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THE CASE FOR CRIMMIGRATION REFORM

MARY FAN

The nation is mired in immigration reform debates again. Leaders vow that this time will be different. The two groups most targeted by immigration control law over the last century, Hispanics and Asians, have increased in numbers and in political power. Conservative leaders are realizing that hostile policies toward people perceived as foreign are alienating rising demographic groups and that reform can be a peace offering. Yet, as in the past, the debate over immigration reform continues to be dominated by a focus on alleged “amnesty for lawbreakers” and a fierce divide that doomed reform proposals in 2005, 2006, 2007, and 2010. One side calls for legalizing an estimated eleven million undocumented people while the other side decries rewarding lawbreakers. Overlooked in the clash are problems in the nation’s swollen “crimmigration complex” that endanger values important to each side.

This Article is about curbing the most problematic excesses of the “crimmigration complex.” The Article uses the term crimmigration complex in two senses, to evoke both the prison-industrial complex and the complex that distorts behavior in psychoanalytic theory. First, crimmigration complex refers to the expanding array of government agencies and private contractors using the expensive artillery of criminal sanctions to enforce civil immigration law. Second, crimmigration complex refers to the competing passions, fears, and history that distort law and policy choices and fuel immigration criminalization, blocking the ability to pursue more cost-effective approaches. Breaking free of crimmigration complex domination requires bridging the fiercely competing worldviews that have repeatedly stymied immigration reform. This Article argues that continuing to feed the ravenous

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crimmigration complex endangers values important to both sides of divide. The Article explores how the impasse-bridging interests of power, demography, and fiscal responsibility counsel for crimmigration reform.

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INTRODUCTION

As immigration reform efforts renew, the usual opposed camps are amassing.1 People concerned about softening immigration laws argue that tough measures are needed to address lawbreakers who jump the lines and gates necessary to protect the nation's limited resources and defend against overflooding.2 People seeking to liberalize immigration laws argue in terms of the plight of a permanent underclass of people lacking legal status and their broken dreams and families.3 After fierce clashes, the intractable conflict stymied immigration reform proposals in 2005,4 2006,5 2007,6 and


2010. Yet immigration reform is a priority again, with proponents emboldened by President Obama’s re-election after winning record shares of the two fastest-rising voter demographic groups, Asians and Hispanics.  

Will demographic change and power shifts break the impasse? Despite early indications of a change in the conservative stances on immigration, clashing worldviews are reshaping legislation proposals and again threatening reform efforts. Shortly after President Obama’s second inauguration, a bipartisan group of eight senators unveiled a sketch of proposed immigration reform focused on carving paths to legalization for unauthorized immigrants. To salve concerns

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8. See, e.g., Pamela Constable & Luz Lazo, Hispanics, Asians Party—and Flex Political Muscle, WASH. POST, Jan. 20, 2013, at C1 (describing record win and influence of rising groups); Press Release, U.S. Census Bureau, Most Children Younger than Age 1 Are Minorities (May 17, 2012), available at http://www.census.gov/newsroom/releases/archives/population/cb12-90.html (reporting that Hispanics are the fastest-rising minority group and the largest, at over 16.7% of the population while Asians are the second fastest-rising minority group).


that legalization, also dubbed amnesty, would lead to a surge of undocumented migration, as occurred after the 1986 amnesty,11 the proposal also promises to further build up borders “with the latest technology, infrastructure and personnel.”12 As unveiled in the United States Senate, the proposed legislation begins with provisions on increasing border policing and prosecutions and then tackles the controversial issue of legalization.13

Despite the compromise and crafting, opponents saw “amnesty for lawbreakers”—and saw red.14 Some raised cost concerns, arguing that legalization would cost U.S. taxpayers $6.3 trillion over the next decades because of the extension of social services and healthcare to the legalized.15 Opponents have also decried the “amnesty first, border security whenever” approach and proposed a host of amendments such as requiring proof of “effective control” of the border for six months before granting provisional status.16 Some House representatives also struck back, introducing a bill that heightens interior tracking of undocumented immigrants, raises

loosen immigration restrictions to admit greater numbers of certain skilled workers desired by powerful businesses, such as the technology industry, reviving efforts that faltered in 2007. Immigration Innovation Act of 2013 (I-Squared Act of 2013), S. 169, 113th Cong. (2013).


12. Immigration Reform Memorandum, supra note 10, at 1; see also, e.g., Four More Years; The Future of GOP, FOX NEWS, Nov. 8, 2012, available at 2012 WLNR 23871071 (transcript of statements of Eric Bolling, co-host, and Charles Krauthammer, commentator) (discussing “amnesty for illegals”); Swarns, Failed Amnesty Legislation of 1986 Haunts the Current Immigration Bills in Congress, supra note 7, at A1 (discussing concerns over another surge in undocumented immigration following a grant of amnesty).


federal penalties for immigration-related offenses, and authorizes states and localities to enact immigration control laws. In the clash of competing worldviews, problems in the nation’s crimmigration complex remain unaddressed—and may be worsened by the saber-rattling.

This Article is about an area neglected in the recurrent collisions in worldviews over immigration reform—the need for crimmigration reform. This Article uses the term “crimmigration complex” in two senses, to evoke both the prison-industrial complex, and the complex that distorts behavior in psychoanalytic theory. “Crimmigration” refers to the use of criminal sanctions to enforce civil immigration law and the increasing erosion of boundaries between criminal and civil immigration law, while the prison-industrial complex refers to the convergence of bureaucratic, political, and private interests that benefit from incarceration spending. “Crimmigration complex” refers to the government agencies and private companies that grow and benefit from using criminal sanctions to enforce civil immigration law. The term crimmigration complex is also meant to be evocative of the notion of a complex in psychoanalytic theory, referring to how memory, emotions, perceptions, and wishes in tension can distort behavior. The Article uses the term “crimmigration complex” to refer to the government agencies and private companies that grow and benefit from using criminal sanctions to enforce civil immigration law. The crimmigration complex has swelled dramatically over the decades, fed by these recurrent political flare-ups. The term crimmigration complex also refers to how the freight of history,
competing desires, fears, and inflamed perceptions fuel recurrent flare-ups of furor over immigration and resort to criminal sanctions to enforce nominally civil immigration law.

Recurring clashes over alleged "amnesty for illegals" is a status competition between worldviews that blinds both sides to the crimmigration investigation and surveillance problems that roused rising voter groups and created the impetus for immigration reform. What galvanized the rising demographic of Hispanics and Asians—both voting citizens and noncitizens—are problems with overbreadth in immigration investigation and criminalization. Overbreadth means casting the web of investigation and incarceration too broadly, leading to concerns such as problematic targeting practices and wasteful spending that bloats the crimmigration complex. Three major overbreadth problems include (1) investigating Americans of particular racial and ethnic backgrounds as potential aliens, (2) spending millions to prosecute immigrants without criminal histories before civilly deporting them, and (3) paying billions to confine immigrants who do not pose a flight or danger risk in a massively expanded civil incarceration complex.

Continuing to feed the ravenous crimmigration complex endangers values important to the worldviews on both sides of the traditional immigration reform divide. To achieve crimmigration reform, it is crucial to argue in terms of interests and values that appeal to people of competing worldviews. Focusing on impasse-bridging interests, the Article argues that power, demography, and fiscal responsibility counsel for crimmigration reform.

The Article proceeds in four parts. Part I discusses the split in worldviews that generates recurrent cycles of failed immigration reform and the fierce focus on the most polarizing issue of alleged amnesty. The conflict blinds reformers to other issues in need of attention. To progress, reformers need to focus on issues that engender values important to the main competing worldviews. This

22. See infra Parts I, II.A–B.
23. See infra Part II.A–B.
25. See infra Parts I, II.
Article argues that crimmigration overbreadth is an issue that threatens values important to both sides of the traditional divide.

Part II argues that power and demography—specifically the need to woo increasingly crucial Hispanic and Asian voters—counsel for attention to curbing crimmigration overbreadth. This Article uses the term "crimmigration overbreadth" to refer to the broad structure of immigration criminalization designed to permit wide discretion over which groups to target for surveillance, investigation, and stigmatization. This Article discusses the historical genesis of overbreadth in criminal immigration law from the nation's earliest days in 1789. Tracing the history lays bare the ambition behind the overbreadth strategy of conferring the flexibility and discretion to target groups perceived as undesirable because of national origin, ethnicity, or race. The strategy is now backfiring, however, because demographic change has broken the bonds of law and generated the potential to change the past paradigms.

Part III argues that the interest of fiscal responsibility and curbing waste also counsel for curbing crimmigration overbreadth. This Part discusses the drain on crime prevention dollars because of the rise of the vast immigration prosecution and incarceration complex. As recent bipartisan progress in reducing incarceration bloat and expense shows, arguments about fiscal responsibility and preventing waste have the potential to build coalitions across traditional divides.26

Part IV of this Article is about immigration criminalization and detention reform that addresses the overbreadth problems. Reform does not mean abolition. Part of the challenge of breaking out of the endless loop of finger-pointing and standing still on immigration reform is avoiding the accusation of radical abolition from one camp, and the belief that there can be no progress without upending the current legal regime from the other camp. Part IV proposes two alternative reforms to immigration criminalization and civil detention laws that curb the worst of the waste and harmful consequences of immigration investigation and incarceration overbreadth.

First, this Article proposes that current laws criminalizing entering or being found in the United States require indicia of risk, such as significant criminal history, in addition to mere alien status. Because alienage is still strongly associated with particular races or ethnicities, having criminalization turn on alienage alone generates controversial racial profiling and investigation overbreadth problems.

26. See infra Parts IV.A and C; infra notes 49, 366, 369 and accompanying text.
Requiring more than mere alienage breaks the racial relevance rationale. Requiring indicia of risk also better directs expensive prosecution and criminal processing resources to cases of greater concern rather than prosecuting only to deport, which could be accomplished civilly. Second, the Article proposes that the federal immigration detention system should learn from the states that have turned to more cost-effective alternatives to incarceration to cut costs and waste.

I. THE NEED TO BRIDGE CLASHING WORLDVIEWS OVER IMMIGRATION REFORM

Immigration reform attempts resemble a national banging of heads against the wall, thudding futilely in 2005, 2006, 2007, and 2010—and renewing again. Clashing worldvews have repeatedly stymied progress, with both sides arguing in sharply different moral registers. This Part discusses the two main conflicting worldviews because, in order to understand what has stymied immigration reform thus far, it is important to understand the underlying competition that fuels ferocity.

For analytical purposes, the two central conflicting worldviews can be classified as hierarchist and egalitarian. The terms come from an elegantly simple anthropological classification that has proved productive in legal scholarship over fiercely-fought topics such as gun control or police use of force. Lawyers and scholars harbor the


fantasy that argument and evidence can convince and even change opinions. The reality, however, is that people often talk past each other and interpret or reject evidence in conformity with their worldviews, particularly on controversial issues. Arguments and facts are perceived through the screen of one's cultural orientation which can be grouped into a few main categories.

For economy of analysis, the main categories fall along two axes. The first is hierarch-egalitarian, a measure of attitudes toward social ordering, authority, and stratification. The hierarch orientation is toward order, ruliness, power, and the use of classifications to distribute rights, entitlements, goods, and duties. Egalitarians, even when they hold power, tend to be troubled by stratification in rights, protections, and life opportunities. The second axis is individualist-communitarian. Individualists value self-sufficiency, autonomy, and non-intervention while communitarians are oriented toward communal duties of care and group solidarity.

For purposes of the polarization in immigration debates, the dominant divide is hierarch-egalitarian because immigration

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32. See, e.g., DOUGLAS, CULTURAL BIAS, supra note 31, at 8–13 (explaining theory); Dan M. Kahan, Cultural Cognition as a Conception of the Cultural Theory of Risk, in HANDBOOK OF RISK THEORY: EPISTEMOLOGY, DECISION THEORY, ETHICS AND SOCIAL IMPLICATIONS OF RISK 725, 742–43 (Sabine Roeser et al. eds., 2012) [hereinafter Kahan, HANDBOOK OF RISK THEORY] (explaining experiment that confirmed importance of worldviews in risk theory); Mark E. Koltko-Rivera, The Psychology of Worldviews, 8 REV. GEN. PSYCHOL. 3, 3–4 (2004) (discussing prevalence and value of theory); see also, e.g., Dan M. Kahan et al., “They Saw a Protest”: Cognitive Illiberalism and the Speech-Conduct Distinction, 64 STAN. L. REV. 851, 884 (2012) (finding that perceptions of whether protesters were expressing dissent or physically intimidating others were shaped by cultural cognition).


34. See Kahan, HANDBOOK OF RISK THEORY, supra note 32, at 727 fig.28.1.

35. See JONATHAN GROSS & STEVE RAYNER, MEASURING CULTURE 6 (1985).


37. See Kahan, HANDBOOK OF RISK THEORY, supra note 32, at 727–28 (discussing communitarian worldviews).
strongly implicates issues of stratification in the distribution of entitlements. Within the central divide, the forms of arguments that most resonate will depend on whether one is individualist or communitarian. For example, hierarchical-individualists may emphasize that undocumented immigrants cut past people who waited their turn in line, are not self-sufficient, are trespassers, and need to be held individually accountable. Hierarchical-communitarians may marshal arguments that undocumented immigrants harm communities by draining social services and jobs and change the neighborly feel and cultural compatibility of a nation. Conversely, egalitarian-individualists may be moved by narratives about the stunting of individual self-actualization. Egalitarian-communitarians may be concerned about a permanent underclass in American society and community responsibilities towards people residing in the nation regardless of immigration status.

38. See, e.g., Steve Lash, Clash Erupts on Amnesty Plan for Undocumented Immigrants, HOUS. CHRON., Oct. 13, 2000, at 14A (quoting Representative Lamar Smith as stating, “Amnesty sends the message, ‘Do not respect our laws. If you come to the United States illegally, you will be rewarded,‘” and quoting Representative Tom Tancredo calling amnesty an insult to Border Patrol agents and “grossly unfair” to people who comply with immigration law and wait their turn).


41. See, e.g., Plyler v. Doe, 457 U.S. 202, 218–20 (1982) (trying to alleviate harms of having a “shadow population” of illegal migrants) and the “specter of a permanent caste of undocumented resident aliens” through Equal Protection doctrine). While egalitarian-individualist arguments have been dominant in antidiscrimination analysis, new influential visions are unfolding. Martha Fineman’s vulnerabilities theory, which illuminates the need for greater state responsiveness to shared human vulnerability, has aspects of egalitarian-communitarian vision that can add fresh insights to diverse domains, including
While the hierarch outlook often seems to correspond more with Republicans or conservatives and the egalitarian outlook with Democrats or liberals, immigration battles are a prime example of how the fault lines can be more complex. For example, President George W. Bush and Republican Senator John McCain were among the prime architects and advocates of a prior immigration reform bill carving paths to legalization for undocumented people among other measures. The bill collapsed in 2007 after opposition blocs formed in Congress that did not just follow party lines, with close to one-third of Senate Democrats helping to block the legislation.

Examining intractable and fierce legal debates through the lens of clashing worldviews helps explain why we have so much talk with so little persuasion in immigration. People are often arguing in terms that matter for people of their worldview rather than the group they are trying to convince. In the immigration reform context, hierarchs and egalitarians often appear to be talking—or shouting fiercely—past each other. In all the shouting and conflict, both camps may miss opportunities for progress on immigration reforms sorely in need of redress that endanger values important to each side. Even more dangerously, fixating on a particularly polarizing issue such as legalization risks intensifying other systemic problems that threaten values important to both sides.

