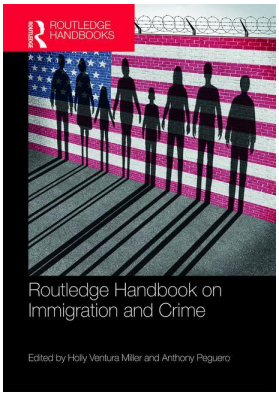

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Immigrants in the Federal Court System

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IMMIGRANTS IN THE FEDERAL COURT SYSTEM

Amanda Pierson and Daniel E. Martínez

Introduction

The 2016 U.S. presidential election once again put immigration center stage on issues of public policy and opinion. In the same speech where he announced his candidacy, President Donald J. Trump stated:

> When Mexico sends its people, they're not sending their best. They're not sending you . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.
>
> *(Washington Post Staff, 2015)*

Despite the attention garnered by the distasteful nature of President Trump's comments, political slander against immigrants is hardly novel; the relationship between policy, immigration, and crime in the United States has always been particularly capricious, molded by coursing political and economic climates as well as localized fear and prejudice (Casanova, 2012; Martínez & Lee, 2000; Mehrabyan, 2014; Varsanyi, 2011). Immigrants especially endure harmful stereotypes as criminals and dependents of the welfare state (Timberlake, Howell, Grau, & Williams, 2015), despite there being little evidence to support that immigrants engage in more crime than native-born citizens or that immigration is associated with higher crime rates (Ewing, Martínez, & Rumbaut, 2015; Ousey & Kubrin, 2018; Rumbaut & Ewing, 2007).

Despite these consistent findings in the sociological literature, research has found that noncitizens[1] are overrepresented in the federal court system (Light, Lopez, & Gonzalez-Barrera, 2014). The primary function of the federal court system is to hear cases involving the potential violation of the U.S. Constitution or federal law. However, the federal court system plays an important role in the lives of noncitizens in ways that do not similarly affect those of citizens. Because immigration policy technically falls under the purview of the federal government, federal courts also hear cases challenging the constitutionality of immigration-related policies passed at the Congressional, state, or local level. In a similar vein, because certain immigration violations are criminal in nature under federal law (e.g., "unlawful entry" and "unlawful reentry"), violators of such laws can be prosecuted in federal court. Noncitizens also face federal court for violations of law unrelated to immigration enforcement; often, they are immediately placed in Immigration and Customs Enforcement (ICE) custody after their release from jail to await federal trial (Beckett & Evans, 2015).

Drawing on data from the United States Sentencing Commission, the Pew Research Center found that the number of offenders sentenced in federal courts has more than doubled over the past 20 years, increasing from 36,564 in 1992 to 75,867 in 2012 (Light et al., 2014). Moreover, the percentage of noncitizens sentenced in federal court increased from 22% to 46% during the same period (Light et al., 2014), while noncitizens represented 22% of people incarcerated in federal prisons as of August 2016 (Federal Bureau of Prisons, 2016). Yet, according to the U.S. Census Bureau, noncitizens have only accounted for about 7% of the general population over the past several years (U.S. Census Bureau, 2015). In other words, immigrants—specifically noncitizens—are clearly overrepresented in federal courts and prisons. And although federal prisoners only account for approximately 9.5% of the total incarcerated population in the United States (Kaeble, Glaze, Tsoutis, & Minton, 2015), proponents of immigration restrictions often cite noncitizens' overrepresentation in the federal court system as justification for an increased punitive approach to immigration control. However, as we argue in this chapter, several key pieces of legislation and changes in immigration enforcement practices have led to these disparities in the federal court and prison system. Specifically, immigrants' overrepresentation in this system is a direct consequence of the criminalization of immigration, not of the criminality of immigrants as a group. In doing so, we hope to offer a critical understanding of the complicating trends in immigration law, criminal law, and the federal court system, and discuss the impacts of a myriad of problematic systems that disregard the rights of noncitizens and their families.

