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Nothing is Ever Black & White: The Criminal Justice System and Its Expansion into “Criminal Alien” Enforcement

Yolanda Vázquez†

*The criminal justice system is “particularly skewed by race and by wealth”
-Barack Obama¹*

On July 14, 2015, President Barack Obama addressed the audience at the NAACP’s 106th National Convention to discuss the stark racial and economic disparities that have existed in the U.S. criminal justice system for almost five decades.² Recognizing that these racial disparities were built on decades of structural inequality, racial discrimination, and bigotry, President Obama opined that the criminal justice system and its consequences could not be viewed in a vacuum, but “as an extension and a reflection of some broader decisions that we are making as a society and it has to change.”³

TRADITIONAL NOTIONS OF THE IMPACT OF THE “TOUGH ON CRIME” AGENDA WITHIN THE CRIMINAL JUSTICE SYSTEM

These “broader decisions” over the last approximately 50 years – increased law enforcement, criminal offenses, prosecution, and severity in punishment – have resulted in two consequences that are often cited as the most profound. First, approximately 2.2 million individuals are currently under the control of the U.S. adult correctional system through incarceration, increasing to approximately 6.4 million individuals if you include those on probation or parole.⁴ Second, the striking racial disparities between black and white males in all aspects of the criminal justice system, including incarcerations, arrests, court processing, death penalty and severity in sentencing rates.⁵ As Loïc Wacquant

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¹ President Barack Obama, *Speech to NAACP on Criminal Justice Reform*, MSNBC, July 14, 2015, <http://www.msnbc.com/msnbc/obama-criminal-justice-reform-naacp-convention>

² *Id.*

³ *Id.*

⁴ DANIELLE KAEBLE ET. AL., U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014 2 tbl 1 (2015)

⁵ *See, generally*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that the criminal justice system has contributed to a new caste system that has maintained the subordination of African Americans in the United

observed; the incarceration of millions of individuals should not be referred to as “mass incarceration,” but as “hyperincarceration,” because the U.S. criminal justice system’s “stupendous expansion and intensification” over the last five decades has not impacted “masses” of individuals but has “finely targeted” a particular group—poor blacks from poor urban areas.⁶

President Obama’s speech acknowledges what many have reiterated for the last fifty years: the “broader decisions” to become “Tough on Crime” has played a significant role in shaping the continued racial and economic disparities that are present in the United States.⁷ He astutely observed that a criminal justice system that “remains particularly skewed by race and by wealth” is “a source of inequity that has ripple effects on families and on communities and ultimately on our nation.”⁸ Addressing the audience of the African-American civil rights organization was fitting and purposeful in his continued push for criminal justice reform, which include decreasing mass incarceration, racial profiling, and racial disparities in sentencing.⁹ His, as well as others’, statements that individuals deserve “second-chances” has created reform efforts that attempt to prevent individuals, families, and communities from being further

States); MAY LOUISE FRAMPTON ET. AL., *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND THE NEW RECONSTRUCTION 1* (NYU Press ed. 2008) (stating that the War on Crime has “fundamentally changed us.”); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (discussing the “multiple dimensions” in which individuals are impacted by the criminal justice system, most significantly African Americans); LOÏC WACQUANT, *PUNISHING THE POOR* (Duke Univ. Press 2009) (finding that the rise in the use of the criminal justice system to punish millions of individuals over the years was the result of the political desire to control the marginalized population in the U.S., specifically, poor blacks in the “ghetto”).

⁶ See Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, *DÆDALUS* 74, 78 (Summer 2010).

⁷ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); MARIE GOTTSCHALK, *CAUGHT* (2015); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (1964); Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, *DÆDALUS* 74, 78 (Summer 2010).

⁸ U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2013* (2014) (citing that 3 percent of black male residents of all ages were imprisoned as compared to 0.5% of white males. It is estimated that 1 in 3 black males can expect to go to prison in their lifetime compared to 1 in); Obama, *supra* note 1.