Reformers hoping to transform the current status quo need to speak in terms that can bridge the clash with hierarchs. Liberal-egalitarians must be particularly attentive to the need to bridge worldviews because social psychology evidence suggests that liberals have a tougher time anticipating and reaching out to people who value principles such as caring, equality, and anti-oppression less than they do. What seems intuitively morally compelling to liberals may not be so intuitive to conservatives, who may have a different interpretation of guiding values and how to weigh competing principles. To liberals, arguing in terms that appeal to conservatives such as fiscal responsibility and political power-building may seem to

45. See id. at 182, 184.
denigrate values they hold paramount and self-evident. Yet the ability to bridge worldviews and argue in different value registers is crucial to accommodate the diversity of perspectives and value systems as well as to accomplish the practical task of reform.

Arguments about fiscal responsibility and political power-building have the potential to bridge competing worldviews and spark progress on long-entrenched problems.46 Indeed, at the state level, concerns over fiscal responsibility and waste have built bipartisan support for finding more cost-effective alternatives to incarceration, drawing in leaders associated with hierarchist politics such as Newt Gingrich.47 Reformers on the left call it being smart on crime while reformers on the right call it being right on crime.48 Federal criminal justice, however, has largely escaped needed scrutiny. Viewing immigration reform through the lenses of fiscal responsibility and what has galvanized rising voter groups also yields fresh insights about what aspects of immigration law are in need of reform and are being overlooked in the furor over red-flag issues such as alleged amnesty.49 The subsequent sections examine how power, demography, and money counsel for reform of some of the most wasteful and overbroad aspects of civil immigration incarceration and criminal immigration laws.

II. DEMOGRAPHY, POWER, AND THE BACKFIRING OF THE INTIMIDATION STRATEGY

Depending on one’s perspective, a major impetus for the current immigration reform revival is poetic, ironic, or frightening. Comprehensive immigration reform today is spurred by the politics of inclusion rather than exclusion and fueled by the need to bow to—

46. See, e.g., Roger A. Fairfax, Jr., From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects, 7 J.L. ECON. & POL’Y 597, 609–12 (2011) (discussing how reframing overcriminalization as being smarter on crime helps gain traction, particularly as governments facing economic challenges must do less with more); Mary D. Fan, Beyond Budget-Cut Criminal Justice: The Future of Penal Law, 90 N.C. L. REV. 581, 620, 623, 634 (2012) (discussing how conservatives have begun advocating for reducing incarceration when framed as fiscal responsibility, smarter and more cost-effective spending and averting waste).

47. See infra notes 369–73 and accompanying text.

48. See infra notes 369 and accompanying text.

49. In another example of the fractiousness of immigration debate, even words are fiercely fought. Though formerly a commonplace term, the word amnesty has become a red flag for immigration hardliners because of its connotations of pardoning lawbreakers and association with the controversial immigration amnesty of 1986, after which unauthorized immigration to the United States surged. See Swarns, Failed Amnesty Legislation of 1986 Haunts the Current Immigration Bills in Congress, supra note 7, at A20.
rather than combat—demographic change. Immigration overhaul is pitched as a promise to Asian and Hispanic Americans who have burst the bonds of immigration control laws historically aimed at restraining their population rise. Controversial new immigration investigation and surveillance laws and birthright citizenship-stripping proposals meant to strike fear in suspected undocumented immigrants have backfired, galvanizing crucial rising demographic groups of voters. In a democracy, with numbers comes power to help define the future of the laws.

This Part describes the rise of immigrant Americans and the growing imperative to curtail immigration investigation and surveillance overbreadth. Immigration investigation overbreadth refers to the expanding package of surveillance, investigation, and criminalization that impacts the rising demographic of Americans perceived as immigrants as well as actual immigrants. Controversial immigration status investigation laws and proposals such as eliminating birthright citizenship are creating a sense of linked fate between Americans perceived as foreigners and immigrants. This Part also discusses the legal-structural roots of some of the most controversial aspects of immigration investigation overbreadth and the preservation by transformation of the historical ambition of discretion to criminally brand and target undesirables due to race, ethnicity, or national origin.


51. See, e.g., Mariano Castillo, Five Reasons Why Time May Be Right for Immigration Reform, CNN (Jan. 28, 2013), http://www.cnn.com/2012/11/13/politics/immigration-reform-five-reasons/index.html (discussing immigration reform as a promise to court key voter groups); David Grant, Immigration Reform: “This Will Be the Year,” Bipartisan “Gang” Says, CHRISTIAN SCI. MONITOR, Jan. 28, 2013, available at 2013 WLNR 2203629 (discussing how immigration reform was a key campaign promise and important issue in determining the 2012 elections and how the election results are transforming the politics of reform).

52. See infra notes 73–104 and accompanying text.

53. Cf. Cristina M. Rodríguez, Latinos: Discrete and Insular No More, 12 HARV. LATINO L. REV. 41, 43, 47–48 (2009) (predicting that with the growth of the Latino population in size and diversity, “the group’s size increasingly will demand that it protect its interests through the political process,” wielding growing voting and bargaining power).
A. *The Rise of Immigrant Americans and the New Imperatives of Immigration Reform*

Feared and desired, Asian and Hispanic voters are rising in political import. Hispanics are the largest and fastest-growing minority group in America, constituting 16.7% of the population as of 2011. More than half of the total United States population growth between 2000 and 2010 was due to the increasing Hispanic population. Hispanic voters are also the fastest-growing part of the electorate. While a smaller fraction of the population and growing at a slower rate than Hispanics, Asians were still the most rapidly rising racial group over the last decade, since Hispanics are counted as an ethnic group in official demography.

The labels of Asian and Hispanic in demographic analysis lump together diverse groups with differing histories, cultures, and politics of color and history. Asian and Hispanic voters may be generations-
deep Americans, perhaps with roots to the nation’s early days. Yet they are immigrant Americans in the sense that they are often perceived as immigrants and share a linked fate of spillover treatment, such as suspicion and hostility, with the predominant immigrant groups—people of Asian or Hispanic backgrounds.

Regardless of formal status in law, Asians and Hispanics are often still perceived as foreigners—the iconic aliens—and adversely impacted by spreading regimes of immigration surveillance, investigation, and stigmatization. Because the artillery of immigration law has been so forcefully concentrated historically on Asians and Hispanics, immigration is a matter of great import to many members of these crucial rising voter demographic groups. Polls and studies indicate that Hispanics and Asians from diverse backgrounds have a strong sense of linked fate and immigrant experiences, backgrounds and fissures around race, background and color; see also, e.g., Carole J. Uhlmaner & F. Chris Garcia, Learning Which Party Fits, in DIVERSITY IN DEMOCRACY: MINORITY REPRESENTATION IN THE UNITED STATES 72, 75, 81, 92 (Gary M. Segura & Shaun Bowler eds., 2006) (presenting data on party affiliation from the Latino National Political Survey and noting differences depending on background; for example, whether one is Mexican-American or Cuban-American).

61. See, e.g., JUAN GONZALEZ, HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA 8 (2000) (tracing history and noting that a Latino/mestizo population has existed continuously in several United States regions since before the founding of the first English colonies at Jamestown and Massachusetts Bay); Program Information, ANCESTORS IN THE AMERICAS (2001), available at http://www.pbs.org/ancestorsintheamericas/program1_1.html (tracing the history of Asians in America back as early as the 1700s).


heritage—particularly intensified by perceptions of discrimination and anti-immigrant attacks.64

Figure 1 charts the rise of Hispanics and Asians by plotting intercensus data from the United States Census Bureau’s population estimates program.65 Note the inflection point, marked on the graph, when Hispanics overtook African Americans to become the most populous minority group in America. Non-Hispanic whites remain the majority group—for now. But consider the slopes of the graph. The slopes show growth trends, which are significantly steeper for Hispanics than all other groups, especially non-Hispanic whites. The rise in numbers is remarkable because for the last century, Asians and Hispanics have been the prime targets of immigration law’s attempt at population restriction.66 Indeed, tight quotas on Asian immigration have kept Asian numbers lower so that even as the fastest-growing race over the last decade, by the time of the 2010 decennial census, Asians represented just 4.8% of the population.67

64. See, e.g., Barreto, supra note 57, at 26–27, 31 (collecting studies and data); Johnson & Hing, supra note 3, at 136 (noting that Latinos and Asian Americans “generally are more concerned with the excesses of immigration law and enforcement”).


67. See William R. Tamayo, Asian Americans and Present U.S. Immigration Policies: A Legacy of Asian Exclusion, in Asian Americans and the Supreme Court 1112 (Hyung-Chan Kim ed., 1992) (discussing impact of quota system); see also Hoeffel et al., supra note 58, at 4 & tbl.1 (providing population proportion figures). Asians alone or in combination with other races accounted for 5.6% of the population. Id.
Not long ago Hispanic and Asian political affiliations were up for grabs. Both groups had a strong reservoir of people who were undecided, unpolticized, or unaffiliated with either Republicans or Democrats. Strategists thought that the Republican Party was a natural fit for Asians and Hispanics because of their traditional family values and conservative outlooks on social and law-and-order issues.

68. See, e.g., Pei-ti Lien et al., Asian Pacific-American Public Opinion and Political Participation, 34 POL. SCI. & POL. 625, 629 (2001) (reporting that 51% of Asian Americans surveyed either did not think of themselves in political terms, were independent, were uncertain about their political affiliation, or declined to state); Rodolfo de la Garza & Louis DeSipio, New Dimensions of Latino Participation, TOMÁS RIVERA POL’Y INST. SYMP. 1, 4 (2006), available at http://trpi.org/wp-content/uploads/archives/dimensions.pdf (“The Hispanic vote is notable not only for its size, but also because it is ‘persuadable’—that is, not yet ‘locked in’ to either major political party.”).

69. See, e.g., Zoltan Hajnal & Taeku Lee, Out of Line: Immigration and Party Identification Among Latinos and Asian Americans, in TRANSFORMING POLITICS, TRANSFORMING AMERICA 129, 138 (Taeku Lee et al., eds., 2006) (reporting large percentages of Asians and Latinos who have no preference as between Republican, Democrat, or Independent political parties); Lien et al., supra note 68, at 628–29 (reporting based on the 2001 pilot study of the National Asian American Political Survey that 20% of Asian-Americans did not think of themselves in partisan terms and 18% were either uncertain or refused to respond); de la Garza & DeSipio, supra note 68, at 5 (noting that in 2004, between 11% and 14% of Latino voters were undecided, substantially greater than for other groups).

70. See, e.g., Stephen P. Nicholson & Gary M. Segura, Issue Agendas and the Politics of Latino Partisan Identification, in DIVERSITY IN DEMOCRACY: MINORITY
Politicians puzzled over why the two groups—particularly the increasingly prosperous Asians—were not joining the Republican Party in greater numbers.71 One recurring observation was that in general, Hispanic and Asian Americans were just not that politicized or mobilized, having low rates of political participation even controlling for voter eligibility.72

Fierce storms over immigration, however, have galvanized and politicized immigrant Americans—most recently stirred by state immigration investigation laws such as Arizona Senate Bill 1070 and copycat legislation.73 The controversial state immigration representation in the United States 51, 66 (Gary M. Segura & Shaun Bowler eds., 2005) (reporting the belief among strategists that Latinos harbored a “latent affection for the GOP’s social agenda that consists of issues such as abortion and traditional family values”); David Sarasohn, Editorial, A Monochromatic Party Woos a Changing America, OREGONIAN, Aug. 29, 2012, available at 2012 WLNR 18575666 (noting beliefs that Latino and Asian voters should be “natural Republicans” because of “commitment to family and education and work”); Dan Walters, LA Shows Way into Future for Rest of State, SACRAMENTO BEE, Mar. 17, 1986, at A1 (statement of Sen. Art Torres, noting that “[b]oth Hispanics and Asians are very conservative on law-and-order issues” and Asians have higher educational and economic levels, factors that might ostensibly incline them to Republicans).

71. See, e.g., Leon Hadar, The GOP’S Asian-American Fiasco, AM. CONSERVATIVE (Nov. 9, 2012), available at http://www.theamericanconservative.com/articles/the-gops-asian-american-fiasco/ (puzzling over why Asians are voting Democratic, though they tend to be wealthier, involved in the private sector, and have other indicia of Republican leanings); Sonia Verma, Fastest-Growing Immigrant Group Will Play Pivotal Role in Determining Next U.S. President, GLOBE & MAIL (Toronto), June 21, 2012, available at 2012 WLNR 12937244 (discussing conservative attempts to woo prosperous Asians); see also, e.g., ZOLTAN HAJNÉL & TAEKU LEE, WHY AMERICANS DON’T JOIN THE PARTY: IMMIGRATION, AND THE FAILURE (OF POLITICAL PARTIES) TO ENGAGE THE ELECTORATE 146 (2011) (noting how attempts at prognostication were complicated by questions of whether Asian and Latino Americans would “ally with the Democratic Party on the basis of collective racial interests as African Americans have since the civil rights era” or whether their affiliation would be channeled more by factors such as liberal and conservative ideological beliefs and economic interests); Harold Meyerson, CA TO GOP: Adios, L.A. TIMES, Nov. 13, 2012, at A13 (offering answers to politicians puzzled over why Asians and Latinos are backing Democrats in record numbers).

72. See, e.g., Lien et al., supra note 68, at 628–29 (reporting that 20% of Asian-Americans did not think of themselves in partisan terms); Melissa R. Michelson, Meeting the Challenge of Latino Voter Mobilization, ANNALS AM. ACAD. POL. & SOC. SCI. 85, 86 (2005) (noting low voter participation rates among Latinos and Asians); Sidney Verba et al., Race, Ethnicity and Political Resources: Participation in the United States, 23 BRIT. J. POL. SCI. 453, 460–61 (1993) (noting that Latinos had substantially less political participation than non-Latino whites and less political participation than blacks).

investigation and surveillance laws sparked protests around the nation over racial and ethnic targeting under the cover of immigration enforcement and showdowns in the Supreme Court and lower courts. While differing somewhat in the details, the laws generally conscript state and local police as well as private citizens, businesses, and basic service providers such as schools into immigration enforcement. The laws generally require officers to check


75. See, e.g., Beason-Hammon Alabama Taxpayer and Citizen Protection Act, No. 535, §§ 4-5, 12-18, 28, 2011 Ala. Acts 888, 906-08, 920 (codified as amended at ALA. CODE § 31-13 (LexisNexis Supp. 2012)) (requiring schools to determine whether children seeking to enroll are aliens or born outside the United States; citizenship verification by officers during any stops; and criminalizing harboring and transporting aliens while “recklessly disregard[ing]” alienage, among other provisions); Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450, (codified in scattered sections of ARIZ. REV. STAT. ANN. titts. 11, 13, 23, 28, 41 (2012), as amended by Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070, 1073-78) (criminalizing transportation of aliens in “reckless[] disregard[]” that the alien is unlawfully present; requiring that “for any lawful stop, detention or arrest” by law enforcement officials “where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person” and other measures); Illegal Immigration Reform and Enforcement Act of 2011, §§ 3, 5, 7, 8(b), 9(b)(1), 20, 2011 Ga. Laws 794, 796-804 (codified in scattered sections of GA. CODE ANN. titts. 13, 16, 17, 35, 36, 42, 45, 50 (2012)) (criminalizing giving undocumented aliens rides; deterring employment of potential undocumented workers; and authorizing immigration status checks “during any investigation of a criminal suspect by a peace officer, when such officer has probable cause to believe that a suspect has committed a criminal violation” among other provisions); Act of May 10, 2011, §§ 2–3, 5, 16-21, 24, 2011 Ind. Acts 1926, 1926-27, 1953-69 (to be codified in scattered sections of IND. CODE titts. 4, 5, 6, 22, 34, 35 (2012)) (requiring law enforcement officers making a lawful stop, detention, or arrest to request verification of citizenship or immigration status if there is reasonable suspicion to believe the individual is an unlawfully present alien and deterring renting to or employing suspected unlawfully present persons among other provisions); Illegal Immigration Enforcement Act of 2011, ch. 21, §§ 3-4, 6, 8, 10-11, 2011 Utah Laws 261, 262–65 (codified in scattered sections of UTAH CODE ANN. titts. 76-77) (requiring immigration status checks of public benefits seekers; criminalizing transporting or harboring suspected undocumented aliens;
immigration status during any stop, detention, or arrest—even everyday traffic stops—if the officer reasonably suspects the person is an illegal immigrant.\textsuperscript{76} Private citizens are deterred from interacting with suspected illegal immigrants through state laws criminalizing transporting or harboring someone in "reckless disregard" of alienage.\textsuperscript{77} Under such laws, giving someone a neighborly ride or renting a room becomes a risky endeavor—particularly when the person has a particular appearance—that might later be called "reckless disregard" of alienage.\textsuperscript{78}

The laws have drawn fire for providing incentives to discriminate based on racial or ethnic appearance as a proxy for suspected undocumented status.\textsuperscript{79} Of course the laws do not formally call for such discrimination. Rather, the laws call for investigation and shunning based on suspected unlawful immigration status. The reality is, however, that race, ethnicity, and language are frequently used as a

mandating that officers conducting any lawful stop, detention, or arrest to verify immigration status if documents indicating immigration status are not supplied; and providing for warrantless arrests based on reasonable cause to suspect someone is an unlawful alien).

