civil immigration system of regulation and the criminal punishment system.

The power to regulate immigration is vested in the federal government and derives primarily from sovereign powers enumerated in the Constitution.<sup>28</sup> The power to admit, exclude, and expel foreign subjects is understood to be “inherent” in the sovereignty and nationhood of the United States.<sup>29</sup> An elaborate web of federal agencies involved in such diverse

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27. *Id.*

28. U.S. CONST. art. I, § 8, cl. 4 (providing that Congress shall have power “[t]o establish a[n] uniform Rule of Naturalization”).

29. *The Chinese Exclusion Case*, 130 U.S. 581, 606-09 (1889) (“For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power. To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and *to attain these ends nearly all other considerations are to be subordinated*. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers . . . . The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.” (emphasis added)). The power to regulate immigration has even been interpreted as predating and superseding the Constitution. Although subsequently criticized on logical and historical grounds, the Supreme Court has held that the federal government’s power of external sovereignty was independent of the

operations as collecting taxes on imports, issuing visas, processing citizenship applications, patrolling the border, apprehending and removing a growing class of deportable non-citizens, and hearing administrative appeals of immigration judges' decisions are all consolidated under the Department of Homeland Security (DHS).<sup>30</sup> As such, immigration law operates as a civil system, highly administrative in nature, and entirely distinct from criminal law enforcement. For example, the processing of citizenship applications for naturalization is an administrative process, as is the investigation, apprehension, and deportation of immigrants who cross the border into the United States without inspection, so-called "illegal aliens."<sup>31</sup>

In contrast, the power of states and the federal government to regulate criminal conduct stems from the Tenth Amendment Reserve Clause (reserving to the states all unspecified regulatory or "police" powers that the Constitution did not explicitly forbid states from exercising),<sup>32</sup> and from the Commerce Clause in article 1, section 8 of the Constitution.<sup>33</sup> Preeminent scholar Stephen Legomsky articulated the core incongruity stemming from the convergence of aspects of these two systems when he observed that immigration law has adopted the language of criminal law enforcement without affording those subject to its coercive power the same Due Process protections as those who are criminally charged.<sup>34</sup>

The immigration system has not simply imitated the techniques of criminal punishment, it has become a hybrid system of "crimmigration" as

Constitution, deriving instead from "necessary concomitants of nationality." *United States v. Curtiss-Wright*, 299 U.S. 304, 318 (1936).

30. This has occurred since 2003, when the Homeland Security Act (HSA), Pub. L. No. 107-296, 116 Stat. 2135 (2002), was passed in response to long-standing concerns about the bureaucratic inefficiency of the (former) Immigration and Naturalization Service (INS).

31. The extent to which this distinction is widely overlooked by a large segment of the American public, and broadly unpopular was vividly illustrated during the 2008 presidential campaign when Rudy Giuliani, mayor of New York City and a frontrunner for the Republican nomination, appeared to shock the nation (and seriously jeopardize his candidacy) by publicly acknowledging that "illegal" immigration is not a crime. During a CNN interview with Glenn Beck, Giuliani stated: "[I]t's not a crime. I know that's very hard for people to understand, but it's not a federal crime." Giuliani went on to explain: "I was U.S. [A]ttorney in the [S]outhern [D]istrict of New York. So believe me, I know this. [W]hen you throw an immigrant out of the country, it's not a criminal proceeding. It's a civil proceeding." Interview by Glenn Beck, CNN, with Rudy Giuliani, GOP Presidential Candidate (Sept. 7, 2007), available at <http://archive.glennbeck.com/news/09072007.shtml>.

32. U.S. CONST. amend. X (providing "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People").

33. U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian Tribes").

34. Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007).



criminal and immigration law enforcement procedures have converged, allowing non-U.S. citizens to be treated as citizen criminals without the (accompanying) procedural protections afforded to those persons who are criminally charged.<sup>35</sup> This has created an asymmetry, that is, a distortion of both the immigration system (criminalized) and the criminal system (procedural exceptionalism for its non-citizen subjects).

My argument, put simply, is that the conflation of civil and criminal processes and standards undermines the rationale and objectives of both systems. It calls into question the legitimacy of immigration laws at the same time that it degrades the traditional operation of the criminal justice system, by creating a kind of civil “exceptionalism” within criminal law enforcement, a situation not envisioned by the Framers of the Constitution when they ratified the Bill of Rights.

This article will begin with a review of the Due Process protections that are at the foundation of the criminal justice system, trace the development of harsh reforms that dramatically altered the landscape of criminal justice in the 1980s and 90s, and describe the growing retreat from penal severity that is currently underway in response to a range of harms that gradually undermined the legitimacy of the system and caused it to become economically unsustainable.

I will then describe the process by which immigration law has similarly adopted penal severity by embracing the theories, objectives, and mechanisms of criminal punishment. By linking its civil enforcement and deportation mechanisms to criminal law enforcement and incarceration, several aspects of the immigration system are said to be “converging” with the criminal system.<sup>36</sup> I will chart the harms that have resulted from the coupling of these two traditionally distinct systems, and describe the structural barriers that impede the immigration system from addressing these harms and embracing the lessons learned from the criminal justice system’s failed experiment with penal severity.

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35. *Id.*; Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 660 (2003) [hereinafter Miller, *Citizenship & Severity*] (describing a hybrid crime-immigration control system created by the convergence of immigration regulation and crime control).

36. Daniel Kanstroom has written extensively about the convergence of deportation law and criminal punishment. KANSTROOM, *supra* note 17; Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771 (2000); Kanstroom, *supra* note 18; Daniel Kanstroom, *Reaping the Harvest: The Long, Complicated, Crucial Rhetorical Struggle Over Deportation*, 39 CONN. L. REV. 1911 (2007).

## I. RECENT HISTORY OF THE CRIMINAL JUSTICE SYSTEM IN THE UNITED STATES

### A. The Severity Revolution & Mass Incarceration

The modern criminal justice system's establishment was roughly concurrent with the establishment of the Union.<sup>37</sup> The framers of the Constitution affirmatively provided individuals under police investigation, charged with a crime, apprehended or otherwise held in the custody of law enforcement with specific rights, including Due Process, freedom from unreasonable searches and seizures, bail, legal counsel, and humane punishment.<sup>38</sup> These rights were conferred on all persons by virtue of the degree of governmental power being brought to bear upon them with no limitation based upon citizenship. An adversarial criminal system was designed to check the discretionary, and potentially unlimited, authority of law enforcement officials to deprive citizens of their liberty largely through the interposition of neutral judicial authority.<sup>39</sup> With fresh memories of British writs of assistance and general warrants, the signatories to the United States Constitution and the Bill of Rights devised a system that guarantees to those whose liberty is being curtailed procedures designed to reduce the risk of wrongful exercise of governmental law enforcement police power.<sup>40</sup> As David Garland observed, with the establishment of the penitentiary system in the late 1700s, these rights reflected a relatively stable set of values and objectives that had endured within the field of criminal punishment for

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37. See 1 WAYNE R. LA FAVE ET AL., CRIMINAL PROCEDURE 266-68 (3rd ed. 2007).

38. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

39. See generally LAFAVE, *supra* note 37, at 171-89, 194-205.

40. See *id.* at 267-76.

two centuries, such as the minimizing of pain and cruelty in the penal process and reformation of the offender through individualized justice.<sup>41</sup> These once-settled notions about criminal law enforcement and punishment changed abruptly with the ascendancy of neo-liberal political ideas and the onset of the War on Drugs.

