BANISHED AND OVERCRIMINALIZED: CRITICAL RACE PERSPECTIVES OF ILLEGAL ENTRY AND DRUG COURIER PROSECUTIONS

Walter I. Gonçalves, Jr.[*]

Scholarship on illegal entry and drug courier prosecutions fails to apply Critical Race Theory (CRT). Disregard of how these prosecutions contribute to racial stratification in and outside American prisons or how drug couriers experience intersectionality ignores sociological and cultural processes. Criminal justice professionals have racialized the system through implicit biases, but a CRT approach to criminal defense can ameliorate this problem. As such, scholars cannot refuse to take notice of CRT.

Jennifer Chacón and Ingrid Eagley have written on illegal entry, describing the convergence of immigration and criminal law. Mona Lynch and Caleb Mason have conducted studies on drug couriers, focusing on the selection of cases for prosecution and the market for couriers along the United States-Mexico border. These scholars failed to consider how post-colonialism or historical oppression (both CRT tools) influence legal processes. Their analyses also lack practical implications for defense lawyers.

This Article uses CRT to unpack the historical and contemporary reality of these prosecutions. With this new framework, it describes strategies for the defense lawyer with the aim of mitigating implicit bias, the main source of racial disparity in today's federal criminal courts. In so doing, it is the first CRT investigation of two types of border crimes. It is also

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the first to describe a race-conscious criminal defense practice within the context of CRT.

I. INTRODUCTION

Illegal entry[1] and drug courier[2] prosecutions are the most prevalent cases brought in the federal criminal courts.[3] Although Latinxs[4] only represent seventeen percent of the United States population,[5] they constitute the majority of defendants charged

[1] People charged with illegal entry include those recently apprehended by the border patrol shortly after entering the United States from Mexico by either crossing the border wall, outside a port-of entry, or illegally present in the United States after deportation. *See infra* section IA.

[2] Drug couriers are people charged with possession with intent to distribute, importation, and conspiracy to commit any of these crimes. Drug couriers include not only people who transport drugs across the U.S. Mexico border in vehicles, but also body carriers and marijuana backpackers who cross through the desert without papers. Body carriers enter the United States as passengers in commercial airplanes as well. Police also arrest couriers after they have entered the United States, transporting drugs within and across state lines. In this Article, analysis focuses on importation of drugs in cars through the U.S.-Mexico border unless otherwise specified.

[3] *See* American Civil Liberties Union, *Fact Sheet: Criminal Prosecutions for Unauthorized Border Crossing* (2018), https://www.aclu.org/other/operation-streamline-issue-brief. Immigrants may also be charged with fraud or misuse of official documents, such as passports or visas under 8 U.S.C § 1546. Combined, immigration and drug crimes have become the most federally prosecuted offenses.

[4] Of, relating to, or marked by Latin American heritage—used as a gender-neutral alternative to Latino or Latina. MERRIAM WEBSTER'S DICTIONARY (last visited Mar. 23, 2020), https://www.merriam-webster.com/dictionary/Latinx.

[5] Latinx account for roughly 17.4% of the general population yet make up 34% of incarcerated individuals. *State and County QuickFacts*, U.S. CENSUS

under these statutes.[6] This sordid reality would be less alarming if Latinx defendants did not experience disparate treatment in all phases of the criminal process because of implicit biases among prosecutors, judges, defense lawyers, and probation and pre-trial service officers.[7] The criminal justice system has failed to address the biases of these professionals, so most are ignorant of the impact of race on litigation. This lack of knowledge facilitates a colorblind[8] approach that permits racial biases to influence how professionals make decisions from bail to sentencing.[9] In my experience, public defenders with many clients, unaware of the negative influence of implicit racial and ethnic bias, spend less

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BUREAU (Dec. 2, 2015), http://quickfacts.census.gov/qfd/states/00000.html [https://perma.cc/S4CA-VZ3U]. I acknowledge that the Border Patrol arrests many Latinxs charged with illegal entry as they enter or recently enter the United States from Mexico. As such, the U.S. census may not consider them part of the U.S. population for this comparison.