\textsuperscript{76}. See Beason-Hammon Alabama Taxpayer and Citizen Protection Act §§ 5, 12; Support Our Law Enforcement and Safe Neighborhoods Act §§ 2(A)–(B) (Ariz.); Act of May 10, 2011 §§ 2–3 (Ind.); Illegal Immigration Enforcement Act of 2011 §§ 3, 6 (Utah); cf. Illegal Immigration Reform and Enforcement Act of 2011 §§ 8–9 (Ga.) (forbidding prohibitions on law enforcement exchanging immigration status information and authorizing immigration status checks “during any investigation of a criminal suspect by a peace officer, when such officer has probable cause to believe that a suspect has committed a criminal violation”).

\textsuperscript{77}. See, e.g., Beason-Hammon Alabama Taxpayer and Citizen Protection Act § 13(4) (criminalizing “[h]arbor[ing] an alien unlawfully present in the United States by entering into a rental agreement . . . with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States”); Support Our Law Enforcement and Safe Neighborhoods Act § 6 (Ariz.) (criminalizing transportation of aliens in “reckless[] disregard” that the alien is unlawfully present); Act of May 10, 2011 § 24 (Ind.) (criminalizing transporting or attempting to transport an alien or harboring an alien knowing or in reckless disregard of the fact that the alien has come to, entered, or remains in the United States in violation of law); Illegal Immigration Enforcement Act of 2011 § 10 (Utah) (criminalizing transportation, moving or attempting to move, or harboring an alien for commercial advantage or private financial knowing or in reckless disregard of the fact that the alien is unlawfully present).

\textsuperscript{78}. See, e.g., Beason-Hammon Alabama Taxpayer and Citizen Protection Act § 13(4) (criminalizing entering into a rental agreement with someone in reckless disregard of alienage); cf. Illegal Immigration Reform and Enforcement Act of 2011 § 7(d) (Ga.) (broadly defining harboring to mean “any conduct that tends to substantially help an illegal alien to remain in the United States” with exclusions for such humanitarian or emergency situations such as services to infants, children, or crime victims).

\textsuperscript{79}. See, e.g., Julia Preston, Immigration Ruling Leaves Issues Unresolved, N.Y. Times, June 26, 2012, at A14 (discussing protests over state laws raising specter of targeting of people perceived as foreign and continuing fears among Latinos because the Supreme Court's decision in Arizona v. United States left the racial profiling issue unresolved).
proxy for such unlawful status. The state laws typically provide that officials may not consider race, color, or national origin "except to the extent permitted by the United States or [state] Constitution." The crucial wiggle words in these disclaimers are “except to the extent permitted” under the Constitution. In 1975, the Supreme Court held in United States v. Brignoni-Ponce that race can be a relevant—albeit not sole—factor for establishing reasonable suspicion of alienage.

Brignoni-Ponce held that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor” though it cannot be a sole factor for reasonable suspicion to stop someone. The Ninth Circuit has tried to rein back Brignoni-Ponce in light of the fact that the proportion of Hispanics has grown so much that Hispanic appearance is not sufficiently predictive of alien status, at least in areas with Hispanic majorities. Even in the Ninth Circuit, however, race remains a relevant factor for suspicion of alienage in areas with a lower concentration of Hispanics. Moreover, the Supreme Court has never ratified the Ninth Circuit’s cutback, and thus Brignoni-Ponce’s holding on racial relevance remains controlling. Indeed, in Arizona v. United States, the Court left standing state immigration investigation laws that have sparked fears over racial profiling pending further clarification and adjudication by the lower courts.

80. See, e.g., Johnson, supra note 63, at 16 & nn.93–95 (2009) (discussing cases where law enforcement targeted Asian Americans and Hispanic Americans as suspected unlawful aliens).

81. See, e.g., ARIZ. REV. STAT. ANN. § 13-1509(C) (West Supp. 2012); see also, e.g., ALA. CODE § 31-13-12(c) (LexisNexis 2011) (“A law enforcement officer may not consider race, color, or national origin in implementing the requirements of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901.”); GA. CODE ANN. § 17-5-100(d) (2013) (“A peace officer shall not consider race, color, or national origin in implementing the requirements of this Code section except to the extent permitted by the Constitutions of Georgia and of the United States.”); UTAH CODE ANN. § 76-9-1003(5) (LexisNexis Supp. 2012) (“A law enforcement officer may not consider race, color, or national origin in implementing this section, except to the extent permitted by the constitutions of the United States and this state.”).

82. 422 U.S. 873 (1975).
83. Id. at 886–87.
85. See United States v. Montero-Camargo, 208 F.3d 1122, 1133 (9th Cir. 2000) (en banc).
86. See United States v. Manzo-Jurado, 457 F.3d 928, 936 & n.6 (9th Cir. 2006).
87. 132 S. Ct. 2492 (2012).
88. See id. at 2509.
Recent proposals to limit birthright citizenship have further underscored the linked fate of immigrants and immigrant Americans. The proposals aim to overrule longstanding Supreme Court precedent and rewrite the Constitution to deny citizenship to native-born people whose parents were noncitizens. Proponents even argue that American-born children of many lawfully-present noncitizens should not be birthright citizens. Legislative proposals aim to exclude, for example, children of lawfully present parents on temporary visas. Proponents would exclude from the purview of the Fourteenth Amendment’s Citizenship Clause, for example, first-generation Americans born of people who lawfully immigrated to America to attend school, or who are lawfully present on work visas. The broad scope of the attack shows the enduring wisdom behind Martin Niemöller’s poem, which begins: “First they came for the [vilified group] and I did not speak out / Because I was not a [member of the vilified group].” The poem ends: “Then they came for me—and there was no one left to speak for me.” The attempt to constrict birthright citizenship starkly shows that even American-born citizens may not always be secure in their belonging.

A stronger sense of linked fate across legal status lines may even shift views on controversial immigration issues such as the legalization/amnesty debate. For example, before the passage of controversial Arizona Senate Bill 1070 and copycat state immigration legislation beginning in 2010, far fewer Asian Americans supported paths to citizenship for undocumented people than in 2012. A 2008 survey of Asian Americans revealed that 46% opposed paths to citizenship for those who had entered the country illegally while only

89. See, e.g., Julia Preston, State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry, N.Y. TIMES, Jan. 6, 2011, at A16.
91. See, e.g., MARGARET MIKYUNG LEE, CONG. RES. SERV. RL 33079, BIRTHRIGHT CITIZENSHIP UNDER THE 14TH AMENDMENT OF PERSONS BORN IN THE UNITED STATES TO ALIEN PARENTS 9–14 (2010) (summarizing national proposals); Preston, supra note 89, at A16 (summarizing state legislative proposals); Eastman, supra note 90, at 5 (suggesting that children of even lawfully present foreign nationals are not fully “subject to the jurisdiction” of the United States).
93. Martin Niemöller, First They Came for the Jews, in HOLOCAUST POETRY 9 (Hilda Schiff ed., 1995).
94. Id.
95. See RAMAKRISHNAN & LEE, supra note 73, at 3.
about 33% were in support.\textsuperscript{96} By 2012, however, a majority of Asian Americans supported paths to legalization (58%) while only 26% were opposed.\textsuperscript{97}

The intent of the state “attrition-through-enforcement” laws and birthright citizenship-stripping proposals was to strike fear in suspected undocumented immigrants and potential sympathizers.\textsuperscript{98} The laws may have backfired, however, by instead striking fear in conservative leaders as the immigration controversies drove crucial voting demographic groups to support the opposing party in record numbers.\textsuperscript{99} Waves of anti-immigrant sentiment with spillover harms to people perceived as foreign have pushed Asian and Hispanic Americans increasingly leftward.\textsuperscript{100} In the latest election, President Obama and the Democratic Party won a record percentage of the Asian and Hispanic votes.\textsuperscript{101} A record-breaking 12.5 million Hispanics voted, and the vast majority—71%—supported President Obama, helping him win battleground states such as Florida, Virginia, and Colorado.\textsuperscript{102} While fewer Asians voted, an even larger percentage supported President Obama (73%), and the relatively more affluent Asian community offered another kind of impact—money.\textsuperscript{103} Dismayed Republican leaders and strategists are trying to soften the

\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} See, e.g., Fan, supra note 18, at 1281 (quoting another sponsor of the bill, Arizona State representative John Kavanagh, as saying “it’s about creating so much fear they will leave on their own”); id. (quoting Alabama State representative Micky Hammon, a co-sponsor of Ala. H.B. 56, explaining that the goal was to make illegal aliens’ lives “difficult and they will deport themselves”).
\textsuperscript{99} See, e.g., CBS MORNING NEWS, Interview by Anne-Marie Green and Susan McGinnis with John McCain, U.S. Senator, Bob Menendez, U.S. Senator, Bob Corker, U.S. Senator, and Paul Ryan, U.S. Representative, Immigration Overhaul (CBS television broadcast Jan. 28, 2013), available at 2013 WLNR 2169140 [hereinafter Green Interview] (statement of Sen. John McCain) (“We are losing dramatically the Hispanic vote, which we think should be ours for a variety of reasons, and we got to understand that.”); Crystal Wright, RNC’s Minority Outreach Plan: More of the Same, WASH. POST, Jan. 31, 2013, available at 2013 WLNR 2463172 (arguing the Republican defeat shows the need for greater outreach to Asians, blacks, and Hispanics).
\textsuperscript{100} See, e.g., RAMAKRISHNAN & LEE, supra note 73, at 3 (reporting on changes of Asian American perspectives on immigration issues between 2008 and 2010); Jordan, supra note 73, at A6 (discussing how anger over Arizona Senate Bill 1070 and related laws are pushing Latinos leftward); Taeku Lee & Karthick Ramakrishnan, Turning Blue, L.A. TIMES, Nov. 23, 2012, at A31 (discussing how strong leftward turn of Asian Americans caught the nation by surprise and explaining reasons for move, including heated immigration rhetoric).
\textsuperscript{101} Constable & Lazo, supra note 8, at C1, C6.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
party stance on immigration to avoid further alienation of these crucial demographic groups.  

Now immigration reform looms as a national priority—with a twist. Today, comprehensive immigration reform is spurred by the politics of inclusion rather than exclusion and fueled by the need to bow to—rather than combat—demographic change. Immigration overhaul is pitched as a promise to Asian and Hispanic Americans who flexed their political muscle in the latest presidential election.  

Thus far, much of the early debate has been about opening routes to legalization of status for undocumented immigrants living in the United States, also dubbed “amnesty.” Paths to legal status would transform the lives of more than ten million undocumented people in the United States, as it did for more than a million undocumented people in the last grant of amnesty in 1986. The legalization/amnesty debate also opens the door to fierce fights over rewarding and incentivizing transgressing immigration laws.  

Overlooked in all the controversy is that amnesty alone does not address a central concern that has rallied voting Asian and Hispanic Americans and nonvoting Americans-in-waiting alike. What has galvanized rising voting demographic groups are the cycles of suspicion, surveillance, and branding as potential criminals that sweep


105. Constable & Lazo, supra note 8, at Cl.


107. See, e.g., Peter Applebome, Throng of Aliens Seeking Amnesty as Deadline Nears, N.Y. TIMES, Apr. 24, 1988, at A1, A27 (describing how more than 1.2 million have applied for general amnesty and another 400,000 have applied under more generous provisions for agricultural workers with tens of thousands more rushing to apply).

108. See, e.g., Swarns, Failed Amnesty Legislation of 1986 Haunts the Current Immigration Bills in Congress, supra note 7, at A20 (discussing controversies and arguments paralleling legalization debate to 1986 amnesty controversies); Keller, supra note 106 (discussing concerns over coddling criminals and controversies over the 1986 amnesty, which was followed by a massive influx of unauthorized immigration).
beyond undocumented people to Americans perceived as foreign. These cycles of targeting and branding are a feature of the structure of immigration criminalization, shaped by the ambition of the immigration criminalization strategy from its earliest days.

B. Immigration Criminalization's Structure and Historical Ambition

1. The Relationship Between Criminalization Breadth and Targeting Discretion

Overbreadth in immigration investigation stems from overbreadth in the structure of immigration criminalization. Discretion to investigate is shaped by the structure of the criminal laws authorizing the intrusion. The broader the structure and standards, the greater the discretion. When the gravamen of criminality hinges primarily on a status feature such as immigration status that predominantly involves certain racial groups, all members of the group bear the greater burden of investigation. This is the logic and result of United States v. Brignoni-Ponce on racial relevance. Brignoni-Ponce noted that, according to government estimates, 85% of undocumented aliens were from Mexico and that between 80% and 92% of arrested deportable aliens were from Mexico. The Court also referred to 1970 census figures indicating that among the persons of Mexican origin registered as aliens in the border states of California, Texas, Arizona, and New Mexico, between 8.5% and 20.4% were registered aliens. When alienage is a crucial feature of criminalization, people of the predominant race or ethnicity of aliens bear the greater burden of investigation—rousing the wave of protests and concerns from immigrant Americans as well as immigrants over targeting.

109. See supra notes 73–104 and accompanying text.
110. See infra Part II.B.2 for a history and analysis.
112. See id.
114. See United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (discussing the relationship between increased criminal scrutiny and identification as part of a specific racial group).
115. Id. at 879 & n.5.
116. Id. at 886 n.12.
2. The Historical Roots of Immigration Criminalization

The problems of the present have roots in the past and a history that still shapes the structure of immigration criminalization laws today. Controversy surrounded the use of immigration criminalization to brand and control undesirables of particular national origins from the nation’s earliest days. The 1798 Alien Friends Act\(^{117}\) sparked fierce condemnation for adopting such a strategy. The legislation was unusual and controversial in an age when the national government scarcely regulated immigration because the nation needed immigrants to work the vast land.\(^{118}\) The Act would later pass into American history as part of the infamous Alien and Sedition Acts that were widely denounced as an embarrassment of governmental overreaching.\(^{119}\) The Alien Friends Act was pushed through by Federalists attempting to silence domestic critics and purge the nation of foreign ideas, particularly those of the French, who were going through the social and intellectual tumult of the French Revolution.\(^{120}\)

The Alien Friends Act was passed a few days before the Alien Enemies Act.\(^{121}\) Both pieces of legislation were aimed at the French, although they were formally framed in generally applicable language.\(^{122}\) Anti-French Federalists whipped up popular sentiment, warning of pillage, rape, and murder by “hard outlandish sans-culotte Frenchmen.”\(^{123}\) Federalists accused their Republican political rivals of being “Frenchmen in all their feelings and wishes” and claimed Thomas Jefferson was a French tool—“the very child of modern illumination, the foe of man, and the enemy of his country.”\(^{124}\)

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117. See Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798) (expired 1800).