Historical Context

The United States has prided itself as a nation of immigrants since its inception, though the relationship between the federal government and noncitizens has hardly been consistent. Historically, the United States has always embraced some groups while viewing others as unwelcome burdens (Martínez & Lee, 2000; Martínez, Lee, & Nielsen, 2004). Irish immigrants were persecuted in the mid-19th century amidst allegations from nativists groups that they increased crime and placed undue stress on welfare institutions (Taylor, 1971). In a similar vein, with the recession of the late 1800s, the public and the state deemed Chinese immigrants the new "racial and cultural undesirables" (Fan, 2013, p. 104).

By 1909, over 57% of the U.S. population consisted of the children of immigrants (Foster, 2001). As noted by Foster (2001), most educators during the mid- and late-19th century—perhaps in response to the high influx of immigration—had adopted a strong view of "Anglo-conformity," where the primary goal "was to divest recent arrivals of their native culture and compel them to conform to the 'virtues' of Anglo-Saxon traditions" (Foster, 2001, p. 1). These demands for assimilation were not limited to education. Political figures also encouraged immigrants to adopt new identities as Americans in the United States rather than preserving traditions from their home countries. In 1915, President Wilson advised new citizens "America does not consist of groups. A man who thinks of himself as belonging to a particular national group in America has not yet become an American" (Olneck, 1989, p. 402).

This sentiment of nativism and assimilation in the United States during this era fueled support for the Immigration Act of 1924, which played a critical role in shaping the country's initial response to the national origin of immigrants (Ngai, 1999). The Immigration Act of 1924 implemented quotas on Italian, Japanese, and Eastern European immigrants, and ranked nationalities in a "hierarchy of desirability" (Motomura, 2006; Ngai, 1999, p. 70). And although Mexicans were exempt from the 1924 quotas, they were apprehended and removed from the United States with fluctuations in the demand for labor (Macías-Rojas, 2016). As a result, prior to 1965, immigrants to the United States were mostly from Western and Northern Europe (Kposowa, Adams, & Tsunokai, 2010). The Immigration and Nationality Act of 1965, known as the Hart-Celler Act, revised the national origin quotas originally instituted in 1924, "made family reunification a central feature of admission

decisions" (Hanson, 2005, pp. 11–12), and instituted new quotas for countries in the Western Hemisphere (Macías-Rojas, 2016). The next major wave of immigration to the United States would not occur until the late 20th century, which consisted mostly of immigrants from Latin American and Asia (Kposowa et al., 2010).

Historically, U.S. law has played a significant role in contributing to the marginalization of immigrants in the United States. For instance, fueled by xenophobia and the anti-Chinese movement, a federal law signed by President Chester A. Arthur forbade Chinese laborers from immigrating to the United States based solely on national origin (Chinese Exclusion Act, 1882). The Chinese Exclusion Act not only prevented new immigrants from coming to the country, but also marginalized those already in the United States and forced many to return to China or migrate to the Deep South, East Coast, and northern Mexico (Alba & Nee, 2003). In a similar vein, an executive order upheld by legislative and judicial bodies essentially allowed federal workers to force Japanese Americans, some of which were immigrants and others native-born, into internment camps during World War II (*Korematsu v. United States*, 1944; Order No. 9066, 1942). More recently, it has become legal practice in Arizona to ask for proof of citizenship during a routine police stop, though the law clearly targets people of color, particularly Latino/a individuals (Cohn, 2012; Support our Law Enforcement & Safe Neighborhoods Act [SOLE & SNA], 2010). These are just a few examples illustrating how criminal and immigration law have operated historically as tools of oppression and social control used against noncitizens in the United States.