[6] *See* United States Sentencing Commission, *Overview of Federal Criminal Cases Fiscal Year 2016* 6 (May 2017) (over half (50.8%) of all drug offenders convicted in federal court were Latinx, while Black offenders constituted 23.6 percent of all drug offenders, and White offenders were 22.8 percent of all drug offenders). *See also* U.S. Sentencing Commission, *Overview of Federal Criminal Cases Fiscal Year 2017* 10 (June 2018) (although United States citizens committed the majority of all federal crimes (59.3%) in fiscal year 2017, the overwhelming majority (90.4%) of immigration offenses were committed by non-citizens).

[7] *See* Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1006-09 (2013) (describing how prosecutors, judges and defense attorneys contribute to a system where the race of the defendant plays an important role in determining case outcomes).

[8] *See* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 77 (2019) (citing Eduardo Bonilla-Silva, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 3 (2003)) (Colorblind theory argues that because society has conquered racism and people of color and White people have full equality, social policies should not take account of race.).

[9] *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135 (2012) (Explaining that implicit biases have an important impact during criminal investigation, arrest, bail, plea bargaining, trial, and sentencing).

time meeting with a Latinx or African American client at a detention facility compared with a White client. Likewise, trial judges, unaware of implicit racial bias's pernicious impact on sentencing or bail decisions, speak in harsher tones and use more disparate words to describe Latinxs compared to Caucasian criminal defendants.

To help alleviate this problem, this Article analyzes concepts of Critical Race Theory (CRT) by applying them to illegal entry and drug courier prosecutions.[10] It then proposes strategies to help the lawyer practice in a way that reduces implicit racial and ethnic bias.[11] As CRT scholars have yet to tackle federal crimes such as illegal entry and drug trafficking, the Article contributes to a new body of CRT research involving Latinxs and border crimes.[12]

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[10] This Article analyzes illegal drug couriers and illegal entrants together for myriad reasons. First, although illegal entrants and drug couriers are arrested everywhere in the country, most of these prosecutions take place in the southwestern part of the United States (southern California, Arizona, New Mexico, and south Texas). Second, most defendants are Latinxs. Third, based on my anecdotal observations, individuals who commit these crimes share common economic motivations to commit these crimes. Illegal entrants enter the United States to seek a better life for themselves and their families by working and remitting money to Mexico or Central America. Drug couriers agree to transport drugs for financial reasons. Most are of low socio-economic strata, working factory, blue-collar, or other low-paying jobs. Fifth, both share low criminal culpability. Most drug couriers are on the lowest rung of a drug organization, fulfilling the task of only driving or transporting drugs from point A to point B. Most have no other function and no knowledge of the workings of any drug organization. Illegal entrants are not part of any criminal organization. Sixth, both form the bulk of caseloads for criminal federal courts along the United States-Mexico border. Seventh, and perhaps most important for the thesis of this Article, defendants from both groups are increasingly imprisoned before being banished from the United States. The exceptions are United States citizen drug couriers, but they are a minority.

[11] Implicit biases are the most prevalent way racial stereotypes perpetuate inequality. I encourage criminal defense lawyers to become aware of CRT perspectives so they can apply a race-conscious approach to law practice.

[12] *See infra* Part II subsections A & B. Existing scholarship addresses how illegal entry fits within the broader process of crimmigration through examining the convergence of criminal and immigration law. This scholarship

The process of overcriminalization and banishment began in the early part of the twentieth century, when the federal government first created illegal entry and drug laws. It climaxed in the early 2000s with the Drug War and in the early twenty-first century with the advent of crimmigration, the merging of criminal and immigration law.[13] These historical processes contributed to implicit biases present today.[14] The thesis of the Article is that the criminal justice and immigration systems overcriminalize and then banish[15] illegal entrants and drug couriers from the United States, despite their relatively low level of criminal threat and responsibility.

Part I highlights points of focus in the existing literature on illegal entrants and couriers pertinent to the Article's investigation. Although certain researchers focus on race, it is never a central part of their analyses. Part II articulates new ways of understanding these cases through the lens of CRT.[16] Armed with

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aims to understand legal problems arising from the advent of fast-track programs. Scholars of drug prosecutions address how law enforcement select and thereby racialize drug couriers for prosecution. They have also studied the rationale for drug courier sentencing and the market for couriers along the U.S.-Mexico border. Finally, existing scholarship proposes amendments to the federal sentencing guidelines and a misdemeanor alternative to reduce excessive punishment.

