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Challenging the "Criminal Alien" Paradigm

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Challenging the “Criminal Alien” Paradigm

Angélica Cházaro



ABSTRACT

Deportation of so-called “criminal aliens” has become the driving force in U.S. immigration enforcement. The Immigration Accountability Executive Actions of late 2014 provide the most recent example of this trend. Even for immigrants’ rights advocates, conventional wisdom holds that if deportations must occur, “criminal aliens” should be the first to go. A voluminous “crimmigration” scholarship notes the ever-growing entwinement of criminal and immigration enforcement, but does not challenge this fundamental premise.

This Article calls for a rejection of the formulation of the “criminal alien”—the figure used to increasingly justify the preservation and expansion of a harmful immigration regime. It thus defends a normative claim that is starkly at odds with settled assumptions in advocacy and the literature: Deportations should not be distributed along the lines of migrant criminality. As a consequence, this Article argues that scholarship and advocacy should embrace “criminal aliens” as the priority group to defend against immigration enforcement efforts.

This move is long overdue. Across the political spectrum, calls are being made to trim back the excesses of the criminal justice system, with both policing and incarceration practices suffering from crises of legitimacy. Yet the immigration system continues to layer the shortcomings and dysfunctions of the criminal justice system onto immigration enforcement efforts. The latest immigration reform effort, in the form of the Immigration Accountability Executive Actions, refines what it means to be a “criminal alien,” thereby expanding partnerships with the criminal justice system and creating stronger nets of social control over broad swaths of the noncitizen population. While offering the possibility of relief from deportation to part of the undocumented population, the Executive Actions ultimately do not curb deportations. Rather, the programs refocus enforcement efforts on an ideologically acceptable target: the “criminal alien.” To avoid this outcome, and to begin to dismantle immigrant vulnerability, the “criminal alien” paradigm must be challenged.

AUTHOR

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INTRODUCTION

On November 20, 2014, after months of delays, President Obama announced the “Immigration Accountability Executive Actions,” a series of administrative reforms to the immigration system. These reforms included expanded protections from deportations—in the form of renewable “deferred action”¹—for certain segments of the unauthorized migrant population.² The response was swift and immediate. Opponents decried the “imperial presidency” and denounced the action as “executive amnesty.”³ Immigrants and their supporters celebrated the expansion of protection but criticized the President for not going far enough.⁴

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1. See *infra* Part I.C for a full discussion of the deferred action programs created by the Executive.
 2. President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [http://perma.cc/RUQ8-4VSN].
 3. Eli Saslow, *Conservative Expert on Immigration Law to Pursue Suit Against Executive Action*, WASH. POST (Nov. 22, 2014), http://www.washingtonpost.com/national/2014/11/22/f6d2b3fe-728a-11e4-ad12-3734c461eab6_story.html [http://perma.cc/R63B-FN3Z] (describing Kansas Secretary of State Kris Kobach characterizing the executive action as “[i]mperial, executive amnesty,” and “[t]he sacrificial shredding of our Constitution.”); see also Ross Douthat, *The Making of an Imperial President*, N.Y. TIMES (Nov. 22, 2014), <http://www.nytimes.com/2014/11/23/opinion/sunday/ross-douthat-the-making-of-an-imperial-president.html> [http://perma.cc/PB4B-6PEH] (claiming that the Obama Administration has become the type of imperial executive President Obama decried during his campaign).
 4. See, e.g., Gustavo Bonilla, *Obama’s Executive Order on Immigration May Not Go Far Enough for My Family*, THE GUARDIAN (Nov. 20, 2014), <http://www.theguardian.com/commentisfree/2014/nov/20/obamas-executive-order-on-immigration-not-far-enough> [http://perma.cc/67T9-KZUM] (arguing that the announced Executive Actions on Immigration will not counteract Immigration and Customs Enforcement (ICE) deadlines for deportation and voluntary removal); see also Tim Gaynor, *Relief or tears as Obama’s reform touch Arizona immigrant families*, ALJAZEERA AM. (Nov. 21, 2014), <http://america.aljazeera.com/articles/2014/11/21/obama-immigration-arizona-awatchpartyreaction.html> [http://perma.cc/2YER-8U9D] (“We were really, really hopeful that everyone was going to benefit from this and unfortunately that’s not the case.”); Michael Larkin & John Cádiz Klemack, *SoCal Undocumented Immigrants Say Obama’s Immigration Overhaul Does Not Go Far Enough*, NBC L.A. (Nov. 20, 2014), <http://www.nbclosangeles.com/news/local/SoCal-Undocumented-Immigrants-Say-President-Obamas-Immigration-Overhaul-Does-Not-Go-Far-Enough-283457871.html> [http://perma.cc/B45Z-343P] (describing the disappointment of undocumented parents and children that, even with the Deferred Action for Childhood Arrivals (DACA) executive action in place, they are “still at risk to be deported”); Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> [http://perma.cc/G6MD-4VT4] (“Immigration advocates and the president’s Democratic allies hailed the announcement even as they insisted that more should be done to provide legal protections for millions of unauthorized immigrants unaffected by Mr. Obama’s directives.”).

Nestled in one of the eleven memoranda simultaneously released by the Secretary of the Department of Homeland Security (DHS) that established the parameters of the Executive Actions⁵ was the “significant misdemeanor,” a category of criminal offenses established as one of the new priorities for immigration enforcement efforts.⁶ It transforms noncitizens convicted of a series of petty offenses, including a single driving under the influence (DUI), into so-called “criminal aliens,”⁷ and directs immigration enforcement agencies to prioritize their arrest, imprisonment, and deportation⁸ (formally known as removal).⁹

The inclusion of the significant misdemeanor in the Executive Actions as a mechanism for facilitating deportations represents just one of the latest manifestations in a growing trend: deportation of “criminal aliens” as the driving force in U.S. immigration enforcement.¹⁰ The contents of the Executive Actions reflect the broadly accepted wisdom that, if deportations must occur, “criminal aliens” should be the first to go.¹¹ Thus, the Executive Actions form part and parcel of the constant growth of immigration-related practices and activities that can be categorized as criminal.¹² Even immigration scholars who have carefully and insightfully

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5. See U.S. DEP’T. HOMELAND SEC., FIXING OUR BROKEN IMMIGRATION SYSTEM THROUGH EXECUTIVE ACTION—KEY FACTS, (Jan. 5, 2015), <http://www.dhs.gov/immigration-action> [<http://perma.cc/REK7-4CTH>].
 6. See Memorandum from Jeh C. Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir. U.S. Immigration & Customs Enft, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., Leon Rodriguez, Dir. U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec’y for Poly 4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<http://perma.cc/RCY5-6VGF>] [hereinafter Priorities Memo]; *infra* Part I.A for a full discussion of the significant misdemeanor.
 7. Throughout the text, I will use the term “criminal alien” in quotes, unless I am referring to the criminal alien category. The Article seeks to problematize the unquestioning use of the concept of the “criminal alien” to guide immigration law and policy, and the use of quotes contributes to that goal.
 8. I will use the colloquial term “deportation” throughout the Article to refer to the process of removal. Removal is the legal term for the formal expulsion of a noncitizen from the United States when the noncitizen has been found removable for violating the immigration laws. Prior to 1997 deportation and exclusion were separate removal procedures. The Illegal Immigration Reform and Immigration Responsibility Act consolidated these procedures into one removal function. Deportation continues to be used outside the immigration legal context to refer to removal, and I adopt that term throughout.
 9. Priorities Memo, *supra* note 6, at 2.
 10. See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128 (2013).
 11. See, e.g., President Barack Obama, *supra* note 2 (“That’s why, over the past six years, deportations of criminals are up 80 percent. And that’s why we’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids. We’ll prioritize, just like law enforcement does every day.”).
 12. See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (arguing that the “theories, methods,

dissected the links between the criminal and immigration system stop short of making the normative claim that deportations should not be distributed along the lines of migrant criminality.¹³ Kevin R. Johnson’s insight that “the ‘criminal alien’ continues to be one of the most reviled characters of all of U.S. law, with many enemies and extremely few political friends (even among immigrant rights advocates),” continues to ring true.¹⁴

This Article challenges the accepted wisdom, arguing for the necessity of dismantling the category of criminal alien as a vector for the harms of immigration enforcement. It does so by analyzing the 2014 Immigration Accountability Executive Actions, positing that the actions represent neither the amnesty decried by critics nor the curb to deportations hoped for by advocates. Instead, by widening who is considered a “criminal alien,” the Executive Actions represent a moment of expansion and consolidation of harmful systems targeting immigrant communities.

The fact that the deportation of “criminal aliens” has become the driving force in U.S. immigration enforcement has led at least one scholar to declare federal immigration enforcement a “criminal removal system.”¹⁵ This system requires the constant production of populations who can be labeled “criminal aliens” and thus be justifiably arrested, detained, and deported. Given its reliance on the criminal system, this production of “criminal aliens” occurs along lines of race,¹⁶ class,¹⁷ and other vectors of social vulnerability.¹⁸ This places immigration enforcement

perceptions, and priorities” of the criminal justice system have been incorporated into the immigration enforcement system).

13. See, e.g., Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 614 (2013) (tracking major developments in immigration law and immigration enforcement that have led to criminalization of immigrants); Legomsky, *supra* note 12, at 469 (arguing that the “theories, methods, perceptions, and priorities” of the criminal justice system have been incorporated into the immigration enforcement system.); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003) (describing the criminalization of immigration law through law enforcement-focused reforms).
14. Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1607 (2009).
15. See Eagly, *supra* note 10, at 1128.
16. See Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1549 (2011) (arguing that the Supreme Court in *Terry v. Ohio* and *United States v. Brignoni-Ponce* effectively enables procedural racial profiling); see also Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (analyzing the Plenary Power Doctrine and its application against Asian and African Americans).
17. See Yolanda Vásquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 666–67 (2011).
18. See Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 385 (2012) (analyzing Secure Communities (S-Comm)’s disparate impact on queer and transgender undocumented communities).

firmly in line with the practices and activities of the criminal justice system.¹⁹ This Article examines the Executive Actions in this light, revealing them as part of a broader thrust not to curb detentions and deportations, but to redirect them toward a more ideologically acceptable set of targets: so-called “criminal aliens.”

The ongoing legal battle over whether certain parts of the Executive Actions will be implemented only serves to mask the preservation of practices that lead to record levels of immigration enforcement. The possible extension of deferred action (protection from deportation) to unauthorized migrants who arrived in the United States as children, and to unauthorized migrant who are parents of U.S. citizens (the two categories included in the Executive Actions’ protections), is currently being contested in the courts. Twenty-six states sued to stop its implementation,²⁰ and the Obama Administration and immigrant advocates are strenuously defending it.²¹ This legal battle, which falls primarily on partisan lines, obscures the fact that expanding deferred action would not lead to a corresponding decrease in deportations. If deferred action is ultimately implemented, those who do not qualify for its protections will receive the full brunt of DHS’s immigration enforcement efforts. The legal battle also ignores that, if deferred action is implemented, the capture of applicants’ biometrics data and the permanent storage of this data in the immigration database relied upon by DHS’s enforcement agencies to apprehend, detain, and deport those who come into contact with the criminal system would mark deferred action applicants as “criminal aliens”-in-waiting.²² Thus, even recipients of deferred action would be only one police stop away from being labeled “criminal aliens,” targeted for immigration enforcement practices.

This Article seeks to unmask these practices and examine how the United States has reduced the response to the social crisis of unauthorized migration to the logics of criminality and expulsion. These logics are grounded in narratives that pit worthy (hardworking, family-oriented) immigrants against unworthy (criminal alien) immigrants.²³ The President’s insistence that the Executive Ac-

19. See Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL’Y REV. 429 (2011).

20. Order of Temporary Injunction, *Texas v. United States*, No. B-14-254 (S.D. Tex. Feb. 16, 2015), <http://www.scribd.com/doc/255992850/Order-of-Temporary-Injunction-Texas-v-United-States> (order granting temporary injunction of implementation of executive action).

21. See Katie Zezima, *Obama: ‘We Will Be as Aggressive as We Can’ on Immigration Appeal*, WASH. POST. (Feb. 25, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2015/02/25/obama-meets-with-immigration-activists-ahead-of-florida-town-hall> [<http://perma.cc/PRX7L9WG>] (advocates and President Obama prepare to “aggressively” defend the new deferred action program enjoined by the Texas District Court).

22. See *infra* Part I.C for a full discussion of the biometrics requirement and its possible consequences.

23. See Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 112 (2013).

tions seek to target immigration enforcement against “felons, not families” places it squarely within these narratives.²⁴ By playing into these false binaries, the Executive Actions appear designed to teach us how to abandon entire populations through consolidating and strengthening of the criminal alien category.²⁵

This Article proposes new terms of engagement, building on, but departing from, the existing literature on the intersections of criminal and immigration law and policy. It builds on scholarship addressing the shortcomings of the criminal justice system, arguing that any attempt to avoid further consolidation of the criminal alien category requires an engagement with the crisis of legitimacy currently facing the criminal system. While many have used the language of “collateral consequences” to acknowledge the disparate impact on those persons caught between the criminal and immigration regimes,²⁶ this Article engages with the way the dysfunctions of the criminal system are overlaid on the immigration system to create cumulative consequences for those whose identity marks them as both criminal and alien.

The Article proceeds in three Parts. Part I analyzes three of the Executive Actions memoranda released on November 20, 2014.²⁷ It argues that the memorandum entitled, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants” (Priorities Memo), which redefined what segments of the noncitizen population constitute priorities for immigration enforcement, ultimately developed new mechanisms to facilitate the arrest and detention of undocumented immigrants.²⁸ It finds that the Secure Communities Memorandum (Secure Communities Memo), which announced the creation

24. President Barack Obama, *supra* note 2; *see also* President Barack Obama, Remarks by the President on Immigration (Nov. 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/21/remarks-president-immigration> [<http://perma.cc/BZS8-47PB>] [hereinafter Nov. 21, 2014 Obama Remarks] (“We’ll keep focusing enforcement resources on actual threats to our security. But that means felons, not families.”).

25. Lisa Marie Cacho, *The Rights of Respectability: Ambivalent Allies, Reluctant Rivals, and Disavowed Deviants*, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP 190, 199 (Rachel Ida Buff ed., 2008).

26. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 703–04 (2002) (explaining the collateral consequences rule and observing that courts have not explained how the rule “fits into the system for evaluating claims of ineffective assistance of counsel”).

27. While eleven memoranda were released as part of the Executive Actions, this Article focuses on the three that arguably have the biggest impact on unauthorized migrant populations currently living in the United States: “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants” (Priorities Memo, *supra* note 6), the Secure Communities Memo (*infra* note 29), and “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents” (Deferred Action Memo, *infra* note 30).

28. *See* Priorities Memo, *supra* note 6.

of the Priority Enforcement Program (PEP) simply rebranded, rather than replaced, Secure Communities (S-Comm)—a predecessor program that established full information sharing between local law enforcement and federal immigration officials.²⁹ Finally, through an analysis of the Deferred Action Memorandum (Deferred Action Memo)—the memorandum that lays out the parameters of the new extended forms of deferred action for childhood arrivals and parents of U.S. citizens and Lawful Permanent Residents—Part I examines the ideological justifications for protecting certain sectors of the undocumented population from detention and deportation, while hypercriminalizing the rest.³⁰ In Part II, the Article lays out how the three memos contribute to the phenomenon known as net widening—creating wider, stronger, and different nets of social control over broad swaths of the noncitizen population.³¹ It also examines how the rhetoric that attempts to differentiate immigrants from so-called real criminals contributes to net widening and inadvertently shores up the ever-expanding category of criminal alien as one suitable for the distribution of the harms of detention and deportation. Part III argues that in order to avoid future cycles of refinement and expansion of criminal enforcement efforts, advocates and scholars must fully grapple with notions of migrant criminality and criminality in general, in an effort to dismantle the distribution of harms based on being a “criminal alien.” Ultimately, by examining the Executive Actions through the lens of the “criminal alien,” this Article seeks to both shape how scholars conceptualize the continual expansion of this category and encourage immigrant advocates to invest in strategies that can halt this expansion and begin its downfall.

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29. See Memorandum from Jeh C. Johnson, Sec’y, U.S. Dep’t of Homeland Sec. on Secure Communities to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, Megan Mack, Officer, Off. of Civil Rights & Civil Liberties & Phillip A. McNamara, Assistant Sec’y, Intergovernmental Affairs (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<http://perma.cc/U4TU-U2WA>] [hereinafter “Secure Communities Memo”].
30. See Memorandum from Jeh C. Johnson, Sec’y, U.S. Dep’t of Homeland Sec. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents, to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t & R. Gil Kelikowske, Comm’r, U.S. Customs & Border Prot. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/8B9C-6QZN>] [hereinafter the “Deferred Action Memo”].
31. See James Austin & Barry Krisberg, *Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform*, 18 J. RES. CRIME & DELINQ. 165, 169 (1981) (“The criminal justice system can be conceptualized as a net or series of nets functioning to regulate and control personal behavior. Each component of the justice system . . . is authorized by the state to intervene in our personal lives.”).

I. THE EXECUTIVE ACTIONS MEMORANDA

A. The Priorities Memo

1. The Creation of the Significant Misdemeanor

In June 2012, the Secretary of DHS announced the creation of Deferred Action for Childhood Arrivals (DACA), a program that offered a reprieve from deportation for eligible unauthorized migrants who had arrived in the United States as children.³² Applications for DACA are processed by U.S. Citizenship and Immigration Service (USCIS), the federal agency charged with administering immigration benefits.³³ Those who qualify receive a renewable employment authorization document and reprieve from deportation for two years.³⁴ DACA represents a victory for immigrant youth who had been organizing for reform;³⁵ recipients of DACA are able to receive social security numbers, and in some states driver's licenses or other forms of formal identification.³⁶ Although DACA

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32. See Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., on Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children, to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enft (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/F7JG-SP5R>] [hereinafter June 15, 2012 Discretion Memo].
33. See *About Us*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/aboutus> [<http://perma.cc/92X8-KU68>] (last visited Jan. 5, 2016).
34. See *General Information: How Do I Request Consideration of Deferred Action for Childhood Arrivals?*, U.S. CITIZENSHIP & IMMIGR. SERVS. 2 (Oct. 2013), <http://www.uscis.gov/sites/default/files/USCIS/Resources/daca.pdf> [<http://perma.cc/Y3Z8-7UXP>].
35. See Miriam Jordan, *Anatomy of a Deferred-Action Dream: How Undocumented Youth Brought Their Cause to the Country*, WALL ST. J. (Oct. 14, 2012), <http://www.wsj.com/articles/SB10000872396390443982904578046951916986168> [<http://perma.cc/EL4R-JN7R>] (Describing marches and protests in Miami, Washington D.C., and Los Angeles, including the 1,500 mile "Trail of Dreams" where four youths marched from Miami to Washington, D.C. to promote the DREAM Act); see also Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 271-72 (2013) (describing the organization of DREAMers into the United We Dream organization preceding the 2010 election season, rallying in public events, and publicizing their opposition to the Obama Administration absent more promises from the Administration).
36. Kari E. D'Ottavio, *Deferred Action for Childhood Arrivals: Why Granting Driver's Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 MD. L. REV. 931, 934 (2013) ("The majority of states . . . confirmed that DACA beneficiaries were eligible for driver's licenses."); see also *Access to Driver's Licenses for Immigrant Youth Granted DACA*, NAT'L IMMIGR. L. CTR. 1 (May 31, 2015), <http://www.nilc.org/document.html?id=1120> [<http://perma.cc/M7YQ-X444>] (last updated May

is restricted to a particular population, for those who do qualify, the downsides appear to be few.³⁷ DACA seems to be a limited, but nonetheless significant achievement.

Not all undocumented immigrant youth qualify for DACA, however. The application form inquires about criminal history, and the instructions, as well as USCIS’s guidance on DACA, clarify that a broad range of criminal convictions will disqualify applicants.³⁸ This in itself is not unusual; every application for immigration relief inquires about criminal history. In creating the application process for DACA, however, DHS created a new crime-based category disqualifying applicants for the immigration benefit—the significant misdemeanor.³⁹ The category had no statutory basis and was a wholesale invention of the Executive Branch.

The instructions for DACA define the significant misdemeanor as an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or one for which the individual was sentenced to time in custody of 90 days or more (not including a suspended sentence). The instructions for DACA further add that anyone convicted of three or more misdemeanors not arising out of the same incident is also disqualified from applying for the program.⁴⁰

In the rush to celebrate the win, and to mobilize resources to assist potential DACA recipients in submitting their applications, little attention was paid by immigration advocates to the emergence of this new category. Attorneys who specialize in the intersection of criminal and immigration law did create advisories and trainings for public defenders who now had to understand the significant

31, 2015) (“[O]therwise-eligible DACA recipients who obtain an employment authorization document and a Social Security number are now able to obtain a license in every state”).

37. See Deferred Action Memo, *supra* note 30, at 2–3.

38. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#national-security> [<http://perma.cc/WKA3-EWP8>] (last updated Aug. 3, 2015) (conviction of a felony offense, significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct precludes DACA consideration); see also Priorities Memo, *supra* note 6, at 4 (categorizing the second-highest priority individuals for deportation for ICE: “aliens convicted of a ‘significant misdemeanor,’ which for these purposes is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence) . . .”).

39. Priorities Memo, *supra* note 6, at 4.

40. *Id.* at 3–4.

misdeemeanor in order to properly advise their noncitizen clients on the immigration consequences of their criminal matters.⁴¹ For the most part, however, the category remained mostly ignored and undertheorized. For two and a half years, the significant misdemeanor existed only as a disqualifying corollary to an application for a nonstatus (deferred action) that was meant to be a temporary fix while Congress passed lasting immigration reform.