122. See KANSTROOM, supra note 66, at 55.


124. Id. at 55–56.
Federalists sought to suppress the "French apostles of Sedition" and also strike at another ethnic bogeyman, "hordes of wild Irishmen" then struggling for liberation from the English.\textsuperscript{125} The aim of the anti-alien acts was to "strike terror among these people."\textsuperscript{126}

The more controversial Alien Friends Act applied in peace or war and permitted the President to "order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any reasonable or secret machinations against the government thereof, to depart out of the territory of the United States."\textsuperscript{127} To further brand the vilified groups as criminal, the Alien Friends Act contained the following criminalization language:

And in case any alien, so ordered to depart, shall be found at large within the United States after the time limited in such order for his departure, and not having obtained a license from the President to reside therein, or having obtained such license shall not have conformed thereto, every such alien shall, on conviction thereof, be imprisoned for a term not exceeding three years, and shall never be admitted to become a citizen of the United States. . . .

And be it further enacted, That it shall be lawful for the President of the United States, whenever he may deem it necessary for the public safety, to order to be removed out of the territory thereof, any alien who may or shall be in prison in pursuance of this act; and to cause to be arrested and sent out of the United States such of those aliens as shall have been ordered to depart therefrom and shall not have obtained a license as aforesaid, in all cases where, in the opinion of the President, the public safety requires a speedy removal. And if any alien so removed or sent out of the United States by the President shall voluntarily return thereto, unless by permission of the President of the United States, such alien on conviction

\textsuperscript{125} HOWARD ZINN, PASSIONATE DECLARATIONS: ESSAYS ON WAR AND JUSTICE 184 (2003).


\textsuperscript{127} An Act Concerning Aliens, ch. 58, 1 Stat. 570, 570-71 (1798) (expired 1800). Conversely, the Alien Enemies Act, parts of which remain in force today, gave the President power to arrest and remove natives, citizens, denizens, or subjects of a hostile nation in times of war or imminent invasion. An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24 (2006)).
thereof, shall be imprisoned so long as, in the opinion of the President, the public safety may require.\textsuperscript{128}

These criminalization provisions gave Federalist President John Adams vast discretion to determine which "alien" or group of aliens to label "dangerous" and wide discretion to deport or incarcerate. The history surrounding the enactment of the law shows that the targets were the bogeymen of the times—the French and the Irish.\textsuperscript{129} The breadth of the legal standards gave the executive discretion and flexibility, however, to pursue whatever groups the shifting tides of popular passions and politics deemed undesirable.

The law—termed "a sacrifice of the first-born offspring of freedom"—roused strong controversy and opposition across the country.\textsuperscript{130} Benjamin Franklin's grandson, Benjamin Franklin Bache, publisher of the Jeffersonian \textit{Philadelphia Aurora}, deplored that "[a] numerous body of people are to be subjected to ruin at the arbitrary mandate of the President."\textsuperscript{131} Then Vice President Thomas Jefferson, termed the act "a most detestable thing."\textsuperscript{132} Jefferson secretly authored the Kentucky Resolution of 1789, which, among other things, protested that the federal government exceeded its delegated power to punish constitutionally-specified offenses such as treason, counterfeiting, and offenses against the law of nations.\textsuperscript{133} The idea that the federal government may only proscribe the handful of offenses spelled out in the Constitution has not won the day.\textsuperscript{134} But the fundamental concern that Jefferson was expressing—overreaching unconstrained power—captures one of the major problems with the structure of the nation's first immigration criminalization law.

\textsuperscript{128} An Act Concerning Aliens, ch. 58, 1 Stat. 570, 571 (1798) (expired 1800) (emphasis added).

\textsuperscript{129} See \textit{Zinn}, \textit{ supra } note 125, at 184.

\textsuperscript{130} \textit{Kanstroom}, \textit{ supra } note 66, at 56.


\textsuperscript{132} \textit{Kanstroom}, \textit{ supra } note 66, at 57.

\textsuperscript{133} \textit{Thomas Jefferson, Kentucky Resolution of 1789, reprinted in 30 The Papers of Thomas Jefferson 1 Jan. 1798 to 31 Jan. 1799}, at 529, 550 (Barbara B. Oberg et al. eds., 2003).

The Alien Friends Act expired two years after its enactment on June 25, 1798. 135 Thirteen years later John Adams wrote that he had not applied the controversial law "in a single instance." 136 This attempt at self-rehabilitation was technically correct because President Adams did not have to initiate proceedings under the law in order to achieve the intended result. 137 The French got the message by the law's very existence. As Jefferson put it, "the threatening appearances from the Alien bills have so alarmed the French who are among us, that they are going off." 138 Even though the law was formally national origin or ethnicity-neutral and targeted at the "alien," everyone knew the law's main target—and how the law's broad design conferred the discretion to go after the vilified group. 139

A later immigration criminalization law did not bother at being subtle. It was explicitly targeted at the new racial and cultural undesirables of the period—the Chinese. In the late 1800s, the nation was reeling from a severe recession. 140 Anti-Chinese campaigners argued that work "would be plenty" if not for the Chinese degrading labor, displacing white workers, serving as "voluntary slaves," and subsisting and living cheaply "like vermin." 141 In a frequent tactic of fierce anti-immigrant politics, the Chinese were painted as a criminal contagion, offenders dumped by China into the United States who gambled, sold women, thieved, and engaged in violence. 142 In this atmosphere of anti-Chinese hatred, Congress enacted the Geary Act in 1892, which provided in part:

135. See Smith, supra note 120, at 86.
136. Id.
137. See id. at 86–87 (explaining that the Act had the effect of intimidating foreigners into leaving the United States).
138. Id. at 87.
139. See id. at 86–87 (discussing the widely understood intent of the laws).
140. For a history, see, for example, Fan, supra note 66, at 911–22.
141. COMM. OF THE SENATE OF CAL., CHINESE IMMIGRATION: THE SOCIAL, MORAL, AND POLITICAL EFFECT OF CHINESE IMMIGRATION 7, 41 (1877), available at http:/ /content.cdlib.org/ark:/13030/hb538nb0d6/?order=2 (characterizing Chinese as "voluntary slaves" and akin to "vermin"); Congressman Horace Davis, Chinese Immigration: Speech of Hon. Horace Davis, of California, in the House of Representatives 3 (June 8, 1878), available at http://content.cdlib.org/ark:/13030/hb7h4nb21q/?order=3&brand=calisphere (arguing work "would be plenty" if not for the Chinese); Senator Aaron A. Sargent, Speech on Immigration of Chinese in the United States Senate 1, 6 (May 2, 1876), available at www.oac.cdlib.org/ark:/13030/hb0j49n3wp/?order=2&brand=oac4 (decrying Chinese).
Any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States.  \[143\]

Rather than refer euphemistically to the "alien," the law openly specified its target. Criminalization was based on being of Chinese descent and unauthorized to be in the United States.

Not only were the Chinese singled out for criminalization, they were subject to a summary criminal process. The punishment could be inflicted on a finding by a commissioner, judge, or justice without grand jury indictment or trial by jury.  \[144\] Ultimately, the Supreme Court invalidated this blatant law of racial targeting on procedural grounds.  \[145\] In Wong Wing v. United States  \[146\] the Court ruled that a criminal trial was required before delivering infamous punishment—even if merely upon "aliens whose race or habits render them undesirable as citizens."  \[147\] For nearly two decades after Wong Wing's intervention, the national government mainly regulated immigration as a civil matter.  \[148\]

By 1918, however, the United States had entered World War I and was again in the grips of fear of alien enemies. In this climate of anxiety, Congress passed an act which made it a crime for previously deported aliens to "return to or enter the United States or attempt to return to or to enter the United States."  \[149\] The act also expanded the basis for inadmissibility and deportation.  \[150\] While formally race and ethnicity-neutral, the concerns behind the immigration criminalization law are suggested by other immigration laws passed around this period. In the Emergency Immigration Act of 1921, Congress, for the first time in the nation's history, set immigration quotas to preserve the racial and ethnic balance against inflows of

\[143\] Geary Act of 1892, ch. 60, § 4, 27 Stat. 25 (repealed 1943).

\[144\] See Wong Wing v. United States, 163 U.S. 228, 235 (1896) (analyzing procedure).

\[145\] Id. at 237.

\[146\] 163 U.S. 228 (1896).

\[147\] Id. at 237.


\[150\] Immigration Act of 1917, ch. 29, 39 Stat. 874 (prohibiting immigration of aliens from specific geographic locations and aliens with certain undesirable characteristics). For a discussion, see, for example, Ngai, *supra* note 148, at 71.
ethnicities and races deemed undesirable. The 1921 act impeded the arrival of whites perceived to be more “ethnic,” such as Italians, who found the restrictions a humiliating denigration. The Immigration Act of 1924, also known as the National Origins Act, elaborated on the use of racial quotas to preserve the Northern European ideal for the nation, particularly impeding Asian (including Japanese) and Eastern European immigration.

By 1929, Congress decided to augment the toughening civil regime with criminal penalties. Around the same time, the ethnic target at the thicket of civil deportation and criminal laws was shifting to Mexicans—though at the time, Mexicans were not subject to the national origin quotas. Nonetheless, the United States-Mexico border was hardening, as the newly created Border Patrol began aggressively apprehending and deporting “irregular” Mexican entrants who did not meet literacy or other requirements. The Act of March 4, 1929 defined two forms of immigration crimes. The first was unlawful entry by an alien into the United States, a misdemeanor punishable by up to a year in prison. The second was entry or attempted entry by a previously deported alien, a felony punishable by up to two years in prison.

The verb “entry” created the atmosphere of a conduct crime. But, as in the past, criminality turned on unauthorized alien status, the proxy for the racial or ethnic bogeyman of the day. During anti-immigrant furor directed primarily against the Chinese, Justice Brewer warned presciently, “It is true this statute is directed only against the obnoxious Chinese, but if the power exists, who shall say it will not be exercised to-morrow against other classes and other people?” By the 1930s, Mexicans were becoming the “prototypical

152. See Constantine Panunzio, Italian Americans, Fascism, and the War, YALE REV., Sept. 1941, at 771, 774–75.
154. See Ngai, supra note 148, at 84–85.
155. Id. at 85–86.
157. Id. § 2.
158. Id. § 1.
159. Fong Yue Ting v. United States, 149 U.S. 698, 743 (1893) (Brewer, J., dissenting).
illegal alien” as “stereotypes about Mexicans as criminals” were taking root in the national consciousness.160

This history of vast discretion to target groups deemed undesirable has shaped the two main immigration criminalization provisions that today account for the vast majority of the largest category of federal case prosecuted. Today, the criminalization of illegal entry by aliens is codified at 8 U.S.C. § 1325, and the penal provisions on previously deported aliens are codified at 8 U.S.C. § 1326.161 Section 1325(a) criminalizes:

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact . . . .162

Immigration criminalization has long pushed the distinction between the criminalization of status and conduct.163 The conduct verbs focused on (1) entering or attempting entry; (2) eluding inspection; and (3) attempting to enter through misrepresentation or concealment that creates the atmosphere of a conduct crime. The price of couching the crime in conduct rather than the gravamen of unlawful status driving the conduct was that prosecutors had the additional pesky task of establishing the conduct, for example entry, in addition to alienage.164 Of course, the key element that makes the conduct criminal is status—alienage.


163. See supra notes 114–48 and accompanying text.

164. Indeed, a whole jurisprudence of how to prove or infer entry has arisen. See, e.g., United States v. DiSantilli, 615 F.2d 128, 137 (3d Cir. 1980) (holding that entry or reentry is committed “when [the alien's] presence is first noted by the immigration authorities” and entry is not a continuing offense if it occurs through a port of entry); United States v. Rincon-Jiménez, 595 F.2d 1192, 1194 (9th Cir. 1979) (holding that the crime of illegal entry under 8 U.S.C. § 1325 completes upon entry and is not a continuing offense). But see, e.g., United States v. Rivera-Ventura, 72 F.3d 277, 282 (2d Cir. 1995) (holding that the addition of the “found in” language in 8 U.S.C. § 1326(a) makes entry a “continuing offense until at least such time as the alien is located”).
In 1952, an alternative formulation of criminality arose: being a previously deported alien "found in the United States" without previous authorization from the Attorney General.\textsuperscript{165} With the addition of the "found in" language, the line between status and conduct crime is vanishingly thin. Section 1326 now provides that the following suffices to constitute a felony:

any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless

(A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or

(B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act . . . \textsuperscript{166}

Contrast the structure of contemporary immigration criminalization law with the language from the Alien Friends Act of 1789 that Thomas Jefferson condemned and not even President Adams could bring himself to enforce.\textsuperscript{167} The discretion to target the undesirables of the day as criminals is wide because criminality turns on the status as alien. The status as alien—and previous deportation—in turn is strongly shaped by laws defining desirable groups permitted to lawfully immigrate and undesirable groups shut out. American history over the centuries has demonstrated that the concept of alien is suffused with a history of controlling the population of groups defined by race, ethnicity, and national origin. Because criminal immigration status turns on alien status, which historically has mapped to particular races, ethnicity, or national


\textsuperscript{166}. 8 U.S.C. § 1326(a) (2012).

origins, immigration criminalization has strongly raced consequences in terms of the demographics of who is investigated and prosecuted.

C. Awakening to Preservation by Transformation

Today, immigration criminalization laws are formally race-neutral. Yet, the historical ambition of ethnic and racial containment through the use of crimmigration laws has been preserved though the rationale has transformed. Rather than openly stating intent to target racial and ethnic undesirables, the new justification is rendered seemingly race-neutral in the muscular rhetoric of combating illegality. This rhetorical transformation brings to mind Reva Siegel's influential notion of preservation by transformation, which illuminates how old ways of control, stratification, and subordination are preserved while the justifications are transformed. As past justifications become dated or repudiated, new ways to justify the persistence of past strategies and structures emerge. We can see the preservation of the ambitions of the past, even if they are no longer nakedly stated, by tracing how they shape the structure of contemporary practices and laws—and the resulting outcomes.

Formally race-neutral criminal laws can nonetheless concentrate impact on different ethnic or racial groups. The impact in the immigration prosecution context is pronounced. Figures 2 and 3 map the tandem rise in the proportion of immigration prosecutions and the numbers of Hispanic defendants around 1994. Immigration is by far the most racially skewed category of federal prosecution—for example, 89.5% of all immigration defendants in 2011 were Hispanic, and 91.9% were non-white. In contrast, for drug trafficking—another category with particularly pronounced racial disproportionalities—the difference is not as extreme. In 2011, for example, 46.6% of narcotics trafficking defendants were Hispanic, 25.5% were black, and 24.9% were white.


171. Id.
Figure 2 shows the trajectory of two other oft-cited federal criminal prosecution priorities—narcotics and white-collar crime prosecutions by proportion of federal cases. The curves show how the proportion of immigration prosecutions among federal cases has risen since the 1990s while the proportion of white-collar crime and narcotics prosecutions has declined. Note that declining proportions of federal prosecutions is distinct from the rise in numbers of prosecutions across categories over time. The chart is about relative proportions to show the shift in focus. The graphs are not meant to imply causation. Rather, the graphs map how these three oft-invoked federal prosecution priorities compare in terms of proportion of federal cases over the last decades.

![Figure 2: The rise of immigration prosecutions by proportion of federal cases](image)

Figure 3 captures the ethnic inversion point in 1997 when the twin trends of declining numbers of white defendants and increasing Hispanic defendants intersected. Thereafter, Hispanics became the largest category by race or ethnicity prosecuted in the federal criminal justice system. By 1998, Hispanics constituted 37% of all federal defendants while whites constituted 32% of the federal defendant population.\(^{172}\) In contrast, Hispanics constituted a minority of about

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11.7% of the United States population in 1999. Controversies over racial and ethnic profiling in immigration enforcement must be construed in light of the stark portrait of the profile of the predominant federal defendant today.