The Criminalization of Immigration Law

Since the late 1990s, several key pieces of federal legislation have effectively led to the devolution of immigration enforcement from the federal level to the local level and increased the convergence of immigration law and criminal law, a process that many scholars have described as the "criminalization of immigration law" (Chacón, 2010; Coleman, 2007, 2012; Stumpf, 2006). These laws include the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, and the 2001 USA PATRIOT Act (Chacón, 2012; Coleman, 2007; Golash-Boza, 2015; Golash-Boza & Hondagneu-Sotelo, 2013; Kanstroom, 2003; Stumpf, 2006; Welch, 2003). Collectively, these policies blurred the lines between immigration and criminal law by expanding the list of deportable offenses and "aggravated felonies," by limiting judicial review in cases of immigration enforcement, and by allowing for the use of secret evidence under certain circumstances (Coleman, 2007; Golash-Boza, 2015; Welch, 2003). Deportations from the United States have increased drastically as a direct result of these policy changes. Although deportation is not considered a punishment in the context of immigration (i.e., civil, administrative) law, the 1996 laws have created disparate outcomes between citizens and noncitizens concerning the de facto use of deportation as punishment, especially when it comes to minor, nonviolent offenses. As stated in *Padilla* (2010), for the majority of noncitizens convicted of crimes, "the drastic measure of deportation is now virtually inevitable" (Kanstroom, 2003; *Padilla v. Kentucky*, 2010).

There is an exception, however, within 8 U.S.C. § 1229b (a) that allows for the cancellation of a legal permanent resident's deportation if they have resided in the United States for at least seven years (at least five of which as a permanent resident) and have not been convicted of an aggravated felony. The difficulty in this exception comes with the way in which an "aggravated felony" is defined. As Golash-Boza (2015) notes, "under IIRIRA, aggravated felonies include any felony or misdemeanor where the court imposes a sentence of at least one year in prison, regardless of whether the sentence was served or suspended," including relatively minor offenses "that do not require judicial review" (p. 105). Furthermore, the discretion to cancel an LPR's deportation is extremely limited because current policy only allows Attorney Generals 4,000 cancellations per year (8 U.S.C. § 1229b (e) (1)).

As noted by Beckett and Evans (2015), "the fusion of civil and criminal law worked to enhance state power" (p. 243). The devolution of that power has created a system where, in the context of federal immigration, "authorities have incorporated many of the enhanced enforcement powers—but not the rights protections—associated with criminal law into the civil immigration system" (Beckett & Evans, 2015, p. 243; Chacón, 2012; Eagly, 2010). For example, the AEDPA of 1996 "formally authorized sub-federal law enforcement officers to arrest and detain unlawfully present noncitizens who had *previously* been convicted of a felony in the United States" (Chacón, 2012, p. 642, emphasis added). In other words, deportation stemming from an aggravated felony has been applied retroactively, a practice that is unlawful when applied to citizens (*Calder v. Bull*, 1798; *Peugh v. United States*, 2013). This means that noncitizens, including LPRs, have faced deportation for aggravated felonies committed *prior* to the implementation of IIRIRA or AEDPA in 1996, even in cases where an individual may have pled guilty in order to serve probation in lieu of jail time (Coleman, 2007; Golash-Boza, 2015; Welch, 2003). This further supports the assertion that, overall, noncitizens face disproportionate legal and social sanctions relative to citizens. Unlike a fine, deportation "represents the ultimate coercion of the state determining the fate of an individual's life," restricting an individual's access to society, personal liberty, and communication with their family (Appelbaum, 2014, p. 233). Moreover, IIRIRA eliminated "most grounds for appeal" and implemented the "expedited removal process" (Golash-Boza & Hondagneu-Sotelo, 2013, p. 275).

IIRIRA also established the framework for the 287(g) program, which allowed the federal government to grant immigration enforcement authorities to local law enforcement agencies, pending that they underwent "adequate training to enforce immigration laws" (Chacón, 2012, p. 642). This "tethering" of federal practices to local law enforcement agencies has likely "enhance[d] the state's capacity to detain and punish" noncitizens (Beckett & Evans, 2015, p. 243). By expanding the types of crimes that merit deportation while increasing the number of individuals authorized to arrest and detain noncitizens, the criminalization of immigration has effectively increased federal court appearances by noncitizens (Coleman, 2007; Welch, 2003), despite immigrants as a group being no more prone to crime than citizens (Ewing et al., 2015; Ousey & Kubrin, 2018; Rumbaut & Ewing, 2007). Ironically, these federal laws also took discretion away from states, often resulting in unusual incarceration practices. For example, 8 U.S.C. § 1226 (c) requires the Attorney General to take any LPR into custody if they might be deportable, even though the Attorney General typically has the ability to offer alternatives to imprisonment (8 U.S.C. § 1226 (c)). In other words, devolution of federal policy has increased a state's ability to arrest and detain, but decreased their flexibility post-arrest. Additionally, this legislation created several structural barriers that prevent immigrants from taking advantage of the basic constitutional rights afforded to citizens in federal court. This has been upheld in the Supreme Court; in *Demore v. Kim* (2003) the Court ruled that noncitizens can be treated in manners that would be unconstitutional if applied to citizens (*Demore v. Kim*, 2003).