2. The Reemergence of the Significant Misdemeanor

On November 20, 2014, the significant misdemeanor made its first appearance outside the DACA application context when President Obama announced a new round of executive actions on immigration that expanded on the 2012 announcement of DACA.⁴² These “Immigration Accountability Executive Actions” were accompanied by DHS’s simultaneous release of a series of memoranda laying out proposed reforms to the immigration enforcement system.⁴³ The memos were directives from DHS Secretary Jeh Johnson to the various directors of DHS’s subagencies charged with managing immigration benefits and enforcement.⁴⁴ This Part focuses on the Executive Action memorandum referred to as the Priorities Memo and the reintroduction of the significant misdemeanor category in this context.⁴⁵

The Priorities Memo establishes three categories of unauthorized migrants who will henceforth be considered priorities for the immigration enforcement efforts carried out by both Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP)—the DHS agencies charged with internal immigration enforcement and enforcement of the immigration laws at borders and ports of entry, respectively. The logic undergirding the Priorities Memo is that the arrest and deportation of the approximately 11 million unauthorized migrants living in the United States remains unfeasible; the memo states, “[d]ue

41. See, e.g., *Understanding the Criminal Bars to the Deferred Action Policy for Childhood Arrivals*, IMMIGRANT LEGAL RESOURCE CTR. (Oct. 2012), http://www.ilrc.org/files/documents/ilrc-understanding_criminal_bars_to_deferred_action_5.pdf [<http://perma.cc/F4YG-6AS3>]; see also *Practice Advisory: Identifying and Keeping Client's Eligible for the New "Deferred Action for Childhood Arrivals (DACA)" Program*, WASH. DEF. ASS'N 4 (Sept. 12, 2012), http://www.defensenet.org/immigration-project/immigration-resources/WDAIP%20Dreamer%20Deferred%20Action%20Advisory%209-13-2012_final.pdf; see also *Padilla v. Kentucky*, 559 U.S. 356, 372–75 (2010) (holding that criminal defense attorneys render ineffective assistance of counsel when they fail to warn their noncitizen clients of the immigration consequences of certain pleas).

42. See President Barack Obama, *supra* note 2.

43. See U.S. DEP'T HOMELAND SEC., *supra* note 5.

44. *Id.*

45. Priorities Memo, *supra* note 6.

to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States.”⁴⁶ Thus, the Memo outlines priority categories to assist ICE and CBP agents in deciding whether to place an individual in removal (deportation) proceedings, as well as aid agents in deciding “whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal or join in a motion or cause; and whether to grant deferred action, parole or a stay of removal instead of pursuing removal in a case.”⁴⁷

The Memo defines the top priority for these efforts, Priority 1, as “threats to national security, border security, and public safety,” with terrorism suspects, individuals caught crossing the border unlawfully, gang members, and convicted felons constituting groups who “must be prioritized” for removal.⁴⁸ The Memo labels “misdemeanants and new immigration violators” as Priority 2, the group that represents the “second-highest priority for apprehension and removal.”⁴⁹ Subsection (a) of Priority 2 lists individuals with three or more misdemeanor convictions, and subsection (b) lists “aliens convicted of a ‘significant misdemeanor’” as individuals who “should be removed.”⁵⁰ Priority 3 names those who have been issued an order of removal after January 1, 2014, as the final, and lowest-priority, enforcement priority category.⁵¹

The Priority Memo’s addition of the significant misdemeanor to an enforcement-related document is a notable development. The significant misdemeanor category did not exist before the June 2012 creation of DACA—a program that was ostensibly created to protect the most respectable and sympathetic among unauthorized migrants in the United States, those who came to this country as children.⁵² DACA was created with the stated purpose of offering deportation relief to this population. With the significant misdemeanor making the leap from a program that offered deportation relief in 2012 to the Priorities Memo in 2014, the act of curbing deportation becomes directly linked to the expansion of the categorical criminalization of immigrants.

This link is heightened by the appearance of the significant misdemeanor in two other 2014 Executive Actions memoranda. The Secure Communities Memo, discussed in detail in Part I.B, *infra*, names significant misdemeanants as among the category of noncitizens whose transfer immigration officials should

46. *Id.* at 2.

47. *Id.*

48. *Id.* at 3.

49. *Id.*

50. *Id.* at 3–4.

51. *Id.* at 4.

52. *See* June 15, 2012 Discretion Memo, *supra* note 32.

seek from local law enforcement directly to federal immigration agency custody (and probable detention and removal).⁵³ Additionally, in the Deferred Action Memo, discussed in detail in Part I.C, the significant misdemeanor appears as a disqualifying factor for the expanded form of DACA, and for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).⁵⁴

The 2014 Executive Actions came about after advocates pushed the President to use his authority to curb the record levels of deportations.⁵⁵ The creation of DAPA and expanded DACA did expand the charmed circle of those who would not be subject to deportation. With the inclusion of the significant misdemeanor in the Priorities Memo, however, the very category used to disqualify some from protection for deportation would also render them targets for enforcement efforts. With the consolidation of the significant misdemeanor category as a priority category for enforcement efforts, deportations, rather than being curbed as advocates sought, will likely just be redirected toward newly named categories of criminal aliens.

3. The Significant Misdemeanor in Context

The creation of the significant misdemeanor category, and the accompanying prioritization of unauthorized migrants with misdemeanor convictions for deportation, constitute only the latest example of the criminal justice system merger with immigration enforcement efforts.⁵⁶ The significant misdemeanor joins the pantheon of categories, including the aggravated felony and the crime involving moral turpitude, that for over a century have served as grounds for triggering immigration enforcement action, as well as for disqualifying immigrants for lawful admission into the United States and for deporting long-term residents of the United States.⁵⁷ This forms part of the context for the rhetoric on display in the President's speech announcing the Executive Actions:

53. See Secure Communities Memo, *supra* note 29.

54. See Deferred Action Memo, *supra* note 30.

55. See, e.g., The Editorial Board, *Yes He Can, on Immigration*, N.Y. TIMES (Apr. 5, 2014), <http://www.nytimes.com/2014/04/06/opinion/sunday/yes-he-can-on-immigration.html> [<http://perma.cc/B458-AVCK>] (decrying unprecedented levels of deportation under the Obama Administration, endorsing the Not One More campaign, and calling for the removal of quota-based deportation programs, an end to Secure Communities, and an extension of sympathetic programs like the DREAM Act to other vulnerable undocumented groups).

56. See Chacón, *supra* note 13.

57. See Miller, *supra* note 13 (describing the criminalization of immigration law through law enforcement-focused reforms); see also Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 407–09 (2006) (describing the historical movement from crimes of “moral turpitude” to a wider variety of crimes that trigger deportation proceedings).

Undocumented workers broke our immigration laws, and I believe that they must be held accountable—especially those who may be dangerous. That’s why, over the past six years, deportations of criminals are up 80 percent. And that’s why we’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mother who’s working hard to provide for her kids. We’ll prioritize, just like law enforcement does every day If you meet the criteria, you can come out of the shadows and get right with the law. If you’re a criminal, you’ll be deported.⁵⁸

While anti-immigrant actors accused the President of going too far in providing what they termed an “executive amnesty,” immigrant advocates critiqued the “felons, not families” line as overly simplistic, divisive, and dehumanizing.⁵⁹ When viewed in the context of decades of deployment of categories like the aggravated felony and crime involving moral turpitude, however, the rhetoric is unsurprising. The “felons not families” catchphrase reveals the federal government’s view that a criminal conviction shifts an immigrant’s identity from a possible parent or worker or child to a body to be processed for detention and deportation. Immigrants have come to be defined by their contact with the criminal justice system; a noncitizen with a criminal record automatically becomes a felon indistinguishable from her criminal record.

By including the significant misdemeanor category under Priority 2, the Priorities Memo clarifies that for the purposes of “focusing enforcement resources on actual threats to our security,” the Executive Branch considers individuals with misdemeanor convictions to be “felons, not families.”⁶⁰ They are completely divorced from their familial or community contexts and are not allowed to simultaneously be considered partners, siblings, or parents. Obama’s repeated invocation of the “felons, not families” line mirrors the reality that an increasingly broad range of criminal convictions is enough to transform a noncitizen into a felon—permanently marked as unworthy of membership in society, and thus a proper target for immigration enforcement efforts.⁶¹ The felon category, at least as wielded by Obama in his speeches, has gone far past the borders of the actual felony conviction in criminal court. As clarified by the Priorities Memo, the individuals newly designated by the Executive Branch as

58. President Barack Obama, *supra* note 2; *see also* Nov. 21, 2014 Obama Remarks, *supra* note 24.

59. *See, e.g.*, Lauren-Brooke Eisen, *Felons, Not Families’ Oversimplifies a Complex Reality*, HUFF. POST: THE BLOG (Nov. 24, 2014, 12:44 PM), http://www.huffingtonpost.com/laurenbrooke-eisen/felons-not-families-overs_b_6212550.html [<http://perma.cc/44QH-F4D2>].

60. *See* Nov. 21, 2014 Obama Remarks, *supra* note 24; *see also* Priorities Memo, *supra* note 6.

61. Priorities Memo, *supra* note 6, at 3–4.

“criminal aliens,” include those convicted of the reified significant misdemeanor, as well as those convicted of three or more misdemeanors.⁶²

4. Cumulative Harms: Layering Immigration Enforcement on Criminal Justice Dysfunction

The Priorities Memo’s refocusing of immigration enforcement toward individuals with an increasingly broad array of misdemeanor convictions demands an analysis of the mechanisms by which immigrants become misdemeanants. By explicitly naming misdemeanants as priorities for detention and removal, DHS piles the shortcomings of the misdemeanor adjudication system on top of the harms of the immigration system, creating cumulative harms.

A broad and growing literature describes the effects stemming from criminal convictions as collateral consequences.⁶³ While much of this literature has touched on the consequences of felony convictions, the consequences extend to all convictions, including misdemeanor ones.⁶⁴ The collateral consequences of misdemeanors, even for individuals who do not spend a day in jail, include fines and supervisions that derail economic and personal well-being, inhibiting an individual’s access to public benefits and higher education (including educational loans), and preventing him or her from getting a job, loan, or lease.⁶⁵ Immigration consequences are chief among the frequently listed collateral consequences of criminal convictions. Indeed, an entire “cimmigration” literature and legal practice have grown around this topic, encouraged by the Supreme Court’s decision in *Padilla v. Kentucky*, which recognizes that competent criminal defense must include consideration of the immigration consequences of criminal pleas.⁶⁶

62. *Id.*

63. See, e.g., Michael Pinard, *Collateral Consequence of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010) (comparing collateral consequences of criminal convictions in the United States with other countries); see also DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (Univ. of Chicago Press, 2007) (examining the effect of easily accessible arrest records on employment opportunities for convicted individuals); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C.L. REV. 255, 282–83 (2004) (discussing felon disenfranchisement).

64. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1089–94 (2015) (arguing for decriminalization of minor offenses to reduce the collateral consequence of nonfelony convictions).

65. *Id.* at 1103.

66. *Padilla v. Kentucky*, 559 U.S. 356, 374–75 (2010); see also César Cuauhtémoc García Hernández, *Strickland-Lite: Padilla’s Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844 (2013) (analyzing a trend toward extension of the right to counsel in immigration proceeding and concluding that *Padilla* adopts a “*Strickland-lite*” approach that weakens the standard for effective assistance of counsel as compared to criminal proceedings).

Given the full integration of the criminal and immigration systems—an integration that flows in both directions—the term collateral consequences may no longer serve to describe the relationship between the two systems. The immigration system has now been injected into the criminal system in the form of requests by ICE to the criminal system to notify ICE officers of the arrests of noncitizens (known as ICE detainers or ICE holds); the full integration of immigration databases into the fingerprinting procedures of the criminal system; and the deputizing (both formal and informal) of local law enforcement to carry out immigration functions.⁶⁷ Likewise, the criminal system has been injected into the immigration system, with the traditionally civil immigration system taking on the punitive aspects of criminal law,⁶⁸ and with the vast expansion of the categories of crimes that can result in expulsion or exclusion.⁶⁹ With this backdrop, the term collateral consequences centers only the criminal experience and sees all consequences of the criminal contact as secondary. Particularly in the misdemeanor realm, however, the criminal consequences may pale compared to the almost guaranteed months (and possibly years) of immigration detention and the almost certain exile that many misdemeanor convictions now engender. For these reasons, cumulative consequences may be a more apt descriptor than collateral consequences.

In the context of the creation of the significant misdemeanor, peeling apart these layers of cumulative harms requires an examination of the dysfunctions of the misdemeanor adjudication system. In a series of articles, criminal scholar Alexandra Natapoff presents a devastating critique of the use of the misdemeanor as a tool of criminal punishment.⁷⁰ Contending that the “U.S. criminal process

67. See Chacón, *supra* note 13, at 643–46.

68. See Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000) (comparing distinctions between punitive civil remedies and deportation proceedings to argue that the procedural safeguards present in criminal proceedings should extend to deportation proceedings); see also Legomsky, *supra* note 12 (arguing that “immigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model” while explicitly rejecting the procedural ingredients of criminal adjudication).

69. The drastic rise in the percentage of federal criminal cases related to the immigration crimes of illegal entry and illegal reentry, alongside the proliferation of state and local ordinances criminalizing migration-related offenses, also forms part of this picture. See Chacón, *supra* note 13, at 614–16.

70. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313–14 (2012) [hereinafter Natapoff, *Misdemeanors*] (arguing that informal, deregulated processing, weak prosecutorial screening, poor defense bar, and high plea rates contribute to mass conviction of petty misdemeanor offenses, which carry harsh consequences and implicate due process concerns); see also Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013) (critiquing the practice of aggregate treatment of misdemeanor offenses, which are increasingly addressed by category instead of individual treatment according to standard local practices and pricing); Natapoff,

cannot be fully understood or evaluated without acknowledging the centrality of petty offenses[.]”⁷¹ she finds that the lack of procedural integrity and the racialization of crime constitute core attributes of misdemeanor convictions.⁷² Natapoff presents convincing evidence that the lack of procedural integrity in misdemeanor processing frequently leads to wrongful convictions rooted in the absence of evidence of individual fault.⁷³ On the racialization of crime, she demonstrates that the lack of procedure during the plea or trial phase of the misdemeanor process transfers the legal authority, as to who will be convicted, to police officers at the moment of arrest. This transfer means that a misdemeanor arrest is overwhelmingly likely to result in a misdemeanor conviction. Because racial profiling is a reality in urban policing, the increased legal authority given to police officers translates into the mass criminalization of people of color, particularly those most likely to draw police attention, including young men, and queer and gender-nonconforming people.⁷⁴ Drawing in part on Natapoff’s work, immigration scholar Jason Cade has also tackled what he calls the “plea bargain crisis” for noncitizens in misdemeanor courts, arguing that for reasons having to do with dysfunction in both the criminal and immigration systems, a noncitizen’s low-level conviction does not reliably indicate guilt and is likely to be the product of unchecked constitutional rights violations.⁷⁵

Young Latino men, the group that disproportionately bears the brunt of the immigration detention and removal apparatus,⁷⁶ are among the young men of color most likely to be subject to misdemeanor arrests without probable cause, particularly when they reside in poor communities where high-volume policing is the norm.⁷⁷ Natapoff lays out the many reasons police may arrest for reasons other than probable cause, including control of the streets and assertion of police authority.⁷⁸ These arrests are rarely scrutinized, and lack of prosecutorial screening, lack of counsel, and the pressure to plead result in a misdemeanor arrest translating almost automatically into a conviction. With ten million misdemeanor cases filed

supra note 64 (analyzing the recent trend toward decriminalizing misdemeanor offenses to meet the current mass incarceration policy developments).

71. Natapoff, *Misdemeanors*, *supra* note 70, at 1317.

72. *Id.* at 1317.

73. *Id.*

74. *Id.* at 1319.

75. See Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013).

76. See ICE *Deportations: Gender, Age, and Country of Citizenship*, TRAC IMMIGR. (Apr. 9, 2014), <http://trac.syr.edu/immigration/reports/350> [<http://perma.cc/X5QV-V7H3>] (noting that between 2012 and 2013, more than 90 percent of ICE deportees were male).

77. Natapoff, *Misdemeanors*, *supra* note 70, at 1330–31.

78. *Id.* at 1331–32.

annually in the United States (as compared to the one million felony convictions entered),⁷⁹ the misdemeanor process represents “the concrete mechanism by which the system is able to generate ‘criminals’ based on race, class, and social vulnerability, unconstrained by evidentiary requirements.”⁸⁰

The problems with which Natapoff and others have diagnosed the criminal justice system, particularly with regard to misdemeanor offenses, become layered on top of the harms of the immigration system. This cumulative effect can be witnessed most clearly when considering the role that race plays in immigration enforcement, at both the local criminal enforcement and federal immigration enforcement levels. Jennifer Chacón, Yolanda Velasquez, and others have tracked the way local law enforcement officers may “more vigorously police populations that they identify as potentially ‘illegal,’” leading to the racial profiling of poor Latinos and others who live in immigrant communities.⁸¹ These individuals may be more likely “to be stopped, arrested, and detained for low-level state and local criminal offenses as they are caught up in an informal dragnet aimed at immigration violators.”⁸² The racially disparate effects of this informal dragnet have been verified by researchers at the Warren Institute, who found that when local police in Irving, Texas, were given 24-hour access to ICE officers, Latinos were arrested for the lowest-level misdemeanor offenses at rates significantly higher than whites and African Americans.⁸³ The brushes with law enforcement for low-level misdemeanors led to many of those arrested being transferred to ICE custody, presumably for detention and deportation.⁸⁴ The study’s authors concluded that the ICE-police partnership “tacitly encourages local police to arrest Hispanics for petty offenses.”⁸⁵

The racialization of crime endemic to the misdemeanor process is layered on top of the informal dragnet deployed against those who are perceived to be not only people of color but also potentially noncitizens. These dual phenomena present arguably the worst manifestation of the cumulative harms of the criminal and migratory control systems. The Executive Branch’s buttressing of the significant misdemeanor priority (and the three or more misdemeanor priority category)

79. *Id.* at 1314–15.

80. *Id.* at 1368.

81. Chacón, *supra* note 13, at 646.

82. *Id.*

83. Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY 1, 2 (Sept. 2009), https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf [<https://perma.cc/J4JB-JPEY>].

84. *See id.* at 3.

85. *Id.*

should be considered in light of these cumulative harms. By explicitly naming misdemeanants as priorities for detention and removal, DHS layers the shortcomings of the misdemeanor adjudication system on top of the harms of the immigration system. DHS generates “criminal aliens” along lines of race, class, and social vulnerability in conjunction with the criminal justice system.⁸⁶ The inclusion of the significant misdemeanor and the three or more misdemeanors categories in the Priorities Memo—categories that focus on a broad range of minor criminal conduct for which the most disadvantaged populations are targeted—reaffirms the validity of using crime as a tool of immigration enforcement, even as it ignores the dysfunctions in the criminal system.⁸⁷

5. Immigration Enforcement Has Become Self-Generating

The inclusion of misdemeanors in the Priorities Memo also contributes to the self-generating nature of the immigration enforcement system, a process parallel to what is occurring in the criminal system. In her article, “Incarceration American-Style,” criminal scholar Sharon Dolovich explores the claim that the U.S. carceral system, while falling far short of serving society’s interests, has become immune from challenges and has become self-perpetuating.⁸⁸ She argues that there is nothing inevitable about incarceration, but that the inability to imagine a response other than incarceration stems not from “the offenders’ choice to offend, but society’s choice to respond to those offenses with time in prison.”⁸⁹ Incarceration, according to Dolovich, “has become the first-line policy response to a range of social problems, the instinctive American response to perceived threats to the social order.”⁹⁰ She further proposes that the criminal system “makes its own inmates.”⁹¹ She gives examples of the harms and humiliations that accompany prison life and life after prison for those marked as ex-cons; these harms are a force in generating behavior that leads to further imprisonment.⁹²

The immigration enforcement apparatus appears to have also reached the point of self-generation, albeit through different mechanisms. This is due, in no small part, to the ever-increasing ties between criminal punishment and immigra-

86. See Natapoff, *Misdemeanors*, *supra* note 70, at 1368 (discussing the effect of misdemeanors on the generation of criminals along lines of race, class, and social vulnerability).

87. See Natapoff, *supra* note 64, at 1066 (arguing that decriminalization of minor offenses, while addressing procedural questions regarding punishment, fails to address more global criticisms of the criminal justice system).

88. See Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POLY REV. 237 (2009).

89. *Id.* at 241.

90. *Id.* at 239.

91. *Id.* at 243.

92. *Id.*

tion enforcement.⁹³ The self-generation of immigration enforcement can be seen in the way that the President’s Executive Actions marked a new category of people—those who have been convicted of significant misdemeanors or three or more misdemeanors—as criminal aliens.⁹⁴ Even as the Executive Branch potentially removed some individuals from ICE’s crosshairs by expanding deferred action through DAPA and expanded DACA, it redirected enforcement by expanding the category of those who were proper subjects of ICE’s attentions. The “felons, not families” catchphrase in the President’s speech announcing the Executive Actions, combined with the expansion of the categories of those considered criminal aliens to include more petty offenders, displays this self-generating logic; the federal immigration enforcement apparatus can no longer seem to imagine a response to unlawful migration that does not further the criminalization of immigrants. As in the criminal context, then, the federal immigration system “makes its own inmates”⁹⁵ by constantly expanding the categories of immigrants who can be subject to its detention and deportation powers.

Ironically, it is exactly this expansion of immigration enforcement, hand in hand with the consolidation of the immigration and criminal systems, that also leads the immigration system to “make its own inmates” in the more literal sense Dolovich describes.⁹⁶ The noncitizens, identified as “criminal aliens” through the criminal system and are subsequently deported, include many who leave behind deep community ties and who seek to reenter the United States following their removal.⁹⁷ The Executive Actions memoranda included this category of deportees as Priority 1 (the highest priority level), in the same document that establishes those convicted of significant misdemeanors or three or more misdemeanors as the second-highest priority.⁹⁸ Under this guidance, a noncitizen who is convicted of a DUI would be prioritized for transfer to immigration detention and likely deported, because a DUI conviction is considered a significant misdemeanor.⁹⁹

93. See García Hernández, *supra* note 107, at 1457–58.

94. See Priorities Memo, *supra* note 6, at 3–4; see also Deferred Action Memo, *supra* note 30, at 4.

95. See Dolovich, *supra* note 88, at 243.

96. See *id.*

97. See Erin R. Hamilton, *Deportees Will Risk Harsh Penalties to Return to Families in the U.S.*, 3 CTR. FOR POVERTY RES. 1, 1 (2013), http://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr_hamilton_immigration_brief.pdf [<http://perma.cc/E3EA-P4RQ>] (“In 2013, the U.S. Immigration and Customs Enforcement [ICE] agency deported 72,000 parents of children who are U.S. citizens. These parents make up one-fourth of all deportees.”).