**FIGURE 3: THE CHANGING RACIAL AND ETHNIC PROFILE OF FEDERAL DEFENDANTS**

III. BLOAT-BUSTING: FISCAL RESPONSIBILITY AND THE FEDERAL CRIMMIGRATION COMPLEX

Egalitarians are frustrated. They proffer poignant stories about a permanent underclass of people lacking legal status living in America. They make paths to legalization a centerpiece of their battles only to watch as the proposals, also dubbed amnesty, become


red flags for opponents rather than rallying points.\textsuperscript{176} Why is the other side not similarly moved? Are they impervious to the power of narrative?\textsuperscript{177} Is narrative just a lefty egalitarian thing?\textsuperscript{178} Here, cultural cognition plays an important role in trying to move past the communication impasse and resultant frustration and stalemate. It is not that the technique of narrative does not work. Many studies show that narrative is a powerful motivator, particularly where affective reactions can help precipitate action.\textsuperscript{179} But the narrative has to bring out issues that resonate with hierarchs as well as egalitarians.\textsuperscript{180}

The search for common ground as an entryway for progress rather than stalemate on immigration reform may also illuminate neglected issues sorely in need of reform. Beyond the

\begin{itemize}
  \item \textsuperscript{176} See, e.g., Keller, supra note 106 (discussing political controversies over alleged amnesty); Weiner, supra note 106 (detailing repeated failed attempts to carve paths to legalization).
  \item \textsuperscript{178} Consider the prevalence of critical race and minority protection perspectives among prominent legal scholars deploying narrative. See supra note 177.
  \item \textsuperscript{180} See Kahan, supra note 33, at 145–48 (explaining how laws and policies that affirm divergent worldviews through "expressive overdeterminism" can help ameliorate intractable conflicts).
\end{itemize}
legalization/amnesty debate, immigration criminalization and incarceration overbreadth endanger values important to both hierarchs and egalitarians. Narratives about waste—fiscal and human—and the need for improved government discipline and responsibility have the power to speak across lines. As this Part discusses, billions have been spent on immigration prosecution and both criminal and civil incarceration, sweeping up many whose cases could be more cost-effectively addressed. Indeed, wrestling with the consequences of swollen spending, waste, and bloat have prompted rare and powerful calls for reform from the front lines and across the typical fault lines on law-and-order issues.

A. A Call for Reform from the Front Lines—and Across Fault Lines

Consider a moment on the front lines of federal criminal justice in the Western District of Texas, one of the top five highest-volume districts in the nation in terms of overall caseload. The sentencing began like many others. The prosecutor and defense attorney stated their names for the record. Neither said much more. When offered the opportunity to make his case for his client, the defense attorney simply replied, "Judge, did you see the letters that were written by him and his wife? That's all that I would have to add, your Honor. He's been in custody for two months." The defendant actually had been in custody for three months.

Rather than merely stating the sentence and moving to the next case in line, this time, Judge Sam Sparks halted the assembly line. The case resembled many others he had seen in recent years—and that was the problem. The judge could hold his silence no longer, saying the following:

181. See supra note 46; infra Part III.C.
184. Id. at 3.
185. See id. at 2, 4 (statement by Judge Sparks correctly noting the length in custody). The time spent in custody matters because it offsets the additional time to be served—and in some cases, whether the defendant gets time served or must do more time. Indeed, because of his lack of prior criminal history and the nature of the offense, Ordones-Soto was sentenced to time served with the standard year of supervised release. Id. at 4.
What in the world is the U.S. Attorney doing spending over $5,000 of taxpayer funds to prosecute this person? He has no criminal record. He’s got two birth dates that are recorded in this country, [which] may or may not be typographical. He has—well, I’ve already spent $4,500 to counties to keep him jailed from November the 2nd. . . . It’s just throwing up $5,000, and that’s if I haven’t had any medical. That’s if he hasn’t had any dental. That’s just basic . . . . What’s the reason he’s prosecuted?

The prosecutor stammered, “Your Honor, I don’t think I could provide you with the satis—.” The judge responded by ordering the reasons in writing and underscoring: “[B]y the time y’all can process somebody, we’ve spent three months in jail. That’s $1,500 a month just for food and water, and I’m tired of it.”

In a subsequent order, Judge Sparks explained his concerns, exemplified in three recent immigration cases before him:

These three defendants—like many of the defendants prosecuted [under] 8 U.S.C. § 1326 in the last six months—have no significant criminal history, and the prosecuting Assistant United States Attorney cannot state a reason that these three defendants were prosecuted rather than simply removed from the United States. The expense [of] these three defendants for housing in county jails is in excess of $13,350 to the date of the sentencing. In addition to those payments to county jail facilities, there are the expenses in time and costs of the United States Attorney’s Office; of the U.S. Marshal’s Service; of the United States Probation Office; of the court personnel; of appointed counsel and the Federal Public Defenders; of interpreters; medical and dental expenses for those in custody; transportation costs. Every judge in the Western District of Texas is sentencing a substantial number of illegal aliens every month. It appears the United States Attorney is not screening these cases to eliminate those persons who need no federal prosecution and should simply be returned to their own country . . . .

The expenses of prosecuting illegal entry and re-entry cases (rather than deportation) on aliens without any significant criminal record [are] simply mind boggling. The U.S. Attorney’s policy of prosecuting all aliens presents a cost to the

186. Id. at 3–4.
187. Id. at 4.
188. Id.
American taxpayer at this time that is neither meritorious nor reasonable.189

The U.S. Attorney’s subsequent written reply to the judge began by pointing out that courts “allow the government discretion to decide which individuals to prosecute, which offenses to charge, and what measure of punishment to seek.”190 The exception to this wide unquestioned discretion was for “extraordinary cases where it appears the prosecutor is motivated by considerations clearly contrary to the manifest public interest.”191 The U.S. Attorney’s Office disagreed that these run-of-the-mill immigration cases were such extraordinary cases manifestly contrary to the public interest.192 Nonetheless, the prosecutors explained that each defendant was found by ICE agents while in custody on charges of driving while intoxicated.193 The reply defended the policy of going after misdemeanants:

As part of the Southwest Border Initiative of the Department of Justice . . . the U.S. Attorney’s Office for the Western District of Texas has expanded its prosecution of immigration violations in recent years. This has included the prosecution of large numbers of illegal entrants for misdemeanor offenses in the border divisions, particularly as part of Operation Streamline in the Del Rio Division starting in 2005. The office has also prosecuted greater numbers of illegal reentry violations in all divisions in the District, to include a wide spectrum of violators, and not only the “aggravated felons” that were the primary subject of prosecutions for violation of Title 8 U.S.C. § 1326 in past years.194 The reply noted prior apprehensions of the defendants and voluntary returns to Mexico.195 Ending the reply on a more personal note, the U.S. Attorney acknowledged that “it is not certain that prosecuting these defendants for felony violations will change their conduct,” but

191. Id. (quoting United States v. Hamm, 659 F.2d 624, 628 (5th Cir. 1981) (en banc)).
192. Id.
193. Id.
194. Id. at 3.
195. Id. at 3–4.
argued he was not willing to wait for them to perhaps commit more serious crimes.\(^{196}\) He observed that Congress could change the laws or withdraw funding, and the Attorney General could direct this office to address its resources elsewhere. But they have not done so, and accordingly, the undersigned anticipates that the office will continue to prosecute similar violators in all divisions in this District.\(^{197}\)

The defendants all received a typical sentence for low-level immigration offenses—time served.\(^{198}\)

**B. Bloat and Immigration Addiction in Federal Criminal Justice**

1. The Elite Fantasy and Crimmigration-Dominated Reality of Federal Criminal Justice

The call to action and scenes from the front lines reveal the troubled state of the federal criminal justice system. After all the expense of criminal processing, deplored by Judge Sparks, the end result was similar to what could be achieved civilly—deportation. The difference was the cost and empty symbolism of criminal processing. As will be discussed in this Part, the price in the aggregate has been an immense burden on strained criminal justice resources and the diluting of the features and protections of American criminal justice.

By 2012, immigration prosecutions were the single largest category of federal case for the fourth consecutive year.\(^{199}\) The number of felony immigration prosecutions in 2010 was an astronomical 989% larger than the number in 1994.\(^{200}\) Of the approximately one-third of cases that make it to federal district court, the large majority—more than 75% in 2010 and 2011—were for

\(^{196}\) *Id.* at 6.

\(^{197}\) *Id.*


illegally entering or being found in the United States.\textsuperscript{201} Of immigration offenders serving time in federal prison, 90\% are there because of an illegal entry or re-entry after deportation conviction.\textsuperscript{202}

Moreover, data for felony prosecutions in district court underestimate the extent of immigration prosecutions because many defendants are disposed of by magistrate judges as overburdened courts struggle with the crippling criminal immigration caseload.\textsuperscript{203} For example, in June 2013 alone, 6,889 immigration defendants were processed by magistrate judges, mainly for illegal entry by an alien.\textsuperscript{204} Because of overload by a crushing criminal immigration caseload, the Ninth Circuit Court of Appeals recently declared a state of emergency, tolling the Speedy Trial Act in the District of Arizona in a "virtually unprecedented" move.\textsuperscript{205}

In the crush, criminal procedure for immigration prosecutions has been diluted down. Immigration defendants inhabit the twilight world of quasi-criminal procedure with abbreviated process and waiver of most rights.\textsuperscript{206} The majority of these federal defendants (two-thirds) are convicted and sentenced by magistrate judges rather than federal district judges for misdemeanor illegal entry.\textsuperscript{207} Half of these convictions and sentencings by magistrate judges occurred on the same day as received by the court.\textsuperscript{208} At the most extreme of this parody of criminal process, defense attorneys may represent multiple defendants in "cattle call" processing, and prosecutors may even be border patrol agents.\textsuperscript{209} Crimmigration procedure has become quasi-criminal in nature—a process bearing a resemblance to criminal processing and punishment—but lacking its protections and even

\textsuperscript{202} MOTIVANS, supra note 182, at 6.
\textsuperscript{203} See id. at 10 (noting that petty immigration crimes are counted in arrest and investigation data but are excluded from prosecution conviction, sentencing, and admission to prison data from the district courts because the cases are handled by magistrate judges and not counted as prosecuted in the district courts).
\textsuperscript{204} Transactional Records Access Clearinghouse, Immigration Convictions for June 2013 (July 22, 2013), http://trac.syr.edu/tracreports/bulletins/immigration/monthlyjun13/gui/.
\textsuperscript{205} In re Approval of Judicial Emergency Declared in District of Arizona, 639 F.3d 970, 971, 975 (9th Cir. 2011). Only two circuit courts have ever approved declaration of a judicial emergency—both more than thirty years ago. See id. at 971.
\textsuperscript{206} See infra notes 249–51 and accompanying text.
\textsuperscript{207} MOTIVANS, supra note 182, at 8.
\textsuperscript{208} Id.
\textsuperscript{209} Ingrid Eagly, Prosecuting Immigration, 104 NW. U. L. REV. 1281, 1351–52 (2010).
using stand-ins for its key players. Besides cost, the ideals and standards of American criminal justice are also being sacrificed.

This reality belies the fantasy of sophisticated federal criminal justice. The swashbuckling acronym soup of federal law enforcers—USAs \(^{210}\), AUSAs \(^{211}\), FBI \(^{212}\), DEA \(^{213}\), ICE \(^{214}\)—generally enjoy greater resources and prestige than their state counterparts. \(^{215}\) The notion is that federal law enforcers tackle the big fish and complex cases, for example, organized crime, terrorist groups, corruption, and financial fraud that have wreaked havoc on the national wellbeing. \(^{216}\) The reality, however, is that most of the immigration cases that constitute the biggest staple of the federal criminal justice system involve illegal entry or aliens illegally remaining in the country—far simpler and humbler than many of the cases handled by under-resourced state officials. \(^{217}\) Immigration and Customs Enforcement ("ICE") and Customs and Border Protection, the two main immigration policing agencies, were the source of more prosecution referrals than all the other Justice Department law enforcement agencies combined. \(^{218}\)

After the 2008 financial collapse that devastated the economy, the nation wondered why federal law enforcers "failed to act as [the] crisis deepened" and why years later "no senior executives have been charged or imprisoned and collective government effort [against such

\(^{210}\) United States Attorneys.

\(^{211}\) Assistant United States Attorneys.

\(^{212}\) Federal Bureau of Investigation.

\(^{213}\) Drug Enforcement Agency.

\(^{214}\) Immigration and Customs Enforcement.


\(^{216}\) See, e.g., Michael E. Horowitz & April Oliver, Foreword: The State of Federal Prosecution, 43 AM. CRIM. L. REV. 1033, 1039-40 (2006) (recounting how "[n]ot long ago, in the criminal context, the federal courts were often viewed as somewhat rarified, the province of specialized or complex cases").

\(^{217}\) See 2011 ANNUAL REPORT, supra note 201, at 37 (noting that most of the immigration cases that have been the largest category of federal cases for the last three years involve unlawful entry or illegally remaining in the country).

\(^{218}\) See Julia Preston, Huge Amounts Spent on Immigration, Study Finds, N.Y. TIMES, Jan. 8, 2013, at A11.
wrongdoing] has not emerged." Indeed, data indicate that around the time of the crisis, financial regulators had been referring substantially fewer cases for criminal investigation. What was the federal criminal justice system doing as the nation began burning? A substantial part of the answer is immigration prosecutions, much like the one that roused the judge's concern, while larger, more complex actors remained virtually untouchable. Of course, this is not to imply causation. Rather, the comparison is made simply to show the relative investment of federal criminal justice resources between complex crimes and the criminal processing of people prior to deportation.

In 1990, immigration prosecutions constituted just 6.2% of reported federal cases. In 1995, shortly before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), immigration prosecutions constituted 8.3% of federal criminal cases. In contrast, fraud constituted 15.4% of federal cases. The combination of what the United States Sentencing Commission designates "non-fraud white-collar crimes" (embezzlement, money laundering, forgery/counterfeiting, and tax

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219. Gretchen Morgenson & Louise Story, A Financial Crisis with Little Guilt, N.Y. TIMES, Apr. 14, 2011, at A1; see also, e.g., Jean Eaglesham, Financial Crimes Bedevil Prosecutors, WALL ST. J., Dec. 6, 2011, at C1 (reporting on demands from lawmakers and angry Americans for prosecution of high-profile executives who contributed to the financial crisis and the difficulties of prosecuting these complex financial cases, especially making a case of criminal intent).


221. See infra figure 4 and note 226 (showing rising share of immigration prosecutions between 1986 and 2011); see also U.S. DEPT OF JUSTICE, FY 2011 BUDGET REQUEST: RESTORE CONFIDENCE IN OUR MARKETS, PROTECT THE FEDERAL FISC, AND DEFEND THE INTERESTS OF THE UNITED STATES 1–2, 7 (2010), available at http://www.justice.gov/jmd/2011factsheets/pdf/defend-interests-unitedstates.pdf (requesting $234.6 million budgetary increase to enable pursuit of mortgage fraud, corporate fraud, and other economic crimes and reporting on the lack of resources, including lack of prosecutors, to pursue such cases); Morgenson & Story, supra note 219, (reporting on refusal of Justice Department to shift agents to mortgage fraud cases and the failure to pursue major actors).


225. Id.
constituted 19.5% of cases. By 2011, immigration prosecutions constituted more than a third of all federal criminal cases. In contrast, fraud constituted 9.8% of cases, and other non-fraud white-collar cases constituted just 3.6% of federal cases. Figure 4 contrasts this sharp shift in the balance of major federal crime categories. Note that Figure 4 charts the change in relative proportions of cases rather than the rise in volume of cases over time. The chart shows the shift in relative federal prosecution priorities by proportion of cases.

**Figure 4. The Rise of Immigration Domination - Comparison with Other Major Crime Categories by Proportion of Cases**

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227. 2011 ANNUAL REPORT, supra note 201, at 37.