Due in part to these laws, the U.S. federal court system is simply not conducive to the fair and equal treatment of immigrants. There is no better example of the discrepancies in federal sentencing between citizens and noncitizens than in nonviolent drug offenses. LPRs can be deported for attempted possession or possession of paraphernalia as well as simple possession of marijuana, even in states where marijuana has been legalized (8 U.S.C. § 1227 (a) (2) (B) (i)). Indeed, in fiscal year 2013, drug-based offenses represented the second largest share of ICE criminal removals behind immigration-related offenses (Simanski, 2013). LPRs are especially prone to misleading assumptions about how federal drug laws affect them: although U.S. law recognizes different types of drug crimes and punishments for citizens, such intricacies are nonexistent for noncitizens (Barillas, 2014). Because of the legal restrictions placed on Attorney Generals and the continued federal ban on marijuana, all noncitizens—including LPRs—risk deportation by engaging in what would otherwise be legal activity (Barillas, 2014).

A major development in immigrant procedural rights in the past decade has come with *Padilla v. Kentucky*, where the Supreme Court ruled that criminal defense attorneys cannot provide adequate

legal representation for their clients if they do not fully notify their clients of the possible deportation consequences of a guilty plea (*Padilla v. Kentucky*, 2010). Noncitizens had often been advised to take a guilty plea in exchange for probation or a lesser jail sentence, only to then be immediately referred to an immigration court to face deportation hearings (Appelbaum, 2014). This created a new burden on defenders (especially public defenders) to specialize in both criminal defense and immigration law, the complexities of which are notorious for being second only to tax law (Appelbaum, 2014). This institutional weakness is coupled with the fact that deportation is not a procedure rooted in criminal law and that *Padilla* does not require defense counsel to actively pursue a deal that avoids deportation (Brown, 2011). As a result, the assumption that *Padilla* has substantially affected how immigrants are treated in the federal court system may be flawed. Additionally, *Padilla* noticeably stopped short in any discussion as to the quality of representation received when a defense attorney does not speak the same language as his or her client. This is a challenge often faced by noncitizens; as pointed out by Appelbaum (2014), the language barrier many immigrants are faced with makes the expectation that they could "access enough information to make an informed decision . . . in this high-stakes scenario" legally "unfair" (Appelbaum, 2014, p. 231). *Padilla* also faces similar criticisms to *Brown v. Board of Education (1954)*, *Gideon v. Wainwright (1963)*, and *Miranda v. Arizona (1966)* in that it accepts the status quo of the court system, rather than addressing the core structural issues—primarily, racial profiling and discrimination—that compel noncitizens to plead guilty in the first place (Appelbaum, 2014). Instead, *Padilla* tasks attorneys with "damage control," trying to limit the negative consequences of a guilty plea.

The criminalization of immigration law has resulted in several negative social consequences for noncitizens and members of their families. These consequences include mass deportation, family separation, and the further criminalization of noncitizens for subsequent reentry following a formal removal from the United States. The criminalization of noncitizens has further escalated in the wake of the interior immigration enforcement programs such as 287(g), Secure Communities, and the Criminal Alien Program. For example, under Secure Communities, anyone apprehended by local law enforcement officials has their fingerprints checked against criminal and immigration databases. If the fingerprint submission results in a match, U.S. ICE may issue a detainer requesting that local authorities hold an individual for up to 48 hours (Ewing et al., 2015; Kubrin, 2014). Nevertheless, closer examination of ICE detainers issued between FY 2008 and 2012 finds that more than 77% of ICE detainer targets had no criminal record (Ewing et al., 2015). Despite the de facto devolution of immigration enforcement from federal to local authorities, some localities have resisted this process by adopting measures limiting their cooperation with federal authorities in the enforcement of immigration law (Ridgley, 2008; Sullivan, 2009). Nevertheless, these so-called "sanctuary policies" do not preempt federal law and therefore do not fully protect noncitizens from deportation (see chapter 20 of this volume for a detailed discussion of so-called sanctuary policies).