98. See Priorities Memo, *supra* note 6, at 3–4.

99. See *id.* at 4. There is not strict uniformity or court interpretation of the term “significant misdemeanor” and not every driving under the influence (DUI) conviction will necessarily be considered to be one. Whether a DUI is considered a significant misdemeanor will vary by jurisdiction and by the applicable state statute. As of September 2015, ICE had released guidance stating,

If they sought to rejoin their families and communities by reentering the United States, they would become “Priority 1 threats to national security, border security, and public safety” because “aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States” are included in this category.¹⁰⁰ Thus, a misdemeanor seeking to enter the United States subsequent to his removal is second only to “aliens engaged in or suspected of terrorism or espionage”¹⁰¹ in the list of priorities for the immigration enforcement system. In this way, the Priorities Memo serves to “make inmates” by creating self-perpetuating targets for immigration detention and removal.¹⁰²

As Priority 1 threats, these noncitizens deported following DUI convictions will face further hurdles if they attempt to return following their deportations. In years past, noncitizens arrested at the border attempting to enter the country unlawfully might spend a few nights in immigration detention before being removed, or might be deported the same day.¹⁰³ In recent years, however, a new tactic has been used: Those caught trying to unlawfully enter the United States now face criminal prosecution—and subsequent incarceration in federal prisons—for the federal crimes of illegal entry (the crime of crossing the border unlawfully) and illegal reentry (the crime of crossing the border unlawfully after a previous removal (deportation)).¹⁰⁴ Only after completing criminal sentences are these noncitizens then subject to immigration enforcement in the form of deportation. With more than two million individuals deported during the first

When determining whether a conviction for DUI is a significant misdemeanor, the elements of the applicable state law must be considered. A conviction (requiring proof beyond a reasonable doubt) for DUI is a significant misdemeanor if the state statute of conviction: (1) constitutes a misdemeanor as defined by federal law (the minimum penalty includes imprisonment for more than 5 days but not more than 1 year); (2) requires the operation of a motor vehicle; and (3) requires, as an element of the offense, either a finding of impairment or a blood alcohol content of .08 or higher.

See Frequently Asked Questions Relating to Executive Action on Immigration, U.S. IMMIGR. & CUSTOMS ENFT, <https://www.ice.gov/ImmigrationAction/faqs> [https://perma.cc/DEY6-JR9] (last visited Jan. 5, 2016).

100. *See* Priorities Memo, *supra* note 6, at 3.

101. *See id.*

102. *See* Dolovich, *supra* note 88, at 243.

103. *See* Lara Jakes Jordan, *U.S. Ends ‘Catch-and-Release’ at Border*, WASH. POST (Aug. 23, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/23/AR2006082301082.html> [http://perma.cc/XT9N-UPTZ] (“Nearly all non-Mexican illegal immigrants caught sneaking into the United States are being held until they can be returned to their home countries . . . [t]he new policy generally does not apply to Mexicans, who are almost immediately returned to Mexico after being stopped by Border Patrol agents.”).

104. *See* Michael T. Light, Mark Hugo Lopez & Ana Gonzalez-Barrera, *The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth*, PEW RES. CTR. (Mar. 18, 2014), <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes> [http://perma.cc/F3H C-HMJP].

six years of the Obama Administration, hundreds of thousands may attempt to return to the United States to rejoin their communities.¹⁰⁵ If the prosecution of the immigration crimes of illegal entry and illegal reentry continues at its current rate, many of those attempting to return will find themselves in federal prison if they are caught at the border. Again, in this situation, the Executive Branch can be said to be “making its own inmates” by deporting millions, then criminally prosecuting those who inevitably return. This process bleeds across the line to the carceral system Dolovich critiques, as immigration-related crimes overtake drug offenses as the largest chunk of the federal criminal enforcement pie.¹⁰⁶

Even as the federal government cements the strategy of making it acceptable to both punish immigrants who have committed crimes with detention and removal and punish those who attempt to reenter after removal,¹⁰⁷ it expands the categories of people who can be considered punishable. A strategy of targeting “felons, not families”¹⁰⁸ only makes sense if there is an ever-widening group of “criminal aliens” to target. In 2007, the ACLU of Massachusetts exposed Operation Endgame—an ICE operation that endeavored to remove all unauthorized migrants by 2012.¹⁰⁹ ICE authorities quickly responded to the revelation by removing any mention of Operation Endgame from their publicly available documents.¹¹⁰ Despite ICE’s attempts to hide explicit mention of its mission, the underlying logic of Operation Endgame is alive and well in the Executive Actions’ treatment of individuals with misdemeanor convictions.

105. Hamilton, *supra* note 97, at 2.

106. See *id.*; see also *Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions*, HUMAN RIGHTS WATCH 2 (May 2013), http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf [<http://perma.cc/N8M2-HLZZ>] (“In 2002, there were 3,000 prosecutions for illegal entry and 8,000 for illegal reentry; a decade later, in 2012, these prosecutions had increased to 48,000 and 37,000, respectively. These cases now outnumber other frequently prosecuted federal offenses such as drug, firearm, and white collar crimes.”).

107. See César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349–50 (2014) (arguing that, under the Supreme Court admonition to consider the legislative intent of a statutory provision authorizing detention in order to distinguish regulatory from punitive detention, immigration legislation and the legacy Immigration and Naturalization Service (INS) detention authority have clearly moved immigration remedies from civil to punitive measures).

108. See Nov. 21, 2014 Obama Remarks, *supra* note 24.

109. Carol Rose & Christopher Ott, *Inhumane Raid Was Just one of Many*, BOS. GLOBE (Mar. 26, 2007), http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/03/26/inhumane_raid_was_just_one_of_many [<http://perma.cc/6UJ4-EC7B>].

110. See “Endgame” Documents: *Before and After*, ACLU OF MASS. (Apr. 4, 2007, 11:00 PM), <http://209.68.62.227/endgame> [<https://perma.cc/C3XS-4HRX>].

B. The Secure Communities Memo

This Part analyzes the strategy through which the criminal alien category comes to have meaning as a vector for detention and deportation of unauthorized migrants by examining a second Executive Actions memorandum, the Secure Communities Memo.¹¹¹ With this memorandum, DHS Secretary Jeh Johnson announced the termination of the Secure Communities (S-Comm) program, one of the Obama Administration's chief initiatives to track and deport immigrants who have come into contact with the criminal system. In its place, Secretary Johnson declared the creation of the Priority Enforcement Program (PEP).¹¹² This Part tracks the initial development of S-Comm and provides a preliminary evaluation of the newly announced PEP. It also analyzes advocacy and organizing against S-Comm, contending that this advocacy created a crisis of legitimacy for S-Comm that the President resolved through the Executive Actions' creation of PEP. This Part argues that PEP, however, ultimately redirects and refines the underlying technologies and policies of S-Comm, rather than ending them.

1. Background on S-Comm

The Bush Administration originally unveiled the S-Comm program in March 2008.¹¹³ The centerpiece of S-Comm was the full integration of immigration and criminal databases, with the goal of comprehensive information sharing between local criminal law enforcement and federal immigration enforcement.¹¹⁴ Before S-Comm, immigration officers had no automated way to run the names and fingerprints of noncitizens held by the criminal system against immigration databases. S-Comm provided this mechanism; with S-Comm, every time local law enforcement ran a person's name through the national Federal Bureau of Investigation (FBI) database (a practice in which every law enforcement office

111. See Secure Communities Memo, *supra* note 29.

112. *Id.* at 3.

113. See ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide, U.S. IMMIGR. & CUSTOMS ENFT (Apr. 14, 2008), <https://www.ice.gov/news/releases/ice-unveils-sweeping-new-plan-target-criminal-aliens-jails-nationwide-0> [<https://perma.cc/NB2R-Y93B>].

114. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 95 (2013) (describing the integration of the Federal Bureau of Investigation's (FBI) biometric database, the Automated Biometric Identification System (IDENT), and ICE's Law Enforcement Support Center, which reviews and assesses arrestee status using all available information, including fingerprints).

engages to look for past warrants and past criminal history of arrestees), that information would be transferred by the FBI to ICE.¹¹⁵

S-Comm brought local involvement in immigration enforcement to unprecedented levels, with immigration legal scholars citing the program as “the largest expansion of local involvement in immigration enforcement in the nation’s history.”¹¹⁶ S-Comm reached past simply targeting noncitizens who came into contact with the criminal system, as the low-tech version of S-Comm, the Criminal Alien Program, had done for nearly two decades before S-Comm’s inception.¹¹⁷ Under the Criminal Alien Program, individuals who interfaced with local law enforcement already had to be identified as foreign born for ICE to be able to interview them. This labor-intensive process was circumvented by S-Comm, which extended the screening by the federal government for immigration violations to every person—citizen and noncitizen alike—arrested by a local law enforcement officer anywhere in the country.¹¹⁸ Even if local law enforcement did not want to submit their arrestees’ fingerprints to ICE for checks against their databases, they had no choice, as there was no mechanism for them to request that the FBI not pass on the fingerprints to ICE.¹¹⁹

The stated goals of S-Comm were to “identify and remove criminal aliens and others who pose a potential threat to public safety” in the name of “smart, effective immigration enforcement.”¹²⁰ The program epitomized the Obama Administration’s adoption of the “smart enforcement” ideal.¹²¹ The seemingly

115. See Michele Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, IMMIGR. POLY CTR. 11 (Nov. 2011), http://www.immigrationpolicy.org/sites/default/files/docs/Secure_Communities_112911_updated.pdf [<http://perma.cc/CSG5-NGM9>].

116. Cox & Miles, *supra* note 114, at 93.

117. For a portrait of the Criminal Alien Program, see Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1118 (2013).

118. See Cox & Miles, *supra* note 114, at 93.

119. As S-Comm spread nationwide, Obama announced the rollback of 287(g) agreements, or federal-local agreements that deputized local law enforcement officers as immigration authorities. Because of the broad and mandatory reach of S-Comm, the administration may have had less of a need for 287(g), which required trainings and memoranda of understanding to be signed and implemented with local law enforcement agencies. S-Comm thus became the primary vector for identifying noncitizens who experienced arrests by local law enforcement officials. See Ted Hesson, *As One Immigration Enforcement Program Fades Away, Another Rises*, ABC NEWS (Dec. 27, 2012), http://abcnews.go.com/ABC_Univision/News/immigration-enforcement-program-287g-scaled-back/story?id=18077757 [<http://perma.cc/N5CF-LHYF>].

120. *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENF’T, <http://www.ice.gov/secure-communities/get-the-facts> [<https://web.archive.org/web/20150409114817/http://www.ice.gov/secure-communities/get-the-facts>] (last visited Apr. 9, 2015).

121. See *Fact Sheet: Smart, Effective Border Security and Immigration Enforcement*, U.S. DEPT. OF HOMELAND SEC. (Oct. 4, 2011), <http://www.dhs.gov/news/2011/10/04/fact-sheet-smart-effective-border-security-and-immigration-enforcement> [<http://perma.cc/Y887-DXBF>] (“DHS is

indiscriminate removals under the Obama Administration, which had surpassed the two million mark at the time of this writing, were a direct result of this strategy. “Smart enforcement,” characterized by the supposed sorting of migrants by risk level that S-Comm facilitated (and which PEP solidifies), in reality resulted in the possible removal of any noncitizen who came into contact with law enforcement; regardless of where they fell in the risk-level categorization provided by S-Comm, they were counted as “criminal aliens.”¹²²

From S-Comm’s inception, the government appeared to pursue a different agenda than “smart, effective immigration enforcement.”¹²³ DHS activated the program county by county over the course of several years, based on what they referred to as a “risk-based rollout strategy” meant to target those counties with the highest possible percentage of noncitizens.¹²⁴ Adam Cox and Thomas Miles carried out an empirical study tracking the activation, finding that “Hispanics constituted 37.9 percent of the population in early-activating counties and only 6.8 percent in counties activating later.”¹²⁵ They also found that that while early activation targeted counties “with large Hispanic populations,” it “did not target counties with large noncitizen populations.”¹²⁶ They concluded, “the correlation between activation and Hispanic population is extremely persistent: it remains large and statistically significant even when we control for border proximity and myriad other factors on which the government might have relied in deciding where to target its limited enforcement resources.”¹²⁷ In analyzing their data, Cox and Miles cite to Bernard Harcourt’s critique of the rise in the role of prediction and systematization, acknowledging that the seemingly neutral mode of policing that S-Comm represents “can in practice concentrate the burdens of law enforcement on minority communities.”¹²⁸ Cox and Miles’ study demonstrates that the “smart enforcement” strategy was an explicitly racialized one,

focused on smart and effective enforcement of U.S. immigration laws in a manner that best promotes public safety, border security, and the integrity of the immigration system.”)

122. See *Secure Communities and ICE Deportation: A Failed Program?*, TRAC IMMIGR. (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349> [<http://perma.cc/UVP2-BW4T>] (“Analysis of ICE data covering these 2.3 million deportations obtained by [Transactional Records Access Clearinghouse (TRAC)] show that while the agency was able to increase the number of noncitizens it deported who had been convicted of a crime, this was largely a result of an increase in the deportations of individuals whose most serious conviction was an immigration or traffic violation.”).

123. *Secure Communities: Get the Facts*, *supra* note 120.

124. Cox & Miles, *supra* note 114, at 105.

125. *Id.* at 114.

126. *Id.* at 121.

127. *Id.* at 134.

128. *Id.* at 133.

disproportionately distributing the burden of detention and deportation of immigrants on Latino communities.

By the beginning of 2013, S-Comm was activated in all counties.¹²⁹ Despite the pushback from local jurisdictions that resisted activation, S-Comm achieved its greatest success by bringing information sharing between local criminal and federal immigration officials to new heights. Data sharing was only part of the work of S-Comm, however. The integration of the databases allowed ICE officials to be notified when the immigration databases registered a match—that is, when the person arrested had a record of being fingerprinted by a federal immigration official. At this point, ICE officials had the option to issue a detainer on the person, or a request that the state or local jail facility hold the person for an extra 48 hours, ostensibly to allow ICE to interview her.¹³⁰ In practice, the ICE detainers meant the nearly automatic transfer of individuals from police custody to ICE custody, with detention and removal proceedings ensuing.

While ICE initially claimed to be most interested in pursuing immigrants who had already been convicted of crimes, the agency abandoned this in practice, issuing detainer requests indiscriminately for anyone who had been arrested, fingerprinted, and was identified as being a match with the databases.¹³¹ The program statistics showed that in 2011, over half of those removed due to S-Comm either had no criminal conviction at all, or a conviction for a minor crime resulting in a sentence less than a year.¹³² This belied the agency’s own S-Comm propaganda, which claimed that “ICE prioritizes the removal of criminal aliens by focusing efforts on the most dangerous and violent offenders.”¹³³

129. See *Activated Jurisdictions*, U.S. IMMIGR. & CUSTOMS ENFT 1 (2013), <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> [https://perma.cc/KYA9-4DSQ] (“As of January 22, 2013, the biometric information sharing capability is activated in 3,181 jurisdictions in 50 states, U.S. Territories and Washington D.C.”).

130. See *Immigration and Customs Enforcement (ICE) Secure Communities (SC) Standard Operating Procedures (SOP)*, U.S. DEPT OF HOMELAND SEC. 8 (2009), http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf [https://perma.cc/8MNU-7LGT].

131. See *Secure Communities and ICE Deportation: A Failed Program?*, *supra* note 122.

132. *Secure Communities: IDENT/LAFIS Interoperability: Monthly Statistics Through September 30, 2011*, U.S. IMMIGR. & CUSTOMS ENFT (Oct. 14, 2011), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf [https://perma.cc/2VTP-B5BB] (Eighty-two percent of undocumented IDENT matches resulted in identification of an individual charged with a Level 2 or Level 3 offense, which constitute minor crimes resulting in a sentence less than a year. Four percent of undocumented IDENT matches resulted in identification of individuals with no charges).

133. *Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens*, U.S. IMMIGR. & CUSTOMS ENFT (Jan. 2010), http://www.cityofws.org/portals/0/pdf/police/sc_brochure_508.pdf [http://perma.cc/PMU6-2XNC].

An analysis of removal data spanning from 2008 to 2013 came to the same conclusion: the number of individuals considered Level 1 offenders, S-Comm's designated target, actually declined during the time period studied.¹³⁴ Among those who were deported with a criminal offense on their record, the top four categories were illegal entry (with 46,759 removals in fiscal year 2013), DUI (with 29,852 removals in the same time period), a traffic offense (15,548 removals), and marijuana possession (6770 removals).¹³⁵ Given that illegal entry and DUI hold the top two places in this list, it is unsurprising that with the November 2014 Executive Actions, DHS announced that those who enter the country unlawfully and those with a DUI (a significant misdemeanor) will now be considered Priority 1 and Priority 2 for removal, respectively.¹³⁶

By elevating reentry and traffic offenses to high-priority reasons for removal, ICE has successfully matched its rhetoric to the reality of removals of individuals with low-level misdemeanors or simple violations. ICE appears to be using this rebranding mechanism to immunize itself from the critiques that plagued the S-Comm program and led to its announced termination.

2. Critiques of S-Comm and Its Refinement Into the PEP Program

Drawing anything but a conjectural link between activism and advocacy on one hand, and changes in government policy on the other, can often prove difficult. In the Secure Communities Memo, however, DHS Secretary Johnson explicitly acknowledges the role that community opposition played in the decision to discontinue S-Comm:

[T]he reality is the program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws. Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation.¹³⁷

134. See *Secure Communities and ICE Deportation: A Failed Program?*, *supra* note 122 ("More striking is that there has been an absolute decline in the number of noncitizens removed who have been convicted of any crime apart from traffic and immigration.").

135. *Id.* at Table 5.

136. As discussed *supra* note 96, whether a particular DUI conviction is ultimately considered a significant misdemeanor will vary by jurisdiction and by the applicable state statute.

137. Secure Communities Memo, *supra* note 29, at 1.

The Secretary’s acknowledgement of the pushback against S-Comm was a departure, as a rigorous defense of S-Comm had until that point characterized ICE’s responses to the program’s critics.¹³⁸

The resistance to S-Comm was broad ranging; everyone from law enforcement officials to immigration attorneys to undocumented activists participated in resisting the program, with demands ranging from requests for reform and transparency to demands that the program be ended, not mended.¹³⁹ Despite the range of actors and tactics, those pushing against S-Comm were united in some common critiques. Ultimately, these critiques attacked the way the program was being carried out in seeming opposition to its stated goal of arresting and deporting “criminal aliens.” Meanwhile, attacks to the underlying logic of the removal of so-called criminal aliens were virtually nonexistent. The absence of critiques of the underlying goals of S-Comm is reflected in the limited changes announced by the Obama Administration in November 2014. While the Secure Communities Memo announced that S-Comm “as we know it, will be discontinued,” the announced changes constitute a mere rebranding of S-Comm. The new version of S-Comm, which the Memo announces “should be referred to as the ‘Priority Enforcement Program’ or ‘PEP,’”¹⁴⁰ amounts to a refinement rather than a dismantling of S-Comm.

Critique 1: S-Comm Cast Too Wide a Net

The resistance against S-Comm fell under two primary categories: (a) critiques of whom the program was sweeping up, and (b) critiques of the manner in which the program’s dragnet was being deployed. The first critique was premised on the claim that S-Comm was not doing what ICE claimed it would do. Advo-

138. See, e.g., *ICE Response to the Task Force on Secure Communities Findings and Recommendations*, U.S. IMMIGR. & CUSTOMS ENFT (Apr. 27, 2012), <http://www.dhs.gov/xlibrary/assets/hsac/ice-response-to-task-force-on-secure-communities.pdf> [<http://perma.cc/L7S2-9B7D>] (presenting a staunch, defensive position in response to critiques by the Task Force on Secure Communities, created in June 2011 at the request of Jeh Johnson, the Secretary of the Department of Homeland Security (DHS)).

139. See, e.g., Pablo Alvarado, *Secure Communities: “End It, Don’t Mend It,”* HUFF. POST BLOG (May 24, 2012), http://www.huffingtonpost.com/pablo-alvarado/secure-communities-end-it_b_1375814.html [<http://perma.cc/C4R2-2JYY>] (arguing that reforms to S-Comm do not go far enough and advocating for a complete end to the program); Elise Foley, *Congressional Hispanic Caucus Demands Deportation Changes*, HUFF. POST (Apr. 4, 2014), http://www.huffingtonpost.com/2014/04/04/congressional-hispanic-caucus-deportation_n_5092192.html [<http://perma.cc/UMA5-K79A>] (explaining a 2014 letter from the Hispanic Caucus to Secretary Johnson calling for reform to deportation priorities and policies, as well as “ending programs that lead to many deportations such as [S-Comm] and the 287(g) policy”).

140. Secure Communities Memo, *supra* note 29, at 3.

cates challenged S-Comm's overly broad net, presenting evidence that S-Comm was leading to the deportation of immigrants who were labeled as relatively innocent, not the hardened "criminal aliens" the program was purportedly designed to target.¹⁴¹ University-based think tanks and nonprofit immigrant advocacy organizations released multiple reports on the program.¹⁴² These reports refuted the government's claim that S-Comm was truly targeting "criminal aliens." They exposed that many of those swept up by S-Comm came into police custody for traffic offenses (including DUIs) and other low-level criminal conduct. Moreover, the reports showed that many were never convicted of the crime for which they were arrested, but were nonetheless routed to immigration detention and into removal (deportation) proceedings.¹⁴³ The bottom line to these critiques was that the government's own data about the removals that resulted from S-Comm did not match its rhetoric about focusing on individuals with serious criminal convictions.¹⁴⁴

The Secure Communities Memo appears to respond to this critique by directing ICE, in this new era, to facilitate only the removal of those who are convicted of certain offenses. Citing to the Priorities Memo (discussed in Part I.A, *supra*), the Secure Communities Memo, through PEP, directs ICE to seek the "transfer of an alien" if she falls under Priority 1 (except for those who are apprehended at the border or ports of entry) or subsections (a) and (b) of Priority 2.¹⁴⁵

141. See, e.g., *Shelve Secure Communities*, L.A. TIMES (Aug. 12, 2011), <http://articles.latimes.com/2011/aug/12/opinion/la-ed-secure-20110812> [<http://perma.cc/SGM5-JYSC>] ("States signed up for [S-Comm] because they thought it would make their neighborhoods safer by getting serious criminals off the streets. But the government's own data indicate that more than half of those deported under the program were undocumented immigrants with no criminal record or only minor ones—not violent felons."); see also *Let Police Pursue Criminals, Not Immigrants*, L.A. TIMES (Mar. 11, 2011), <http://articles.latimes.com/2011/mar/11/opinion/la-ed-secure-20110311> [<http://perma.cc/B2QW-UYQU>] ("[S-Comm] isn't succeeding at targeting violent criminals. Instead, it is increasingly diverting police from public safety for other purposes.").