[13] *See* John Schmitt et al., *The High Budgetary Cost of Incarceration*, CTR. FOR ECON. & POL'Y RESEARCH 7-9 (2010), *available at* http://www.cepr.net/index.php/publications/reports/the-high-budgetary-cost-of-incarceration/

[14] One example of how inaccurate information leads to implicit bias is how gross estimation of Black and Latinx crimes rates led to implicit bias amongst law enforcement and the general public. Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, THE SENTENCING PROJECT 13-17 (2014).

[15] *See* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (In contemporary criminal jurisprudence, the term deportation is "the equivalent of banishment or exile.")).

[16] The Article applies the following CRT analytical tools: revisionist history and contemporary racial mistreatment of subjugated groups; legal history and disparate enforcement of laws; the racial impact of imprisonment; post-colonialism; intersectionality; and how imprisonment maintains racial

this theoretical background, Part III proposes new, CRT-based ways for defense lawyers to litigate these cases so the system can minimize racial disparities.

II. EXISTING SCHOLARSHIP ON ILLEGAL ENTRY AND DRUG COURIER PROSECUTIONS

In order to enhance understanding of a CRT way of thinking about illegal entry and drug couriers, this part describes important areas of existing scholarship in these prosecutions. The defense lawyer, judge, or prosecutor cannot appreciate a CRT approach without a general idea of the lay of the land.

A. Illegal Entry

Illegal entry prosecutions are violations of 8 U.S.C. § 1325. As used in this Article, the term "illegal entry" also encompasses illegal re-entry under § 1326 unless otherwise specified. Under § 1325, the crime of physical entry without inspection at a port of entry, avoiding examination or inspection, or making false statements while entering or attempting to enter is a misdemeanor punishable by fine, up to six months in prison, or both. Under § 1326, unlawfully re-entering or attempting to re-enter the country after having been deported, ordered removed, or denied admission is a felony punishable up to two years in prison. If an entrant has prior convictions, the maximum sentence could be ten or twenty years. Physical presence in the United States, unlike illegal entry, is not a criminal offense.[17] Overstaying a visa is likewise not a crime.[18]

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stratification. I selected these analytical methods because they best fit the topic. It would be difficult to study illegal entry prosecutions from the perspective of interest convergence because there is no convergence of interests between subjugated Latinxs and American elites in the adjudication of illegal entry and drug courier cases. Other tools within CRT, such as how these prosecutions perpetuate microaggressions, are open areas for future research.

[17] Arizona v. United States, 567 U.S. 387, 407 (2012).

[18] *See Should Overstaying a Visa Be Considered a Federal Crime instead of a Civil Offense?* (Oct. 29, 2016), *available at* https://immigration.procon.org/questions/should-overstaying-a-visa-be-considered-a-federal-crime-vs-a-civil-offense/

Most illegal entry defendants face "fast-track" prosecutions as part of the Operation Streamline (OSL) program. "Fast-track" creates problems for migrants because of the speed with which the system expects guilty pleas. On the other hand, any illegal entry defendant, fast track or otherwise, may face Fourth and Fifth Amendment violations. The typical defendant also faces hurdles at pre-trial release and sentencing. The scholarly discussion of these topics is part of crimmigration.

1. Fast-track Programs

The development of "fast-track" increased the speed with which courts process defendants and decreased incentives to go to trial.[19] The standard deal under a fast-track plea agreement requires that the defendant accept the plea before the deadline for indictment.[20] This pre-indictment timeline generally requires the defendant to plead guilty within two weeks or less.[21] In exchange for sentencing concessions, defendants must waive their rights to grand jury indictment, jury trial, discovery, a full presentence report, constitutional challenges, and appeal.[22] Consequently, fast-track cases plead within days, as migrants want the system to release them quickly. This decreases the number of trials.[23]

The high speed of fast-track forces prosecutors, judges, and defense lawyers to spend less time on cases.[24] Defense attorneys

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[19] *See* Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1034-35 (2006).