The Zero-Tolerance Approach to Unauthorized Border Crossings

In 2011, U.S. Customs and Border Protection officially introduced the Consequence Delivery System (CDS), which is a program "that guide[s] management and agents through a process designed to uniquely evaluate each subject and identify the ideal consequences to deliver to impede and deter further illegal activity" (U.S. Congress, 2011). This relatively new approach to immigration enforcement within the 100 km border region, predicated on general deterrence, is a clear departure from U.S. Department of Homeland Security's prevention-through-deterrence strategy that aimed to deter would-be border-crossers by heavily enforcing and patrolling areas of the border frequently used by unauthorized migrants (Andreas, 2000). The aim of the CDS has been to increase the penalties associated with subsequent unauthorized migration in an effort to reduce recidivism.

Although established several years before its official adoption in 2011, one of CDS's integral programs is Operation Streamline. First established in the Del Rio sector of the U.S. Border Patrol in

2005, this program was also operational in the Yuma, Laredo, Tucson, and Rio Grande Valley sectors as of 2016. Operation Streamline consists of a "zero-tolerance" trial en masse that processes 40 to 80 apprehended border-crossers on a daily basis in federal district courts, ultimately convicting them of "unlawful entry" (8 U.S.C. § 1325), which is a misdemeanor, or "unlawful reentry" (8 U.S.C. § 1326), which is a felony (Lydgate, 2010). Immigrants convicted of unlawful entry can be fined and receive a sentence of up to six months (Lydgate, 2010; 8 U.S.C. § 1325). Those convicted of unlawful reentry may be fined and receive a sentence of up to two years, although sentences can be as high as ten or 20 years, depending on one's prior criminal record (Lydgate, 2010; 8 U.S.C. § 1326). In 2012, the average sentence length for unlawful reentry was around 23 months, and 15 months for other immigration offenses (Light et al., 2014). Both convictions result in a "formal removal" (i.e., deportation) from the United States.

Prior to the implementation of Operation Streamline, most unauthorized Mexican border-crossers were granted a "voluntary return" by Border Patrol, which does not carry the same penalties as a deportation or a conviction of unlawful entry or reentry. However, since 2005, there has been a significant decrease in voluntary returns granted to unauthorized immigrants caught in transit near the border and an increase in deportations and "expedited removals," the latter of which do not require judicial review (Light et al., 2014, p. 6).

Some federal district courts also share this authority. According to Chacón (2010), districts with "'an exceptionally large number' of illegal reentry cases" qualify for "Fast Track" options, which offer sentences "in illegal reentry cases that are significantly below the federal guidelines" (Chacón, 2010, p. 143). In this process, an immigrant would waive his or her right to appeal in exchange for immediate deportation, with the focus lying in maximizing prosecutorial resources (Blum, 2003; Chacón, 2010). Over 160,000 immigrants were deported via Fast Track between 2001 and 2011, many under the pressures created by the alternative of mandatory detention (Koh, Srikantiah, & Tumlin, 2011; Morawetz, 2000).

Operation Streamline and Fast Track options specifically, and the zero-tolerance approach to immigration enforcement along the U.S.-Mexico border more broadly, have been major factors contributing to the overall number of federal court convictions as well as the proportion of noncitizens tried in the federal court system. According to the Pew Research Center, "the increase in unlawful reentry convictions alone accounts for nearly half (48%) of the growth in the total number of offenders sentenced in federal courts" between 1992 and 2012 (Light et al., 2014, p. 4). As of 2012, federal immigration offenses (i.e., unlawful reentry and other immigration convictions) accounted for 30% of all federal convictions, second only to drug convictions, which consisted of 33% of federal convictions (Light et al., 2014).