142. See, e.g., Waslin, *supra* note 115, at 9–10 (describing the failure of S-Comm to make good on the goal to deport "dangerous criminals," instead deporting first-time minor offenders or those who were not charged with any crime); see also Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGR. POL'Y CTR. 8–9 (Feb. 2010), http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf [https://web.archive.org/web/20150906114645/http://immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf] (examining the use of jail status check programs under the S-Comm program in Travis County, Texas, which prompted deportation of immigrants apprehended for minor offenses, and in many cases without any criminal charges or history); see also *Secure Communities and ICE Deportation: A Failed Program?*, *supra* note 122 (In 2013, ICE deported 151,833 undocumented immigrants without any criminal convictions).

143. See sources cited *supra* note 142.

144. See *id.*

145. Secure Communities Memo, *supra* note 29, at 2.

These categories are composed of those convicted of three or more misdemeanors and those convicted of significant misdemeanors.¹⁴⁶

The Secure Community Memo’s adoption of the Priorities Memo’s new categories reflects the deportations that had already been taking place under S-Comm since 2008. An April 2014 report relying on ICE’s own data found that in 2013, 216,810 people with criminal convictions were deported (out of a total of 368,644 deportations).¹⁴⁷ The top two offenses for those deported with convictions were the federal misdemeanor of illegal entry (46,759 deportations), followed by the traffic offense of DUI (29,852 deportations).¹⁴⁸ Those arrested for illegal entry face nearly automatic deportation at the end of their federal criminal sentences.¹⁴⁹ Their original arrests are often carried out by immigration authorities themselves, so S-Comm is not necessary to apprehend this population. For the second largest category, however, the existence of local and federal law enforcement partnerships is necessary in order to turn a DUI into a deportation order.

By transforming the DUI into a significant misdemeanor through the Priorities Memo, and then naming those with significant misdemeanors as appropriate “criminal alien” targets for the revamped S-Comm in the Priorities Memo, DHS is performing a sleight of hand. If people with DUIs continue to be such a large part of the removal pie, then PEP’s data will show that the government is doing what they said they would do—deporting priority “criminal aliens.” Nothing will necessarily have to change in terms of ICE’s actual practice—they are already deporting those convicted of DUIs in high numbers—but DHS will be able to respond to the criticism that they are arresting the wrong people, because PEP has now named those convicted of DUIs as the right kind of “criminal alien” target.

The current immigration system relies on low-level, local ICE employees to make calls about who to detain and deport, and it remains unclear how effectively centralized guidance from higher-ups (in the form of memoranda like the Executive Actions) will trickle down to local offices.¹⁵⁰ Even if the guidance does not trickle down, if ICE officers continue to target who they have already

146. *Id.*

147. *Secure Communities and ICE Deportation: A Failed Program?*, *supra* note 122.

148. *Id.*

149. For a discussion of entry and reentry offenses, see Chacón, *supra* note 13, at 637–39; *see also* García Hernández, *supra* note 107, at 1472–73 (describing the steady increase in entry and reentry deportations throughout the Bush Administration and continuing throughout the Obama Administration).

150. *See* Julia Preston, *Agents’ Union Stalls Training on Deportation Rules*, N.Y. TIMES (Jan. 7, 2012), <http://www.nytimes.com/2012/01/08/us/illegal-immigrants-who-commit-crimes-focus-of-deportation.html> [<http://perma.cc/ALW9-6F5H>].

been targeting, the numbers will support a shift from S-Comm to PEP that appears responsive to the S-Comm critics' concerns, simply because DHS has recategorized the largest group of people who were facing detention after non-immigration arrests, those arrested for DUIs, as a proper target.

This recalibration of policy that allows DHS's rhetoric to reflect its existing practice, and thereby avoid actual reform, is a familiar move for the agency. A 2014 exposé by journalist Garrett M. Graff revealed that when faced with congressional pressure to account for the high levels of corruption within the ranks of Border Patrol agents, DHS simply recalibrated how it measured corruption:

In Obama's first year, [Customs and Border Protection] and DHS leadership even ordered the agency to change its definition of "corruption" to downplay the number of total incidents. Instead, according to internal affairs official Wong, the agency began to differentiate between "mission-compromising corruption"—bribery, narcotics-smuggling or human-smuggling allegations—and "non-mission-compromising corruption," a "lesser" category of cases that included things like employees' sexually assaulting detainees or workplace theft. Only the "mission-compromising" problems, the agency now decreed, would be reported to Congress. (Even rape and attempted murder . . . wouldn't have to be disclosed.) The distinction helped them wipe nearly a third of the corruption cases out of statistics.¹⁵¹

The Secure Communities Memo promises to collect and analyze data from the new PEP to root out "inappropriate use to support or engage in biased policing."¹⁵² In line with past practice, DHS will continue gathering data on removals of "criminal aliens."¹⁵³ The ordered recalibration of the definition of corruption achieved congressionally acceptable, lower levels of Border Patrol corruption. Likewise, the recalibration of the term "criminal alien" to include those with DUIs, who already face removal at high numbers, under the new category significant misdemeanor, will serve to achieve acceptably high levels of the removals of "criminal aliens."

The Secure Communities Memo also announced that ICE officers should focus their efforts on seeking custody of those who have already been convicted,

151. Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO (Nov./Dec. 2014), http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220_full.html [<http://perma.cc/RT9T-97CD>].

152. Secure Communities Memo, *supra* note 29, at 3.

153. *Id.* at 2.

not merely those who have been arrested, as was happening under S-Comm.¹⁵⁴ Again, because of the difficulty of making the ICE reforms at the top trickle down to local agents, it is hard to know how this directive will play out in the field. Nevertheless, because the key element of S-Comm (the information transfer of local law enforcement’s fingerprints to the FBI, then to DHS databases) happens at the time of arrest, noncitizens will be on ICE’s radar whether or not they are convicted. The Secure Communities Memo leaves the first of S-Comm’s two goals—identifying noncitizens in criminal custody for transfer to ICE—untouched.¹⁵⁵ Having overcome local resistance to this full information sharing and having activated S-Comm everywhere, the Executive Branch appears loath to disturb the perfect merger of local arrest information with federal immigration databases. Indeed, the Memo directs ICE to “continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks.”¹⁵⁶ Because this information is transferred at the time of arrest, the fact that the Secure Communities Memo directs ICE to wait until an arrested person is convicted before seeking them out will be of little comfort to noncitizens who have survived by steering clear of immigration authorities. It remains to be seen whether ICE will actually wait until individuals are convicted before seeking their transfer, once they know that a noncitizen is in local criminal custody. Given the enormous variance in local practice by ICE officers, the Memo’s shift to the language of “conviction” rather than “arrest” is unlikely to trickle down completely to local practice.

Critique 2: Local Law Enforcement Unnecessarily Cooperated With ICE

The second set of critiques of S-Comm focused on the cooperation of local law enforcement with ICE. Advocates criticized local law enforcement for handing over noncitizens to ICE custody after they were identified through the forced information sharing. As S-Comm was activated in county after county, long-time immigration advocates who had already been tracking the Criminal Alien Program, as well as advocates alarmed by the new program, began to target

154. *See id.* (“[U]nless the alien poses a demonstrable risk to national security, enforcement actions through the new program will only be taken against aliens who are convicted of specifically enumerated crimes.”).

155. *See id.* (instead of S-Comm, “ICE should put in its place a program that will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks.”).

156. *Id.*

the immigration detainer.¹⁵⁷ By campaigning around the voluntary nature of the immigration detainer or “ICE hold,” immigration advocates sought to render S-Comm ineffectual.¹⁵⁸ By convincing local law enforcement that they were under no obligation to comply with ICE holds, and encouraging them to stop doing so using both legal¹⁵⁹ and policy arguments,¹⁶⁰ advocates sought to attack the mechanism that translated a match in the immigration databases into a detention and a removal order.

Advocacy on ICE detainees was successful in many jurisdictions, with cities, counties, and in some cases, entire states limiting their cooperation with ICE in holding noncitizens.¹⁶¹ While advocates used some of the same arguments about the overbroad application of S-Comm against people who had either not been convicted or been convicted of low-level offenses in arguing for detainer reform on the local level, they also focused on the argument that cooperation with federal immigration law enforcement damaged the relationships between immigrant

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157. For a broader description of the Criminal Alien Program and immigration, see *supra* notes 114–116 and accompanying text. See *Legal Bulletin*, BROWARD CTY. SHERIFF'S OFFICE (June 19, 2012), <http://www.ailasouthflorida.org/wp-content/uploads/2014/06/Broward-Sheriff-Legal-Bulletin-ICE-Detainers.pdf> [<http://perma.cc/26R3-4HVK>] (declining to honor ICE detainees unless supported by probable cause in Broward County, Florida); see also Letter from Timothy P. Ryan, Miami-Dade Corr. & Rehab. Dep't. to Marc Jeffrey Moore, Field Off. Dir., U.S. Dep't. of Homeland Sec., *Changes to Federal Detainer Procedures* (Jan. 7, 2014), <http://www.ailasouthflorida.org/wp-content/uploads/2014/01/2014.01.07-Implementation-of-Miami-Dade-Detainer-Policy-2.pdf> [<http://perma.cc/BE46-9DFV>] (honoring ICE detainer requests only with written agreement from the federal government to reimburse for all costs related to compliance, and where the inmate has a previous conviction for a forcible felony as defined by Florida law, or the inmate is pending a charge of a nonbondable offense); Andy Reid, *Palm Beach County Sheriff Agrees to Curtail Immigration Jailings*, SUN SENTINEL (July 22, 2014), <http://www.ailasouthflorida.org/wp-content/uploads/2014/01/2014.01.07-Implementation-of-Miami-Dade-Detainer-Policy-2.pdf> [<http://perma.cc/3RX3-RLZC>] (Sheriff Bradshaw of Palm Beach County stopped automatically complying with federal detainer requests in response to demands from a coalition of Palm Beach religious congregations.).
158. See LENA GRABER, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWYER'S GUILD, *THE ALL-IN-ONE GUIDE TO DEFEATING ICE HOLD REQUESTS (A.K.A. IMMIGRATION DETAINERS)* 10, (Ann Benson et al. eds., 2012) (emphasizing the optional nature of ICE hold requests, and the discretion of local law enforcement).
159. For a list of lawsuits that halted ICE detainees, see Secure Communities Memo, *supra* note 29, at 2 n.1.
160. See, e.g., Waslin, *supra* note 115, at 8–9 (analyzing DHS deportation records under S-Comm to conclude that, although the stated goal of the program was to prioritize deportations, in practice the program casts too wide a net, often deporting low-level offenders or those with no criminal charges).
161. California, Connecticut, and Maryland adopted statewide laws, policies, or both, limiting cooperation with ICE holds, as did some of the most populous counties in the United States, including Cook County (Illinois), Miami-Dade County (Florida), King County (Washington), and Orange County (California), as well as the District of Columbia. For a list of states, cities, and counties who limited cooperation with ICE holds, see *Challenge Unjust Immigration Detainers*, NAT'L IMMIGRANT JUSTICE CTR., <http://www.immigrantjustice.org/detainers> [<http://perma.cc/6FPJ-LPP9>] (last visited Jan. 5, 2016).

communities and local law enforcement.¹⁶² Particularly in jurisdictions that claimed to espouse community policing tactics, advocates argued that immigrants would be less likely to call the police to report crimes when contact with local law enforcement served as a conduit to immigration detention.¹⁶³ Advocacy also focused on the chilling effect on immigrant survivors of violence, for whom the police-ICE partnerships purportedly acted as another barrier to accessing supportive services from the police.¹⁶⁴

Anti-S-Comm lawmakers and their supporters introduced and passed the Trust Act in California, legislation that in its very name called for a restoration of the trust between immigrant communities and the police that police-ICE collaboration had theoretically torn asunder.¹⁶⁵ The bill drastically limited the situations in which local law enforcement would transfer noncitizens from local custody to ICE custody on the basis of ICE detainers.¹⁶⁶ Law enforcement proved susceptible to Trust Act advocacy, as one of the primary talking points—that immigrant communities should not be discouraged from cooperating with the police—ultimately served to reinforce police officers’ legitimacy as those most properly tasked with protecting and serving their communities. In other jurisdictions, and occasionally within the same jurisdiction, advocates focused not only on the police-immigrant trust arguments, but on an opposite argument: Advocates warned that having a direct conduit to immigration enforcement created racial profiling that led to pretextual arrests of Latinos and others profiled as immigrants, as well as their resulting transfer to immigration custody.¹⁶⁷

While the Secure Communities Memo acknowledges the criticisms of the S-Comm program, it does not explicitly name troubled relationships between

162. Waslin, *supra* note 115, at 12. (“[S-Comm] raises questions about local police authorities’ ability to build strong, trusting relationships with their communities. If a police agency cannot assure its immigrant community that there will be no immigration consequences to providing information or cooperating with police, immigrants will be less likely to come forward to report crimes, making the job of police more difficult.”).

163. Waslin, *supra* note 115, at 12.

164. See Radha Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C.J.L. & SOC. JUST. 185, 194 (2012).

165. Assemb. B. 1081, 2011 Leg., Reg. Sess. (Ca. 2011) (“The [S-Comm] program and immigration detainers harm community policing efforts because immigrant residents who are victims or witnesses to crime, including domestic violence, are less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation.”).

166. *See id.*

167. These arguments were not exclusive to opposition to S-Comm. S-Comm received disproportionate attention as the newest iteration of police-ICE collaboration, but advocates also made similar arguments about the effect of the long-active Criminal Alien Program (the low-tech version of S-Comm) and of the more recent 287(g) agreements (agreements that empowered local law enforcement to act as immigration authorities for certain limited purposes). See Hesson, *supra* note 119.

local police and immigrant communities as part of the impetus. Nevertheless, the agency announced a change in detainer policy, clarifying that instead of detainer requests, ICE will instead issue requests for notification: “Requests that state or local law enforcement notify ICE of a pending release during the time that person is otherwise in custody or under state or local authority.”¹⁶⁸ These requests presumably will trigger ICE action in picking up the person upon their release.

Advocates have already begun warning immigrant communities that this might translate into ICE rounding up immigrants at the gates of local jails, or in their homes and workplaces.¹⁶⁹ It remains unclear how local jurisdictions will react to the notification requests, but this development mirrors what was already occurring in jurisdictions that had refused to detain immigrants for ICE. Attorneys in California, where the Trust Act curtailed local law enforcement’s cooperation with detainers, have warned that ICE had already begun adjusting their tactics to the new reality of detainer reform even before the announcement of the Executive Actions by targeting noncitizens for arrest and detention immediately upon their release from jail.¹⁷⁰ In other jurisdictions, ICE has used the booking information gleaned from local jails through S-Comm to pick up individuals in their own homes.¹⁷¹ The Secure Communities Memo thus seems to be ICE’s attempt to implement nationally the strategies it was already developing locally to make the most of the information gathered from the now fully operational information sharing infrastructure S-Comm put in place. The tremendous gains that have been made by advocates pushing to alter ICE detainer policies will only be maintained if local law enforcement treats detainer requests as identical to notification requests, but how jurisdictions will respond in practice remains to be seen.

C. The Deferred Action Memo

The aspect of the November 2014 Immigration Executive Actions that has received the most attention from policymakers, advocates, and the media appears in the memo titled, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents”

168. Secure Communities Memo, *supra* note 29, at 2.

169. See, e.g., *Organizer Alert: Life After “PEP-Comm”*, IMMIGRANT LEGAL RESOURCE CTR. 3 (2015), http://www.ilrc.org/files/documents/ilrc_organizers_advisory-2015-01_06.pdf [<http://perma.cc/94Y3-U53F>] (warning communities of increased ICE presence at “jails, courthouses, and homes”).

170. Interview with Ann Benson, Directing Attorney, Wash. Def. Ass’n. Immigr. Project (on file with author).

171. *Id.*

(hereinafter Deferred Action Memo).¹⁷² This Memo announced an expansion of the current Deferred Action for Childhood Arrival (DACA) program and the creation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.¹⁷³ Estimates vary, but of the approximately 11 million undocumented persons believed to reside in the United States, approximately 5 million may qualify to register with the government under either DAPA or expanded DACA.¹⁷⁴

In June 2012, DHS announced the creation of the predecessor to this Executive Action, the original DACA.¹⁷⁵ Immigration service providers immediately began preparations to assist eligible immigrant youth in applying for the relief. USCIS, the subagency of DHS charged with administering the benefit, had received 727,164 applications as of December 31, 2014, denying 38,597 and approving 638,897.¹⁷⁶ Having learned from the DACA experience, immigrant advocates wasted no time after the November 20, 2014, announcement to create coalitions focused on preparing for the implementation of the announced programs.¹⁷⁷ Advocates are poised to assist as many individuals as possible in applying for the benefits of the expanded DACA and the newly created DAPA, in an attempt to provide protection from deportation to the millions who might qualify.¹⁷⁸ Large grants by foundations are structured to specifically assist in DAPA and expanded DACA implementation, and immigrant legal service providers are preparing for the large increase in workload in processing DAPA and expanded DACA applications by recruiting and training volunteers and new staff.

However, these preparations have been put on hold by a lawsuit filed in federal district court seeking to stop the implementation of DAPA and expanded DACA.¹⁷⁹ Twenty-six states joined in the case, *Texas v. USA*, and on February 16, 2015, the District Court for the Southern District of Texas issued a temporary injunction. The injunction blocked DHS from accepting applications for

172. See Deferred Action Memo, *supra* note 30.

173. See *id.*

174. *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/immigrationaction> [<http://perma.cc/PRT8-ZSY6>] (last updated Apr. 15, 2015) (estimating that 4.9 million undocumented individuals may qualify for relief under DACA and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)).

175. See Deferred Action Memo, *supra* note 30.

176. The rest of the applications remained pending. See Neufeld Decl. at 10, ¶ 23, *Texas v. United States*, No. 14-CV-254 (S.D. Tex. Feb. 16, 2015), <http://crimmigration.com/wp-content/uploads/2015/01/Neufeld-declaration-1-30-15.pdf> [<http://perma.cc/9Z9V-AXU7>].

177. See, e.g., *About Administrative Relief*, ADMIN. RELIEF RES. CTR., <http://www.adminrelief.org/about> [<http://perma.cc/87MK-2GT8>] (last visited Jan. 5, 2016).

178. See *id.*

179. See *Texas v. United States*, No. B-14-254, 2015 LEXIS 18551 (S.D. Tex. Feb. 16, 2015).

the expanded form of DACA (two days before the agency began adjudicating them) and blocked DAPA implementation plans from moving forward.¹⁸⁰ On the government's appeal, the Fifth Circuit affirmed the District Court's refusal to lift the preliminary injunction until the case is heard on the merits.¹⁸¹ The Department of Justice has requested that the Supreme Court review the Fifth Circuit's decision to block the implementation of DAPA and Expanded DACA.¹⁸² If the Supreme Court decides the case before June 2016, the Obama Administration will have a few months to implement the new programs. If not, Obama's successor may decide to either continue pursuing the DAPA and expanded DACA or may abandon them altogether. While the failure of a previous attempt to block deferred action through a similar lawsuit in 2012 indicates that the plaintiffs are unlikely to prevail in the courts, the delay in implementation caused by the lawsuit points to an uncertain future for DAPA and expanded DACA.¹⁸³

The fight over the implementation of DAPA and expanded DACA, as well as the ongoing preparations to help eligible individuals apply,¹⁸⁴ emphasize the benefits individuals could receive from these programs. Detractors consider the programs an executive amnesty, while supporters highlight the way the programs will allow undocumented youth and parents to "come out of the shadows" and receive work permits.¹⁸⁵ Viewing DAPA and expanded DACA through this

180. *See id.*

181. *See* *Texas v. United States*, No. 15-40238, 2015 WL 3386436 (5th Cir. May 26, 2015).

182. *See* Petition for a Writ of Certiorari, *United States v. Texas*, No. 15-674 (U.S. Nov. 20, 2015), <http://immigrationimpact.com/wp-content/uploads/2015/11/US-v.-Texas-Petition.pdf> [<https://web.archive.org/web/20160105164341/http://immigrationimpact.com/wp-content/uploads/2015/11/US-v.-Texas-Petition.pdf>].

183. *See* *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (ICE agents lacked standing to bring suit against DHS officials to challenge the constitutional and statutory validity of a directive and memorandum promulgated by officials that changed ICE deportation procedures and prosecutorial discretion); *see also* Molly Hennessy-Fiske, *Advocates Urge Immigrants Not to Be Deterred by Ruling Blocking Obama Plan*, L.A. TIMES (Feb. 17, 2015), <http://www.latimes.com/nation/nationnow/la-na-immigration-lawsuit-applications-daca-dapa-20150217-story.html> [<http://perma.cc/Q65F-NGN8>] (reporting that DHS Secretary Jeh Johnson issued a statement in response to the preliminary injunction in *Texas v. United States*, claiming "we fully expect to ultimately prevail in the courts, and we will be prepared to implement DAPA and expanded DACA once we do").