[20] *See* Albert Llosas Barrueco, *Fast-Tracking* United States v. Booker*: Why Judges Should Not Fix Fast Track Disparities*, 6 CONN. PUB. INT. L.J. 65, 109 (2006) (citing United States Sentencing Commission Public Hearing on Implementing the Requirements of the PROTECT Act 10- 12 (Sept. 23, 2003), http:// www.ussc.gov/hearings/9_23_03/9_23_03.htm (statement of Marilyn L. Huff, J., S.D. Cal.)).

[21] *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1322 (2010).

[22] *Id.*

[23] *See* Horowitz & Oliver, *supra* note 19, at 1035.

[24] *Id.*

have little time to conduct ethically required case investigations.[25] This leads to increasing numbers of innocent clients pleading guilty. For instance, clients may have been born in the United States without knowing it, or be derivative citizens because a father or mother was born in the United States. There may also have been due process violations in their underlying immigration case, which would allow for a collateral attack of the underlying re-entry prosecution.[26] Defense lawyers are unable to investigate this information within the time limits set in a fast-track plea offer.[27]

Fast-track prosecutors are not traditional United States Attorneys, but Border Patrol lawyers who do not extend negotiable plea offers.[28] With the exception of OSL, Border Patrol prosecutors prosecute only civil immigration cases for Immigration and Customs Enforcement (ICE). They work out of agency offices, do not have the same level of oversight as Assistant United States Attorneys, and are less willing to engage in the give-and-take of criminal plea-bargaining.[29] In my experience as a lawyer representing migrants under OSL, Border Patrol prosecutors make plea decisions based solely on the immigration or criminal history of the accused, and seldom take into consideration mitigating factors. The only way to negotiate a better plea, a core defense function, is to convince the

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[25] *See* César Cuauhtémoc Garcia Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1478 (2014) (noting that criminal defense attorneys who advise clients about the best course of action without engaging in thorough investigation of the relevant law and facts would seem to deny these defendants the right to effective assistance of counsel provided by the Sixth Amendment).

[26] 8 U.S.C. §1326(d) allows for a collateral attack of an underlying deportation order for the charge of re-entry after deportation. This is a way for courts to dismiss re-entry felony deportation charges under 8 U.S.C. 1326.

[27] Fast track cases are mostly resolved within 10 days of the initial appearance. *See* Eagly, *supra* note 21, at 1324.

[28] *See id.* at 1332. This author's experience in the Tucson sector in the District of Arizona is that all fast-track plea offers are non-negotiable.

[29] *Id.* (citing Joanna Lydgate, *CAssembly-Line Justice: A Review of Operation Streamline*, CHIEF JUSTICE EARL WARREN INST. 15 (Jan. 2010), http://www.law.berkeley.edu/files/ Operation_Streamline_Policy_Brief.pdf).

prosecutor that an error took place in applying plea bargain policies. Worse, these prosecutors do not disclose the content of these policies.

2. Operation Streamline (OSL)

(OSL) started in 2005.[30] Today, as it did at its outset, OSL tries to adopt a "zero-tolerance" approach to unauthorized border crossing.[31] OSL clients are mostly Mexicans or Central Americans who attempt to enter the United States for work, reunite with family[32], or both.[33] If the suspect was previously deported and re-enters, the government will charge a felony[34] and a misdemeanor.[35] The vast majority of OSL defendants plead guilty to the misdemeanor count, ranging from thirty to 180 days in custody depending on the number of voluntary departures, removals, deportations, or criminal history. Researchers estimate that OSL generates approximately eighty prosecutions per day per district.[36]

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[30] *See* Fernanda Santos, *Detainees Sentenced in Seconds in "Streamline" Justice on Border*, N.Y. TIMES (Feb. 11, 2014), https://nyti.ms/1fWYvIU [https://perma.cc/E8LN-KWTC].

[31] *See U.S.: Reject Mass Migrant Prosecutions*, HUM. RTS. WATCH (July 28, 2015), https://www.hrw.org/news/2015/07/28/us-reject-mass-migrant-prosecutions. "Although the program was originally touted as a 'zero-tolerance' program, the Border Patrol sectors in which Operation Streamline is currently active have differing policies as to which unauthorized migrants should be criminally charged and which should go through the usual administrative removal process." *Id.*

[32] Family in this Article includes not only a heterosexual family unit, but also homosexual, bisexual, single-parent, children with parents in prison, and extended families.