Operation Streamline has received criticism beyond its contribution to the systematic criminalization of immigrants. For instance, Lydgate (2010) has questioned Operation Streamline for violating migrants' constitutional right to due process and for channeling federal resources away from the prosecution of more serious crimes, including human and drug smuggling (Lydgate, 2010). Others have highlighted the clear link between the explosive growth of private immigration detention facilities throughout the southwestern United States and the increased utilization of Operation Streamline (Martínez & Slack, 2013; Migration and Refugee Services, United States Conference of Catholic Bishops, & Center for Migration Studies [MRS/USCCB & CMS], 2015). Furthermore, because a conviction of unlawful entry or reentry carries possible time in detention, Martínez and Slack (2013) have called attention to the possible unintended social consequences of incarcerating largely economic migrants alongside more serious criminal offenders, including their exposure to illegitimate means structures. A recent report by U.S. Department of Homeland Security's Office of Inspector General determined that Operation Streamline carries possible international implications, as the Border Patrol does not offer guidance on how to process immigrants who "express fear of persecution or return to their home country," which quite possibly violates U.S. treaty obligations (Office of Inspector General, 2015, p. 2).

Balancing State Interests and the Effects of Zero-Tolerance Laws

The state has a valid interest in keeping crime low and promoting legal immigration; exploring deportation as a possible repercussion of criminal activity logically follows these conclusions as a legitimate avenue to promote these interests. However, we argue that it is in the best interest of the state to promote strong and healthy families by creating environments and legal structures where families can thrive, as these long-term investments may ultimately help protect against future social problems.

A zero-tolerance approach to unauthorized border crossings and the criminalization of immigration violate these values in important, but often unseen ways. This is partly because the material effects of deportation on families have been relatively under-examined in the literature (Henderson & Baily, 2013). However, a handful of studies have examined the effects of deportation on "mixed-status" families, where parents do not share the same citizenship status as their children (Dreby, 2012; Henderson & Baily, 2013; Rosas, 2012; Taylor, Lopez, Passel, & Motel, 2011; Zayas, Aguilar-Gaxiola, Yoon, & Rey, 2015). Approximately 16.6 million people in the United States live in families with at least one unauthorized immigrant, and 9 million live in families with at least one unauthorized adult and one U.S.-born child (Taylor et al., 2011). Moreover, there are approximately 4.5 million children who "were born in the U.S. to at least one unauthorized immigrant parent" (Taylor et al., 2011, p. 6). Deportation is a constant threat to mixed-status families. Between July 2012 and September 2013 alone, over 200,000 mixed-status families were separated by deportation proceedings (Zayas & Bradlee, 2014). Several studies have illustrated that the threat and process of deportation has longstanding harmful effects on family structures (Dreby, 2012; Rosas, 2012; Taylor et al., 2011; Zayas & Bradlee, 2014; Zayas et al., 2015). There are few protections in place to preserve family structures once deportation has become a possible reality for parents. Deportees can apply for the cancellation of a deportation order if they can demonstrate "'exceptional and extremely unusual hardship' to a U.S. permanent resident or citizen parent, spouse, or child" (Henderson & Baily, 2013). However, this process can be cost-prohibitive and arduous, and does not necessarily result in a favorable outcome. As Henderson and Baily (2013) note, "legal appeals have established that 'personal distress and emotional hurt' are *typical* responses to deportation and therefore do not constitute grounds for such cancellation" (p. 452, emphasis in original). Similarly, although there are family reunification structures in place should a parent be deported, child welfare departments rarely follow through on these processes (Rosas, 2012). Instead, parental rights are forgone and as a result, 5,100 children born to immigrant parents were placed in foster care in 2011 alone, with 15,000 more expected by the end of 2016 (Wexler, 2011; Zayas & Bradlee, 2014). This only further fuels stereotypes of immigrants as burdens on the welfare state.