In 1982, President Reagan gave a speech at the Department of Justice that foreshadowed radical changes within the American criminal justice system.<sup>42</sup> He boldly asserted that “our criminal justice system has broken down” and that “it just isn’t working.”<sup>43</sup> His proposed response to this crisis would culminate in a “severity revolution”<sup>44</sup> that would dramatically alter fundamental objectives, rationales and mechanisms of crime control, and change public opinion about the criminal justice system and the people subject to its authority for decades.

Characterizing crime as an epidemic, Reagan cited as causes: lax pursuit, prosecution, and punishment of criminals; over-investment in social welfare programs; and privileging the rights of repeat offenders over those of the innocent as its causes.<sup>45</sup> Reagan described the “increasing organized crime involvement in drug abuse” as an “invisible, lawless empire.”<sup>46</sup> Lauding tough new state sentencing reforms that meted out severe sentences for repeat offenders, President Reagan called for a new era of “swift and sure” punishment.<sup>47</sup> He outlined eight new crime-fighting initiatives, one of which was the allocation of millions of dollars for new prison and jail construction.<sup>48</sup>

One of the states pioneering tough new sentencing reforms was New York. New York State has the ignominious distinction of leading the Unit-

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41. David Garland is a British social scientist who analyzed similarities between harsh crime control reforms in the United States and the United Kingdom in the 1980s and 1990s as a reflection of social insecurity, risk, and control crises constituting “late modernity.” Garland observed that these conditions played a crucial role in shaping responses to crime control in the United States, United Kingdom, and other developed countries. Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 218-19 (2001).

42. President Ronald Reagan, Speech to U.S. Dep’t of Justice (Oct. 15, 1982) [hereinafter Reagan Speech], in *Text of President’s Speech on Drive Against Crime*, N.Y. TIMES, Oct. 15, 1982, at A20.

43. *Id.*

44. The term “severity revolution” was coined by Joseph Kennedy to describe the overwhelming and unprecedented political consensus behind increases in the severity of criminal punishment in the 1980s and 1990s. See Joseph Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 832 (2000).

45. Reagan Speech, *supra* note 42, at A20.

46. *Id.*

47. *Id.*

48. *Id.*

ed States in harshly punishing drug users alongside the dealers who were once the primary target of drug enforcement laws.<sup>49</sup> In passing the 1973 Rockefeller Drug Laws<sup>50</sup> in tandem with the Second Felony Offender Law,<sup>51</sup> the New York State Assembly imposed harsh mandatory minimum prison terms for the possession or sale of relatively small amounts of controlled substances as well as for any second felony conviction within ten years, regardless of the circumstances of the conviction or the nature of the offenses.<sup>52</sup> The Rockefeller Drug Laws marked an unprecedented shift toward addressing drug abuse and addiction through criminal punishment, rather than medical and public health interventions. The Second Felony Offender Law sent scores of two-time non-violent felony offenders to prison.<sup>53</sup> Together, these harsh laws usurped the power of judges to use discretion in sentencing decisions, and flooded New York's prisons with non-violent, low-level drug offenders even before Reagan gave his 1982 address.

Furthermore, these laws dramatically reconfigured the size, composition, and complexion of New York State's prison population. Annual drug commitments to prison, which had totaled 470 in 1970, rose to 8521 by 1999,<sup>54</sup> browning the prison population considerably. By 1999, African American and Latino men and women comprised 90% of all New York

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49. See, e.g., Susan N. Herman, *Measuring Culpability by Measuring Drugs? Three Reasons to Reevaluate the Rockefeller Drug Laws*, 63 ALBANY L. REV. 777, 777-78 (2000).

50. N.Y. PENAL LAW §§ 220.00-.65, 221.00-.55 (McKinney's 2010) (incorporating provisions of the Rockefeller Drug Laws).

51. PENAL LAW § 70.06.

52. As *New York Times* columnist Clyde Haberman described the stage upon which enactment of the Rockefeller Drug Laws was set:

Nelson A. Rockefeller was governor then. Drug criminals had New York by the throat in one of the city's periodic heart-of-darkness phases. Rockefeller wanted to show he could be tough as nails with dope dealers. The result was statutes that eternally bear his name in common idiom. Their essence was to send drug felons to prison for very long stretches, with sentences made mandatory and leniency rendered unacceptable even for first-time offenders.

Clyde Haberman, *Thirty-five years of Rockefeller Drug Laws, and Hope there Won't be Thirty-six*, N.Y. TIMES, May 13, 2008, at Editorial B1.

53. ANNE-MARIE CUSAC, CRUEL AND UNUSUAL: THE CULTURE OF PUNISHMENT IN AMERICA 177 (2009). In 2001, New York State sent 2586 drug offenders with no prior violent felony convictions to prison. LEGAL ACTION CTR., A-7978, COST SAVINGS THAT WOULD ACCRUE TO NEW YORK UNDER THE ASSEMBLY'S DRUG LAW REFORM BILL 3 (2003), *available at* [http://lac.org/doc\\_library/lac/publications/Assembly%20cost%20savings.pdf](http://lac.org/doc_library/lac/publications/Assembly%20cost%20savings.pdf).

54. JUDITH GREENE & MARC MAUER, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 6 n.1 (citing N.Y. State Dep't of Crim. Justice Serv., 1999 Crime and Justice Annual Report), *available at* [http://www.sentencingproject.org/docs/publications/publications/inc\\_DownscalingPrisons2010.pdf](http://www.sentencingproject.org/docs/publications/publications/inc_DownscalingPrisons2010.pdf).

State prisoners incarcerated for a drug offense.<sup>55</sup> Between 1988 and 1999 the Department of Correctional Services (DOCS) added two maximum-security prisons, fourteen medium-security prisons, and four minimum-security prisons, increasing overall system capacity by 56% (from 41,242 to 72,951).<sup>56</sup>

New York's tough sentencing reforms established a pattern of increasingly harsh policies. Labeled the "War on Drugs," these laws and policies upended settled notions about the objectives of criminal punishment, and typified law enforcement's approach to contraband drug abuse and sales. They also produced a myriad of social harms in the process. As states like Texas, California, and Florida followed New York's lead by toughening criminal penalties for drug offenders, Congress passed federal sentencing guidelines which limited the discretion of judges to set indeterminate criminal penalties and parole boards to decide when—within the sentencing range—the offender was sufficiently rehabilitated to be conditionally released on parole.<sup>57</sup> Instead, Congress imposed a table for calculating sentences on the basis of the conduct involved in the offense and the offender's criminal history, with optional upward and downward adjustments based upon a range of aggravating or mitigating factors.<sup>58</sup> Many states followed suit. By 2001, sixteen states had abolished their parole boards and replaced them with determinate sentencing regimes.<sup>59</sup> Guideline sentencing explicitly rejected rehabilitation as an objective of incarceration, abolished parole, and effectively transferred sentencing decisions to the discretion of prosecutors laying the charges.<sup>60</sup>

### B. Penal Severity Produces a Range of Harms

These severity reforms—determinate sentencing, mandatory minimum sentences, repeat offender enhancements, elimination of parole, and dramatic expansion of the prison system—inevitably followed produced a range of harms. Court-stripping and categorical sentencing increased the

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55. *Symposium Notes from the Field: Challenges of Indigent Criminal Defense*, 12 N.Y. CITY L.REV. 203, 229 (2008) (citing Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 754 (1993)).

56. GREENE & MAUER, *supra* note 54, at 7.

57. The Sentencing Reform Act of 1984, Pub.L. No. 98-473, 98 Stat. 1837.

58. U.S. SENTENCING GUIDELINES MANUAL § 5A (2009).

59. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 13 (Oxford Univ. Press ed., 2003).