228. 2011 SOURCEBOOK, supra note 226, at fig.A n.1.

2. The Pressures and Costs of Bloat

Over the decades, resources have poured into immigration investigation. By 1998, the Immigration and Naturalization Service ("INS") budget had billowed by nearly eight times its 1986 level.230 By 1999, the INS budget was $4.2 billion—with $900 million earmarked for the Border Patrol, which was offering signing bonuses to rapidly expand its ranks.231 The INS, then the umbrella organization for border policing, secured resources by painting the flow of drugs and people over the border as a security threat.232 But the Border Patrol found that it took “little effort and little staff time” to arrest immigrants in large quantities, whereas narcotics enforcement was much more labor-intensive.233

Fast and easy immigration prosecutions increasingly proved alluring to prosecutors too.234 In the latter half of the 1990s, the General Accounting Office began intensifying pressure on the Justice Department to measure performance using “measurable targets” and “performance goals” such as the output targets used in the private sector.235 Justice Department officials tried to push back initially, explaining that setting numerical targets for outputs such as number of convictions over the year would compromise ethics, create the appearance of hunting heads for loot, and compromise the quality of justice.236 In an internal memorandum, then-Attorney General Janet

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231. Id. at 96.
232. See id. at 100-01.
233. Id. at 100.
234. For an analysis of how the values of criminal justice can be compromised when numbers become the main focus of the criminal justice system, see Mary De Ming Fan, Disciplining Criminal Justice: The Peril Amid the Promise of Numbers, 26 YALE L. & POL’Y REV. 1, 27-48 (2007).
Reno expressed concern over the pressure to "set a target regarding a future level of law enforcement activity—such as making numeric projections for indicators such as arrests, indictments, convictions, or asset seizures—without sufficient consideration to the quality or impact of those actions."237

Ultimately, however, the Justice Department succumbed to the pressures and began setting targets for how many cases to bring in the year ahead and the win rate to attain.238 The Justice Department continues to set targets and report on how it met or exceeded them each year in its budget requests to Congress.239 For example, the target number of total defendants processed in fiscal year 2011 was 88,369, and the target win rate was 90% of cases.240 In its budget request to Congress, the Justice Department reported that it had exceeded these targets, processing 90,461 defendants in fiscal year 2011 with a 93% win rate.241

Prosecutorial success is measured by sustaining high processing numbers, and the pressure has intensified as the increase in prosecutorial funding has fallen below the rate of inflation, impeding the ability to pursue more complex cases without immediate conviction pay-offs.242 With federal criminal justice pressured into doing what Reno had cautioned against—"striving to reach a targeted goal, or quota, for its own sake, without regard to the activity's larger purpose"243—immigration prosecutions became addictive. Immigration cases are the fastest to process and yield high conviction rates and vast body counts in terms of defendants prosecuted.244 Between 2000 and 2004, the median time for prosecution of immigration cases fell from 115 days in 2000—already the lowest of

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237. Reno Memorandum, supra note 236.
238. For a history, see Fan, supra note 234, at 16–27 (detailing the Department of Justice's eventual embrace of statistics as a means of measuring performance).
240. Id.
241. Id.
243. Reno Memorandum, supra note 236.
244. See, e.g., 2011 SOURCEBOOK, supra note 226, at tbl.11; Transactional Records Access Clearinghouse, Prosecution Time by Department of Justice Program Category (2005), http://trac.syr.edu/tracins/highlights/v04/protimeprocat.html (showing the short processing time of immigration cases).
the major case categories—to just 37 days by 2004. While felony immigration prosecutions in United States district court take more time, the median case processing time is still substantially faster compared to the processing time for other categories. Because of the heavy immigration case volume, the five Southwest border districts that handle the huge majority of all immigration cases, and more than half of all federal cases, had a median case processing time of just four months compared to nine months in non-Southwest border districts. Moreover, the guilty plea rate is the highest for immigration cases of all major case categories, for example, 99.4% in fiscal year 2011.

The rapid mass processing is enabled by streamlined fast-track programs in which prosecutors recommend shorter sentences if defendants waive their rights and plead guilty early, typically shortly after the initial arraignment and appointment of counsel. The abbreviated process has roused concerns among defense attorneys over the pressure to plead guilty based on scant discovery with no opportunity for the defense attorney to investigate the legal or factual issues. Such early disposition programs have withstood constitutional challenges, however.

The addiction to immigration prosecution has persisted though migration into the United States has been falling substantially since 2007, as the United States economic decline reduced the lure of

245. Transactional Records Access Clearinghouse, supra note 244.

246. See MOTIVANS, supra note 182, at 24–25 (discussing the short average processing times of immigration offenses in the Southwest border districts, as compared to the average processing times in non-Southwest border districts).

247. Id. at 8, 24.

248. 2011 SOURCEBOOK, supra note 226, at tbl.11. The only higher guilty plea rate was the 100% rate for the handful of cases involving antitrust (0.01% of all federal cases); food and drug violations (0.06% of all federal cases); and use of a communications facility in committing a narcotics offense (0.5% of all federal cases). Id. As is evident from the tiny fraction of cases these categories represent, none are a major category.


250. See, e.g., Michael O'Connor & Celia Rumann, The Death of Advocacy in Re-Entry After Deportation Cases, THE CHAMPION, Nov. 1999, at 43 (expressing concern over the pressure for immigration defendants to plead guilty, often with scant discovery and no attorney investigation into the legal or factual issues).

251. United States v. Estrada-Plata, 57 F.3d 757, 761 (9th Cir. 1995) (upholding the government's application of its fast-track plea bargaining policy).
jobs. Between 2007 and 2009, the annual inflow of undocumented migrants was nearly two-thirds less than from 2000 to 2005. Inflows from Mexico—which represent about 60% of all undocumented migrants—began plunging with the collapse of the United States housing market and lure of construction jobs. Demographers recently estimated that net inflow from Mexico has fallen to zero or perhaps less because of the battered United States job market, the border build-up and associated heightened dangers of border crossing, rising deportations, and socioeconomic conditions in Mexico, including declining birth rates.

Despite the plunging rates of unauthorized migration and fewer apprehensions at the border, the number of arrests for immigration violations tripled between 2000 and 2010. By 2010, apprehensions of unauthorized migrants reached the lowest level since 1972, but the Border Patrol and other border policing agencies arrested three times more people for referral to criminal prosecution rather than civil processing. The number of immigration prosecutions in district courts rose by 72% between 2005 and 2010. The district court figure does not capture the full extent of the rise because the vast majority of immigration cases, two-thirds in 2010, were disposed of by magistrate judges, who also handled a swelling number of immigration cases.

Moreover, the massive army of Border Patrol agents nearly doubled between 2004 and 2010, swelling past the hiring surges of the 1990s. The large ranks of Border Patrol agents have huge political lobbying power to force prosecutors to take their cases, even against the prosecutors' better judgment about how best to allocate limited resources on competing priorities.

253. Id. at i.
255. Passel, Cohn & Gonzalez-Barrera, supra note 254, at 6.
256. Motivans, supra note 182, at 7.
257. Id.
259. Motivans, supra note 182, at 8.
260. Id. at 6.
261. See, e.g., Fan, supra note 234, at 41 (detailing case of Carol Lam, a U.S. attorney who was dismissed in controversial fashion in 2007).
Attorney for the Southern District of California was controversially dismissed after intense Border Patrol lobbying because her “immigration deliverables” decreased when she focused on more complex and culpable actors, such as violent drug cartels, fraudsters, and corrupt politicians.262

Much has been made of prosecutorial discretion and the import of sound judgment about how best to use limited resources to serve competing public safety goals.263 But in a time of intense pressures to rack up and sustain conviction and processing statistics, prosecutorial discretion to make wise judgments may be becoming more myth than reality, particularly in border districts. Only 1% of immigration matters referred by border policing agencies such as United States Border Patrol and Immigrations and Customs Enforcement were declined in 2010.264 Federal prosecutors facing a crushing load of immigration cases must rely on fast-track processing because the number of prosecutors has not risen nearly as dramatically as the number of Border Patrol agents.265 Whether federal prosecutors want to or not, the expensive artillery of criminal justice has increasingly been used to do the work of civil immigration law.266 The systematization of immigration prosecution and pressures against exercising better judgment about use of resources only entrenches the crimmigration addiction.

Prosecuting more migrants from a shrinking pool means wasting resources on people with little to no criminal histories, a practice that one federal judge criticized on the record.267 Frank Zimring has noted


263. Cf., e.g., KENNETH CULP DAVIS, POLICE DISCRETION 38–40, 52, 139, 144 (1975) (discussing the import of discretion, despite his critiques in the street policing context); Michael Edmund O’Neill, When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations, 79 NOTRE DAME L. REV. 221, 225 (2003) (discussing the need to exercise discretion in a world of limited resources); Ellen S. Podgor, Race-ing Prosecutors’ Ethics Codes, 44 HARV. C.R.-C.L. L. REV. 461, 474 (2009) (discussing how prosecutorial discretion can be used with compassion to correct injustices).

264. MOTIVANS, supra note 182, at 19.

265. See id. at 16 fig.12 (comparing sharp increase in Border Patrol officers with much smaller rise in federal prosecutors).

266. See Eagly, supra note 209, at 1349 (arguing that increasingly “criminal law acts as immigration law” and civil immigration enforcers increasingly operate within a criminal framework, eroding the civil-criminal immigration distinction).

a similar problem in the overincarceration context. When incarceration continues to rise though the pool of people committing crimes is smaller, expensive prison resources are misspent on people who do not pose a public danger, buying little to no incapacitation benefit. Sentences for immigration offenses have fallen as more people who would usually be processed civilly are swept up into the criminal justice system to keep criminal processing statistics high. The number of minor defendants disposed of as misdemeanants by magistrate judges have surged. While many defendants processed by district judges still tend to have prior criminal histories, defendants prosecuted by district judges rather than by magistrate judges represent a minority of all immigration defendants.

Moreover, to the extent that immigration defendants serve prison time rather than being deported, their stay in federal prison is paid for by United States taxpayer dollars. It cost taxpayers an average of $22,632 a year to house one prisoner in the Federal Bureau of Prisons in 2001. The costs associated with the incarceration of undocumented immigrants has been heavily criticized, particularly by those favoring tough immigration laws. As more states and localities have participated in cooperative immigration investigation agreements with the federal government, the costs of keeping immigrants in custody among the states has

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269. See Motivans, supra note 182, at 30 fig.23 (graphing generally decreasing sentences for illegal reentry between 1999 and 2010); Transactional Records Access Clearinghouse, Prison Sentences Drop for DHS-Immigration Convictions (2005), http://trac.syr.edu/tracins/highlights/v04/dhsprisconvG.html (charting decline in sentences).
270. See Motivans, supra note 182, at 8, 26.
271. Id.
mounted. An oft-decried figure is the $1.5 billion that states and the federal government spent on incarcerating undocumented immigrants for immigration and non-immigration offenses. Whether the stay in prison is a few days pending criminal processing, or a year or more following sentencing for an immigration conviction, the burden of incarceration is borne by United States taxpayers.

C. The Civil Immigration Incarceration Complex

Incarceration due to criminal processing of immigrants is only part of the cost burden. Civil detention, rather than criminal processing or punishment, is a major reason for the explosive growth of immigration incarceration. Between 1994 and 2011, the yearly number of people held in immigration detention skyrocketed nearly 430%. Over the last decade and a half, ICE has become the manager of the largest detention and supervised release system in the nation.

In 2011, ICE detained 429,247 people—an all-time high. The immigration detention system held far more people in custody than for all crimes in the federal criminal system, which in 2011 held

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279. Simanski & Sapp, supra note 277, at 4.
216,362 prisoners.280 The breakdown of the backgrounds accounting for 90% of the immigration detainees includes:

- 67% Mexicans;
- 9% Guatemalans;
- 6.2% Hondurans;
- 5.5% El Salvadorans;
- 1% Dominicans;
- 0.8% Indians; and
- 0.7% Ecuadoreans.281

To house all the immigration detainees, ICE relies on a network of more than 300 facilities, many run by private contractors such as the Corrections Corporation of America.282

The cost of maintaining the nation's biggest detention complex is massive. For fiscal year 2013, the Department of Homeland Security requested more than $1.9 billion for its custody operations.283 This request was actually a decrease of about $91.2 million from the amount Congress gave ICE in fiscal year 2012 for its custody operations.284 The cost figure was for maintaining 32,800 detention beds at a cost of $122 a day per person.285 The detention beds are distributed in a mix of Federal Bureau of Prisons facilities, federal detention centers, ICE-owned detention facilitates, and contract facilities.286

Many of the facilities holding immigration detainees were built as jails and prisons.287 Movement is generally restricted in these facilities and some detainees are imprisoned alongside sentenced criminals despite the ostensibly civil nature of immigration detention.288 An increasing proportion of immigrants held in detention have no criminal history.289 About 95% of detainees are


281. SIMANSKI & SAPP, supra note 277, at 4.


284. Id. at 35.

285. Id. at 36.

286. Id. at 36–37.

287. See SCHRIRO, supra note 278, at 21.

288. See id.

289. See Kalhan, supra note 276, at 44–45 (reporting approximately 81,000 people in immigration detention in 1994).
released within four months of incarceration but about 1%—amounting to 2,100 people in 2009—were detained for a year or more. Rejecting constitutional challenges to immigration detention, the Supreme Court in *Zadvydas v. Davis* noted that "[t]he proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect." The reality of immigration detention, however, is incarceration in harsh conditions similar to—and sometimes essentially the same as—criminally-convicted defendants.

Civil immigration detention in criminal-like conditions has sparked controversy and criticism, including from the Inter-American Commission on Human Rights. In recent years, the overburdened immigration detention system has been plagued with scandals over needless suffering and even death as inmates held in filthy conditions and sometimes intense pain waited for attention from swamped officials. More than 100 immigration detainees have died in custody since 2003, many of them young people. Some immigration detainee deaths were preventable, such as the death of a 34-year-old detainee whose life could have been saved by aspirin. A growing number of voices have argued that the incarceration of civil immigration detainees in criminal punishment-like conditions without criminal process or protections violates due process and human rights norms.

Why has the immigration incarceration complex exploded so precipitously and with such severe consequences? The answer

290. SCHRIRO, supra note 278, at 6. ICE has been working to decrease the average length of stay from around 31 days in 2009 and 2010 to 29.2 days in 2011. See U.S. DEP’T OF HOMELAND SEC., supra note 283, at 39.
292. Id. at 690.
296. Priest & Goldstein, supra note 294.
297. See, e.g., INTER-AM. COMM’N ON HUMAN RIGHTS, supra note 293; Dow, supra note 276, at 533; Kalhan, supra note 276, at 44–45.
involves laws and policies shaped by the storms of history. Immigration detention is not a new practice. Infamously, immigrants in the early decades of the 1900s were held in harsh conditions for weeks—and sometimes years in wartime—at New York Harbor's Ellis Island. In 1956, however, the INS adopted a rule under which deportation proceedings would generally begin with issuance of an Order to Show Cause rather than an arrest, though on the books the Attorney General retained the discretion to arrest. Detention policies began toughening, however, in the 1980s and 1990s as waves of Cubans, Haitians, and Central Americans landing on American shores roused national concern. To deter Haitians from setting sail for the United States, President Ronald Reagan promulgated mandatory detention policies. The use of mandatory detention further expanded when Congress enacted the Anti-Drug Abuse Act of 1988, which among other provisions, required detention for aggravated felons awaiting deportation.

The biggest legal landmark in the expansion of mandatory detention, however, was the IIRIRA. IIRIRA ramped up civil immigration detention in at least two major ways. First, IIRIRA required mandatory detention of inadmissible arriving aliens claiming asylum, meaning noncitizens applying for admission at a port of entry or interdicted in international waters who claim asylum. Such asylum seekers are detained for the pendency of proceedings to adjudicate their claim of a credible fear of persecution and until removal if their asylum petition is ultimately denied.