184. *See id.*

185. *See* Marc A. Thiessen, *How to Push Back on Obama's Executive Amnesty*, WASH. POST (Dec. 1, 2014), http://www.washingtonpost.com/opinions/marc-thiessen-how-to-push-back-on-obamas-executive-amnesty/2014/12/01/b1a494f2-7963-11e4-84d4-7c896b90abdc_story.html [<http://perma.cc/WBD7-V75E>] (characterizing the executive action as "de facto amnesty" and "executive amnesty"); *see also* Eli Saslow, *Conservative Expert on Immigration Law to Pursue Suit Against Executive Action*, WASH. POST (Nov. 22, 2014), http://www.washingtonpost.com/national/2014/11/22/f6d2b3fe-728a-11e4-ad12-3734c461eab6_story.html [<http://perma.cc/R63B-FN3Z>] (Kansas Secretary of State Kris Kobach characterizing the executive action as "imperial, executive amnesty" and "[t]he sacrificial shredding of our Constitution").

lens functions to separate the program from the parts of the Executive Actions—including the Priorities Memo and the Secure Communities Memo—that are focused on enforcement. The Deferred Action Memo itself, however, makes clear that enforcement lies at the heart of deferred action; the goal of DAPA and expanded DACA is to remove certain persons from ICE and CBP’s crosshairs because “DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States.”¹⁸⁶ In other words, the sharpened enforcement that the Priority Memo and the Secure Communities Memo establish relies on the Deferred Action Memo: USCIS’s exercises of prosecutorial discretion to those deemed deserving is the flipside to the hypercriminalization of the millions left out of the protections of DAPA and expanded DACA. For these reasons, an examination of the criminal alien-generating aspects of the Executive Actions demands an analysis of DAPA and expanded DACA through an enforcement lens.

1. DAPA and Expanded DACA: Who Qualifies?

DAPA and expanded DACA, viewed broadly as the Executive Actions’ wins for immigrant communities, have the capacity to temporarily move entire categories of unauthorized migrants out of ICE’s clutches.¹⁸⁷ As a result of these programs, two categories of migrants (youth arrivals and parents of U.S. citizens and Lawful Permanent Residents) have been deemed unsuitable targets for detention or deportation for the time being. The November 2014 Executive Actions built upon the original large-scale implementation of prosecutorial discretion by the Obama Administration, the June 2012 announcement of the original DACA.¹⁸⁸ Under the first version of DACA, people who were under the age of 31 as of June 2012, who had entered the United States under the age of 16, and whose entry had occurred before June 15, 2007, could qualify for DACA.¹⁸⁹ Except for limited circumstances, only those age 15 and over could apply to USCIS, and proof of enrollment or graduation from high school or a GED program was required.¹⁹⁰ The Deferred Action Memo upgraded DACA by removing the age cap on the program: under the new program, as long as a person was under the age of 16 before they entered, being over the age of 31 would no longer serve to

186. Deferred Action Memo, *supra* note 30, at 1.

187. See Lucy Westcott, *Undocumented Immigrants and Advocates Welcome Obama’s Executive Action at Viewing Party*, NEWSWEEK (Nov. 21, 2014), <http://www.newsweek.com/undocumented-immigrants-and-advocates-welcome-obamas-executive-action-285997> [<http://perma.cc/SG8F-LLYL>].

188. See Deferred Action Memo, *supra* note 30.

189. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 38.

190. See *id.*

disqualify them.¹⁹¹ This change is thought to potentially qualify 300,000 more individuals for the program.¹⁹²

The primary benefits of expanded DACA are a three-year award of work authorization and the knowledge that for those three years, the DACA recipient will not be a priority for deportation—that is, unless she comes into contact with the criminal system and triggers one of the categories in the Priorities Memo.¹⁹³ The work authorization document qualifies an individual for a social security number, and allows the DACA recipient access to employment and educational opportunities previously closed to her, as well as the possibility of travel outside the country if she receives advance permission to return.¹⁹⁴ DACA recipients are considered lawfully present, but, as the memo makes clear, DACA is not a legal status, and confers “no substantive right, immigration status or pathway to citizenship.”¹⁹⁵

DAPA provides the same benefits, but rather than qualifying individuals on the basis of their childhood arrivals in the United States, DAPA’s benefits accrue to those unauthorized migrants who have U.S. citizen or Lawful Permanent Resident children.¹⁹⁶ Like recipients of expanded DACA, applicants must have resided in the United States since January 1, 2010.¹⁹⁷ The factors that disqualify individuals from receiving DAPA and expanded DACA are slightly different, but both programs would disqualify those convicted of a broad range of criminal offenses.¹⁹⁸ The disqualifying factors for DAPA demonstrate the close

191. Deferred Action Memo, *supra* note 30, at 3.

192. *President Obama’s Immigration Announcement*, NAT’L IMMIGR. LAW CTR. (Nov. 26, 2014), <http://www.nilc.org/execactionssummary.html> [<http://perma.cc/J7T5-2W53>] (estimating approximately 300,000 will qualify under the expanded version of DACA).

193. As explained *infra*, detention and deportation can still occur if the DACA recipient has an encounter with law enforcement.

194. See *Social Security Number and Card—Deferred Action for Childhood Arrivals*, SOC. SEC. ADMIN., http://www.ssa.gov/pubs/deferred_action.pdf [<http://perma.cc/J9QM-G74Z>] (last visited Jan. 5, 2015) (Social Security Number eligibility under DACA); see also *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> [<http://perma.cc/NE2L-4FZZ>] (last updated June 15, 2015) (ability to travel outside United States under DACA).

195. Deferred Action Memo, *supra* note 30, at 5.

196. See *id.* at 4.

197. See *id.*

198. See *id.* at 3; see also *Practice Advisory for Criminal Defenders: New “Deferred Action for Parental Accountability” (DAPA) Immigration Program Announced by President Obama*, IMMIGRANT LEGAL RES. CTR. & NAT’L IMMIGR. PROJECT OF THE NAT’L LAWYERS GUILD 1 (Nov. 24, 2014), http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_ar-dapa-criminal-defender-advisory-11_25_2014.pdf [<http://perma.cc/XZE9-29E5>] (“Both DAPA and DACA are barred by conviction of any felony, a ‘significant’ misdemeanor, or three misdemeanors. However, even here there are differences, for example in the definition of what constitutes a felony and misdemeanor.”); *Understanding the Criminal Bars to the Deferred Action Policy for*

connection between the Priorities Memo and the Deferred Action Memo. Rather than list out the disqualifying factors individually, the Deferred Action Memo directly incorporates the Priorities Memo, stating that individuals who “are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum” may be eligible for DAPA.¹⁹⁹ As explained in Part I.A, *supra*, the significant misdemeanor category, first created as a disqualifying factor for the original DACA, reappears in the Priorities Memo, and thus is also integrated into the structure of DAPA.

2. DAPA and Expanded DACA in Context: The Executive’s Back-End Power Over Immigration

Analyzing the links between DAPA and expanded DACA and the immigration enforcement regime requires a consideration of the ways in which the delegation of immigration authority to the Executive Branch contributes to these links. The prevailing wisdom holds that Congress, through its authority over the creation and expansion of the immigration code, decides the categories of immigrants allowed to enter and remain in the United States.²⁰⁰ However, as tracked by Cristina Rodriguez and Adam Cox, the expansion of the immigration code by Congress has “had the counterintuitive consequences of delegating tremendous authority to the President to set immigration screening policy by making a huge fraction of noncitizens deportable at the option of the Executive.”²⁰¹ Because millions of noncitizens are deportable at the option of the President, this functionally gives the Executive Branch the power “to exert control over the number and types of immigrants inside the United States.”²⁰² This power is exercised at the back end of the system, “through the exercise of prosecutorial discretion with respect to whom to deport, rather than at the front end of the system, through decisions about whom to admit.”²⁰³ This “de facto delegation” ends up giving the Executive “vast discretion to shape immigration policy by

Childhood Arrivals, IMMIGRANT LEGAL RESOURCE CTR. (Oct. 2012), http://www.ilrc.org/files/documents/ilrcunderstanding_criminal_bars_to_deferred_action_5.pdf [<http://perma.cc/D4EQ-V9HH>] (discussing applicable criminal convictions under DACA).

199. Deferred Action Memo, *supra* note 30, at 4.

200. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)) (finding that over no area is the legislative power more complete than immigration).

201. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009).

202. *Id.*

203. *Id.* at 464.

deciding how (and over which types of immigrants) to exercise the option to deport.²⁰⁴ This power has been concentrated in ICE officials, who are responsible for deciding whom to detain and charge as removable.²⁰⁵

The November 2014 Executive Actions appear designed to further consolidate this authority. The Priorities Memo clarifies whom ICE will target, and the Deferred Action Memo outlines the parameters of whom will be spared. It makes no difference that DAPA and expanded DACA will be managed through USCIS, the branch of the immigration authority that grants benefits; the population-level exercise of prosecutorial discretion nonetheless shapes the form and size of the undocumented population in the United States at the whim of the President. The line between USCIS and ICE is a fluid one. The threat of handing over rejected DAPA and expanded DACA applications to ICE for enforcement remains present, and, more importantly, those who do not or cannot apply for these programs will be more firmly under ICE's purview.

Moreover, by creating the significant misdemeanor ground, discussed in Part I.A, *supra*, the President is further shoring up immigration power in the Executive. There is no statutory basis (and thus no legislative review or approval) of the category, but it nonetheless creates a new group of appropriate "criminal alien" targets for deportation. This expansion of categories of appropriately deportable noncitizens is the flipside of the creation of DAPA and expanded DACA, programs that carve out a less appropriately deportable segment of the noncitizen population.

3. DACA and DAPA Theorized

The original creation of DACA in 2012 and its expansion in November 2014 provided a lifeline for the immigrant youth who have organized since 2001 for the passage of successive versions of the DREAM Act, a bill that would provide lawful status for noncitizen youth.²⁰⁶ The original DACA program falls far short of the promises of the DREAM Act, and is considered by many to be a placeholder until the bill can win passage, either as a standalone bill or as part of a broader comprehensive immigration reform package. Although it is not

204. *Id.* at 511.

205. *See id.* at 519.

206. *See* Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001) (the first DREAM Act introduced in 2001); Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 108th Cong. (2003) (the second attempt at the DREAM Act); Development, Relief, and Education for Alien Minors Act of 2007, S. 2205, 110th Cong. (2007) (the third attempt at the DREAM Act); *see also* Development, Relief, and Education for Alien Minors Act, S. 729, 111th Cong. § 3 (2009).

the DREAM Act, much of the framing of DACA closely mirrors that surrounding DREAM Act advocacy.²⁰⁷

Amalia Pallares has laid out what she calls the “neoliberal rationality” that has prevailed in public discussion of the DREAM Act, which stands in contrast with immigrant youth advocacy centering community, family, fairness, and equality.²⁰⁸ The same neoliberal rationality is in full view in the official narratives around the creation and now expansion of DACA. DACA recipients emerge as the ideal neoliberal actors: framed as exceptional, required to perform the myth of self-reliance, driven to show that they are self-propelled and can achieve their own economic viability, and exempting the state and private industry from social support.²⁰⁹ The federal government has made clear that DACA recipients’ independence must be absolute—they do not qualify for medical insurance through the Affordable Care Act, nor do they qualify for federal financial aid that might assist them.²¹⁰ Despite having to go it alone, they are also valued for their potential economic contributions. The President highlighted this valorization of immigrant youths’ latent productivity, seamlessly linking it to American exceptionalism in his November 21st remarks supporting the November 20th Executive Actions:

We’re constantly being replenished with strivers who believe in the American Dream. And it gives us a tremendous advantage over other nations. It makes us entrepreneurial. It continues the promise that here in America, you can make it if you try, regardless of where you come from, regardless of the circumstances of your birth.²¹¹

As projected through the DACA program, immigrant youth are simultaneously valued for their ability to advance without assistance and for their potential economic contributions—contributions that would generate more pure profit for the United States given that these youth will have to subsidize their own advanced schooling and healthcare.

207. This Part is animated by the insights of political scientist Amalia Pallares, in her close examination of the framing of DREAM Act advocacy in her book, *AMALIA PALLARES, FAMILY ACTIVISM: IMMIGRANT STRUGGLES AND THE POLITICS OF NONCITIZENSHIP* (2015).

208. *Id.* at 104.

209. *See id.* at 106.

210. *See Immigration Status and the Marketplace*, HEALTHCARE.GOV, <https://www.healthcare.gov/immigrants/immigration-status> [<https://perma.cc/VW8D-8DAV>] (last visited Jan. 5, 2016) (clarifying that recipients of DACA do not qualify for the Affordable Care Act “Marketplace”); *see also Questions and Answers: Financial Aid and Undocumented Students*, U.S. DEPT OF EDUC. (May 2014), <https://studentaid.ed.gov/sites/default/files/financial-aid-and-undocumented-students.pdf> [<https://perma.cc/R9VH-QSQF>] (clarifying that DACA students are not eligible for federal financial aid).

211. Nov. 21, 2014 Obama Remarks, *supra* note 24.

While the rationales surrounding DACA appear to valorize the potential of its recipients as individual advancers of American exceptionalism, DAPA occupies a different niche. In one respect, the creation of DAPA falls squarely in line with the historical valorization of family reunification in U.S. immigration law and policy.²¹² At least since the passage of the Immigration and Nationality Act of 1952, “there has been an immigration norm that prioritizes family reunification in cases of family members abroad, and family unity in cases of families who reside in the United States.”²¹³ While more recent changes in immigration law have drastically increased deportations and curtailed options for legalization, family unity remains, at least in theory, one of the pillars of the immigration system.

The focus on family unity, however, does not value all families equally. DAPA valorizes the unity of families that include U.S. citizen or Lawful Permanent Resident children. For families that do not include U.S.-born children, the principle of family unity seems not to apply, as evinced by the exclusion of parents of DACA recipients from eligibility for relief. This can be linked to the way that DAPA valorizes innocence. Whereas with DACA the innocence of immigrant youth who came to the United States “through no fault of their own” is centered, DAPA valorizes the innocence of U.S.-born children who are not to blame for their parents’ action. By offering protection from deportation to their parents, these U.S.-born children are protected. Their birth in the United States appears to trump their parents’ wrongdoing, and their potential suffering (in the case of their parents’ deportation) counts in a way that the suffering of an undocumented youth (or even a DACA recipient) losing a parent to deportation does not. The value of DAPA applicants thus lies in part in their role as the creators and caretakers of that most valuable form of life—U.S. bodies born on U.S. soil.

This selective focus on family unity is particularly stark given the current expansion of “family detention”—a euphemism for the incarceration of immigrant women with their young children during the pendency of their removal proceedings.²¹⁴ Those detained in family detention centers primarily consist of

212. For an in-depth overview of the historical recognition of family in immigration and citizenship law, see Kerry Abrams & R. Kent Piacenti, *Immigration’s Family Values*, 100 VA. L. REV. 629, 655–64 (2014).

213. PALLARES, *supra* note 207, at 25.

214. See, e.g., *ICE’s New Family Detention Center in Dilley, Texas to Open in December*, U.S. IMMIGR. & CUSTOMS ENFT (Nov. 17, 2014), <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december> [<https://perma.cc/2PGJ-5PMG>] (“The South Texas Residential Center in Dilley is the fourth facility the Department of Homeland Security (DHS) has used to increase its capacity to detain and expedite the removal of adults with children who illegally crossed the Southwest border.”).

recent arrivals apprehended while attempting to cross the U.S.-Mexico border.²¹⁵ Their recent arrival marks them as ineligible for the potential protections of DAPA or DACA.²¹⁶ The dire conditions at the Artesia, New Mexico family detention facility, where the average age of children was 6.5 years old,²¹⁷ involved grossly inadequate healthcare, educational support, and legal support.²¹⁸ Attorneys visiting their clients described sick, malnourished children and desperate mothers housed in barracks reminiscent of the Japanese internment camps.²¹⁹ While the Artesia facility has now closed, it has been replaced by the largest immigration detention center in the United States in Dilley, Texas, designed to house exclusively women and their children, with a capacity of 2400 migrants.²²⁰

The simultaneous expansion in the use of criminal alien requirement (CAR) facilities—federal prisons housing exclusively immigrants, mostly men who are prosecuted for either entering or reentering the United States unlawfully—completes this picture.²²¹ The estimated 90,000 deportations of parents each year translate increasingly into criminal convictions for illegal reentry for many of those who attempt to return.²²² A recent study found that the risk of incarceration does not deter those trying to return to their family members, guaranteeing a continued pool of bodies for the privately owned CAR prisons.²²³ During his announcement of the Executive Actions, the President asked, “Are we a nation that

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215. *Id.*; see also, AM. BAR ASS'N COMM'N ON IMMIGRATION, FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE (2015), http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf [<http://perma.cc/AMZ5-R4L9>] (analyzing the U.S. government's decision, as a policy matter, to detain women and children fleeing to the United States to seek protection).
216. See Deferred Action Memo, *supra* note 30, at 4 (requiring individuals to have arrived before January 1, 2010, in order to qualify for DAPA or expanded DACA relief).
217. Vicki B. Gaubeca, *Stop Warehousing Immigrant Mothers and Children*, ALBUQUERQUE JOURNAL (Aug. 28, 2014, 12:02 AM), <http://www.abqjournal.com/453083/opinion/stop-warehousing-immigrant-mothers-and-children.html> [<http://perma.cc/QN7C-YUUX>].
218. *Expose and Close*, DETENTION WATCH NETWORK (Sept. 2014), http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose_close_-_artesia_family_residential_center_nm_2014.pdf [<http://perma.cc/CCS4-GGQB>].
219. *Grassroots Leadership Condemns Expansion of For-Profit Family Detention Centers*, GRASSROOTS LEADERSHIP (Nov. 18, 2014), <http://grassrootsleadership.org/releases/2014/11/grassroots-leadership-condemns-expansion-profit-family-detention-centers> [<http://perma.cc/9NP4-BAMT>].
220. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), <http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html> [<http://perma.cc/EQ6U-DG2W>].
221. *Warehoused and Forgotten*, ACLU 2-3 (June 2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf> [<https://perma.cc/6R4S-74UG>].
222. Seth Freed Wessler, *Nearly 250K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES (Dec. 17, 2012, 9:45 AM), http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html [<http://perma.cc/HV6C-QPJW>].
223. See Hamilton, *supra* note 97.

accepts the cruelty of ripping children from their parents' arms?"²²⁴ The expansion of CAR facilities to house those attempting to return to their families seems to answer this question in the affirmative. The valuing of family unity that DAPA purports to advance must be theorized alongside the two attacks on the family that family detention and CAR facilities represent.

DAPA's justification is not limited to family unity. The value of immigrant parents as laborers appears central as well. Obama alluded to this in his November 20th speech, asking, "Are we a nation that tolerates the hypocrisy of a system where workers who pick our fruit and make our beds never have a chance to get right with the law? Or are we a nation that gives them a chance to make amends, take responsibility, and give their kids a better future?"²²⁵ In contrast to the DACA-eligible youth, who appear to be valued for their potential contributions as America's future producers, potential DAPA recipients are naturalized both as caretakers of America's future entrepreneurs, and as the workers at the lowest ranks of the segmented labor market.²²⁶ Writing in 2009 about the President's relationship to immigration law, Adam B. Cox and Cristina M. Rodríguez foreshadowed this aspect of the Executive Actions, explaining that the delegation of power on the enforcement side of immigration policy makes it possible for the President, "without having to resort to the legislative process, to alter significantly the composition of the immigrant labor force."²²⁷ Thus, under DAPA, the most malleable laborers would be given permission to stay, while the rest are hypercriminalized and drawn into the detention to deportation pipeline.

The narratives around innocence, exceptionalism, and family unity that bolster DAPA and both the original and the expanded DACA programs also serve to mask the underlying policies that have resulted in an undocumented population of 11 million. At their core, DACA and DAPA are prosecutorial discretion programs, or attempts by the federal government to provide a case-by-case evaluation of eligible individuals. The collective demands of immigrants are both masked and nullified by the individualized forms of prosecutorial discretion that DACA and DAPA represent. The worthiness of each applicant's capacities and productive potential, either as laborers and protectors of U.S. citizen or Lawful Permanent Resident children (DAPA) or potential producers (DACA and expanded DACA) are grounded in a neoliberal perspective that measures each applicant against the pre-approved narratives. While the decision to migrate is a personal one, the factors pushing individuals to attempt unauthorized crossings

224. President Barack Obama, *supra* note 2.

225. *Id.*

226. PALLARES, *supra* note 207, at 104.

227. Cox & Rodríguez, *supra* note 201, at 464.

into the United States, and to remain in the United States if they cross successfully, are not. For example, the displacement of Mexican workers occasioned by the North American Free Trade Agreement (NAFTA),²²⁸ the land-grab-fueled displacement of migrants from South America,²²⁹ and the poverty and gang violence leading to the so-called surge in Central American migrants’ arrivals during the summer of 2014,²³⁰ are all masked by a rhetoric that views migration as an individual choice with individual, at-fault actors. The millions of potential individual exercises of prosecutorial discretion through DAPA and expanded DACA cast a huge web of obfuscation over the root causes of migratory flows. As explained below, they also serve to mask the unhampered growth of the immigration enforcement apparatus, of which these programs are an integral part.

4. DAPA and Expanded DACA and the Production of the “Criminal Alien”

Generally speaking, the unauthorized migrants who might have thus far avoided the immigration enforcement apparatus and the criminal justice system are those most likely to submit their detailed applications to USCIS if the programs move forward. If they are properly informed, unauthorized migrants are unlikely to apply for DAPA or expanded DACA if they have criminal convictions that disqualify them from the relief and simultaneously make them priorities for detention and removal.²³¹ Immigrant advocacy organizations are attempting to assure this outcome by offering preliminary public education about DAPA and expanded DACA’s disqualifying factors, in the hopes of bringing down the number of people who will submit their information to USCIS without the guarantee of the promised benefit.²³² The vast majority of those who submitted applications

228. See DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* (2008).

229. See SASKIA SASSEN, *EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY* (2014).

230. See Ana Gonzales-Barrera, Jens Manuel Krogstad & Mark Hugo Lopez, *DHS: Violence, Poverty, is Driving Children to Flee Central America to U.S.*, PEW RES. CTR. (July 1, 2014), <http://www.pewresearch.org/fact-tank/2014/07/01/dhs-violence-poverty-is-driving-children-to-flee-central-america-to-u-s> [<http://perma.cc/7W7Q-YU9W>] (observing drastic increases in Honduran and Salvadoran child migration in response to surges in gang and drug trafficking violence).

231. See, e.g., Jeanne Batalova, Sarah Hooker & Randy Capps, *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action*, MIGRATION POLY INST. 5 (Aug. 2014), <http://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action> [<http://perma.cc/QJ2R-PBWA>].