60. LISA SEGHELLI & ALISON SMITH, CONG. RESEARCH SERV., RL 31340, *FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS* 14 (2007).

federal prison population by more than 600%.<sup>61</sup> Between 1983 and 1998, the rate of prison drug offender admissions increased eighteen-fold for Hispanics and twenty-six-fold for African Americans, in comparison to seven-fold for whites.<sup>62</sup> The unprecedented expansion of the prison population led to prison over-crowding which, in turn, endangered the physical safety of inmates and correctional officers alike.<sup>63</sup> The prison industry became the panacea for rural factory-based communities saddled with a declining industrial economy that saw their fortunes rise (or fall) on their ability to attract prison construction.<sup>64</sup> Thus prison expansion became a growth industry, with built-in incentives for harsh sentencing legislation and criminal convictions. With state and federal prisons holding a larger population of prisoners for longer terms of incarceration under considerably harsher conditions of confinement, three decades into the severity revolution, prisoners are being released at the end of long, determinate sentences at alarming rates into a substantially weakened system for supervising them.<sup>65</sup> In contrast to parolees of the 1970s, the average inmate coming home today has served a longer prison sentence, been more disconnected from family and friends, has spent more time in highly restrictive confinement (e.g. keeplock, solitary confinement, administrative segregation), has a higher incidence of addiction and mental illness, is less educated, and is less employable.<sup>66</sup>

### C. “Severity Fatigue” Prompts Ameliorative Reforms

Nearly four decades after Reagan’s neo-liberal endorsement of penal severity, the criminal justice system has begun to confront the negative consequences—both intended and unintended—of its severity revolution. Moderating programs and policies have filtered into the criminal system, driven primarily by economic limitations, reduced capacity, and a growing awareness that the United States simply cannot incarcerate its way out of the problems of drug addiction, mental illness, and poverty. These criminal

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61. Frank O. Bowman, III, *The Failure of Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1329 (2005) (citing ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEP’T. OF JUSTICE, NCJ 151654, PRISONERS IN 1994, at 1 (1995)).

62. PETERSILIA, *supra* note 59, at 28.

63. See Nola Joyce, *A View of the Future: The Effect of Policy on Prison Population Growth*, 38 CRIME & DELINQ. 357, 357-68 (1992).

64. See TRACY L. HULING, U.S. COMM’N ON CIV. RIGHTS, PRISONS AS A GROWTH INDUSTRY IN RURAL AMERICA: AN EXPLORATORY DISCUSSION OF THE EFFECTS ON YOUNG AFRICAN AMERICAN MEN IN THE INNER CITIES (1999), available at [http://www.prisonpolicy.org/scans/prisons\\_as\\_rural\\_growth.shtml](http://www.prisonpolicy.org/scans/prisons_as_rural_growth.shtml).

65. PETERSILIA, *supra* note 59, at 16.

66. *Id.* at 53.

justice reforms are taking place primarily at the state and local levels where the harm of mass incarceration and over-criminalization are intimately experienced.

Major reform of guideline sentencing has been underway since 2004, when the legal landscape of sentencing changed precipitously. In 2004, the Supreme Court decided *Blakely v. Washington*,<sup>67</sup> which held that Washington State's statutory guideline system violated the Sixth Amendment by permitting courts to impose enhanced sentences based on facts not found by a jury beyond a reasonable doubt or admitted by the defendant.<sup>68</sup> At the time, this type of guideline sentencing was an important procedural component of roughly half of all state sentencing regimes.<sup>69</sup> Less than a year later, the high Court addressed the constitutional infirmity of the federal sentencing guidelines in light of the *Blakely* analysis. In *United States v. Booker*, the Court found that the federal sentencing guidelines violated the Sixth Amendment as previously applied because they direct judges to increase sentences based on facts not found by a jury.<sup>70</sup> The *Booker* Court upheld the guidelines as a system of "effectively advisory" sentencing rules.<sup>71</sup> As a result of the ruling, lower court judges now have discretion in sentencing defendants unless the offense carries a mandatory sentence (as specified in the law).<sup>72</sup> It remains unclear what direction states, such as New York, and the federal government will choose to take next in sentencing reform.<sup>73</sup>

Although *Booker* left untouched a major source of racial disparity in federal sentencing—mandatory minimum sentences for crack cocaine sales and a 100-to-1 sentence disparity between powder and crack cocaine—this vestige of harsh federal "lock the door, and throw away the key" drug sen-

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67. 542 U.S. 296 (2004).

68. *Id.* at 303.

69. Bowman, *supra* note 61, at 1316.

70. 543 U.S. 220, 232 (2005).

71. *Id.* at 245.

72. *Id.*

73. Some scholars remain skeptical about the ability of *Blakely*, and particularly *Booker* (in the federal context), to dramatically rebalance the sentencing scale in light of *Booker*'s salvaging of the guidelines on an "advisory" basis, and given the part of the opinion that creates appellate review of federal sentences on a reasonableness standard.

If the guidelines calculation and adherence to a guideline sentence become primary considerations in reasonableness review, then [the Court] has succeeded in reinstituting the guidelines much as they were. The only theoretical difference is that the guidelines will now best be characterized as presumptive rather than mandatory. The only functional difference would be that we would still have guidelines with the force of law, but judges would have an expanded . . . power [to make downward departures].

Bowman, *supra* note 61, at 1350.

tences from the 1990s was abolished earlier this year when President Obama signed into law the Fair Sentencing Act of 2010,<sup>74</sup> reducing the gap between crack and powder cocaine sentencing from 100-to-1 to 18-to-1.<sup>75</sup>

In 2009, thirty-six years after initiating its harsher rules, New York would again play a significant role in criminal sentencing reform. This time, the Empire State reversed its course by eliminating mandatory minimum prison sentences for most drug offenses (the sentencing arena untouched by *Booker*), expanding the use of alternatives to incarceration (such as therapeutic courts and probation), reducing penalties for some repeat, nonviolent drug offenses, and providing for retroactive re-sentencing of felons previously convicted under the Rockefeller Drug Laws.<sup>76</sup> Other states are similarly scaling down harsh mandatory sentencing laws and returning discretion to judges.<sup>77</sup>

This extraordinary shift away from severe criminal sentences toward an approach to drug policy that instead focuses on rehabilitation can be credited to two principal factors: state budget shortfalls in a climate of economic recession,<sup>78</sup> and strong public opinion in favor of alternatives to incarceration for non-violent drug offenders.<sup>79</sup> What New York and other states have realized is that harsh punishment is more costly an approach to drug addiction and abuse than treatment, particularly in a declining economic climate.

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74. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

75. Denise Lavoie & Bill Draper, *Crack-Coke Sentence Disparity Persists*, WASH. POST, Sept. 12, 2010, at A02.

76. *Drug Policy in New York: From the Rockefeller Drug Laws to a Health and Public Safety Approach: Explaining the 2009 Reforms*, DRUG POLICY ALLIANCE, [www.drugpolicy.org/statebystate/newyork/rdl/](http://www.drugpolicy.org/statebystate/newyork/rdl/) (follow "RLD Reforms Explained" hyperlink) (last visited Nov. 21, 2010).

77. Since 2001, when the nation's prison rate rose at the lowest rate since the onset of the War on Drugs, several states have reduced their prison populations using a variety of methods, including parole reforms, abolishing mandatory minimum sentences for some crimes, and creating alternatives to incarceration. These states include Ohio, Michigan, Texas, North Carolina, Alabama, and Louisiana. Press Release, Justice Policy Inst., *States Reduce Incarceration, Change Sentencing Laws to Address Fiscal Crises* (Jan. 7, 2003) (on file with author).

78. See generally PEW CTR. ON THE STATES: ONE IN 100: BEHIND BARS IN AMERICA 2008, at 30, available at [http://www.pewcenteronthestates.org/report\\_detail.aspx?id=35904](http://www.pewcenteronthestates.org/report_detail.aspx?id=35904).