[33] *See* Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV.. 485 (2010)

[34] *See* 8 U.S.C. § 1326. The maximum penalty is two years but can increase to 20 years if the person has a prior aggravated felony or other criminal history.

[35] *See* 8 U.S.C. § 1325. The maximum penalty for this misdemeanor is 6 months.

[36] *See* Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, *supra* note 33, at 483 (There are eight border districts participating in the OSL

OSL radically changed immigration prosecutions.[37] Before this change, when Border Patrol agents apprehended a migrant crossing for the first time, DHS either voluntarily returned her to her home country or administratively detained and processed her through the civil immigration system.[38] The United States Attorney's Office usually saved prosecutions only for migrants with criminal records and for those who made repeated attempts to cross the border.[39] OSL "removed that prosecutorial discretion, requiring the criminal prosecution of all border crossers, regardless of their prior history."[40] Since its creation in 2005, OSL prosecutions focus on those arrested trying to cross for the first time.[41] Despite these efforts, prosecutors are limited to a daily quota of prosecutions per day.[42] Further, as a matter of policy,

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program; Del Rio, Texas; Yuma, Arizona; Tucson, Arizona; Las Cruces, New Mexico; El Paso, Texas; Laredo, Texas; Brownsville, Texas; and McAllen, Texas.).

[37] *See generally id.* ("Operation Streamline has fundamentally transformed U.S. border enforcement practices. Before Streamline began, when DHS's Border Patrol agents apprehended a migrant attempting to cross the border unlawfully for the first time, DHS either voluntarily returned that migrant to her home country or administratively detained her and processed her through the civil immigration system. The U.S. Attorney's Office (USAO) usually saved prosecution for migrants with criminal records and for those who made repeated attempts to cross the border. Operation Streamline removed that prosecutorial discretion, requiring the criminal prosecution of all border crossers, regardless of their prior history,")

[38] *Id.*

[39] *Id.*

[40] *See id.* at 484.

[41] *See Operation Streamline*, GRASSROOTS LEADERSHIP (last visited Mar. 27, 2020), http://grassrootsleadership.org/OperationStreamline. ("Operation Stream- line, a policy begun in 2005, mandates that nearly all undocumented immigrants crossing the Southern border in certain areas be prosecuted through the federal criminal justice system, a departure from previous practices when most immigration cases were handled exclusively within the civil immigration system.") *Id.*

[42] *See* Joshua Partlow, *Under Operation Streamline, Fast-Track Proceedings for Illegal Immigrants*, WASH. POST (Feb. 10, 2014), https://www.washington

the Border Patrol does not refer for the prosecution of juveniles, persons with certain health conditions, and others who require prompt return to their country of origin for humanitarian reasons.[43]

OSL has no deterrent impact on the number of migrant crossings, but the government relies on deterrence principles to continue the program.[44] The decrease in apprehensions that started in the year 2000 is more than likely a result of the falling United States economy, not OSL.[45] Alternative explanations for the decrease include the increasing number of human smugglers, technology, and physical barriers by the Border Patrol[46] to prevent both illegal entry and drug smuggling.[47]

OSL negatively affects other areas of the justice system. For example, some believe OSL leads immigrants to pay smugglers, a strategy likely to decrease chances of apprehension by the Border Patrol.[48] OSL also leads to increases in fraud cases because migrants show up at the border with fake documents or documents belonging to others who sold them on the black market.[49] Further, OSL channels law enforcement resources toward the apprehension and prosecution of low-level offenders,

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post.com/world/the_americas/under-operation-streamline-fast-track-proceedings-for-illegal-immigrants/2014/02/10/87529d24-919d-11e3-97d3-f7da321f6f33_story.html (daily OSL prosecutions have a capacity of 70 people in Tucson).

[43] Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, *supra* note 33, at 484 n.14.

[44] *Id.* at 517.

[45] *Id.* at 516.