Currently, children are not a legal consideration in federal deportation cases (Henderson & Baily, 2013). As noted by Henderson and Baily (2013), despite a child's best interests being a central tenant for "children's rights under international law, U.S. child welfare law, and the immigration law of many other countries, no such protection currently exists under U.S. immigration law" (p. 452). Critics have argued that by promoting a children's rights framework within immigration law would rest "too heavily on the notion of equality, which requires the person in question (in this case a child) to assert his or her own rights" (Staller, 2011, p. 176). However, zero-tolerance policies must be balanced by the valid representation of individuals who must cope with the aftermath caused by these policies; some of the greatest harm created by zero-tolerance immigration policies is done to the citizen-children of immigrant parents (Henderson & Baily, 2013; Zayas & Bradlee, 2014; Zayas et al., 2015).

The harms of zero-tolerance and criminalization policies precede deportation; deportation itself "takes place against a backdrop of exploitation, stigma, and discrimination" (Henderson & Baily, 2013, p. 451). These feelings of exploitation, stigma, and discrimination also feed the "constant fear of the possible arrest, detention, and deportation of" family members, which trigger a specific group

of risk factors in citizen-children (Zayas et al., 2015, p. 3213). Therefore, deportation is only the final stage of trauma rather than an initiating event (Zayas et al., 2015). During a child's developmental years, these anxieties often manifest as psychopathological disorders and antisocial behaviors (Henderson & Baily, 2013). These include depression, anxiety, aggression, conduct problems, post-traumatic stress disorder, enuresis, oppositional defiant disorder, irritability, and a disruption of eating and sleeping habits (Henderson & Baily, 2013; Zayas & Bradlee, 2014; Zayas et al., 2015). U.S. citizen-children with unauthorized immigrant parents are at greater risk for these types of behaviors when compared to children from nonmixed status families—even after controlling for demographic factors and personal history of trauma (Zayas et al., 2015, p. 3215). Citizen-children in mixed-status families also face social consequences of zero-tolerance and criminalization policies: they experience higher rates of marginalizing conditions including loss of income and poverty, food insecurity, and delayed cognitive development (Zayas & Bradlee, 2014; Zayas et al., 2015).

In addition to failing to prioritize families, zero-tolerance and criminalization policies are clear examples of institutionalized discrimination, which may partially help explain noncitizens' overrepresentation in the federal court system. First, these laws promote policies that encourage racial profiling. A noncitizen's journey through the federal court system begins long before the individual encounters immigration officials or local law enforcement agents. In other words, structural factors contribute largely to extant disparities between citizens and noncitizens seen in the federal court system. Nonwhite immigrants in particular are subject to racial profiling and discrimination, often subconscious maladies that pervade institutions and communities at a macro level (Crosby & Dovidio, 2008). There is little evidence that immigrants commit more crime than the native-born population (Lee, Martínez, & Rosenfeld, 2001; Martínez & Lee, 2000; Reid, Weiss, Adelman, & Jaret, 2005). Rather, data tends to err in favor of immigrants (specifically Latino/a immigrants), who actually have significantly lower crime rates than citizens (Lee et al., 2001; Martínez & Lee, 2000; Reid et al., 2005). Moreover, noncitizens may face an additional level of stereotyping and apprehension because of their presumed national origin. Recent laws, including Arizona's 2010 SB 1070, which allows police to stop any individual under suspicion of illegal entry, have exemplified the role racial profiling plays in discussions of immigration (SOLE & SNA, 2010). Because it is not possible to determine someone's citizenship status based solely on visual cues, Arizona SB 1070 encourages racial profiling (Cohn, 2012). Further, critics have argued the law mandates typically unconstitutional suspicionless stops and seizures, "inviting officers to use 'hunches' as a proxy for racial profiling" (Cohn, 2012, p. 171). Neither citizens nor noncitizens are afforded any protections to this practice in federal court. To the individual being stopped by police and questioned about his or her citizenship, the effects of these laws are rooted in harassment that polarizes residents and reinforces stereotypes (Cohn, 2012). These policies are equally harmful to citizens because these laws create feelings of distrust and discrimination (Cohn, 2012).