79. *Id.*; see also Jennifer Steinhauer, *To Trim Costs, States Relax Hard Line on Prisons*, N.Y. TIMES, Mar. 25, 2009, at A01.



## II. A RECENT HISTORY OF THE IMMIGRATION SYSTEM IN THE UNITED STATES

Nearly forty years after Rockefeller's clarion call to arms, the American immigration system is similarly referred to as "broken." Calls for more rigorous immigration law enforcement and more punitive approaches to immigration law violators are echoing in legislative assemblies across the nation, on the airwaves, and in the studios of conservative cable news pundits. Yet the "severity revolution" within immigration law is already well underway. Starting in the late 1980s, Congress aggressively began importing criminal punishment methods and processes into immigration law enforcement and deportation processes as an extension of the war on drugs.<sup>80</sup> Scholars have described this as the criminalization of immigration law: an ill-suited marriage of civil and criminal standards that reconfigures the standards of both systems, and insulates the immigration system from many reforms taking place within the criminal system.<sup>81</sup>

Harsh immigration law reforms enacted by the 104th Congress in 1996 prompted a wide-scale discussion among immigration law scholars of the increasing punitiveness or "criminalization" of immigration law.<sup>82</sup> While

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80. Miller, *Citizenship & Severity*, *supra* note 35, at 625-26 (describing the war on drugs as focusing attention on the inability of customs and immigration services to prevent contraband and foreign drug couriers from crossing U.S. borders; "[t]hese inadequacies within the Immigration and Naturalization Service coupled with the emerging role of the U.S. border as a 'crime scene' encouraged Congress to resort to the use of criminal penalties and enhanced law enforcement to staunch the flow of both contraband and illegal immigration across the border").

81. See generally Jennifer M. Chacón, *Managing Migration through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1827-32 (2007); Daniel Kanstroom, *Criminalizing the Undocumented: Ironie Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 640 (2004); Legomsky, *supra* note 32, at 472; Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005) [hereinafter Miller, *Blurring the Boundaries*]; Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376-77 (2006).

82. Miller, *Citizenship & Severity*, *supra* note 34, at 634-35 ("The Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA') expanded the scope of existing aggravated felonies related to gambling, transportation for purposes of prostitution, alien smuggling, passport fraud, and other forms of document fraud. The Act expanded the definition to include new offenses involving: obstruction of justice, perjury or bribery offenses for which a sentence of at least five years or more may be imposed; commercial bribery, forgery, counterfeiting and vehicle trafficking offenses for which a sentence of at least five years or more may be imposed; offenses committed by an alien ordered previously deported; and offenses relating to skipping bail for which a sentence of two or more years may be imposed. Five months later, the IIRIRA not only expanded the definition of aggravated felonies once again to include new offenses such as rape and sexual abuse of a minor, but it also lowered the sentence length and monetary amount thresholds involved in many crimes defined as aggra-

this discussion acknowledged the relationship between the regulation of immigration and the control of crime dating to the exclusion of alien convicts as far back as 1875,<sup>83</sup> and a recent tendency to regulate certain immigration-related conduct of citizens and non-citizens alike, the 1996 legislation represented a sharp detour away from a civil, regulatory notion of immigration law enforcement, and an exponential uptick in the use of criminal theories, processes, and punishment.<sup>84</sup> Never before had scholars broadly discussed the relationship between certain immigration processes (like deportation) and crime control in terms of a convergence or merger. Equally unprecedented is the immigration system's larger societal role in "governing through crime."<sup>85</sup>

Today—some fourteen years after the 104th Congress—convergence of the civil immigration system with the criminal punishment system (and the resulting harm) is a well-established fact.<sup>86</sup> Whereas the punitive impact of deportation has been acknowledged for over a century, the civil immigration system now mimics the criminal justice system in its aggressive importation of criminal categories (e.g., "aggravated felons," "criminal aliens," ICE "Most Wanted" list),<sup>87</sup> criminal law enforcement mechanisms (e.g., "Operation Predator," "Operation Community Shield"),<sup>88</sup> institutions of

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vated felonies. For example, the IIRIRA lowered the amount of funds involved in a money laundering crime to be considered an aggravated felony from \$100,000 to \$10,000 and lowered to one year the sentence length required for many "crimes of violence" and theft offenses to be considered aggravated felonies."); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546; Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214.

83. Act of Mar. 3, 1875, ch. 141, § 4, 18 Stat. 477 (prohibition upon the importation of alien convicts).

84. Legomsky, *supra* note 34, at 471 (noting that the unmistakable importation of the criminal justice model into immigration law has created a displacement of the civil, regulatory model of immigration law).

85. *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME (2007); Miller, *Citizenship & Severity*, *supra* note 35, at 645.

86. *See supra* note 82 and accompanying text.

87. In March 2003, ICE's Detention and Removal Office created a "Most Wanted" List of "the most dangerous criminal aliens." *Hearing Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 104th Cong. 4 (2004) (statement of Michael Garcia, Assistant Secretary, ICE).

88. ICE has created several task forces that target select populations for removal, including Operation Absconder, Operation Last Call, Operation Predator, Operation ICE Storm, and Operation Return to Sender. *See generally* Jennifer Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 344-45.

criminal punishment (e.g., incarceration in county jails and immigration detention facilities),<sup>89</sup> and crime control rationales.<sup>90</sup>

The immigration system is one unconstrained by the concerns of the Framers about the exercise of governmental power on criminal suspects, criminal defendants, and convicted criminals. However, this approach to immigration in some instances exceeds the power of the criminal system, importing criminal categories and attaching severe consequences to these categories, without the corresponding obligation to afford processes that narrow the risk of erroneous decisions and arbitrary exercise of governmental power.<sup>91</sup> Stephen Legomsky advances this notion when he persuasively argues that United States immigration policy has asymmetrically adopted the language of criminal law enforcement without affording those subject to its coercive power the same Due Process protections as the criminally charged.<sup>92</sup>

### A. Dangerous Discourse

The immigration system's use of the vocabulary of criminal dangerousness and its heavy use of incarceration illustrate the enhanced power of this asymmetrical arrangement. For example, consider the use of the term "aggravated felony" in the context of crime-based deportation.<sup>93</sup> As immigration scholars have discussed at length, the term "aggravated felony" as applied in the immigration context bears little resemblance to the same term used in the criminal context.<sup>94</sup> In the criminal context, an aggravated crime is a crime considered more heinous due to the presence of certain circumstances such as commission of a crime with a deadly weapon, the youthfulness or vulnerability of the victim, or the element of reckless disregard in the commission of the crime.<sup>95</sup> The perpetrator of the crime—the aggravated felon—is usually subject to more severe penalties than if he or she had committed the crime without those aggravating circumstances.<sup>96</sup> Congress embraced this criminal category as a heightened rationale for mandatory detention and removal of certain non-citizen felons by fashioning more

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89. Miller, *Citizenship & Severity*, *supra* note 35, at 648.

90. *Id.* at 655 ("[I]mmigrants are increasingly managed through incapacitation.").

91. Legomsky, *supra* note 34, at 481.

92. *Id.*

93. Immigration and Naturalization Act § 101(a)(43), 8 U.S.C. § 1101 (2006).

94. Miller, *Citizenship & Severity*, *supra* note 35, at 634 ("[T]he degree of severity of crimes considered 'aggravated felonies' has lost a clear, rational connection to the nefarious connotation it has in the criminal law."). The term "aggravated felony" is defined at 8 U.S.C. § 1101.

95. 6 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 26:3(c)-(d) (2006).