232. See, e.g., *Understanding the Criminal Bars to the Deferred Action for Childhood Arrivals*, IMMIGRANT LEGAL RESOURCE CTR. (2012), http://www.ilrc.org/files/documents/ilrc-2012-daca_chart_1.pdf [<http://perma.cc/J3AN-VT9R>] (providing a brief overview of how criminal history affects eligibility for deferred action as a reference for applicants).

to USCIS for the original DACA program qualified for the benefit,²³³ and the same could be true of the enhanced DACA and the new DAPA if individuals receive accurate information and competent assistance with the application process.

The process of applying for deferred action involves the submission of a detailed form with extensive biographic data; the forms created for the first iteration of DACA asked applicants to list every single address at which they have resided since they arrived in the United States.²³⁴ More importantly, every person who applies for DAPA or expanded DACA would be subject to a background check. Upon submission of an application to USCIS, migrants would receive a notice directing them to a biometrics capture appointment at their nearest USCIS office.²³⁵ For many applicants whose survival has thus far depended on avoiding detection by immigration authorities, this appointment will be the first time they willingly enter a federal immigration facility. At the appointment, the applicants' fingerprints and photographs will be taken.²³⁶ The background check is carried out by running the fingerprints against available federal criminal and immigration databases in an attempt to flag disqualifying factors such as past criminal records, past deportations, or both.²³⁷ If the initial round of DACA applications are any indication, most applicants will presumably clear this hurdle.

The captured biometric data will be used for purposes other than just a background check, however. The information will enter the Automatic Biometric Identification System (IDENT), a database that serves as "a central DHS-wide system for storage and processing of biometric and associated biographic information for national security; law enforcement; immigration and border management; intelligence; background investigations for national security positions

233. This was clearly the case with the first iteration of deferred action (DACA), with a ratio of 638,897 applications approved to 38,597 denied. The rest of the applications remained pending. See Neufeld Decl., *supra* note 176.

234. See *U.S. Citizenship and Immigration Services (USCIS) Form I-821D: Consideration of Deferred Action for Childhood Arrivals*, U.S. DEPT. OF HOMELAND SEC. 2-3, <http://www.uscis.gov/sites/default/files/files/form/i-821d.pdf> [<http://perma.cc/769Z-TM8E>] (form last updated June 4, 2014) (Part 2, "Residence and Travel Information," requires each previous address since the applicant arrived in the U.S.).

235. See *Instructions for Consideration of Deferred Action for Childhood Arrivals*, U.S. DEPT. OF HOMELAND SEC. 3, <http://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf> [<http://perma.cc/5RRU-GQTL>] (last updated June 4, 2014) ("Individuals requesting DACA must provide fingerprints, photographs, and signatures (biometrics). You may receive a notice scheduling you to appear at an Application Support Center (ASC) for biometrics collection.")

236. *Id.*

237. See *Privacy Impact Assessment Update for the Customer Identity Verification (CIV) System*, U.S. DEPT. OF HOMELAND SEC. 3 (Apr. 26, 2010), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_civupdate.pdf [<http://perma.cc/C3GR-2LQQ>] (detailing the background fingerprint-check procedure).

and certain positions of public trust; and associated testing, training, management reporting, planning and analysis, or other administrative uses.”²³⁸ IDENT bridges the enforcement aspects and the benefits-granting aspects of the agency’s work by holding the records of all noncitizens fingerprinted by DHS, whether they have been encountered for detention or deportation purposes, or for purposes of obtaining lawful immigration status.²³⁹ All DAPA and expanded DACA applicants’ information would be entered in IDENT and remain in the database, past the expiration of the three-year deferred action period or the programs’ cancellation under future presidential administrations.

The potential capture of the data of millions of DAPA and expanded DACA recipients in the IDENT database takes on particular weight when analyzed alongside the federal government’s complete integration of IDENT into efforts to apprehend and deport “criminal aliens.” The full activation of S-Comm in every jurisdiction translates into any arrest of any person, citizen or noncitizen, anywhere in the country, triggering a check against the fingerprints in the IDENT database.²⁴⁰ As discussed in Part I.B, *supra*, this aspect of S-Comm will remain unchanged in the newly created PEP. Most of those who apply for DAPA and expanded DAPA would do so because they have no path to lawful status in the United States. For those who managed to cross into the country without encountering any border enforcement officials or without having been fingerprinted or photographed by those officials, no record of their existence currently resides within federal immigration databases.²⁴¹ If they were arrested by local law enforcement, a search of the IDENT database would not reveal their noncitizen status. Unless they are flagged as noncitizens some other way (for example, through an in-person interview conducted pursuant to the Criminal Alien

238. See *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)*, U.S. DEPT. OF HOMELAND SEC. 2 (Dec. 7, 2012), http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy_pia_usvisit_ident_appendixj_jan2013.pdf [<http://perma.cc/WXL9-VYUU>] (detailing procedure for IDENT checks).

239. See Cox & Miles, *supra* note 114, at 94 n.21.

240. See *Secure Communities: Monthly Statistics Through August 31, 2014 IDENT/IAFIS Interoperability*, U.S. IMMIGR. & CUSTOMS ENFT 1, http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2014-to-date.pdf [<http://perma.cc/2K6R-GVT2>] (last visited Jan. 5, 2016) (all IDENT matches removed, whether convicted or not).

241. See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1853 (2011) (“[O]f the 11.2 million unauthorized migrants in the United States, only a few are arrested. The 11.2 million are somewhere within the borders of the United States, but the federal government does not know exactly who they are or where they live or work.”); see also *id.* at 1828 (“[A]bout 6.7 million unauthorized migrants—are believed to have entered without inspection at a port of entry.”).

Program), they may be able to go through the criminal process without being flagged for transferred to ICE custody.²⁴²

Now, however, any future encounters with law enforcement by DAPA or expanded DACA recipients, whose data would then be in IDENT, could lead to quick identification by immigration enforcement authorities and transfer to immigration custody. To avoid detection, DAPA and expanded DACA recipients would need to remain above reproach in every area of their lives, a task that could prove impossible for people of color, especially young men who may attract police attention despite their best efforts to perform DAPA or expanded DACA levels of respectability.²⁴³

In the worst case scenario for this population, a future administration may choose not only to cancel the deferred action programs, but to use the information in IDENT to track down, detain, and deport those who have made their presence known through their DAPA or expanded DACA applications.²⁴⁴ This may prove politically unpopular, particularly if millions of individuals end up applying for and receiving these forms of relief. However, the mass deportations of Operation Wetback in the 1950s (which included the rounding up of over a million people, including U.S. citizens of Mexican descent) demonstrate that this outcome, while likely to prove controversial, is not politically impossible.²⁴⁵

This is not an argument for the millions who may qualify for deferred action to remain in the shadows if the program moves forward. The decision of whether or not to apply for DAPA or expanded DACA, even if one unquestionably qualifies for the relief, is a highly personal one. Coming out of the shadows to be counted and accounted for, however, while it may bring the benefits of work authorization and a social security number, involves stepping into the potential net of immigration enforcement. Voluntary entry into the IDENT database (one of the primary mechanisms for producing “criminal aliens”) at a time when detention

242. Ingrid Eagly has tracked how local jurisdictions may handle knowledge of an arrestee’s lack of U.S. citizenship differently depending on local attitudes toward unauthorized migration, with some jurisdictions actively seeking to use this information to initiate immigration enforcement efforts, and others seeking to ignore it. Eagly, *supra* note 10.

243. See Carbado & Harris, *supra* note 16 (arguing that the Supreme Court in *Terry v. Ohio* and *United States v. Brignoni-Ponce* effectively enables procedural racial profiling).

244. *But see* Motomura, *supra* note 241, at 1853–54 (“[T]he combination of the Gonzales rule, § 287(g) agreements, and [S-Comm] can give the federal government more information about potentially removable individuals than the federal enforcement apparatus can handle—either politically given various constituencies opposed to certain types of enforcement, or practically given its limited capacity.”).

245. See U.S. IMMIGR. & NATURALIZATION SERV. ANN. REP., at 31 (1954); see also Giberto Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 81 (1975) (finding that during 1950s, as many as one-sixth of the total “Mexican-origin” population in the United States was deported).

and deportation are at an all-time high is a required tradeoff for the temporary protections of DAPA or expanded DACA.

II. NET WIDENING IN THE IMMIGRATION CONTEXT

The excesses of the carceral state have pierced public consciousness, and law enforcement officials now routinely make pronouncements about the need to reconsider the strategies that have led the United States to become the world’s leading jailer.²⁴⁶ By contrast, in the immigration realm, the unprecedented resources applied to both border and interior enforcement and the growth in detention have not yet reached politically unpalatable levels.²⁴⁷ Still, the two million deportations benchmark surpassed by the Obama Administration in April 2014 generated a great deal of activism and backlash against the Executive’s enforcement strategy.²⁴⁸ When the head of the National Council of La Raza, historically a supporter of the Obama Administration, publicly called the President the “Deporter-in-Chief,” the President could no longer ignore the crisis.²⁴⁹

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246. See, e.g., U.S. Attorney Gen. Eric Holder, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> [<http://perma.cc/UTV7-JQ8Q>] (acknowledging that “young black and Latino men are disproportionately likely to become involved in our criminal justice system” and that “people of color often face harsher punishment than their peers”); see also FBI Dir. James B. Comey, Remarks to Georgetown University (Feb. 12, 2015), <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> [<https://perma.cc/ZTJ7-8W55>] (FBI Director James Comey recognized “hard truths” in the aftermath of the fatal shooting of Michael Brown in Ferguson, Missouri. Comey acknowledged that “at many points in American history, law enforcement enforced the status quo, a status quo that was often brutally unfair to disfavored groups. . . . [R]esearch points to the widespread existence of unconscious [racial bias.]”); Jesse McKinley, *Pat Robertson Says Marijuana Use Should be Legal*, N.Y. TIMES (Mar. 7, 2012), <http://www.nytimes.com/2012/03/08/us/pat-robertson-backs-legalizing-marijuana.html> [<http://perma.cc/L79Z-3X3T>] (evangelical leader Pat Robertson advocating for drug law revision, stating, “It’s completely out of control . . . prisons are being overcrowded with juvenile offenders having to do with drugs. And the penalties, the maximums, some of them could get 10 years for possession of a joint of marijuana. It makes no sense at all”).
247. See *The Growth of the U.S. Deportation Machine*, IMMIGR. POLY CTR. fig. 2 (Apr. 9, 2014), <http://www.immigrationpolicy.org/just-facts/growth-us-deportation-machine> [<http://perma.cc/NC5C-XEL7>] (graph of U.S. Border Patrol Budget, FY 1993–2013); see also Graff, *supra* note 151 (examining the increase of Border Patrol budgets in comparison to the combined budgets of the FBI, ATF, DEA, Secret Service and U.S. Marshals).
248. Editorial, *Mr. Obama Feels the Heat*, N.Y. TIMES (Mar. 14, 2014), <http://www.nytimes.com/2014/03/15/opinion/mr-obama-feels-the-heat.html> [<http://perma.cc/XR25-ZNA2>] (“An escalating campaign by immigration advocates against President Obama’s get-tough policies (nearly two million deportations and counting) is having an effect on the deporter in chief.”).
249. See Eyder Peralta, *National Council of La Raza Dubs Obama ‘Deporter-in-Chief’*, NPR (Mar. 4, 2014), <http://www.npr.org/blogs/thetwo-way/2014/03/04/285907255/national-council-of-la-raza-dubs-obama-deporter-in-chief> [<http://perma.cc/4CJS-B5UD>].

Possibly hoping to relieve public pressure against deportations, the Executive acted, announcing the November 2014 Immigration Accountability Executive Actions. In this context, the November 2014 announcement can be seen as the President's best effort to fix some of what is considered broken in the immigration system.²⁵⁰ Nevertheless, even as the expansion of DACA and creation of DAPA indicate a rejection of an indiscriminate deportation strategy, the massive underlying mechanisms of immigration enforcement survive in both new and refined forms.²⁵¹ These forms include the creation of new criminal alien categories like the significant misdemeanor,²⁵² the rebranding of S-Comm into PEP,²⁵³ and the addition to the IDENT database of all of those who apply for DAPA or expanded DACA.²⁵⁴ The broad powers of the immigration enforcement apparatus remain intact, and their differential impacts on the "criminal alien" remain unchanged.²⁵⁵ While the Executive Actions did expand the population of immigrants who may be protected from deportation, the three Memos examined in the preceding sections may have the effect of widening the nets of social control over the noncitizen population.

Net widening is a phenomenon associated with forms of penal reform that function to expand state control over an ever-growing criminal justice population.²⁵⁶ "The criminal justice system can be conceptualized as a net or series of nets functioning to regulate and control personal behavior. Each component of the justice system . . . is authorized by the state to intervene in our personal lives."²⁵⁷ The term net widening has been applied where the reformers' intentions are frustrated by the unintended consequences of widening, strengthening, or creating

250. See President Barack Obama, *supra* note 2 ("But today, our immigration system is broken—and everybody knows it . . . When I took office, I committed to fixing this broken immigration system . . . [T]here are actions I have the legal authority to take as President—the same kinds of actions taken by Democratic and Republican presidents before me—that will help make our immigration system more fair and more just. Tonight I am announcing those actions.").

251. See Natapoff, *supra* note 64, at 1104 (arguing that decriminalization alters and strengthens the penal system's powers of governance and control and concluding that "by rejecting the overtly punitive and costly policies of mass incarceration, it permits the massive underlying mechanism to survive in new forms").

252. See discussion *supra* Part I.A.

253. See discussion *supra* Part I.B.

254. See discussion *supra* Part I.C.

255. Natapoff, *supra* note 64, at 1104.

256. See Austin & Krisberg, *supra* note 31, at 169 ("The criminal justice system can be conceptualized as a net or series of nets functioning to regulate and control personal behavior. Each component of the justice system . . . is authorized by the state to intervene . . ."). In the following sections, this Author will apply the concept of net widening to the immigration context.

257. *Id.* at 169.

new nets of social control.²⁵⁸ As explained by James Austin and Barry Krisberg in their formative article on the topic, (i) reforms that increase the number of subgroups in society whose behavior is regulated and controlled by the state create wider nets; (ii) reforms that increase the state’s capacity to control individuals through intensifying state intervention create stronger nets; and (iii) reforms that transfer intervention authority from one agency or control system to another create new nets.²⁵⁹ While the net widening critique was originally developed in the penal reform context, applying it to the immigration Executive Actions offers valuable insights and suggests new directions for future reform efforts.

A. The Executive Actions Create Wider Nets

The creation and consolidation of the significant misdemeanor category creates wider nets by expanding the pool of people who are properly labeled criminal aliens. As discussed in Part I.B, *supra*, DUIs already constituted the most common criminal conviction for deportees (after the immigration crime of illegal entry). The explicit inclusion of the DUI as a significant misdemeanor nonetheless constitutes a form of net widening, as the immigration enforcement system is now expanding in name to reflect—and continue to justify—the expansion in practice. Individuals with DUI convictions and other misdemeanor convictions will continue to be identified through the criminal system and transferred to detention centers. The consolidation of the significant misdemeanor transforms the action of driving while intoxicated into an identity (“criminal alien”). The consequence is that noncitizens with a single DUI conviction will continue to face the full force of the detention and deportation apparatus.

Apart from the expansion of categories in the Priorities Memo, the expanded biometric capture required as part of DAPA and expanded DACA implementation can also be theorized as creating wider nets. DAPA and expanded DACA would create a new entry point for the IDENT database, as discussed in Part I.C, *supra*.²⁶⁰ These wider nets are part of what immigration scholar Anil Kalhan describes as “immigration panopticism,”

258. *Id.* at 176–77 (analyzing partial decriminalization movements in marijuana laws creating correspondent increases in other areas of law enforcement such as narcotics offenses); *see also* Natapoff, *supra* note 64, at 1095 (arguing that decriminalization efforts such as drug courts and other partial decriminalization programs actually widen the criminal justice net by increasing “the numbers of offenders routed into the criminal system”).

259. *See* Austin & Krisberg, *supra* note 31, at 170.

260. *See Privacy Impact Assessment Update for the Customer Identity Verification (CIV) System*, U.S. DEPT. OF HOMELAND SEC. 3 (Apr. 26, 2010), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_civupdate.pdf [<http://perma.cc/C3GR-2LQQ>] (detailing the background fingerprint-check procedure); *see also Privacy Impact Assessment for the Automated Biometric Identification System*

which eliminates zones in society where immigration status is invisible and irrelevant and puts large numbers of public and private actors—including law enforcement and criminal justice officials . . . in the position of monitoring and determining immigration status, identifying potential immigration law violators, collecting personal information from those individuals, and informing federal authorities.²⁶¹

Many DAPA and expanded DACA applicants will have thus far managed to avoid capture by the immigration authorities.²⁶² If the programs move forward, with no better options in sight, DAPA and expanded DACA applicants will willingly submit their biometrics information to DHS, signing up for heightened surveillance by immigration enforcement agencies.²⁶³ While deferred action may be a signal that the President is rejecting the fiscal and human cost of indiscriminate deportations, it maintains mechanisms of tracking, labeling, and control over a disfavored population (noncitizens) over the long term.

Whether the information in IDENT is used for a future mass deportation program, or simply for the current person-by-person arrest of those noncitizens who come into contact with the criminal system, the addition of millions of previously uncounted migrants into IDENT widens nets by increasing the state's capacity to control migrants. Because IDENT contains the information of everyone who has come into contact with DHS's immigration branches, it cannot be said to be a criminal database.²⁶⁴ This distinction may be considered meaningless, as inclusion in IDENT, because of its full integration into local criminal enforcement efforts, marks everyone in the database as a potential "criminal alien," and thus a potential subject of immigration enforcement.²⁶⁵ Because those who go on to become Lawful Permanent Residents nonetheless remain in IDENT, the database's reach extends far into the future, marking anyone who has ever been a noncitizen as a potential candidate for detention or deportation. For those whose

(IDENT), U.S. DEPT. OF HOMELAND SEC. 2 (Dec. 7, 2012), http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy_pia_usvisit_ident_appendixj_jan2013.pdf [<http://perma.cc/WXL9-VYUU>] (detailing procedure for IDENT checks).

261. Kalhan, *supra* note 117, at 1145.

262. Approximately 6.7 million unauthorized migrants in the United States are thought to have entered the United States without inspection by immigration authorities. While some percentage of these individuals may have had at least one encounter with border authorities or other agents of DHS, many will have avoided all contact with immigration authorities. See Motomura, *supra* note 241, at 1828.

263. As explained in Part I.C, submitting biometrics information is part of the application process for DAPA and expanded DACA.

264. For an explanation of IDENT procedures, see generally *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)*, *supra* note 238.

265. See *Secure Communities: Monthly Statistics Through August 31, 2014 IDENT/LAFIS Interoperability*, *supra* note 240.

data is held in IDENT, only attaining U.S. citizenship (and the protection from deportation citizenship offers) erases the potential for detention and deportation.

B. The Executive Actions Create Stronger Nets

The Executive has repeatedly made it clear that DAPA and expanded DACA would not grant recipients lawful status; it merely deprioritizes them for deportation.²⁶⁶ In this sense, for those who receive deferred action, this decriminalization in ICE’s eyes is in some way a tradeoff for their continued unlawful status. In other words, by applying for deferred action, unauthorized migrants make themselves known to immigration authorities without suffering the usual outcomes of detention and deportation, and successful applicants are diverted into the three-year period of DAPA or expanded DACA.²⁶⁷

This tradeoff in the form of DAPA and expanded DAPA may have a net-widening effect by increasing immigration enforcement against other populations. In the criminal realm, initial attempts to decriminalize marijuana were criticized as having the effect of “widening and toughening the net in other areas of law enforcement,” leading to increased arrest of persons committing other drug-related offenses.²⁶⁸ In the immigration realm, the removal of DAPA and expanded DACA recipients as short-term enforcement priorities could also lead to the “widening and toughening” of the net in other areas of immigration enforcement, providing political cover for the expansion in the use of detention and border enforcement resources.²⁶⁹

An example of how this net widening of targeted migrant populations could occur takes place in the family detention context. Since 2007, the congressional budget has included a mandate that 34,000 immigration detention beds be funded

266. See Deferred Action Memo, *supra* note 30, at 5 (“This memorandum confers no substantive right, immigration status, or pathway to citizenship.”); see also *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 38 (“Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status.”).

267. Other ways of theorizing the spectrum of non-U.S. citizenship statuses include “twilight status” and “liminal status.” See David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, MIGRATION POLICY INST. (2005), http://www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf [<http://perma.cc/E99F-GGL4>] (categorizing the various statuses of the undocumented population); see also Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, in S. ATLANTIC Q. 113:3 9 (Summer 2014) (discussing the vulnerability of noncitizens who are in a “liminal status”).