[46] *Fact Sheet*, U.S. DEP'T OF HOMELAND SEC., SECURE BORDER INITIATIVE (Nov. 2, 2005), http://www.druglibrary.org/ schaffer/GOVPUBS/gao/pdf23.pdf.

[47] *See Border Control: Revised Strategy is Showing Some Positive Results*, U.S. GEN. ACCT. OFF. 12-15 (1994), https://www.gao.gov/products/ GGD-95-30.

[48] *See* Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, *supra* note 33, at 517.

[49] *Id.*

rather than on criminals who create border violence.[50] During OSL's first several years, as immigration prosecutions increased nationwide, white collar, weapons, organized crime, public corruption, and drug prosecutions decreased.[51] OSL also places a burden on state court systems because they handle the overflow of cases that federal prosecutors must decline because of high misdemeanor immigration caseloads.[52]

3. Pre-trial Violations and Sentencing Problems

It is common for Border Patrol agents to question migrants while in custody without first explaining Miranda warnings and for judges to permit these admissions during trial.[53] As one judge explained, field interrogation "did not amount to a practice the agents should know was reasonably likely to elicit an incriminating response."[54] "In so ruling, the court relied explicitly on the organizing principle of institutional autonomy: administrative immigration agents are 'merely fact finders' who have 'no discretion regarding whether or not the defendant will be prosecuted or subjected to administrative proceedings.'"[55]

Illegal entry prosecutions also lead to Fourth Amendment violations that judges have refused to suppress for trial.[56] District courts have moved the functional border into the homes of

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[50] *See id.* at 520.
[51] Solomon Moore, *Push on Immigration Crimes Is Said to Shift Focus*, N.Y. TIMES (Jan. 12, 2009), http://www.nytimes.com/2009/01/12/us/12prosecute.html?_r=1&hp=&pagewanted=all.
[52] *See* Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, *supra* note 33, at 543.
[53] *See* Eagly, *supra* note 21, at 1310 (citing United States v. Lugo, 289 F. Supp. 2d 790, 791-92 (S.D. Tex. 2003)).
[54] *Id.*
[55] *Id.* at 1310.
[56] *Id.*

previously deported aliens.[57] They have concluded that the law strips defendants in illegal reentry prosecutions of any Fourth Amendment protections at the time of their previous deportation.[58] In an extreme example, a district judge in Kansas refused to suppress evidence found in a warrantless search of an undocumented defendant's private residence, characterizing him as a "trespasser" or "squatter" in his own home.[59]

Bail is another problem for migrants charged with illegal entry.[60] Although courts detain eighty-one percent of those charged with drug trafficking after arrest and eighty-seven percent of those charged with violent crimes, courts detain a full ninety-five percent of those who have committed immigration crimes (which are largely nonviolent and most often misdemeanors) upon arrest.[61] The Bail Reform Act does not permit courts to consider alienage in release decisions.[62] On the other hand, if a judge states a reason aside from status for denying pre-trial release, it is impossible to know for sure if the decision had anything to do with immigration.[63]

Undocumented crossers also face problems at sentencing. The formal understanding of the criminal system is that courts

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[57] *Id.*
[58] *Id.*
[59] *See id.* at 1313.
[60] *See* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 632 (2012) (citing *Bureau of Justice Statistics*, U.S. DEP'T OF JUST., FED. JUST. STAT. 1 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf).
[61] *Id.*
[62] United States v. Chavez, 536 F. Supp. 2d 962, 968 (E.D. Wis. 2008) (fact that defendant is illegal alien does not prevent court from considering release); United States v. Hernandez, 2012 WL 1034942, at *3 (D. Kan. 2012) (fact that ICE says it will likely deport defendant if released on bail not dispositive; not for court to reconcile ICE and prosecutor's interests).
[63] *See* Eric Brickenstein, *Making Bail and Melting Ice*, 19 LEWIS & CLARK L. REV. 229, 244 (2015) ("Courts' consistent and seemingly unquestioning willingness to consider immigration status in the flight risk calculus is dubious given the significant statutory arguments against it.").