96. *See id.*

austere deportation laws.<sup>97</sup> What began as a legislative means of ensuring deportation as a consequence of a serious crime with aggravating factors (initially restricted to murder, weapons trafficking, and drug trafficking) has been expanded to encompass far less serious crimes with no aggravating circumstances. For example, a crime as minor as a misdemeanor may constitute an aggravated felony in the immigration system.<sup>98</sup> Furthermore, in many instances an individual need only have committed a crime punishable by a sentence of at least one year in prison to be classified as an aggravated felon, and subjected to mandatory detention prior to deportation.<sup>99</sup>

### B. Over-Incarceration of Immigrants

Criminally enhanced civil regulation is also evident in the immigration detention system. Detention has been used as a means of managing non-U.S. citizens for over a hundred years, dating back to 1892, when the United States opened its first immigration detention facility at Ellis Island.<sup>100</sup> However, it is only within the past twenty years that immigration detention has expanded beyond a few distinct facilities, into an expansive network of custodial facilities varying dramatically in size, staffing, and supervision. At the end of the 2008 fiscal year, ICE operated the largest detention and supervised release program in the United States.<sup>101</sup> In 2008, a total of 378,582 non-U.S. citizens from 221 countries were in custody or supervised by ICE in a network of over 300 facilities throughout the United States and its territories.<sup>102</sup> These facilities range from cells in small local jails operated by county sheriff's departments leased by ICE to large immigration service processing centers owned by ICE and operated by private security companies.<sup>103</sup> Fifty percent of the detained immigrant population

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97. Immigration and Nationality Act § 237(a)(2)(A)(iii) (providing for deportation of aggravated felons); *id.* § 236(c)(1)(B) (providing for mandatory detention of aggravated felons).

98. *See, e.g.,* Biskupski v. Attorney General of U.S., 503 F.3d 274, 279 (3d Cir. 2007); *Gattem v. Gonzales*, 412 F.3d 758, 761 (7th Cir. 2005).

99. Immigration and Nationality Act § 101(a)(43) (enumerating aggravated felony crimes for which the term of one year imprisonment or more subjects the non-U.S. citizen convicted felon to mandatory detention, including: a crime of violence that is not purely a political offense, § 101(a)(43)(F); a theft or burglary offense, § 101(a)(43)(G); a RICO offense, § 101(a)(43)(J); an offense relating to commercial bribery, counterfeiting, or forgery, § 101(a)(43)(R); and an offense relating to obstruction of justice, perjury, or bribery of a witness, § 101(a)(43)(S)).

100. *See* Ellis Island Foundation, *supra* note 2.

101. DORA SCHIRO, DEP'T OF HOMELAND SEC. IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009).

102. *Id.*

103. *Id.* at 9-10.

is housed in county jails, alongside county prisoners and convicted felons.<sup>104</sup>

Not only does the federal immigration detention system exceed all criminal incarceration systems in size, it also operates on the model established by the criminal system, with many of the same chronic problems: substandard medical care,<sup>105</sup> deaths in detention,<sup>106</sup> inadequate mental health care,<sup>107</sup> and custodial sexual abuse.<sup>108</sup> Immigration detainees are locked up in facilities governed by penal norms, sent to disciplinary segregation when they break the rules of the facility, stripped of their property, forced to wear prison garb, and guarded by personnel trained to treat them as security threats.<sup>109</sup> These are conditions that seem inappropriate in light of the civil, administrative authority under which they are being detained. Indeed, most immigration detainees are held in custodial conditions more restrictive than the average felon serving criminal time in a state prison.<sup>110</sup> Dora Schriro, a career corrections administrator and former director of the Colorado Department of Corrections, was recruited by the Obama Administration to overhaul the nation's immigration detention system. During the six months that Schriro served as director of the ICE Office of Detention Policy and Planning, she wrote a report critical of the criminal conditions under which immigration detainees are held, observing the irony that:

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104. *Id.* at 10.

105. HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION (Mar. 17, 2009); FLORIDA IMMIGRANT ADVOCACY CENTER, DYING FOR DECENT CARE: BAD MEDICINE IN IMMIGRATION CUSTODY (Feb. 2009).

106. Nina Bernstein, *Another Jail Death, and Mounting Questions*, N.Y. TIMES, Jan. 28, 2009, at A14; Nina Bernstein, *City of Immigrants Fills Jail Cells With Its Own*, N.Y. TIMES, Dec. 27, 2008; Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. TIMES, May 5, 2008, at A1; Nina Bernstein, *Ill and in Pain, Detainee Dies In U.S. Hands*, N.Y. TIMES, Aug. 13, 2008, at A1; Nina Bernstein, *Man's Death in Private Immigration Jail Bares Difficulty of Detention Overhaul*, N.Y. TIMES, Aug. 21, 2009, at A13; Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. TIMES, June 26, 2007, <http://www.nytimes.com/2007/06/26/us/26detain.html>; Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1.

107. HUMAN RIGHTS WATCH, US: IMMIGRATION NEGLECTS HEALTH (Mar. 17, 2009), available at <http://www.hrw.org/en/news/2009/03/17/us-immigration-detention-neglects-health>.

108. JUST DETENTION INT'L, SEXUAL ABUSE IN U.S. IMMIGRATION DETENTION (Jan. 2009), available at <http://www.justdetention.org/en/factsheets/immigrationfactsheet.pdf>.

109. Miller, *Blurring the Boundaries*, *supra* note 81, at 199 n.210.

110. Despite the fact that non-U.S. citizens detained on crime-based grounds are being deported for past criminal convictions, civil detention for administrative, regulatory purposes should not resemble, or even exceed, the punitiveness of criminal incarceration. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 689, 724 (1893).

As a matter of law, immigration detention is unlike criminal incarceration. Yet immigration detention and criminal incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways. Each group is ordinarily detained in secure facilities with hardened perimeters in remote locations at considerable distances from counsel and/or their communities. With only a few exceptions, the facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons. Their design, construction, staffing plans, and population management strategies are based largely upon the principles of command and control. Likewise, ICE adopted standards that are based upon corrections law and promulgated by correctional organizations to guide the operation of jails and prisons . . . . These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.<sup>111</sup>

Schiro criticized the excessive level of restriction of ICE detention as well as its resulting expense.<sup>112</sup> Schiro found the correctional principles of command and control to be inappropriate for the population of immigration detention.<sup>113</sup> One of the key recommendations of her report included introducing “management tools and informational systems to detain and supervise aliens in a setting consistent with [their] assessed risk.”<sup>114</sup> Schiro’s view of immigration detention is divorced from the standards, techniques, and excessive cost of criminal incarceration. Had Schiro continued to direct the ICE Office of Detention Policy and Planning, one can imagine her reconstructing the nation’s immigration detention system on a model more consistent with deportation as a civil, regulatory, administrative system. However, her resignation cast a shadow of reality on a bold, new reconstruction of immigration detention going forward.