268. Austin & Krisberg, *supra* note 31, at 177.

269. *Id.*

on any given night.²⁷⁰ Anti-detention advocates refer to this funding mandate as the “bed quota,” drawing attention to its absolute uniqueness; in no other realm of the U.S. carceral state does an openly acknowledged incarceration quota exist, much less dictate policy.²⁷¹ The mandate continues in effect, and the Executive has not challenged it, instead calling for an increase in the funding of detention beds in the most recent budget.²⁷² Family detention—the incarceration of migrant mothers together with their children—constitutes the largest percentage of the new detention beds.²⁷³ The protection from deportation that DAPA and expanded DACA would offer to migrants who arrived prior to January 2010 would leave those who have arrived more recently, including the women and children who continue to arrive, as prime targets for these stronger nets of immigration enforcement in the form of family detention.²⁷⁴

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270. See Ted Robbins, *Little-Known Immigration Mandate Keeps Detention Beds Full*, NPR (Nov. 19, 2013, 5:04 PM), <http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full> [<http://perma.cc/7GCT-99W3>] (“The mandate calls for filling 34,000 beds in some 250 facilities across the country, per day, with immigrant detainees.”); see also Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 13, 2013), http://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html [<http://perma.cc/Y6C5-8J4S>] (“The policy requires [ICE] to keep an average of 34,000 detainees per day in its custody, a quota that has steadily risen since it was established in 2006.”).
271. See *AILA’s Take on the Detention Bed Quota*, AM. IMMIGR. LAWYER’S ASS’N (Apr. 2, 2014), <http://www.aila.org/infonet/ailas-take-on-the-detention-bed-quota> [<http://perma.cc/CC57-WS7P>] (comparing other federal and local law enforcement agency detention policies to conclude that the ICE quota is “an aberration in law enforcement”); see also *Eliminate the Detention Bed Quota*, NAT’L IMMIGRANT JUSTICE CTR., <https://www.immigrantjustice.org/eliminate-detention-bed-quota> [<https://perma.cc/87TU-RAMH>] (last visited Jan. 5, 2016) (“No other law enforcement agency is subject to a statutory quota on the number of individuals to hold in detention.”); *End the Immigration Detention Bed Quota*, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/EndTheQuotaNarrative> [<https://web.archive.org/web/20150911015624/http://www.immigrantjustice.org/eliminate-detention-bed-quota#.Vov1yvkjrhE>] (last visited Jan. 5, 2016) (“[N]o other law enforcement agency operates on a quota system.”).
272. See OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016 BUDGET OF THE U.S. GOVERNMENT 58–60 (2015), <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf> [<http://perma.cc/SFQ3-86P8>] (the 2016 budget will increase funding for “additional technology and infrastructure, and expanding and enhancing intelligence and targeting capabilities,” as well as increase “the acquisition and sustainment of technology and tactical infrastructure along U.S. borders,” fund “recapitalization of aging non-intrusion inspection equipment and ports of entry,” and fund Customs and Border Protection (CBP) “intelligence and targeting activities”); see also Carly Perez, *DWN Statement: Obama Budget Harms Immigrants by Funding Increased Detentions and Monitoring #EndtheQuota #ExposeandClose*, DETENTION WATCH NETWORK (Feb. 3, 2015), <https://detentionwatchnetwork.wordpress.com/2015/02/03/dwn-statement-obama-budget-harms-immigrants-by-funding-increased-detentions-and-monitoring-endthequota-exposeandclose> [<https://perma.cc/7DD8-PGMQ>] (the new budget will “[b]ring the total number of detention beds to 34,040—40 beds above the congressionally-mandated detention bed quota.”).
273. See Perez, *supra* note 272.
274. Austin & Krisberg, *supra* note 31, at 169.

The Executive Actions also cement the ongoing expansion of Border Patrol resources, guaranteeing continued efforts to catch, detain, and remove those who are either initially attempting to enter the United States or trying to return to their families and communities post-deportation.²⁷⁵ As these examples demonstrate, even as lack of lawful status would be decriminalized for some in the form of DAPA and expanded DACA, the total required amount of immigration enforcement would remain the same or be exceeded and more vigorously directed toward those who do not qualify for the deferred action programs. For those who cannot be made right with the law, the Executive Actions promise a stronger net in the form of bolstered mechanisms for their capture, detention, and deportation.

C. The Executive Actions Create New Nets

Net widening scholars also critique reforms that create new nets in the criminal realm by transferring intervention authority from one agency or control system to another one, rather than replacing or radically altering existing institutions.²⁷⁶ In the immigration context, this transfer of intervention authority had already been moving from federal immigration authorities to local criminal authorities, but the November 2014 Executive Actions bolstered this transfer.²⁷⁷ The S-Comm program, now replaced by PEP, is part of what immigration scholar Hiroshi Motomura calls the “recent dramatic expansion of the state and local role in bringing removable noncitizens into contact with federal enforcement.”²⁷⁸ With “criminal aliens” making up the largest percentage of removals, ICE relies heavily on noncitizens’ contact with local law enforcement to serve as the conduit to immigration detention and removal proceedings.²⁷⁹ Because most noncitizens transferred to ICE custody will be placed into removal (deportation) proceedings, ordered removed, and actually removed, Motomura posits that the “discretion that matters” is the discretion by local law enforcement to arrest.²⁸⁰ As

275. See Memorandum from Jeh Charles Johnson, Sec’y. U.S. Dep’t of Homeland Sec. on S. Border & Approaches Campaign, to R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot., Admiral Paul F. Zukunft, Commandant, U.S. Coast Guard, Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., W. Craig Fugate, Adm’r, Fed. Emergency Mgmt. Agency & Alan D. Bersin, Acting Assistant Sec’y for Policy (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_southern_border_campaign_plan.pdf [<http://perma.cc/294C-3VC3>] (extending previous programs by commissioning three joint task forces incorporating U.S. Coast Guard, CBP, ICE, and USCIS).

276. See Austin & Krisberg, *supra* note 31, at 169.

277. Motomura, *supra* note 241, at 1858; see also Eagly, *supra* note 10.

278. Motomura, *supra* note 241, at 1858.

279. See Eagly, *supra* note 10, at 1128.

280. Motomura, *supra* note 241, at 1853 (“The chances are very high that removable noncitizens arrested by federal officers will be put into civil removal, if not prosecuted criminally. Once put into

Motomura explains, it is the “enforcement preferences and prejudices of state and local gatekeepers” that dictate the initial arrests of noncitizens, in turn defining which noncitizens end up deported.²⁸¹

Federal authorities tend to unquestioningly rely on the validity of local arrests and convictions, and this reliance tends to mask local law enforcement agents’ racial and ethnic preferences and prejudices (even as biases vary in severity from jurisdiction to jurisdiction).²⁸² The very fact that a noncitizen’s introduction into the immigration enforcement apparatus occurs through the criminal system automatically brands him a “criminal alien” for immigration purposes,²⁸³ a branding that helps obscure any shortcomings in the process of criminal arrest and prosecution.²⁸⁴ Under the original S-Comm program, a local arrest was sufficient for ICE to seek a noncitizen’s transfer. The new Secure Communities Memo has clarified that only those noncitizens with convictions (not merely arrests) will be priorities for transfer to immigration custody.²⁸⁵ The reality remains, however, that convictions begin with arrests, and thus the “discretion that matters”²⁸⁶ continues to be the decision by local law enforcement to arrest. As a result, immigration enforcement authority experiences a *de facto* transfer from federal to local hands, and local authorities choose who will be exposed to federal immigration enforcement.

The Secure Communities Memo’s focus on convictions also consolidates the transfer of immigration enforcement authority to a new set of actors: local prosecutors.²⁸⁷ Particularly for those accused of misdemeanors (and who become an immigration enforcement priority as a result of these charges), this transfer of power may prove less relevant, as arrests in the misdemeanor context

civil removal, the chances are very high that they will be ordered and actually removed.”). For a parallel discussion on how police officers’ discretion often determines outcomes in the misdemeanor adjudication system, and the effects of this discretion, see *supra* notes 69–79 and accompanying text.

281. Motomura, *supra* note 241, at 1857.

282. *Id.*

283. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-187, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS 6 (2011) (defining “criminal aliens” as those noncitizens “who are residing in the United States legally or illegally and are convicted of a crime.”).

284. For more discussion on how the harms of the immigration enforcement system are layered on top of the harms of the misdemeanor adjudication system, see *supra* notes 80–86 and accompanying text.

285. Secure Communities Memo, *supra* note 29, at 2 (“ICE should only seek the transfer of an alien in the custody of state or local law enforcement through the new program when the alien has been convicted of an offense listed in Priority 1 (a), (c), (d), and (e) and Priority 2 (a) and (b) of the November 20, 2014 [Priorities Memo], or when, in the judgment of an ICE Field Office Director, the alien otherwise poses a danger to national security.”).

286. Motomura, *supra* note 241, at 1842.

287. Secure Communities Memo, *supra* note 29, at 2.

translate into convictions at incredibly high rates.²⁸⁸ Nonetheless, ICE appears to be leaving nothing to chance: As Ingrid Eagly has revealed, ICE provides office-wide trainings to local criminal prosecutors in counties with high noncitizen populations.²⁸⁹ The goal of these trainings is to have “local prosecutors properly charge and plead their criminal cases to maximize ICE’s chance of obtaining removal when desired.”²⁹⁰ With these trainings, ICE seeks to avoid “litigation challenges,” in which “ICE is unable to secure removal or the process of doing so is more cumbersome.”²⁹¹ ICE retains the authority to detain and remove noncitizens but relies on local actors to arrest and prosecute in ways that will indelibly mark a noncitizen as a “criminal alien.” The Secure Communities Memo thus consolidates intervention authority in local jurisdictions, giving local police and prosecutors the power to both create and shape the nets that capture noncitizens.

D. Disavowing Criminality Contributes to Net Widening

An immigration reform strategy premised on distancing immigrants from criminality contributes to the net widening effects described in the above Subparts. Pro-immigrant advocacy commonly pushes back on the criminalization of immigrants by claiming and asserting respectability for immigrants—that is, in order to claim the right to be protected, immigrants are compelled to “discredit, disavow, and deny the ‘criminal’ and/or ‘illegal’ populations within their communities to represent themselves fitting the ideals and standards of ‘respectability.’”²⁹² In this case, to make the argument against S-Comm and in favor of immigrant rights, advocates represented immigrants “as worthy and deserving . . . and most important[ly], as not criminal.”²⁹³ As Lisa Marie Cacho explains, “Unfortunately, disavowing criminality or illegality does not challenge the logic of crime and punishment but actually strengthens, sustains, and substantiates it. This logic leaves those who are most legally vulnerable in both communities with very few

288. See Natapoff, *Misdemeanors*, *supra* note 70, at 1328 (“Lacking evidentiary rigor and adversarial testing, it is a world in which a police officer’s bare decision to arrest can lead inexorably, and with little scrutiny, to a guilty plea. It is, in other words, a world largely lacking in a scrutinized evidentiary basis for guilt, and therefore one in which the risk of wrongful conviction is high.”).

289. See Eagly, *supra* note 10, at 1220 (“Within Los Angeles, Harris, and Maricopa Counties, ICE has begun to tailor its approach to the peculiarities of local practice. In particular, public records requests reveal that ICE has conducted office wide trainings of prosecutors in each of the three county-level prosecution offices.”).

290. *Id.* at 1220.

291. *Id.* at 1221.

292. Cacho, *supra* note 25, at 199. According to Professor Lisa M. Cacho, “‘respectability’ functions as an ideological shorthand for the values, ethics, and attributes of a person residing in the United States, who deserves to be legally protected.” *Id.* at 198 (emphasis omitted).

293. *Id.* at 199.

allies.”²⁹⁴ With S-Comm, as with other aspects of immigration policy, the disavowal of migrant criminality allows a response that widens the net, redefining ever more noncitizens as “criminal aliens” by crafting and consolidating new categories like the significant misdemeanor. This pushes immigrants to perform ever more difficult feats of respectability, forcing them to avoid all negative contact with the criminal system, even when, particularly for low-income immigrants of color, such avoidance may prove systemically impossible.²⁹⁵ For those who register for DAPA or expanded DACA, such a performance of respectability becomes more important than ever, given the required addition of their biometric information to the immigration enforcement databases.

The deployment of innocence—one of the hallmarks of the disavowal of criminality—in the efforts to argue for lawful status for immigrants who arrived in the United States as children has been broadly analyzed and critiqued.²⁹⁶ Less attention has been paid to the ways that innocence is used in the advocacy around ending police-ICE collaborations. The arguments made against S-Comm, including those that demanded reforms to the program because it targeted the wrong kind of immigrant, relied on a narrative of immigrants as guilty only of working hard to provide for their nuclear families. The 2011 Immigration Policy Center’s report on S-Comm exemplified this type of argument when it recommended that S-Comm “become a program that focuses solely on those immigrants who have been convicted of serious criminal offenses, or who have been identified by law enforcement officials to pose a threat to national security or public safety.”²⁹⁷ This type of recommendation posits those without a criminal record or with a minor criminal record as innocents or near innocents who should not be swept up in an immigration apparatus that is viewed as targeting the wrong kind of immigrant. This in turn requires the rejection of those who do face convictions after arrests, as well as those who are arrested for more serious offenses.²⁹⁸

294. *Id.*

295. For the proposition that racial profiling uniquely contributes to arrests of noncitizens, see Carbado & Harris, *supra* note 16 (comparing *Terry v. Ohio* and *U.S. v. Brignoni-Ponce* to conclude that racial profiling is uniquely harmful when facilitated by civil immigration procedures).

296. See, e.g., Daysi Diaz-Strong, Christina Gómez, María E. Luna-Duarte, Erica R. Meiners, & Luvia Valentin, *Commentary: Organizing Tensions—From the Prison to the Military-Industrial Complex*, 36 SOC. JUST. 73, 74 (2010) (“Strategies for legalization offered by the state and embraced by many vulnerable communities, such as the DREAM Act, trade on tropes of ‘innocence’ and ‘merit,’ thus reinforcing the idea that there are ‘real’ criminals and undeserving or guilty immigrants who should legitimately be denied access to pathways for legalization.”).

297. Waslin, *supra* note 115, at 17.

298. Cacho, *supra* note 25, at 198 (With this type of argument, immigrants are “compelled to discredit, disavow, and deny the ‘criminal’ and/or ‘illegal’ populations within their communities to re-present themselves fitting the ideals and standards of ‘respectability.’”).

Separate from but related to the discourses of innocence were the calls to reject S-Comm on the basis that the program supposedly threatened partnerships between immigrant communities and local law enforcement.²⁹⁹ This line of advocacy also draws on the idea that immigrants are not criminals, but rather, innocents needing protection from the police. A coalition of immigrant rights’ groups advocating for the Trust Act in California, the bill that limited S-Comm’s reach by limiting the use of ICE detainers,³⁰⁰ describes the need for the Trust Act in the following way: “With TRUST, immigrant crime victims and witnesses will be able to come forward and cooperate with police without fear of deportation. This will rebuild confidence in local law enforcement that’s been badly damaged by the ‘Secure’ Communities or S-Comm deportation dragnet.”³⁰¹ These sorts of statements draw on an image of a trusting relationship between the police and immigrant communities of color that purportedly previously existed and that S-Comm has negatively impacted. The framing of the argument against S-Comm as one for a need for restored trust between unauthorized migrant communities and the local police posits immigrants as those who are served by the police, not those who are targeted by the police, and frames them as respectable (non)citizens owed the state’s protection, not its sanction. There is no doubt that knowledge of police-ICE collaboration renders encounters with local police even more frightening for low-income unauthorized immigrants of color. Given the history of racial profiling and overpolicing of people of color, however, especially Black and Latino immigrants and queer and gender-nonconforming immigrants of color, the call to a return to a time of healthy relationships between police and communities may ring hollow for those who are targeted by the police whether or not ICE is collaborating with them.³⁰²

As described below, pushing for reforms that would focus enforcement on so-called dangerous criminals instead of innocent immigrants exempts

299. See Waslin, *supra* note 115 (citing obstacles to community policing under S-Comm, which promoted the view among immigrant communities that local law enforcement is associated with immigration enforcement); see also *Secure Communities*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/documents/statefed/SecureCommunitiesJuly2012.pdf> [<http://perma.cc/3DD5-HQ84>] (last updated July 26, 2012) (“Opponents say [S-Comm] is detrimental to community policing goals which rely on the trust and support of community members to protect public safety.”); see also ICE’s “Secure Communities”: *Washington State Communities Can’t Afford It*, ONE AM. (2011), <https://www.wereoneamerica.org/sites/wereoneamerica.org/files/SComm%20Fact%20Sheet%205%206%2011.pdf> [<https://perma.cc/3FLN-FWCB>] (“Secure Communities’ hurts community policing initiatives by eroding trust between communities and local law enforcement.”).

300. For an explanation of ICE detainers, see *Immigration and Customs Enforcement (ICE) Secure Communities (SC) Standard Operating Procedures (SOP)*, *supra* note 130.

301. CAL. TRUST ACT, <http://www.catrustact.org> [<https://perma.cc/L29K-K5ZT>] (last visited Jan. 5, 2016).

302. See Carbado & Harris, *supra* note 16.

immigration enforcement practices from critique by making them isolatable to so-called real immigrant criminality. This ends up shoring up both the criminal alien category and the problems with the criminal justice system itself.

1. Disavowing Criminality Reinforces the “Criminal Alien” Category

By relying on discourses of innocence, anti-S-Comm advocates inadvertently encouraged the sort of expansion of the criminal alien category, as well as enforcement based on this category, that both the Priorities Memo and the Secure Communities Memo promulgate. Advocates released reports and studies that tracked ICE’s removal statistics and argued that many of those removed did not fall into the criminal alien category, but in doing so, these reports and studies reinforced the category as a viable and meaningful one.³⁰³ ICE’s expansion of the definition of “criminal alien” to include more categories of crimes is perversely sensible when viewed in light of this advocacy. If the public relations problem with S-Comm includes the targeting of innocents or nearly innocents, then it is a logical response for DHS to clarify and codify immigrants whose criminal record consists of a DUI—one of the largest groups deported in recent years, and whom advocates posit as nearly innocents—as priority “criminal aliens.”³⁰⁴ This redefinition of an arguably innocent category into a categorically criminal one is precisely what occurred with the Secure Communities Memo.

Beyond merely broadening the criminal alien category, the Secure Communities Memo, like much of the 2014 Executive Actions, reinforced “criminal” as a category suitable for highly targeted and aggressive immigration enforcement efforts. ICE will continue to gather the biometrics information of all noncitizens (and citizens, for that matter) at the point of arrest and will be able to act upon that information at their discretion.³⁰⁵ If ICE continues to target those who are arrested but not convicted, advocates may rightly continue to point out that ICE is not following its own directives. Every time advocates do this, however, they will be reinforcing the legitimacy of an immigration enforcement apparatus organized around a merger with the criminal justice system by engaging with the logic that a negative outcome for an immigrant in the criminal system (a conviction) is sufficient reason to detain and deport him. Ultimately, PEP represents a refined form of S-Comm: By clarifying that those subject to the program are truly criminal by ICE’s expanded definition, the

303. See Waslin, *supra* note 115.

304. See *ICE Deportations: Gender, Age, and Country of Citizenship*, *supra* note 76, at tbl.5 (citing that deportations for DUI numbered 32,463 in 2012 and 29,852 in 2013).

305. Secure Communities Memo, *supra* note 29, at 2.

program is rendered less vulnerable to the advocacy efforts that rely on drawing a distinction between “innocent immigrants” and “criminal aliens.”

By abandoning, at least in name, the overt rhetoric of creating secure communities but still relying heavily on the rhetoric of criminality that makes certain individuals a priority for enforcement, the new PEP makes it even more difficult to get at the underlying logics that can transform “innocent immigrants” into “criminal aliens.” Namely, the factors that contribute to an “innocent immigrant” becoming a “criminal alien”—race, class, gender, and local policing practices, to name a few—are rendered invisible by ICE’s restated and refined focus on priority “criminal aliens” who have already been convicted. The ease by which an innocent immigrant can be transformed into a priority “criminal alien” upon conviction, and thus find herself beyond the reach of mainstream advocacy efforts, is also erased. Ultimately, both ICE’s efforts and the respectability politics upon which they rely teach us how to abandon entire categories of people and end up strengthening, sustaining, and substantiating the logic of the criminal alien category.³⁰⁶

2. Disavowing Criminality Shores Up the Criminal Justice System

The unprecedented size of the U.S. carceral machinery has made its way into public consciousness. Across the political spectrum, calls have been growing for the shrinking of the currently incarcerated population.³⁰⁷ The killing of Michael Brown in Ferguson, Missouri, the killing of Eric Garner in New York City, New York, and the resulting nationwide protests have drawn attention to racially targeted policing and use of force.³⁰⁸ Yet, despite the connections between the immigration and criminal enforcement systems, the reforms that are beginning to be considered for policing and incarceration in the United States have not touched the immigration enforcement and detention apparatus. If anything, narratives reinforcing immigrant criminality have become more

306. See Cacho, *supra* note 25.

307. See, e.g., Wesley Lowery, *The Bipartisan Push for Criminal Justice Gets a Koch-Funded Boost*, WASH. POST (Feb. 19, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2015/02/19/the-bipartisan-push-for-criminal-justice-gets-a-koch-funded-boost> [<http://perma.cc/CRJ7-T8HK>] (describing the launch of a new bipartisan coalition spanning from Tea Party Groups to the American Civil Liberties Union (ACLU) and Center for American Progress to fund criminal justice reform).

308. See, e.g., J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [<http://perma.cc/CF9D-6M8P>] (highlighting protests throughout Washington, D.C., and New York in response to the refusal to indict Officer Pantaleo).

pervasive, as evinced by Obama's repeated invocation of the "felons, not families" catchphrase.³⁰⁹

The announced reform to S-Comm whereby only those convicted will be the focus of enforcement needs to be considered side-by-side with critiques of the criminal justice system. Criminal scholar Alexandra Natapoff's work, cited in Part I.A, *supra*, has catalogued the dangers in assuming that misdemeanor convictions—the vast majority of criminal matters in the system, and the basis for many S-Comm referrals—actually correspond with guilt.³¹⁰ When anti-S-Comm advocates critiqued the program for sweeping up those who are arrested and not just focusing on those convicted, the convictions themselves were assigned weight and legitimacy in the criminal system as reliable indicators of criminality for the immigration enforcement system—legitimacy that they did not merit. Anti-S-Comm advocates' call for detainer reform on the basis of restoring trust between police and immigrant communities masked the fact that police carry out arrests for reasons that have nothing to do with evidence and much to do with racial bias and other factors.³¹¹

PEP, S-Comm's replacement, relies on the legitimacy of the criminal justice system, as "criminal aliens" are created by law enforcement and prosecutors through local practices. Believing in the potential effectiveness of PEP requires trusting that every step in the criminal process—arrests, bond determinations, convictions (whether the result of a plea or a trial), and sentencing—is producing legitimate criminals for the immigration apparatus to detain and remove. When advocates fight against S-Comm or PEP, and call for the program to only go after those convicted and not those arrested, they are likewise evoking trust in the criminal process, and in the legitimacy of the population of prisoners it produces. At a time when the criminal justice system faces a crisis of legitimacy, such a move is particularly problematic.

309. President Barack Obama, *supra* note 2; *see also* Nov. 21, 2014 Obama Remarks, *supra* note 24 ("[W]e'll keep focusing enforcement resources on actual threats to our security. But that means felons, not families.").

310. *See* Natapoff, *supra* note 64, at 1064 ("Because the petty offense process rarely scrutinizes cases and because nearly everyone pleads guilty, arrests convert easily—in some places automatically—into convictions. In other words, getting arrested, particularly for a minor urban disorder offense, can be tantamount to sustaining a criminal conviction.").

311. *Id.* at 1064. ("Arrests for minor crimes are easily made with little or no evidentiary support. This is especially true for urban quality-of-life offenses, which often take place in bulk as police strive to control high-crime neighborhoods.").