⁹ See, e.g., SENTENCING REFORM AND CORRECTIONS ACT OF 2015 (S. 2123, Introduced Oct. 1, 2015, revised April 28, 2016, 114th Congress, 2015-2017); THE FAIR SENTENCING ACT (2010); The Smart on Crime Initiative (2013), *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>; Commutation of 46 individuals with Nonviolent Drug Crimes (2015) *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>.

entrenched in poverty, crime, and health issues, touting that “America is a nation of Second Chances.”¹⁰

These “second chances” are meant to eradicate the “criminal” label stigma, a category of inequality delineated by race, class, and gender that causes those who fall under it to be framed as “dangerous,” “undeserving,” “morally deviant” and “detestable.”¹¹ With these framings, a “criminal’s” unequal access to resources and unequal treatment has been legitimated for decades.¹² And because the racial disparities within the criminal justice system find a larger percentage of the black population in the system, criminal offenders are racialized as black.¹³

THE “TOUGH ON CRIME” AGENDA CONTINUES FOR LATINOS

However, while President Obama, bipartisan organizations, and various states, policymakers and advocates have begun criminal justice reform efforts,¹⁴

¹⁰ President Barack Obama, Remarks by the President in Address to the Nation on the Commutation of 46 Individuals, THE WHITE HOUSE, July 13, 2015, <https://www.whitehouse.gov/blog/2015/07/13/president-obama-announces-46-commutations-video-address-america-nation-second-chance>; Loretta Lynch, U.S. Attorney General, Keynote Address at the 106th NAACP National Convention (July 15, 2015) (recognizing the devastating impact of over-policing and collateral consequences on children and communities) available at <http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-keynote-address-106th-naACP-annual-convention>

¹¹ See Susan T. Fiske et. al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 878-902 (finding that criminals in U.S. society are categorically among the most socially stigmatized and detested groups).

¹² DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL* (2007) (describing the process by which groups are categorized and those categorizations legitimate the allocation of resources that detrimentally affect one group over the other); See Gabriel J. Chin, *Race, The War on Drugs, and Collateral Consequences*, 6J. GENDER RACE & JUST. 253, 259 – 260 with notes (2002) (describing a “criminals” exclusion from various federal benefits, the ability to carry a firearm, live in public housing, vote, or obtain various occupational licenses).

¹³ See Jeanette Covington, *Racial Classification in Criminology: The Reproduction of Racialized Crime*, 10 SOC. FORUM 547, 547- 567 (1995); Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONT. CRIM. JUST. 276, 276-288 (2007).

¹⁴ See, e.g. The Coalition for Public Safety website available at <http://www.coalitionforpublicsafety.org> (detailing the list of bipartisan members of the Coalition, such as the Koch Brothers, ACLU, Laura & John Arnold, Americans for Tax Reform, and the Center for American Progress); Laura Barron-Lopez, *Senators Breathe New Life into Criminal Justice Reform Bill, Unveil Changes*, HUFFINGTON POST, Apr. 28, 2016, http://www.huffingtonpost.com/entry/senators-criminal-justice-reform_us_57227d46e4b01a5ebde52012; Stephen Dinan, *Lawmakers Reach Across the Aisle to Draft Criminal Justice Reform*, THE WASHINGTON TIMES, July 6, 2015,

the President's speech on immigration enforcement and its reform conveyed a very different message.¹⁵

"Criminality" was the focus of President Obama's speech to the nation on immigration. "Criminal aliens" were categorized as "dangerous" and "actual threats to our security."¹⁶ He proudly proclaimed that the deportation of "criminal aliens" was up 80 percent and their deportations would continue with increased resources for enforcement, prosecutions, detention, and removal.¹⁷ In his speech and his administration's actions over the last approximately eight years, it was clear that any individual labeled a "criminal alien" was not only unworthy of second chances, but categorized as so dangerous that expulsion from the country – most likely forever – was the only method available to secure the nation's safety. Reciting "[f]elons, not families," "[c]riminals, not children," and "[g]ang members, not a mom who's working hard to provide for her kids," President Obama promised to "prioritize, just like law enforcement does every day."¹⁸ These words expressed recurring themes that had been constructed during the rise of the "Tough on Crime" movement, that criminals are social deviants, deserving of harsh punishment, completely disconnected from families and communities, and unworthy of second chances.¹⁹ These themes and labels that had become entrenched in the nation's political and social framework and were largely responsible for the nation's booming carceral system and the consequences that state and federal governments are now struggling to correct.