In addition to the over-incarceration of immigrants, ICE has inherited other problems chronically plaguing the bloated criminal justice system, including racial profiling,<sup>115</sup> mismanagement of the mentally ill,<sup>116</sup> wrong-

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111. SCHIRO, *supra* note 101, at 10, 16. Schiro’s findings included the following: a high percentage (66%) of detainees were subject to mandatory detention, half (51%) had felony convictions, and only 11% of those felons had committed violent crimes; the majority of the detainee population is characterized as having a low propensity for violence; the vast majority of ICE detention facilities are built, and operated, as jails and prisons to confine pre-trial and sentenced felons; and ICE is comprised primarily of law enforcement personnel with extensive expertise performing removal functions, but not in the design and delivery of detention facilities and community-based alternatives. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See generally TREVOR GARDNER, II & AARTI KOHLI, EARL WARREN INST., THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (2009).

ful conviction (deportation),<sup>117</sup> sexual abuse of detainees, including female detainees,<sup>118</sup> and substandard health care.<sup>119</sup> Unlike the criminal punishment system whose excesses have been checked by state budget crises, lack of capacity, and severity fatigue on the part of voters, ICE is not similarly constrained. After the 1996 reforms, and particularly in the wake of the 9/11 attacks, federal spending on immigration has soared.<sup>120</sup>

The specter of the asymmetrical arrangement that mimics the mechanisms and processes of crime control, and invokes the intensely punitive public sentiment about criminals, also functions to conflate the tools of crime and immigration control. The current use of immigration detainers by immigration law enforcement authorities conflates civil and criminal authority to arrest and detain individuals, and increasingly results in criminal law enforcement officials violating Due Process guarantees.<sup>121</sup> In addition to prolonging lawful criminal detention beyond the time legally authorized, the deployment of immigration detainers within the criminal system has produced other harmful distortions of criminal procedure. Immigration detainers lodged against persons held in county jails on criminal charges

116. Bill Ong Hing, *Systemic Failure: Mental Illness, Detention, and Deportation*, 16 U.C. DAVIS J. INT'L L. & POL'Y 341 (2010).

117. Andrew Becker and Patrick J. McDonnell, *U.S. Citizens Caught Up in Immigration Sweeps*, L.A. TIMES, Apr. 9, 2009, <http://www.latimes.com/news/nationworld/nation/la-na-citizen9-2009apr09,0,3056253.story>; Suzanne Gamboa, *AP Impact: Citizens Held as Illegal Immigrants*, MSNBC (Apr. 12, 2009), [http://www.msnbc.com/id/301807291ns/us\\_news-life](http://www.msnbc.com/id/301807291ns/us_news-life).

118. See generally STOP PRISONER RAPE, NO REFUGE HERE: A FIRST LOOK AT SEXUAL ABUSE IN IMMIGRANT DETENTION (2004). In 2004, Stop Prisoner Rape, an organization known for its advocacy concerning the sexual abuse of men in criminal custody, published one of the early reports detailing problems of sexual abuse in U.S. immigration detention centers. The report focused on three main issues: "(1) the considerable and troubling reported record of sexual abuse of detainees, (2) the lack of substantive policies and procedures in place to address such abuse, and (3) immigration officials' refusal to allow independent monitoring of conditions for detainees." *Id.* The ACLU recently publicized the sexual abuse of female detainees at a privately-operated detention facility in Texas. See generally Press Release, ACLU, Sexual Abuse of Female Detainees at Hutto Highlights Ongoing Failure of Immigration Detention System, Says ACLU (Aug. 20, 2010) (on file with the author).

119. *Washington Post* reporters Dana Priest and Amy Goldstein wrote a series of articles in 2008 on the woeful inadequacy of medical care in immigration detention facilities and the deaths in custody resulting from medical neglect. See, e.g., Dana Priest & Amy Goldstein, *Careless Detention: System of Neglect*, WASH. POST, May 11, 2008, <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>.

120. See generally Migration Pol'y Inst., *Immigration Enforcement Spending Since IRCA* (2005), available at [www.migrationpolicy.org/ITFIAF/FactSheet\\_Spending.pdf](http://www.migrationpolicy.org/ITFIAF/FactSheet_Spending.pdf).

121. Press Release, ACLU of Florida, ACLU: I.C.E. Detainers Unlawful and Pose Risks to Local Governments (July 17, 2009), available at [http://www.aclufl.org/news\\_events/?action=viewRelease&emailAlertID=3763](http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=3763).

commonly jeopardize the person's ability to obtain bail. A fundamental assumption within penal modernism is the ability of people who are jailed to return to their communities before trial upon the posting of bail to the court and a judicial determination that the person is not a danger to the community or a flight risk.<sup>122</sup>

### C. Civil "Exceptionalism" Within Criminal Law Enforcement and Punishment

The observation that this asymmetry operates to confuse civil and criminal law enforcement tools and to prolong detention that would be impermissible under the adjudicative, criminal model may be worse than Professor Legomsky suggests. It may be the case that the distortion is, in fact, symmetrical. Just as the importing of criminal categories, objectives, and theories distorts the immigration system, the importing of civil administrative tools also distorts the adjudicative, Due Process-oriented criminal punishment system. This occurs by truncating procedures, eliminating criminal rationales, such as the possibility of bail, and creating an exceptionalism for non-citizens in the criminal justice system—a situation not contemplated by its designers. The use of ICE Detainers provides a compelling example of civil, regulatory power distorting the criminal punishment system.

#### 1. *ICE Detainers Exempt Non-U.S. Citizens From Opportunities Broadly Afforded to Prisoners*

In addition to distorting criminal law enforcement processes,<sup>123</sup> ICE detainers lodged against non-citizens in correctional custody result in their exemption from basic services and opportunities broadly provided to convicted felons. For example, non-U.S. citizen inmates incarcerated in state facilities have been denied opportunities to participate in educational, occupational, and work release programs on the ground that such rehabilitative programs are reserved for inmates who will be released into "society." Non-citizen prisoners have also been barred from assignment to minimum-security facilities due to ICE detainers without regard to the minor nature

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122. 18 USC 3142(f) provides that only persons who fit into certain categories are subject to detention without bail: persons charged with a crime of violence, an offense for which the maximum sentence is life imprisonment or death, certain drug offenses for which the maximum offense is greater than ten years, repeat felony offenders, or if the defendant poses a serious risk of flight, obstruction of justice, or witness tampering. There is a special hearing held to determine whether the defendant fits within these categories; anyone not within them must be admitted to bail. 18 U.S.C. § 3142(f) (2006).

123. See generally *supra* note 34.



of the offense or the proximity of their parole date.<sup>124</sup> ICE detainers likewise exclude non-U.S. citizens in federal prisons from sentence reduction programs aimed at encouraging them to seek substance abuse treatment. ICE detainers have even operated to strip non-citizen prisoners of sentence reduction credits earned *prior* to the issuance of the detainer, despite Due Process protections for other losses of “good time” credit related to misconduct.<sup>125</sup> Federal courts have condoned these practices on Due Process and Equal Protection grounds.<sup>126</sup>

## 2. *ICE Detainers Adversely Affect the Provision of Criminal Bail to the Criminally Charged*

ICE detainers can dramatically increase the amount of bail non-citizens are required to pay when they are accused of a crime. Although the right to reasonable bail is enshrined in the Eighth Amendment,<sup>127</sup> when an ICE detainer is placed on a non-U.S. citizen in state criminal custody the state may increase dramatically the amount of bail the accused is required to pay on the grounds that the detainer increases the risk of the accused failing to ap-

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124. *Franklin v. Barry*, 909 F. Supp. 21, 29 (D.D.C. 1995).