Second, IIRIRA mandated detention for inadmissible or deportable aliens who have committed a wide range of offenses.

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299. 21 Fed. Reg. 97, tit. 8, §§ 242.1–2 (Jan. 6, 1956); see also, e.g., Johns v. Dep't of Justice, 653 F.2d 884, 889 n.7 (5th Cir. 1981) (describing the history of the process before 1956).
305. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.").
ranging from major to minor offenses such as prostitution or drug possession if the statutory maximum is over a year. Mandatory detention means no opportunity to argue for release on bond because one presents no risk of flight or danger to the community—factors customarily considered in criminal cases in deciding whether someone should be released on bond. Moreover, review of whether the defendant even has a qualifying offense for mandatory detention is constricted. An alien may challenge the detention decision before an immigration judge only by showing that he "was not convicted of the predicate crime, or the INS is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention."

The use of mandatory detention has further grown after the national shock of the terrorist attacks on September 11, 2001. The growth has been a function of law and practice. As to law, the USA PATRIOT Act of 2001 authorized mandatory detention of noncitizens who the Attorney General has reasonable grounds to believe are engaged in terrorist activity or "any other activity that endangers the national security of the United States." Concerns have been raised about the use of this power to hold suspects in the twilight of civil detention without criminal process.

Generally, the Supreme Court has been reticent about intervening in immigration detention. In Demore v. Kim, the Supreme Court rejected a challenge to mandatory detention. The challenge was brought by Hyung Joon Kim, a lawful permanent resident who faced deportation proceedings because of convictions for first-degree burglary and petty theft. Kim argued that his

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306. 8 U.S.C. § 1226(c)(1) (2012); see also 8 U.S.C. § 1182(a)(2)(A)(i)(II), (a)(2)(D)(i) (listing engagement of prostitution or a controlled substances offense with a statutory maximum of over a year as qualifying grounds); see also, e.g., Gryll, supra note 276, at 1213–14 (describing mandatory immigration detention of long-time legal permanent resident with prior drug possession conviction).


310. 8 U.S.C. § 1226a(a)(1).


313. Id. at 531.

314. Id. at 513.
detention violated due process because immigration authorities had made no determination that he either posed a danger to society or was a flight risk before detaining him.\textsuperscript{315} Writing for the Court, Justice Rehnquist reversed the Ninth Circuit’s ruling that mandatory detention violated substantive due process.\textsuperscript{316} Justice Rehnquist underscored that “in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”\textsuperscript{317} Noting that detention periods typically last roughly a month and half in the vast majority of immigration cases, though detention lasted six months in Kim’s case, Justice Rehnquist held mandatory immigration detention was constitutionally permissible.\textsuperscript{318}

More recently, the Supreme Court has imposed some detention length limits through statutory interpretation to avoid constitutional concerns. The Court has construed immigration laws to authorize the government to hold inadmissible or removable aliens for a period reasonably necessary to effectuate removal and not indefinitely or potentially permanently.\textsuperscript{319} In the domain of immigration detention, however, the Court has generally shown great deference to the political branches. For significant change to curb the costs of immigration detention, the political branches must act.

IV. CURBING OVERBREADTH COSTS IN IMMIGRATION CRIMINALIZATION AND DETENTION

The contours of the comprehensive immigration reform agenda are still being hammered out. Much of the early energy has been devoted to proposing paths to legal status for undocumented people, also dubbed amnesty by opponents who succeeded in defeating proposals in 2005, 2006, 2007, and 2010.\textsuperscript{320} Whether or not a deal is reached on the status adjustment, the fierce battles should not blind legislative leaders and the nation to the need to address the costs, waste, and controversy generated by immigration criminalization and civil detention overbreadth.

\textsuperscript{315} Id. at 514.
\textsuperscript{316} Id. at 531 (reversing Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002)).
\textsuperscript{317} Id. at 522 (quoting Reno v. Flores, 507 U.S. 292, 305–06 (1993)).
\textsuperscript{318} Id. at 529–31.
\textsuperscript{320} See supra notes 4–7.
Reform proposals must avoid the trap of all-or-nothing thinking and accusation of radicalism. Reform of criminal immigration laws need not entail abolition or wholesale decriminalization. Finding a smarter alternative to continuing to feed a multi-billion-dollar civil immigration incarceration complex does not mean sending criminal aliens likely to abscond onto the streets. These proclamations of moderation may not be fully satisfactory to egalitarians seeking more radical reform. Progress has oft-derailed, however, in search of the impossible purist vision that appeals to a particular worldview.

Law is often tilted toward the visions of the powerful and maintaining hierarchist order. Immigration law is particularly tilted toward a hierarch’s vision of order and against an egalitarian’s dream of de-stratification because immigration law fundamentally stratifies groups seeking to be a part of the United States. Egalitarians hoping to change and humanize harsher aspects of immigration law thus bear a heavier burden of bridging the divide in worldviews and framing issues in terms that also appeal to hierarchs. This Part presents two proposals that can curb the resulting harms to values important to both egalitarians and hierarchs. First, this Article argues that resources can be better spent by requiring indicia of risk beyond undocumented status for deployment of the expensive artillery of criminal justice. Second, this Article argues that the federal system should learn from the states in pursuing smarter and more cost-effective solutions than wide-scale immigration incarceration without sufficient risk assessment about whether the benefits are worth the costs.

A. Recalibrating the Baseline for Criminal Processing Rather than Civil Removal

Sometimes the best insights for reform can emerge from a veteran of the front lines. Recall the concerns of Judge Sparks


regarding the "mind boggling" expenses of "prosecuting illegal entry and re-entry cases (rather than deportation) [of] aliens without any significant criminal record." Judge Sparks, descendant of a venerable line of Texas sheriffs and an appointee of Republican President George W. Bush, is no soft touch on crime. Rather, his concern was smarter use of the heavy and expensive arsenal of criminal law and fiscal responsibility. The defendants before him were going to get time served and then be civilly deported because of their lack of criminal history. They could have just been civilly deported without going through the motions of criminal processing. Why pay extra for county jail facilities, prosecutors' time and costs, U.S. Marshal's Service costs, U.S. Probation Office costs, criminal court personnel costs, appointed criminal defense counsel costs, court interpreters' expenses, medical, dental and housing expenses, and transportation costs?

As discussed in Part III.B, part of the reason for such bafflingly wasteful expenditures is that immigration prosecutions are a quick and easy way to rack up massive conviction statistics to meet case processing and conviction quotas. Prosecuting unlawful aliens for immigration crimes is not rocket science. Immigration criminalization is so broad that the simple fact of apprehension in the United States nearly speaks for itself once alienage and lack of authorization is established. That enhances the allure of immigration prosecutions—and their addictive "empty calorie" effect. The immigration prosecutions have an empty calorie effect in the sense that many defendants without criminal histories get time served and are removed afterward, yet they are a fast way to build statistical bloat.

The problem is that the huge conviction and case processing quotas

325. See, e.g., Rick Casey, Texas' Powerful Mini-Lynch Mob, SAN ANTONIO EXPRESS-NEWS, Apr. 3, 2000, available at 2000 WLNR 9677556 (noting Judge Sparks was recommended by Republican Sen. Phil Gramm for a judgeship, appointed by President George W. Bush, and "is a law-and-order conservative, but he puts emphasis on the word "law" ").
326. See supra notes 186–93 and accompanying text.
327. See Order at 2–3, United States v. Ordones-Soto, No. A-09-CR-590-SS (W.D. Tex. Feb. 5, 2010) ("These three defendants—like many of the defendants prosecuted [under] 8 U.S.C. § 1326 in the last six months—have no significant criminal history, and the prosecuting Assistant United States Attorney cannot state a reason that these three defendants were prosecuted rather than simply removed from the United States.").
328. Id.
329. See supra Part III.B.2.
330. See supra Part III.B.2.
that law enforcers target to secure funding each year do not speak to the public safety gained by the action.\textsuperscript{331} Yet funding and performance evaluations are measured by such conviction statistics; indeed, target numbers of defendants processed and win rates are set in advance each year.\textsuperscript{332} Taxpayers and overburdened courts have to bear the costs for the quasi-criminal costume drama.

Judge Sparks's critique suggests a cure for the worst of the waste. Prosecutors can choose to pursue aliens without significant criminal history because currently the criminal laws criminalizing being found in or entering the United States simply require proof of alien status. The heavy and expensive artillery of criminal justice can be better aimed by requiring indicia of risk beyond criminal status, such as significant prior criminal history, for criminalization. At a minimum, to warrant criminal intervention rather than standard civil processing, the crime should specify a factor that poses a greater risk of harm warranting more than a time-served disposition.

While criminal history is an imperfect proxy for risk, it is a better one than mere alienage. Indeed, criminal history is a crucial factor in calibrating sentences because of the understanding that people with prior criminal history may be in greater need of deterrence and incapacitation and may pose a greater risk.\textsuperscript{333} Before people are treated as risks, there should be a basis for the assumption such as prior significant criminal history. The question of what counts as significant criminal history that sufficiently indicates risk is a matter for democratic deliberation.

The fundamental point, however, is that criminal punishment and its costs should not turn just on the status of being an alien. Civil regulation rather than criminal punishment is the traditional method of addressing people who lack the documents or fortuity of birth to be lawfully in the United States.\textsuperscript{334} As Deputy Secretary of State William J. Burns explained:

> U.S. immigration law—and our uniform foreign policy regarding the treatment of foreign nationals—has provided that

\begin{footnotesize}
\textsuperscript{331} See supra Part III.B.2. \\
\textsuperscript{332} See U.S. DEP’T OF JUSTICE, supra note 239, at 23 (setting targets and reporting on whether prior year’s targets were met). \\
\end{footnotesize}
the unlawful presence of a foreign national, itself, ordinarily will not lead to that foreign national’s criminal arrest, incarceration, or other punitive measures (e.g., legislated homelessness) but instead to civil removal proceedings. Unlawful presence is a basis for removal, not retribution. This is a policy that is understood internationally, that is consonant with multilateral resolutions expressing the view that an individual’s migration status should not in itself be a crime, and that is both important to and supported by foreign governments. This policy has been the subject of repeated international discussions, and is firmly grounded in the United States’ human rights commitments as well as our interest in having our own citizens treated humanely when abroad.335

How is this policy consistent with the current two most frequently prosecuted crimes in federal criminal justice, illegal entry by an alien336 and being a previously deported alien found in the United States?337 The distinction is vanishingly thin but, for the crime of illegal entry, hinges on the conduct of entry plus alien status. It is even harder to distinguish the felony of being a previously deported alien found in the United States from the bald criminalization of unlawful presence by an alien. While the formal policy is that unlawful presence is a basis for removal rather than retribution, unlawful presence following deportation is currently a widely-used basis for criminal retribution.

The principle that unlawful presence is dealt with through civil removal rather than criminal prosecution is not just a matter of normative perspective. We need not wade into the bog of contestation over the quantum of retributive moral desert for unlawful entry and presence. Rather, the principle makes sense as a matter of cost-efficiency and common sense. Why activate the expensive heavy artillery of criminal law for something customarily addressed by civil removal just to reach largely the same outcome of removal? Narrowing the vast breadth of criminal immigration law would circumscribe the discretion to simply fill statistics with undocumented people regardless of whether there is any value to processing them criminally. This better ensures that resources are spent where they may add value.

335. Id.
337. Id. § 1326.
B. Beyond Racial and Ethnic Proxies for Criminal Immigration Law

Requiring more than alien status as the boundary line for criminalizing entering or being found in the United States also can help lessen the problems of racial and ethnic targeting in immigration investigation. The historical ambition of enabling vast discretion to target the racial or ethnic bogeyman of the day lingers in the broad structure of immigration criminalization laws. The alien status that is the *sine qua non* of the crimes of illegal entry by an alien, and being a previously deported alien found in the United States is intimately intertwined with race, ethnicity, and national origin. In criminal law enforcement, courts are rejecting the use of race and ethnicity as an indicator of criminal propensity—the likelihood of committing a crime. But in the immigration context, race and ethnicity have long been used as a heuristic—a rough and potentially inaccurate cognitive rule-of-thumb—for the alien status that transforms entry or being found in the United States into a crime.

As discussed in Part II.A, the notion that race or ethnicity is relevant to suspicion of alien status was partially blessed by the Supreme Court in *United States v. Brignoni-Ponce*. *Brignoni-Ponce* reasoned that since about 85% of aliens are of Mexican origin and at least 8.5% to 20.4% of the people of Mexican origin in border states are registered aliens, “Mexican appearance” was a relevant factor for suspicion of unlawful entry, albeit insufficient as the sole basis for an investigative stop. *Brignoni-Ponce* reasoned:

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338. See *supra* notes 149–53, 165 and accompanying text.


340. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (holding that “Mexican appearance” is a relevant factor in reasonable suspicion albeit cannot be the sole factor); *Chavez v. United States*, 683 F.3d 1102, 1112 (9th Cir. 2012) (addressing allegations that Border Patrol agents engage in a practice of principally focusing on “Latin, Hispanic or Mexican appearance” of vehicle drivers or occupants in deciding whether to stop cars); Johnson, *supra* note 339, at 1029 n.136 (collecting cases relying on the *Brignoni-Ponce* factors, including race, and discussing how stops because of risk can later be justified in terms of myriad post-hoc indicia of suspicion).

341. *Brignoni-Ponce*, 422 U.S. at 887; *see supra* Part II.A.

342. *Brignoni-Ponce*, 422 U.S. at 879 & n.5, 886 n.12.
Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.343

Today, the vast majority of immigrants originate from Latin America and Asia.344 According to Pew Center statistics, people from Latin America (50%) and Asia (27%) account for 77% of all immigrants.345 Unauthorized immigrants from Latin America account for 81% of all of the nation’s approximately eleven million unauthorized immigrants.346 Asia is the next largest source of unauthorized immigrants, accounting for 11%.347 Together, Latin America and Asia account for 92% of all unauthorized immigrants.348 Thus it remains the case that the vast majority of all aliens—especially unauthorized aliens—have a Hispanic or Asian profile.

That is only part of the story, however. As the proportions of Asian Americans and Hispanic Americans have grown, the probability that someone of Asian or Hispanic appearance has illegally entered the United States has decreased.349 As Judge Reinhardt wrote for the Ninth Circuit, sitting en banc in United States v. Montero-Camargo,350 the Hispanic population has increased at least fivefold in the border states that the Supreme Court referenced—and Hispanics are the majority population in some areas.351 He concluded that “[r]easonable suspicion requires particularized suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part

343. Brignoni-Ponce, 422 U.S. at 886–87 (emphasis added).
345. Id.
347. Id.
348. Id.
349. See United States v. Montero-Camargo, 208 F.3d 1122, 1132–33 (9th Cir. 2000) (en banc).
350. 208 F.3d 1122 (9th Cir. 2000).
351. Id. at 1133.
in a particularized reasonable suspicion determination.” The Supreme Court denied certiorari.

While Montero-Camargo was a bold challenge to the notion of racial relevance to suspicion of criminal unlawful entry, Brignoni-Ponce’s racial relevance statement is still quoted with approval as authority in reasonable suspicion cases. Moreover, even in the Ninth Circuit, in areas with smaller concentrations of Hispanics, the Court has held that Brignoni-Ponce’s rationale holds sway and Montero-Camargo’s attempt to distinguish the Supreme Court’s racial relevance holding does not apply. Litigants arguing that the rise in the Hispanic population renders Brignoni-Ponce inapplicable also must wrestle with the fact that Brignoni-Ponce was not based just on the probability that a person of Hispanic appearance is likely to be an alien in any given region. Brignoni-Ponce also emphasized the predominance of people of Hispanic appearance among those apprehended as aliens in its racial relevance analysis. This latter rationale is predicated on the ethnic predominance among immigration defendants. And, as discussed in the data and charts in Part II.C, ethnic predominance persists.