Finally, zero-tolerance and criminalization policies feed fears of deportation, decreasing crime reporting and increasing the dark figure of crime. Henderson and Baily (2013) specifically highlight the ways in which immigration status is associated with the underreporting of domestic violence victimization. Moreover, as Langton, Berzofsky, Krebs, and Smiley-McDonald (2012) note, just over half of violent victimizations perpetrated against Latino/as between 2006 and 2010 were not reported to police, suggesting that Latino/as have lower reporting rates than Blacks as well as American Indians/Alaskan Natives. Nearly a third of this group stated that they did not report their victimization because "the police would not or could not help" or because "the victim suffered fear of reprisal or getting [the] offender in trouble" (Langton et al., 2012, p. 7). This finding debunks critics of immigration reform who proclaim that community policing alone is a solution that can mitigate the negative effects of criminalization. Sentiments of distrust pervade many nonwhite and noncitizen communities, and structural barriers previously discussed prevent effective community policing or are so ingrained within the criminal justice system that community policing alone cannot address the root

causes of the problem. This includes limitations on Attorney Generals, zero-tolerance unauthorized entry laws, as well as the criminalization of immigration (Barillas, 2014; Cohn, 2012).

Conclusion

The federal court system specifically, and the convergence of immigration law and criminal law more broadly, have contributed to the overrepresentation of noncitizens in the federal court system and in federal prisons. While these disparities certainly stem in part from the fact that immigration policies and immigration enforcement fall under the purview of the federal government, we contend that this overrepresentation is also a direct consequence of the criminalization of immigration and zero-tolerance unauthorized entry laws rather than the criminality of immigrants as a group. The criminalization of immigration has its origins in law, most notably the 1996 immigration laws and policies associated with the "war on terror" (Chacón, 2012; Coleman, 2007; Golash-Boza, 2015; Golash-Boza & Hondagneu-Sotelo, 2013; Kanstroom, 2003; Stumpf, 2006; Welch, 2003). These laws increased interior immigration enforcement by facilitating the cooperation of federal and local officials in the enforcement of immigration law. These policies also expanded the list of deportable offenses to include relatively minor offenses and allowed deportation to be applied retroactively, thereby leading the current mass deportation regime (Coleman, 2007; Golash-Boza, 2015; Kanstroom, 2003; Welch, 2003). The courts have been slow to respond to these injustices, or have ruled against the rights of immigrants to allow them to be treated unconstitutionally if the same outcome were to be applied to citizens (Appelbaum, 2014; *Demore v. Kim*, 2003). Since cases like *Padilla* and *Demore*, the criminalization of immigration has escalated. For example, Operation Streamline has increased federal court convictions as well as the proportion of noncitizens tried in the federal court system (Light et al., 2014).

Increased deportation has had adverse effects on the very citizens these laws are supposed to benefit. Citizen-children from mixed-status families are especially harmed, being put at an increased risk for several behavioral disorders and social stigma (Zayas et al., 2015). Despite this, children are still not a legal consideration in deportation cases (Henderson & Baily, 2013). Zero-tolerance and criminalization laws also encourage racial profiling, which increases stigma and discrimination against non-white citizens in addition to their noncitizen counterparts (Cohn, 2012). These laws can also increase crime by decreasing reporting, especially in violent crime against racial minorities (Henderson & Baily, 2013; Regoli et al., 2011). Immigration policy attempts to respond to these pitfalls of ineffective legislation by over-relying on criminal law and the welfare state, but it is clear the United States cannot continue to pride itself as a nation of immigrants while simultaneously criminalizing immigration and promoting zero-tolerance policies.

Note

1 The term "noncitizen" refers to any individual who resides in the United States, legally or in an unauthorized manner, under any other citizenship status. This includes legal permanent residents who have "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed" (8 U.S.C. § 1101 (a) (20) (2006)). Accordingly, the term "citizen" refers to any individual in the United States with full legal status and all of the privileges entailed in that status. This includes natural-born citizens as well as individuals who have immigrated to the United States but have achieved full citizenship status through naturalization or a similar process.

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