125. Hector A. Camarena, a federal prisoner, completed a drug rehabilitation program entitling him to sentence reduction of up to one year. After the Bureau of Prison (BOP) determined that Camarena was eligible for early release, ICE subsequently issued a detainer stating that it was investigating whether Camarena was deportable. The BOP subsequently rescinded Camarena’s earned credit. In *Camarena v. Slade*, the Ninth Circuit affirmed a district court order denying the prisoner’s petition for writ of habeas corpus. 107 F. App’x 821 (9th Cir. 2004). However, one of the three judges strongly dissented. *Id.* at 823. Describing the situation as “Kafkaesque,” Circuit Judge Pregerson pointed out that had Camarena been deprived of good time credit for misconduct, he would have a range of rights to challenge the decision. *Id.* But notice of a possible civil immigration charge was sufficient to deprive him of those Due Process rights, and prevent him from challenging the validity of the detainer. *Id.*

126. *McLean v. Crabtree*, 173 F.3d 1176, 1184 (9th Cir. 1999) (holding that the exclusion of prisoners with ICE detainers from sentence reduction programs involving supervision in a halfway house was permissible because prisoners subject to possible deportation upon release from custody have an incentive to escape custody whereas prisoners without detainers are more likely to complete the program in order to rejoin their communities); *Duarte v. Washington*, 2010 WL 3522514, at \*5 (E.D. Wash. Sept. 7, 2010) (holding that the exclusion of prisoners with ICE detainers from educational, vocational, rehabilitation, and other treatment programs does not violate the Equal Protection clause); *see, e.g., United States v. Tamayo*, 162 F. App’x 813, 816 (10th Cir. 2006) (“[T]here is a rational basis to deem deportable aliens, who will be sent out of the country after the term of their sentence, ineligible for programs geared toward rehabilitating prisoners who will re-enter society after their release from confinement.”); *Ruiz-Loera v. United States*, 2000 WL 33710839, at \*2 (D. Utah June 23, 2000) (deterring further re-entry, avoiding risk of flight, and saving expenses are legitimate bases to treat deportable persons differently).

127. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

pear at trial. For non-citizens facing criminal charges, this frustrates their ability to adequately prepare a defense, and fails to deter the state from jailing innocent people. For example, in *New Jersey v. Fajardo-Santos*, an ICE detainer was placed on a non-U.S. citizen nearly four months after his arrest for sexual assault.<sup>128</sup> After the defendant procured bail in the amount of \$75,000 in exchange for release from custody, he was turned over to ICE and placed in federal custody. His bail was then increased to \$300,000 cash on the ground that the detainer increased the risk that the defendant would not appear for trial.<sup>129</sup> He was then transferred back to state custody on the trial court's order to produce.<sup>130</sup>

When defendant Fajardo-Santos appealed the fourfold increase in bail, his application for reduction of bail was initially granted on the ground that the foreseeable transfer to ICE custody prompted by the detainer did not constitute a "change of circumstance" sufficient to justify the increase in bail.<sup>131</sup> The appellate court reinstated the \$75,000 bail and ordered Fajardo-Santos returned to ICE custody where he would have the opportunity to post his criminal bond and then "participate in the defense of both proceedings."<sup>132</sup> However, on appeal the state supreme court reversed and reinstated the \$300,000 bail amount, albeit with an admonishment to the prosecutor that bail modifications based upon the lodging of an ICE detainer should be filed in a timely fashion, and not after the defendant has posted bail.<sup>133</sup>

Despite the virtual certainty that a criminal defendant with an ICE detainer will remain in either state or federal custody due to the compound authority of both the criminal and civil systems being exercised over him or her, criminal bail can reach exorbitant heights as a reflection of a defendant's greater motivation to flee from custody. Thus the deployment of civil, regulatory immigration power within the confines of the criminal system distorts the rationale of providing bail to the criminally charged, i.e., a rational connection between higher risk of flight and higher bail.

### III. BIGGER PICTURE: IMPORTING THE CRIMINAL SYSTEM'S SEVERITY ABSENT ITS REFORMS

In October 2009, Janet Napolitano sketched an outline of reforms to the immigration detention system, pledging to transform it from a patchwork of

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128. 973 A.2d 933, 935 (N.J. 2009).

129. *Id.* at 935-36.

130. *Id.* at 936.

131. *Id.* at 933.

132. *Id.* at 936.

133. *Id.* at 935.

jail and prison cells into a “truly civil detention system.”<sup>134</sup> The contours of that plan included the creation of a new Office of Detention Policy and Planning under the (subsequently short-lived) leadership of well-regarded career correctional administrator Dora Schriro. The following month, DHS Secretary Janet Napolitano announced the Obama administration’s plans to overhaul the entire U.S. immigration system to focus enforcement on the most dangerous illegal immigrants and criminal aliens.<sup>135</sup> She described impending reforms as a “three-legged stool” that would balance tougher immigration law enforcement and a “tough and fair” pathway to earned legalization (for illegal immigrants) with a streamlined legal immigration system.<sup>136</sup> Napolitano stressed the significance of enforcement agreements with state and local law enforcement agencies, referring to them as “force-multipliers” in the apprehension of “dangerous criminal aliens.”<sup>137</sup> She lauded the expansion of the Secure Communities Program and its effectiveness in identifying criminal aliens and illegal aliens booked into local jails.<sup>138</sup>

One year later, reform advocates are still awaiting the promised wide-ranging reforms. Evaluating the administration’s progress in the year following Napolitano’s announcement, the ACLU contends that the immigration enforcement system continues to over-rely on “prolonged detention practices [that] deny detainees their most basic element of due process.”<sup>139</sup> The organization further charges that immigrants who pose no danger or risk of flight are still being locked up long term without a bond hearing before an immigration judge.<sup>140</sup> Substandard medical care, sexual abuse of detainees, and limited services to mentally disabled detainees lacking the mental competency to represent themselves are chronic deficiencies the ACLU raised as evidence of systemic failure unlikely to be solved “in the

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134. Nina Bernstein, *U.S. To Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 6, 2009, [http://www.nytimes.com/2009/08/06/us/politics/06detain.html?ref=nina\\_bernstein](http://www.nytimes.com/2009/08/06/us/politics/06detain.html?ref=nina_bernstein).

135. Julia Preston, *White House Plan on Immigration Includes Legal Status*, N.Y. TIMES, Nov. 14, 2009, <http://www.nytimes.com/2009/11/14/us/politics/14immig.html>.

136. *Id.*

137. *DHS Secretary Janet Napolitano Discusses Comprehensive Immigration Reform*, 86 NO. 44 INTERPRETER RELEASES 2812 (2009).

138. *Id.*

139. Press Release, ACLU, ACLU Says Nation’s Broken Immigration Detention System Still Urgently Needs Reform—Few Strides Have Been Made Under Obama And Much More Still Needs To Be Done (October 6, 2010), *available at* <http://www.aclu.org/immigrants-rights/aclu-says-nations-broken-immigration-detention-system-still-urgently-needs-reform>.

140. *Id.*

absence of independent external oversight.”<sup>141</sup> The media raised these issues as well.<sup>142</sup>

While there is some evidence that ICE policies have changed,<sup>143</sup> the Obama administration has premised the promised reforms on taking a more aggressive approach toward dangerous illegal and “criminal” aliens, and a softer approach to less threatening non-U.S. citizens who run afoul of immigration laws. Not only is this strategy problematic (for reasons I will discuss shortly), but it is inconsistent with the actual policies being implemented by ICE. For example, the disclosure of a memo written by James M. Chaparro, the director of ICE’s Detention and Removal Operations (DRO) in March 2010 cast doubt upon the sincerity, or at least the consistent implementation of promised reforms from ICE’s administrative leadership down to the field officers. The memo directed DRO officers nationwide to boost deportation numbers, make maximum use of detention, and detain more people suspected only of unauthorized status. These enforcement priorities are in direct contradiction to those set forth by DHS Secretary Janet Napolitano and ICE Assistant Secretary John Morton who both repeatedly testified, for much of the past year, that ICE’s priority is the deportation of dangerous criminal offenders.<sup>144</sup>

Whereas the criminal punishment system has shifted away from penal severity, the immigration law enforcement and detention system has been slower to reduce the harms it has generated, despite the Obama administration’s stated commitment to immigration reform. Structural reasons account for much of the immigration system’s failure to follow criminal reforms.