The data on ethnic and racial predominance and jurisprudence on racial relevance to reasonable suspicion is the Achilles heel of suits pending in the courts over the state immigration investigation provisions left standing for further litigation. The challenged provisions generally require state officers to make reasonable attempts to determine the immigration status of any person stopped, detained or arrested if “reasonable suspicion exists that the person is an alien who is unlawfully present in the United States” unless certain documents are produced. The immigration status investigation

352. Id. at 1134 (emphasis added).
355. United States v. Manzo-Jurado, 457 F.3d 928, 935–36 & n.6 (9th Cir. 2006).
provision has roused national and international concern over potential racial and ethnic targeting and stigmatization as well as fears over the use of race and ethnicity to establish reasonable suspicion.\(^\text{359}\)

In *Arizona v. United States*, the Supreme Court invalidated three of four provisions on review from Arizona's immigration criminalization legislation on federal preemption grounds because of conflict with national immigration law and enforcement policy.\(^\text{360}\) But the Court left standing the immigration investigation provision for further development by the lower courts, studiously avoiding the issue of race and reasonable suspicion.\(^\text{361}\) It remains an open question whether state officers may stop a person of color for some minor offense such as a traffic violation, and then prolong the detention by asserting reasonable suspicion of illegal entry based on mannerisms, appearance, and other factors.\(^\text{362}\)

The Court's hope is that the lower courts will construe the provisions in a manner that avoids conflict with federal law.\(^\text{363}\) The implicit hope is that the statutes may be construed and enforced in a way to avoid having to confront the festering and murky issue of the...

\(^{359}\) See, e.g., Editorial, *A Challenge to a Brutal Anti-Latino Law*, N.Y. TIMES, July 21, 2012, at A18 (discussing how § 2(B) of the Arizona law was aimed at codifying the controversial practices of Arizona Sheriff Joe Arpaio, who has been sued for targeting Latinos); Chin & Johnson, *supra* note 84, at A15 (discussing why the Arizona provision enables racial profiling); Alan Gomez, *Hispanics, Police at Odds in Alabama: Implementing Immigration Law Has Some Complaining of Harassment*, USA TODAY, July 24, 2012, *available at* 2012 WLNR 15450140 (reporting on concerns by Hispanic residents of Alabama about “constant harassment and racial profiling” by police operating under a similar immigration investigation provision as § 2(B) of the Arizona law).


\(^{361}\) Id. at 2509.

\(^{362}\) See id. (“There is no need in this case to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law.”).

\(^{363}\) See id. at 2510 (stating that “without the benefit of a definitive interpretation from the state courts it would be inappropriate to assume” a construction that conflicts with federal law and citing admonitions to construe statutes in ways to avoid constitutional questions).
continuing relevance of *Brignoni-Ponce*. Should race, ethnicity and national origin continue to be relevant in the reasonableness analysis? And is this approach consistent with federal crimmigration law and policy? *Arizona v. United States* gave the lower courts hints as to how to avoid these intensely controversial questions. The opinion suggested that if the investigation provision is interpreted as “only requir[ing] state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives.”

In other words, do the immigration investigation during detention for some other offense and avoid basing prolonged detention on reasonable suspicion of illegal entry.

Why has the Court so doggedly avoided revisiting the larger issue of racial and ethnic relevance in reasonable suspicion of an immigration crime? Part of the answer may be that the solutions for the intensely complex and controversial question are best framed in the political branches. Indeed Justice Kennedy concluded *Arizona v. United States* with a call for thoughtful deliberation:

> Immigration policy shapes the destiny of the Nation . . . . The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation’s meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse.

In the next round of immigration reform, Congress has the opportunity to tackle the question rather than leaving it for the courts to struggle over. Federal criminal immigration law reform that bases criminalization on indicia of risk such as alienage plus significant criminal history rather than merely alienage can at once better direct the expensive artillery of criminal law and avoid the use of race, ethnicity, and national origin as a proxy for criminal status. Requiring more than alien status for criminalization of unlawful entry or being found in the United States will further dilute the logic of reliance on race or ethnicity as a proxy for criminality.

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364. *Id.* at 2509.
365. *Id.* at 2510.
C. Learning from the States on Incarceration and More Cost-Effective Approaches

Immigration incarceration—both from criminal and civil processing—is another issue urgently in need of congressional leadership. Here the federal government can learn from the awakening of the states to the costs of overincarceration and turn to more cost-effective approaches. For the first time in nearly forty years the nation’s prison population began declining rather than rising in 2010. In 2011, incarceration continued to decline for the second consecutive year, by 0.9%, a small but remarkable change from the patterns of the past. In 2012, the number of prison inmates declined for the third consecutive year, by 1.7%. Buffeted by economic crises, communities across the nation and political spectrum are seeking ways to be smart rather than spendthrift on crime to curb extravagant prison spending. In a time of budget crises and the need for greater fiscal discipline, leaders not typically associated with egalitarian politics such as Newt Gingrich are even joining in leading the decarceration movement, dubbed being right on crime by conservatives.

Besides incarceration costs for criminal processing, the costs associated with civil immigration detainees generated by both the federal criminal and civil administrative systems are a massive billion-


dollar burden in difficult budgetary times. Here the federal
government can learn from innovations in the states. For example,
Mississippi and Texas cut incarceration costs by improving risk
assessment and sorting to determine who can be more cost-effectively
kept in the community rather than incarcerated. Alternatives to
incarceration are expanding in popularity and prevalence even in
tough-on-crime states.

The federal government, however, has lagged behind the smarter
solutions trend. Federal prison rolls continued to grow—increasing
3.1% in 2011—even as state prison populations have dropped. Recently, the United States Department of Justice sounded the alarm
that the increasing federal prison population and expenditures are
“crowding out” investment in crime prevention, threatening to reverse public safety gains, and “are incompatible with a balanced crime policy and are unsustainable.” While criminal immigration sentences are shorter on average than drug sentences, more people are swept up, meaning more bodies awaiting processing in pretrial
and presentencing detention and more people being sentenced.


374. CARSON & SABOL, supra note 280, at 2.


376. On any given day, the U.S. Marshals Service has approximately 63,000 people in custody awaiting processing in federal court. U.S. MARSHALS SERVICE, http://www.usmarshals.gov/duties/factsheets/facts-2011.html (last updated Apr. 15, 2011). The vast majority of people in the custody of the U.S. Marshals Service are imprisoned in a variety of state, local, and private jails. Id. For a discussion of pretrial detention aggravating overcrowding in detention facilities see, for example, Laura I. Appelman, Justice in the Shadowlands: Pretrial Detention, Punishment, and the Sixth Amendment, 69
Immigration defendants constitute 45% of all federal defendants incarcerated pending processing.\textsuperscript{377} The reform proposed in Part IV.A of curbing criminalization overbreadth will help decrease the costs of incarcerating immigrants in criminal proceedings. Incarceration due to criminal prosecution is only part of the story, however.

As described in Part III.C, civil immigration detention has exploded over the last fifteen years because of broad mandatory detention provisions that restrict the ability to sort out those who might be more cost-effectively kept in alternatives to detention.\textsuperscript{378} Currently, 8 U.S.C. § 1226 governs the arrest, detention, and release on bond of aliens pending a decision about removal from the United States.\textsuperscript{379} The provision gives the Attorney General the option of detaining arrested aliens, releasing them on bond, or granting conditional parole.\textsuperscript{380} The discretion to release on bond rather than detain is circumscribed, however, for arriving aliens claiming asylum for whom current law requires mandatory detention.\textsuperscript{381}

The discretion to release an alien on bond is also circumscribed by 8 U.S.C. § 1226(c), which requires the Attorney General to take into custody any alien who is inadmissible or deportable because of the commission of a wide array of offenses.\textsuperscript{382} Potentially qualifying grounds for mandatory detention range from major to minor, including prostitution or drug possession if the statutory maximum is over a year.\textsuperscript{383} Section 1226(c) incorporates a vast and open-textured list of potentially qualifying grounds for mandatory detention, including crimes of "moral turpitude" or "aggravated felonies," a category so broad that offenses "need not be either aggravated or a felony."\textsuperscript{384} As Nancy Morawetz has noted, the lists are so broad that

\begin{itemize}
\item \textsuperscript{377} Motivans, supra note 182, at 28.
\item \textsuperscript{378} See 8 U.S.C. § 1226(c) (2012) (prescribing a list of grounds for mandatory detention).
\item \textsuperscript{379} Id. § 1226(a).
\item \textsuperscript{380} Id.
\item \textsuperscript{381} Id. § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.").
\item \textsuperscript{382} Id. § 1226(a).
\item \textsuperscript{383} Id. § 1226(c)(1); see also id. § 1182(a)(2)(A)(i)(II), (D)(i) (listing engagement of prostitution or a controlled substances offense with a statutory maximum of over a year as qualifying grounds).
\end{itemize}
shoplifting with a one-year suspended sentence might count as an aggravated felony, and jumping a turnstile or using unauthorized cable services may constitute crimes of moral turpitude, which in turn are grounds for mandatory detention.

Because of these broad mandatory detention provisions, the executive faces the unpalatable choice of building more civil detention facilities to alleviate the severity of current conditions or allowing problematic conditions to fester. The current state of housing civil immigration detainees in conditions for criminals, and even alongside convicted criminals serving their sentences, strains both basic principles of United States and international law. The Supreme Court has historically distinguished between punitive imprisonment and the "temporary confinement" or "detention" of arrested persons or aliens in exclusion or removal proceedings. Yet imprisonment in conditions—and even facilities—used for convicted criminals presents the pains of the paradigmatic form of punishment. Indeed, the Inter-American Commission on Human Rights recently found human rights violations in the incarceration conditions of immigrants not accused, tried, nor convicted of any crime. Incarceration in conditions used for criminals without the criminal procedural protections required by the Fifth and Sixth Amendments also raises serious constitutional questions.

The Obama Administration has announced the goal of turning immigration detention into a "truly civil system" through expensive improvements to detention conditions and the construction of more

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385. Id. at 1941.
386. 8 U.S.C. § 1226(c)(1).
388. See Schriro, supra note 278, at 21.
389. See, e.g., Smith v. Doe, 538 U.S. 84, 100 (2003) (describing "the punishment of imprisonment" as the "paradigmatic affirmative disability or restraint"); Hudson v. United States, 522 U.S. 93, 104 (1997) (using the "'infamous punishment' of imprisonment" as the yardstick for analyzing whether affirmative disabilities or restraints constitute punishment).
390. See, e.g., Ex parte Wilson, 114 U.S. 417, 427–28 (1885) (explaining that what is considered infamous punishment "may be affected by the changes of public opinion from one age to another" and tracing changes in opinion in what constitutes infamous punishment over time).
civil facilities. The plan of creating a more humane immigration detention system has faced high hurdles, however, because of outrage from some legislators over giving illegal aliens a "Holiday on ICE." Fewer taxpayer dollars would need to be spent for building facilities for civil immigration detainees and improving housing, medical, dental, and other living conditions if fewer immigrants were detained because of smarter selection of who can remain on bond out in the community.

The wisdom of saving money by determining who can remain on bond rather than be detained is not lost on Congress, which has allocated funds to explore alternatives to immigration detention. Nor is the need lost on ICE, which oversees alternatives to detention programs utilizing varying supervision strategies, including GPS monitoring, radio frequency monitoring, and telephonic reporting. The rates of absconding for the programs are between 1.5% and 9.5%. In 2007, ICE reported that it had "exceeded its funded bed space level and therefore must apply rigorous criteria to determine which apprehended aliens are detained." Despite this recognition, by 2011, the number of immigration detainees had soared to a record 429,247 people.

One of the major handicaps to fully benefitting from improving risk assessment and launching alternatives to detention programs is the broad mandatory detention provisions. Some arriving asylum seekers or people with prior convictions for petty offenses, such as shoplifting or prostitution, might more cost-effectively remain out on bond in the community with monitoring and support from community organizations and family during proceedings rather than being incarcerated. This is especially the case for long-time residents in

395. See, e.g., Gryll, supra note 276, at 1214 (detailing example of long-time permanent resident with strong family ties in mandatory detention because of prior drug possession conviction).
397. Id.
399. SIMANSKI & SAPP, supra note 277, at 4.
400. See, e.g., Christopher Stone, Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project, 14 GEO.
the United States with strong family, community, or faith-based ties. Legislative leadership to curb the costs of immigration detention is needed to cut back the mandatory detention provisions. A safety-valve provision that would extend alternatives to detention for people with low risk of absconding and who present no danger to the community would better permit the flourishing of more cost-effective solutions.

CONCLUSION

A great challenge for legal leaders and scholars seeking progress on fiercely fought and passionately-perceived reform issues such as immigration is bridging the intractable divide in worldviews. Progress requires breaking out of the standard endless loop of values conflicts and talking past each other. To garner support rather than generate more sound, fury, and defeat, visions of reform must be infused with multiple meanings that appeal to people with different worldviews and values. Because the immigration law status quo is weighted toward a hierarch vision of control, reformers particularly need to show how values important to hierarchs also are at stake. Presenting arguments and proposals that move egalitarians are not enough. Bridging worldviews is not merely a strategic device to achieve progress. The approach can also illuminate overlooked problems that endanger values and interests important to both sides, such as immigration criminalization and incarceration overbreadth.

Demographic power shifts and the need to conserve taxpayer dollars make the case for reform in terms that implicate the interests and values of hierarchs as well as egalitarians. The broad structure of criminalization enables the wasteful and costly criminal processing of aliens prior to civil removal to bloat conviction statistics while passing the buck to taxpayers.

401. See id. at 682 (noting particular efficacy with certain groups with stronger reasons to comply).
402. See Kahan, supra note 33, at 145–48 (explaining that expressive overdetermination—infusing law and policy with a surfeit of meanings so that divergent worldviews can be simultaneously affirmed—can help people bridge conflicts and make progress over recurring seemingly intractable controversies).
403. Cf. McCann & Lovell, supra note 323, at 8 (explaining power dynamics and tilts in law).
404. For the mortuary of dead comprehensive immigration reform bills, see supra notes 4–7.
405. See supra Parts I, II.
406. See supra Part III.B.
found in the United States on alien status also opens the door for racial relevance in suspicion of criminality because both lawful and unlawful aliens in the United States are predominantly Hispanic or Asian. Stigmatization and suspicion as potential criminals has galvanized these rising voter demographic groups and pushed them leftward, threatening the power base of conservatives. On the civil side of the blurred civil-criminal line in immigration law, widespread civil immigration detention has consumed billions of taxpayer dollars and given rise to inhumane conditions.

Drain on national resources is oft-raised by immigration hardliners concerned about conserving limited resources. This Article has explored how the interest in conserving resources and government spending counsel for curbing overbreadth in immigration investigation, prosecution, and incarceration. Moreover, as the consequences of racial profiling in immigration investigation galvanize the two fastest-rising voter groups, breaking the link of racial relevance arising from the structure of immigration criminalization overbreadth should become a bipartisan reform issue. To tackle the immense challenge, it is important to understand the intimate relationship between profiling and the historical ambition and resulting structure of immigration criminalization detailed in this article.

Reform need not mean radical abolition, an accusation that would be ammunition to kill efforts at progress. Two key reforms would better constrain waste and destructive discretion and more effectively target the expensive artillery of criminal law and civil immigration detention. First, indicia of risk such as significant criminal history in addition to undocumented status must be required before the expensive artillery of criminal justice is used. Second, the federal immigration incarceration system should learn from successes in the states in reducing reliance on incarceration to cut costs that outweigh benefits. These reforms will help curb the worst of the fiscal waste and human harms of immigration incarceration and prosecution overbreadth.

407. See supra Parts II.A–B, IV.B.
408. See supra Part II.A.
409. See supra Parts III.C, IV.C.
410. See, e.g., supra note 2.
411. See supra Part II.B.