III. EMBRACING THE “CRIMINAL ALIEN,” DISMANTLING THE CARCERAL STATE

The Parts above have argued that rather than curb deportations, the November 2014 Executive Actions will result in the total amount of enforcement to either remain the same or increase. Biometric databases will label every noncitizen as a potential “criminal alien,” and any noncitizen contact with local law enforcement will continue to lead to potential immigration enforcement action. For noncitizens, behavior like drunk driving will serve to permanently alter identity, turning an immigrant into a “criminal alien.” These harms are layered on top of the shortcomings and dysfunctions of the criminal justice system, which will remain unaddressed in the push to mark more noncitizens as “criminal aliens” and deport them on this basis.

The strategies for keeping immigrants out of the expanding criminal alien category (and thus curbing deportations) have proven unsuccessful. The pro-immigrant advocacy that led to the announcement of Executive Actions—labeling the President as “Deporter-in-Chief,”³¹² demanding deferred action for all immigrants,³¹³ and demanding an end to S-Comm³¹⁴—ultimately resulted in a refinement of immigration enforcement that protects one portion of the undocumented population even as it hypercriminalizes the rest. In this sense, the Executive Actions can be considered a “conservative response to a radical challenge.”³¹⁵ The President’s “felons not families” rhetoric is only the most obvious symbol of the inherently conservative nature of the changes.³¹⁶

Advocacy that continues to distance immigrants from criminals as a response to the criminalization of myriad aspects of the civil immigration system will only lead to further refinements in enforcement such as those seen in the Executive Actions. The transformation of the significant misdemeanor into a priority category for deportation and the metamorphosis of S-Comm into PEP only further clarify that appeals to the innocence and respectability of immigrants will not stop and may, on the contrary, enable DHS’s push to

312. See Peralta, *supra* note 249.

313. See Reshma Shamasunder, *Deferred Action for All: A Common-Sense Step to Honor Immigrants’ Contributions*, HUFF. POST BLOG (Sept. 10, 2014, 7:22 PM), http://www.huffingtonpost.com/reshma-shamasunder/deferred-action-for-all-a_b_5798562.html [<http://perma.cc/VM34-SNRJ>] (calling for an extension of deferred action to “all of California’s 2.6 million undocumented residents—and to undocumented immigrants across the nation . . .”).

314. See Alvarado, *supra* note 139 and accompanying text.

315. Natapoff, *supra* note 64, at 1109.

316. See Nov. 21, 2014 Obama Remarks, *supra* note 24.

broaden and cement categories of migrant criminality.³¹⁷ Reforms like those proposed by the Executive Actions that ground their logic in immigrant criminality are fated to continue to expand and strengthen “criminal alien” as a suitable marker of disposable immigrant lives.

To avoid future cycles of refinement and expansion of immigration enforcement efforts, a new direction is needed. The remainder of this Article offers three proposals to guide scholarship and advocacy in order to curb detention and deportation distributed along the lines of migrant criminality.

A. Embrace and Defend the “Criminal Alien”

The criminalization of migration has reached the point where the de facto position for unauthorized migrants, particularly the 6.7 million who entered without inspection, is that of “criminal alien” until proven otherwise.³¹⁸ Because immigration enforcement practices center on detaining and deporting an ever-widening swath of people defined as “criminal aliens,” it seems logical that scholars and advocates ought to push back by attacking the correlation between migration and criminality.³¹⁹ However, instead of mounting a

317. For a full discussion of the Executive Actions’ changes, see *supra* Parts I.A and I.B.

318. Motomura, *supra* note 241, at 1828 (“[A]bout 6.7 million unauthorized migrants . . . are believed to have entered without inspection at a port of entry.”); see also Eagly, *supra* note 10, at 1128 (finding that the “deportation of ‘criminal aliens’ is now the driving force in American immigration enforcement.”). Eagly is careful to point out that “not all noncitizens who are removed are criminals.” *Id.* at 1128–29 n.9. This Article argues that the construction of immigrants as criminals renders all noncitizens presumptive “criminal aliens” unless they can prove that they merit prosecutorial discretion. The burden is on the noncitizen to prove worthiness, not on the immigration enforcement system to prove criminality.

319. See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) (arguing that blurred boundaries between immigration policy, crime control, and national security have improperly subsumed the original impetus for each sector); see also Matthew T. Lee, Ramiro Martinez, Jr. & Richard Rosenfeld, *Does Immigration Increase Homicide? Negative Evidence from Three Border Cities*, 42 SOC. Q. 559, 560, 571–74 (2001) (concluding that there is no correlation between recent immigration and higher crime rates); Rubén G. Rumbaut, Roberto G. Gonzales, Golnaz Komaie & Charlie V. Morgan, *Debunking the Myth of Immigrant Criminality: Imprisonment Among First-and Second-Generation Young Men*, MIGRATION POL’Y INST. (June 1, 2006), <http://www.migrationpolicy.org/article/debunking-myth-immigrant-criminality-imprisonment-among-first-and-second-generation-young> [<http://perma.cc/7YGZ-JT4G>] (“Paradoxically, incarceration rates are lowest among immigrant young men, even among the least educated and the least acculturated among them, but they increase sharply among the U.S. born and acculturated second generation . . .”); Rubén G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation*, AM. IMMIGR. COUNCIL (Feb. 21, 2007), <http://www.immigrationpolicy.org/special-reports/myth-immigrant-criminality-and-paradox-assimilation> [<http://perma.cc/EX59-WK4L>] (“In fact, data from the census and other sources show that for every ethnic group without exception, incarceration rates among young men are lowest for

seemingly never-ending series of defenses against the myth of migrant criminality (the idea that immigration enforcement on the basis of the criminal alien category is justified in part by the criminal tendencies of noncitizens as a group), scholars and advocates would do well to begin to mount an unabashed defense of the “criminal alien.”³²⁰ Defending against migrant criminality on the grounds that immigrants are not criminals merely invites immigration authorities to expand the category of the criminal alien, to justify the current record levels of deportations. Reforms that move the power to punish, detain, and deport around from one government actor or agency to another and justify the transfer on the basis of contact with the criminal system do the same. Releasing the grip on narratives of deserving and undeserving immigrants and mounting a full defense of the “criminal alien” would allow for more nuanced advocacy and scholarship. A defense of the “criminal alien” should not be based on the category being overbroad or on immigration being a civil, not a criminal wrong. The category is too well established for those arguments to result in broad-based pro-immigrant reforms. Instead, an embrace of the “criminal alien” requires challenging the very formulation of the category and revealing it as an unnatural classification for the distribution of the harms of detention and deportation. It also requires a critique of the system that produces migrants—primarily poor migrants of color from the Global South—as criminals.³²¹

B. Examine Immigration Enforcement Within the Totality of the U.S. Criminal Justice System

Instead of exceptionalizing the criminalization of immigrants, advocates and scholars should practice engaging in what Dylan Rodriguez calls the “difficult praxis of conceptualizing immigration detention within the organic logic of the totality of U.S. carceral state violence.”³²² Scholars have already begun the

immigrants, even those who are the least educated. This holds true especially for the Mexicans, Salvadorans, and Guatemalans who make up the bulk of the undocumented population.”)

320. This would admittedly be a departure from current practice. University of California Davis (UC Davis) School of Law Dean Kevin R. Johnson points out that “the ‘criminal alien’ continues to be one of the most reviled characters of all of U.S. law, with many enemies and extremely few political friends (even among immigrant rights advocates).” Johnson, *supra* note 14, at 1607.

321. Kevin R. Johnson, Dean of UC Davis School of Law, summarizes the distribution of immigration harms along the lines of race, class, and country of origin in *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009).

322. Dylan Rodriguez, “I Would Wish Death on You...” *Race, Gender, and Immigration in the Globality of the U.S. Prison Regime*, SCHOLAR & FEMINIST ONLINE (2008), <http://www.ethnicstudies.ucr.edu/>

work of mapping out the ways in which immigration has been criminalized and how aspects of the immigration system have been injected into the criminal justice system.³²³ Scholars and advocates should go a step further and consistently conceptualize the totality of immigration enforcement practices, including arrests, detentions, and exercises of prosecutorial discretion (such as deferred action) within the framework of the criminal justice system.³²⁴

The anti-prison movement is gaining ground as the crises in the practices of policing, processing, and incarcerating individuals come into ever-sharper relief.³²⁵ Immigration scholars and advocates avoid anti-prison and anti-police brutality scholarship and social movements at their peril, given how immigration has been inextricably entwined with the criminal system. At best, this omission risks defining the problems facing immigrants so narrowly as to produce reforms that change little and simultaneously reinforce migrant criminality. At worst, it threatens to undermine anti-prison and anti-police brutality movements by bolstering the logic of criminality in general. Analyzing immigration

publications_media/rodriguez/SCHOLAR_AND_FEMINIST_ONLINE.pdf [http://perma.cc/ QSL6-YCH4].

323. The burgeoning “cimmigration” field has already begun this labor. The work of Juliet Stumpf, Jennifer Chacón, César Cuauhtémoc García Hernández, and many others has vastly expanded the analysis of the growing links between the criminal and immigration systems. *See, e.g.*, DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–83, 1353 fig.4 (2010); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 654–55 (2004); *see also* García Hernández, *supra* note 66; Legomsky, *supra* note 12; Miller, *supra* note 13; Stumpf, *supra* note 57.
324. The work of Ingrid Eagly, Jason Cade, and Hiroshi Motomura exemplifies this approach. *See, e.g.*, Cade, *supra* note 75; Eagly, *supra* note 10; Motomura, *supra* note 241.
325. The recent announcement of a partnership between the right-leaning Koch Brothers and left-leaning George Soros, among others, illustrates this trend. *See* Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, N.Y. TIMES (Feb. 18, 2015), <http://www.nytimes.com/2015/02/19/us/politics/unlikely-cause-unites-the-left-and-the-right-justice-reform.html> [http://perma.cc/D5MH-R334]. While the momentum is growing, longtime anti-prison scholars and activists are issuing warnings about the direction of criminal justice reform. *See* Ruth Gilmore, *The Worrying State of the Anti-Prison Movement*, SOC. JUST. (Feb. 23, 2015), <http://www.socialjusticejournal.org/?p=2888> [http://perma.cc/5JHN-U3AP]. Whatever the direction of the movement, immigration scholars and advocates, with few exceptions, have remained peripheral to it. One exception is the New York-based Families for Freedom, an organization run by individuals directly affected by deportation. *See, e.g.*, Abraham Paulos, *U.S. Criminal Deportations and the Future of Black Immigrants*, HUFF. POST BLOG (Feb. 26, 2015, 3:36 PM), http://www.huffingtonpost.com/abraham-paulos/us-criminal-deportations-_b_6763282.html [http://perma.cc/3F7F-XFFT] (“[W]e may question why it is that there exists a false distinction between criminal justice reform movement, racial justice and immigrant rights despite that many of us suffer injustices through our lived experiences as Black bodies. The domestic and global systems of oppression do not entertain such distinctions and neither should we.”).

enforcement within the context of the broader carceral state not only helps expose the shortcomings in reform strategies that give further reach and weight to the criminal alien category, but also helps provide an opening to produce both scholarship and advocacy that generate viable alternatives to the current criminal justice system.

C. Assess Proposed Reforms by Whether They Bolster the Detention and Deportation of “Criminal Aliens”

With any proposed reform on the immigration front (from a local campaign to a new law to an expansion of the Executive Actions), scholars and advocates must ask whether the reform increases harm against those labeled “criminal aliens.”³²⁶ This question must include an inquiry into whether the category of criminal alien itself is expanded or reinforced by the suggested reform. A full defense of the “criminal alien” demands this focus on how reforms impact the most criminalized migrants in order to dismantle the harms distributed by the criminal alien category. This requires flipping the usual script. Current advocacy and scholarship often argue for the worthy or not (yet) criminalized immigrants to be spared the harms of detention and deportation, and to be given a pathway to citizenship.³²⁷ The focus in this type of intervention seems to be on placing immigrants on the documented side of the undocumented-documented divide.³²⁸ Advocacy and scholarship that prioritize a defense of the “criminal alien” should instead aim to disturb the notion that immigrant enforcement should be based on contact with the criminal system. This type of advocacy’s focus should be to reduce the harms of criminality by interrupting and dismantling the mechanisms that lead to unauthorized migrants’ detention and deportation.³²⁹

326. For a full discussion on this guiding principle, see Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of Illegality*, 52 HARV. J. ON LEGIS. 355 (2015).

327. See, e.g., Stephen W. Bender, *Compassionate Immigration Reform*, 38 FORDHAM URB. L.J. 107, 122 (2010) (“Conditions such as learning English should be replaced by an unfettered pathway to citizenship that aims to successfully and respectfully integrate undocumented immigrants into the political, economic, and social fabric of our communities.”); see also Gilbert, *supra* note 35, at 310 (“If DACA serves as a stepping stone to passage of the DREAM Act and comprehensive immigration reform, then this bold assertion of Executive authority will have lasting impact.”); Johnson, *supra* note 14, at 1621 (“For reasons of fairness, the legalization, or regularization of the immigration status, of undocumented immigrants has long been a priority of the advocates of immigrants.”).

328. See Cházaro, *supra* note 326.

329. These mechanisms include local policing practices and programs like S-Comm.

D. Embrace the “Criminal Alien” in Practice

Advocacy efforts to disarm the category of criminal alien, while nascent, have begun. They emerged in the most unexpected of settings during the 2012 reauthorization of the Violence Against Women Act. As part of the reauthorization, Congress tried (and failed) to insert language expanding the aggravated felony category—which leads to almost guaranteed deportation—to include those persons who had three or more DUI convictions.³³⁰ Domestic violence advocates, a group usually characterized as willing partners of the criminal justice system, rejected expanding a criminal alien category in the name of protecting women from violence.³³¹ They actively lobbied against the creation of a new DUI-based aggravated felony, and in their congressional lobbying efforts presented talking points that rejected this development.³³² This successful effort was surprising in part because it pulled away from the role typically assigned to contemporary domestic violence advocates.³³³ Their rejection of the expansion of the criminal alien category was especially notable as a moment in which people who were invited to be part of the expansion of the criminal justice system and its ties to the immigration system refused the invitation.

These efforts are also emerging organically from those who have the most to lose—immigrants who are already imprisoned in detention centers. In March 2014, 1200 immigrants held in a Tacoma, Washington immigration detention

330. See S. REP. NO. 112-153, at 35 (2012) (attempting to add habitual drunk driving to the list of aggravated felonies for deportation in the Violence Against Women Act (VAWA)).

331. See, e.g., *Oppose Grassley Amendment (MDM12037) to the Violence Against Women Act Reauthorization (S. 1925) Regarding Removal of Drunk Drivers*, NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE (Feb. 17, 2012), http://www.ncdsv.org/images/NTFESDVAW_TalkingPointsVAWADrunkDrivingAmendment_2-17-2012.pdf [<http://perma.cc/C6ZG-K85Q>] (“Senator Grassley’s Amendment to S. 1925, elevating a third drunk driving conviction to the status of an aggravated felony for the purposes of immigration removal, does not belong in VAWA.”); see also *National Sign-On Letter Opposing Third DUI Resulting in an Aggravated Felony*, AM. IMMIGR. LAWYERS ASS’N (Feb. 4, 2013), <http://www.aila.org/advo-media/aila-correspondence/2013/letter-opposing-third-dui-resulting-in-felony> [<http://perma.cc/RZF4-AZME>] (urging Congress to reject Grassley’s amendment to VAWA: “The amendment attempts to use VAWA as a back door to address other immigration matters that are irrelevant to the focus of VAWA, thus threatening to undermine the integrity and purpose of VAWA.”).

332. See *Eliminate the Detention Bed Quota*, *supra* note 271; *National Sign-On Letter Opposing Third DUI Resulting in an Aggravated Felony*, *supra* note 331.

333. BETH RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* 83 (2012) (describing the centrality of criminal justice strategies to the contemporary domestic violence movement and explaining that “[t]he subsequent over-reliance on the criminal legal system and law enforcement strategies, and on legal and legislative reform more broadly, as the solutions to the problem of violence against women, solidified ultimately into one of the most important dimensions of the anti-violence movement’s work . . .”).

center began a 56-day hunger strike.³³⁴ The group of hunger strikers included a mix of long-time Lawful Permanent Residents with serious criminal records, recent arrivals seeking asylum, and long-term undocumented residents whose road to detention had begun with a single DUI.³³⁵ They made broad-based demands, from improvements in their conditions of confinement to an end to all deportations, all without drawing distinctions between their worthiness for such changes on the basis of their respective criminal records.³³⁶ The detention facility encourages inmates to fear each other by color-coding their dress.³³⁷ At the time of the hunger strike, detainees were dressed in blue, orange, or red depending on their level of perceived dangerousness, based loosely on their criminal records. Their housing also depends on their outfit color, with more purportedly dangerous detainees housed in separate sections of the prison.³³⁸ Despite these external impositions of alleged levels of criminality, long-time Lawful Permanent Residents stood

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334. Alexis Krell, *Hunger Strike at Tacoma's Immigration Detention Center Enters Day 4*, NEWS TRIBUNE (Mar. 12, 2014), <http://www.thenewstribune.com/2014/03/10/3089804/hunger-strike-at-tacomass-immigration.html> [<http://perma.cc/PG5J-NDXY>] (documenting a hunger strike at the Northwest Detention Center “in protest of deportations, in demand of better food, [and better] treatment by guards and working conditions at the center.”).
335. See Alex Altman, *Prison Hunger Strike Puts Spotlight on Immigration Detention*, TIME (Mar. 17, 2014), <http://time.com/27663/prison-hunger-strike-spotlights-on-immigration-detention> [<http://perma.cc/XR2B-P7ZG>] (In addition to an individual immigration detainee who protested his own detention, hundreds of protestors who followed suit “in Tacoma were also reacting to the policy known as mandatory detention, which often locks up offenders indefinitely. The policy was expanded by a pair of laws passed in 1996 and strengthened by the Patriot Act after Sept. 11, 2001. It requires that categories of non-U.S. citizens be imprisoned without evaluating the threat they may pose, often without giving them a bond hearing.”); see also Kristen Millares Young, *Migrant Detainees at Washington State Centre Continue Protesting Conditions*, GUARDIAN (Mar. 12, 2014), <http://www.theguardian.com/world/2014/mar/12/immigration-detainees-washington-state-center-protest-conditions> [<http://perma.cc/PBG5-GLYD>] (documenting family member protests outside the gates of the Northwest Detention Facility in Tacoma, Washington).
336. See Max Blumenthal, *Why Immigrant Detainees are Turning to Civil Disobedience*, NATION (May 23, 2014), <http://www.thenation.com/article/179987/why-immigrant-detainees-are-turning-civil-disobedience> [<http://perma.cc/G9JK-43E9>] (“As the national media focused in on Tacoma, Mora Villalpando and two local immigration lawyers attempted to initiate negotiations with ICE. Their demands were drawn up by the hunger strikers: an end to the indefinite waits for hearings, the solitary confinement regime, the medical deprivation and the callous and arbitrary separation of families. Instead of negotiations, they were met with an iron-fisted crackdown.”).
337. Angélica Cházaro, *Rolling Back the Tide: Challenging the Criminalization of Immigrants in Washington State*, 11 SEATTLE J. FOR SOC. JUST. 127, 134 (2012). Descriptions of detention center conditions are based on Cházaro’s own observations. For more information about human rights issues at the Northwest Detention Center, see SEATTLE U. SCH. OF LAW INT’L HUMAN RIGHTS CLINIC, VOICES FROM DETENTION: A REPORT ON HUMAN RIGHTS CONDITIONS AT THE NORTHWEST DETENTION CENTER IN TACOMA 5 (2008), http://www.wereoneamerica.org/sites/default/files/OneAmerica_Detention_Report.pdf [<http://perma.cc/HFR2-HXH4>].
338. See ICE, ICE/DRO DETENTION STANDARD CLASSIFICATION SYSTEM at 3 (2008), http://www.ice.gov/doclib/dro/detention-standards/pdf/classification_system.pdf. [<http://perma.cc/XU6U-65YA>].

side by side with recent arrivals, and those with criminal records stood by those without, jointly facing solitary confinement and other threats to collectively and collaboratively draw attention to their common conditions.³³⁹ Their refusal of the invitations to abandon each other on the basis of their different levels of criminality provides an example for all pro-immigrant scholars and advocates.

Additionally, when examining immigration enforcement within the totality of the criminal justice system, separate opportunities emerge. If advocates are interested in attacking the significant misdemeanor category and other categories that lead to detention and deportation, then joining efforts may contribute greatly to dismantling the jail-to-deportation pipeline for noncitizens. For example, advocates could collaborate to decriminalize property crimes and to recategorize drug and alcohol use as part of public health crises rather than as reasons for arrest and criminal prosecution. Likewise, advocacy efforts to end racist policing may be more effective in curbing deportations than further refinements to the new version of S-Comm, rebranded as PEP, as getting booked and fingerprinted by local police is the first step on the road to detention and deportation. In sum, pro-immigrant scholars and advocates must commit fully to efforts to address the excesses of the criminal system. This only becomes possible if “criminal aliens” become a group to rally around and defend, not a group to differentiate from and reject.

CONCLUSION

The specter of the “criminal alien” haunts all aspects of the November 2014 Immigration Executive Actions; the accepted tenet that immigration enforcement should be distributed along the lines of migrant criminality leads to the criminal alien category becoming ever broader, with more noncitizens subjected to the harms of detention and deportation. At the same time, the criminal justice system—the same system that helps produce “criminal aliens” for the immigration enforcement agencies—faces a crisis of legitimacy over both mass incarceration and policing practices. Scholars and advocates interested in halting the unprecedented rates of immigrant detention and deportation should accept the opportunity offered by the crisis of legitimacy in the criminal justice system and create a crisis for the “criminal alien” paradigm, rejecting a deportation regime premised on migrant criminality. Only by rejecting the “criminal alien” paradigm will opportunities emerge to avoid future executive actions and legislative reforms that increase harm for unauthorized migrants.

339. *See* Interview with Sandy Restrepo, Attorney (01/15/2015) (regarding her representation of hunger-striking detainees). This information is also based on the Author's experience representing detainees during the hunger strike, alongside attorney Sandy Restrepo.