First, as the subject of federal regulation, immigration enforcement (and its criminalization) has been fueled by a national security budget with pockets far deeper than that of any state criminal justice system. For ex-

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141. *Id.*

142. Nina Bernstein, *For a Mentally Ill Immigrant, a Path Clears Out of the Dark Maze of Detention*, N.Y. TIMES, Sept. 11, 2009, at A20 (describing the prolonged detention of a mentally disturbed asylum seeker, frequently in solitary confinement); Dana Priest & Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Price*, WASH. POST, May 11, 2008, at A1 (discussing medical neglect of immigration detainees, and citing eighty-three deaths in detention from 2003-2008).

143. Deportations of convicted criminals rose by 19% in 2009 and are on pace to rise by 40% this year. Conversely, deportations of non-criminal illegal immigrants fell 3 percent and are on pace to drop 33% this year. Spencer S. Hsu & Andrew Becker, *ICE Officials Set Quotas to Deport More Illegal Immigrants*, WASH. POST, Mar. 27, 2010, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html>.

144. *Id.*

ample, the total proposed 2011 budget for homeland security is approximately \$5.5 billion.<sup>145</sup> Of that figure, ICE plans to spend \$5.34 million to finance its operations.<sup>146</sup> This figure represents more than twice the total 2007 budget for corrections alone in New York State, and more, by far, than any single state spent on corrections in 2007, with the sole exception of the deeply debt-ridden state of California.<sup>147</sup>

Budgetary crises have forced states to reexamine over-incarceration and downsize their prison populations. In contrast to the categorical “get tough” approach of recent decades, states like Kansas, Michigan, New York, and New Jersey are adopting evidence-based policies to reduce their prison populations and promote cost-effective approaches to public safety with demonstrable results.<sup>148</sup> State budgetary constraints, and the factors that contribute to them, have had little effect on the growth of the federal immigration detention system. To the contrary, the increasing criminalization of immigration violations has provided sizable financial incentives to promote and expand immigration detention. Indeed, the America’s Program, a non-profit policy studies center founded by the International Relations Center, recently reported on the profitability of the private sector, taxpayer-funded, immigration detention industry and its aggressive political lobbying practices.<sup>149</sup>

Second, immigration law enforcement and the deportation system are insulated from most of the social harms that states experienced in the 1990s (and continue to experience) after adopting harsh criminal reforms. Unlike the criminal system, which has embraced re-entry initiatives in order to reduce the harms caused by dramatic increases in prison populations in recent decades,<sup>150</sup> the immigration enforcement system has no such initiatives. There is no re-entry for deportees.<sup>151</sup> By transporting deportees to the country of their citizenship, ICE is permitted to externalize the costs of their support without regard for individualized justice.<sup>152</sup> In the case of

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145. DEP’T OF HOMELAND SECURITY, ICE FISCAL YEAR 2011 OVERVIEW CONGRESSIONAL JUSTIFICATION 3, *available at* [www.ice.gov/doclib/foia/secure\\_communities/fy2011overviewcongressionaljustification.pdf](http://www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressionaljustification.pdf).

146. *Id.* at 86.

147. PEW CTR. ON THE STATES, *supra* note 78.

148. GREENE & MAUER, *supra* note 54.

149. Peter Cervantes-Gautschi, *Wall Street and the Criminalization of Immigrants*, AMERICA’S PROGRAM BLOG (June 10, 2010), <http://www.cipamericas.org/archives/3304>.

150. JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 309-11 (2005).

151. Moreover, re-entry by individuals who have been ordered removed has been criminally punished since 1996.

152. Even when a non-U.S. citizen ordered removed has resided in the United States since infancy, that individual is deportable to the country of his or her citizenship—a coun-

non-U.S. citizen criminal offenders, *but for* their citizenship status, these individuals would generally be eligible for post-release re-entry services to aid their transition from the prison to the street. Under the deportation regime, the public does not have to contend with the consequences of quasi-criminal immigration law enforcement, detention, and removal because (apart from the impact on deportees' families) the impact is primarily felt abroad.

Third, the public outrage that was once so prominently directed toward criminal offenders consistent with the ascendancy of neo-liberal political values under President Reagan (and later under Presidents George H. W. Bush and George W. Bush) has weakened as the excesses of penal severity became unsustainable. For example, as state budgets for higher education were cut to support a rapidly expanding prison system,<sup>153</sup> taxpayers began to question the logic of unchecked prison expansion. With the realization that prison growth was being fueled by mandatory minimum sentences meted out to non-violent felony drug offenders, the public began to support drug treatment and other alternatives to incarceration, as well as prison downsizing measures, such as early release programs, and the repeal of mandatory minimum sentences.<sup>154</sup> However, negative public regard of immigrants—particularly those whose violation of immigration regulations renders them deportable<sup>155</sup>—remains consistently high. For example, a recent poll taken by Quinnipiac University's Polling Institute reflects widespread public sentiment (66%) favoring stricter immigration law enforcement rather than assimilating immigrants into American society.<sup>156</sup> Not only did a majority (51%) of those polled support the aggressive law enforcement and harsh criminal penalties for undocumented migrants enacted

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try that may be completely foreign to the deportee. In addition, there is a wealth of evidence to suggest that U.S. *citizens* have been unlawfully deported. However, the removal system has no process by which unlawfully deported citizens can return to the United States. Daniel Kanstroom, Director of the Boston College Post-Deportation Human Rights Project, has commented that "the legal system has not developed a mechanism to right that wrong for the thousands of people who have been wrongly deported." Nina Bernstein, *For Those Deported, Court Rulings Come Too Late*, N.Y. TIMES, July 21, 2010, at A1.

153. By 1999, New York State spent \$100 million more on its correctional budget than its entire state university system. GREENE & MAUER, *supra* note 54.

154. See generally MARK KLEIMAN, *WHEN BRUTE FORCE FAILS* (2009).

155. This group includes visa overstayers, out-of-status visa holders, non-citizens who surreptitiously cross the border, and non-citizens with criminal convictions. See Immigration & Nationality Act § 237(a).

156. From May 19-24, 2010, Quinnipiac University surveyed 1914 registered voters nationwide with a margin of error of +/- 2.2 percentage points. Poll Release, Quinnipiac Univ. Polling Inst., More U.S. Voters Want Arizona-Like Immigration Law, Quinnipiac University National Poll Finds (Jun. 1, 2010), available at <http://www.quinnipiac.edu/x1284.xml?ReleaseID=1460&What=&strArea=&strTime=3>.

by Arizona in its Senate Bill 1070, they supported it despite a 45% belief by voters that it will lead to discrimination against Hispanics.<sup>157</sup> The results of this poll are borne out by the introduction, or proposed introduction, in at least twenty-two states of legislation mimicking the provisions of Senate Bill 1070.<sup>158</sup>

### CONCLUSION

Nearly forty years ago, the criminal justice system embraced a new philosophy for dealing with crime. Encouraged by the growing popularity of a conservative “tough on crime” movement, the criminal justice system invested heavily in tough criminal law enforcement and incarceration. Roughly twenty years later, the immigration law enforcement system followed the criminal justice system down the same precipitous path, jumping off the same severity cliff. Subsequently, the criminal system was made to come to terms with the harsh, economically unsustainable system. However, structural impediments including a virtually limitless national security budget and costs that are externalized beyond the border, cast doubt upon the likelihood that the current harsh system of immigration enforcement will be reformed any time soon.

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157. *Id.*

158. Arkansas, Colorado, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah—have introduced or are considering introducing similar legislation. *Arizona is Not the First State to Take Immigration Matters Into Their Own Hands*, IMMIGR. POL’Y CTR. (May 14, 2010), <http://www.immigrationpolicy.org/just-facts/arizona-not-first-state-take-immigration-matters-their-own-hands>.