President Obama's two speeches represent the disconnect that is occurring across the nation. While a growing consensus exists acknowledging the moral cost of the criminal justice system's "tough on crime" agenda on poor blacks

<http://www.washingtontimes.com/news/2015/jul/6/james-sensenbrenner-robert-scott-draft-criminal-ju/>.

¹⁵ See e.g., President Barack Obama, Remarks by the President in Address to the Nation on Immigration, THE WHITE HOUSE, Nov. 20, 2014, <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>; Michael Finnegan and James Queally, *At Rowdy but Peaceful Rally in Anaheim, Trump hits Immigration Hard*, LOS ANGELES TIMES, Mar. 25, 2016, <http://www.latimes.com/politics/la-na-pol-trump-rally-anaheim-20160525-snap-story.html>

¹⁶ President Barack Obama, Remarks by the President in Address to the Nation on Immigration, THE WHITE HOUSE, Nov. 20, 2014, <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See e.g., S. G. SHOHAM AND R. RAHAV, MARK OF CAIN – THE STIGMA THEORY OF CRIME AND SOCIAL DEVIANCE (1982); NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993 70 (1994).

and the communities in which they live, there has been a failure to recognize the way in which the enforcement of immigration law through the criminal justice system has the same consequences so many allege to be working to eradicate in criminal justice reform efforts.²⁰

The criminal justice system has expanded to “finely target” another group of individuals through the category of the “criminal alien.”²¹ While traditionally, the criminal justice system has been criticized for impacting blacks at greater percentages than any other racial group, the use of the criminal justice system to regulate immigration has expanded its enforcement to poor Latinos, both citizen and noncitizen alike.²²

Since 1988, the number of Latinos incarcerated in the United States has nearly quintupled.²³ Estimates state that between 2000-2007, Latino males represented the largest increase to the incarcerated population.²⁴ Racial profiling and racial disparities are occurring nationwide, and the “criminal alien” is

²⁰ Obama, *supra* note 1; The Coalition for Public Safety website *available at* <http://www.coalitionforpublicsafety.org> (detailing the list of bipartisan members of the Coalition, such as the Koch Brothers, ACLU, Laura & John Arnold, Americans for Tax Reform, and the Center for American Progress); Laura Barron-Lopez, *Senators Breathe New Life into Criminal Justice Reform Bill, Unveil Changes*, THE HUFFINGTON POST, Apr. 28, 2016, http://www.huffingtonpost.com/entry/senators-criminal-justice-reform_us_57227d46e4b01a5ebde52012; Stephen Dinan, *Lawmakers Reach Across the Aisle to Draft Criminal Justice Reform*, THE WASHINGTON TIMES, July 6, 2015) <http://www.washingtontimes.com/news/2015/jul/6/james-sensenbrenner-robert-scott-draft-criminal-ju/>.

²¹ 8 U.S.C. § 1101(a)(3) (An “alien” is “any person not a citizen or national of the United States”). The term “criminal alien” is used to describe a non-citizen or non-national of the United States who is removable under the Immigration and Nationality Act (INA) § 212(a)(2)(A) or § 237(a)(2)(A) for having been convicted of certain enumerated crimes. *See* Immigration and Nationality Act (INA) §§ 212(a)(2)(A), 237(a)(2)(A), 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A) (2012). This term currently includes immigration violators if prosecuted and convicted in federal criminal court, including those called “illegal aliens” since unauthorized migration is prosecuted in federal court under INA § 275& 276.

²² *See* U.S. DEP’T OF HOMELAND SEC., IMMIGR. ENFORCEMENT ACTIONS: 2013 ICE REMOVAL STATISTICS 6 (2013) *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>; STEVEN K. SMITH & CAROL J. DEFANCES, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE 1 (1996) *available at* <http://www.bjs.gov/content/pub/pdf/id.pdf>.

²³ ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 10 (2015).

²⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2011-12, 12 (2011) *available at* <http://www.bjs.gov/content/pub/pdf/fjs1112.pdf> (stating that Latinos comprised 56 percent of those charge in federal court in 2012); Garance Burke, *Latinos Form New Majority of Those Sentence to Federal Prison*, HUFFINGTON POST, Sept. 9, 2011, http://www.huffingtonpost.com/2011/09/09/hispanic-majority-prison_n_955823.html (last visited Aug. 13, 2015).

racialized as Latino, most notably Mexican.²⁵ Despite the fact that the majority of those removed are for nonviolent offenses, “criminal aliens” are viewed as “less than human” and deserving of unequal treatment.²⁶ As a result, Michael T. Light has written that “Latinos are now the most disadvantaged group with the [criminal] courts.”²⁷

IS CRIMINAL JUSTICE REFORM ONLY FOR NON-LATINOS?

In the last ten years, criminal justice reform efforts have taken front stage. The criminal justice system has been used to prosecute migrants, deport individuals, separate families, and devastate communities through the label of the “criminal alien,” increasing over the last thirty years with no end in sight.²⁸

²⁵ Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L. J. 599 (2015).

²⁶ See U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, REMOVAL STATISTICS-CRIMINAL ALIENS available at <http://www.ice.gov/removal-statistics/> (last visited Sept. 8, 2013); Tony Santaella & Nate Stewart, *Taco Cid T-Shirt: ‘How to Catch an Illegal Immigrant,’* WLTX News, Jan. 8, 2013, available at <http://www.wltx.com/news/article/215832/2/Restaurant-T-Shirt-How-to-Catch-An-Illegal-Immigrant> (racializing “illegal immigrants” as Latinos and comparing them to animals by displaying an animal trap with two tacos underneath the box as way to catch them); Kristen Butler, *Wisconsin Official Likens Immigrant to Satan, Gets Fired*, UPI.COM available at http://www.upi.com/Odd_News/Blog/2013/08/09/Wisconsin-official-likens-immigrants-to-Satan-gets-fired/7551376059567/ (decree which purports to allow for the open hunting of “illegal immigrants” by stating, “Illegal Immigrant Hunting Permit-No Bag Limit-Tagging Not Required” as well as the remark given by former WI DOT Steven Kreiser calling undocumented immigrants a “stream of wretched criminals” who he compared to Satan).

²⁷ Ingrid Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1753 (2011) (discussing the criminal prosecution against migrants for smuggling themselves) (italics omitted); Ingrid Eagly, *Criminal Justice for Noncitizens*, 88 N. Y. U. L. REV. 1126, 1196-1214 (2013) (discussing the various way that immigration status is taken into account during criminal prosecution); Michael T. Light, Michael T. Light et. al., *The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities across U.S. District Courts, 1992-2009*, 48 LAW & SOC. REV. 447, 448 (2014) (citing Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender and Age on Sentencing Outcome in U.S. Federal Courts*, 27 JUST. Q. 1-27 (2009) (although discusses their treatment in federal court, other evidence exists concerning their treatment in several state jurisdictions).

²⁸ See Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 INDIANA L. J. 643, 645 (2014) (discussing the increasing termination of parental rights of Latino noncitizens in immigration proceedings); JOANN DREBY, CENTER FOR AMERICAN PROGRESS, *HOW TODAY’S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES* (Aug. 20, 2012) available at <http://www.americanprogress.org/issues/immigration/report/2012/08/20/27082/how-todays-immigration-enforcement-policies-impact-children-families-and-communities/> (last visited Mar. 21, 2014); Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequences*

This calls into question criminal reformers' true motives and leaves many to wonder if "justice and redemption," "opportunity" and "second chances" is only for non-Latino individuals, families, and communities. However, if lawyers, policy makers, and activists are truly concerned with a fair and just criminal justice system, as reformers, they must come together to eradicate the moral consequences of the criminal justice system for all who are caught in its net.

of the Incorporation of Immigration Law into the Criminal Justice System, 54 How. L. J. 639, 665-73 (2011) (discussing the impact of crimmigration on Latinos, their families, and the community in which they live).