must sentence all defendants based on neutral factors.[64] However, emerging evidence suggests that courts hold noncitizens to a different standard.[65] For example, "[a]ccording to a study released in 2009, noncitizens convicted in the federal system are far less likely to be sentenced to alternative sentences (such as probation) than are citizens."[66] A recent study also found that federal judges have been four times more likely to impose imprisonment for convicted noncitizens than for citizens, even after accounting for sentencing guidelines and criminal histories.[67]

After sentencing, migrants face problems both when they arrive in prison and when the Bureau of Prisons releases them to ICE for deportation. Once the "deportable alien" designation is made, noncitizens are subject to conditions that increase the severity of punishment. The Bureau of Prisons assigns all deportable aliens to facilities with higher security levels.[68] Undocumented immigrants are also unable to participate in drug rehabilitation programs like the Residential Drug Abuse Program (RDAP).[69] Further, ICE houses defendants in immigration custody after the completion of their criminal sentence. The system thus punishes migrants more severely, as courts often do not credit immigration custody time in criminal cases.[70]

4. Illegal Entry and Crimmigration

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[64] *See* Ashlin Carter Quirk, *Application of Federal Sentencing Guidelines to Aliens*. United States v. Restrepo*, 999 F.2d 640 (2d Cir. 1993).,* 8 GEO. IMMIGR. L.J. 129, 129 (1994) (alienage is only considered in few cases at sentencing such as immigration crimes).

[65] *See* Michael T. Light et al., *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79(5) AM. SOC. REV. 827 (2014) (finding that "citizenship status is a salient predictor of sentencing outcomes[,] more powerful than race or ethnicity" and this citizenship effect has grown over time).

[66] *See* Eagly, *supra* note 21*,* at 1317.

[67] *See* Light, *supra* note 65, at 837.

[68] *See* Eagly, *supra* note 21, at 1318.

[69] *Id.*

[70] *Id.*

Illegal entry prosecutions form part of a larger process called crimmigration, or "the intersection of criminal and immigration law."[71] Scholar Juliet Stumpf coined the term,[72] which refers to the criminal prosecution of migrants, a process that began to take place in the United States in 1954 with Operation Wetback and has continued to today.[73] Through crimmigration, the United States not only criminalizes undocumented migrants, but also removes them from the country through the civil system.[74]

Crimmigration scholarship is diverse and aims to understand how criminal and immigration law work together. It includes the study of immigration detainers[75] by local (non-federal) law enforcement, mass incarceration of undocumented persons because of arrests for misdemeanors,[76] the use of the immigration laws by

[71] *See* Yolanda Vázquez, *EXCLUSION: Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L. J. 639, 671 (2011) (listing the many issues that both communities and individuals face in communities against whom crimmigration is practiced).

[72] *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

[73] *See* Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 621-22 (2015) (discussing the repatriation of Mexican immigrants and their forcible removal during "Operation Wetback," which began in 1954).

[74] *See generally* Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799 (2010) (noting that deportation undermines family reunification, the cornerstone of stated U.S. immigration policy).

[75] *See* Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 281, 305 (2013) (noting that ICE's current guidance authorizes a detainer under many circumstances in which a prisoner is charged with or has been convicted of a misdemeanor).

[76] *See* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 130 (2012) (describing instances in which criminal law becomes "an immigration regulation proxy").

local police to extend the arm of the federal government,[77] OSL,[78] and other areas.[79] Crimmigration scholarship examines the ways the two systems interact rather than viewing them as separate institutions with entrenched doctrinal divisions.[80] This focus reveals that the civil immigration and criminal justice systems are a single intertwined regulatory bureaucracy that moves between criminal and civil enforcement mechanisms in a manner that blurs and reshapes law enforcement power, prosecutorial incentives, and the aims of criminal law.[81]

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[77] *See* Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 L. & SOC'Y REV. 241, 245-46 (2015) (discussing how the arrest and detention trends of immigrants in King County, Washington mirror the biases against immigrants across the United States); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. 135, 135-36 (2009) (characterizing actions of 1980s and 1990s as evidence that "U.S. government has increasingly handled migration control through the criminal justice system").

[78] *See generally* Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65 (2012); Eagly, *supra* note 21; Lydgate, *supra* note 33; Katharine Brink, *Neglecting Due Process Rights of Immigrants in the Southwest United States: A Critique of Operation Streamline*, 89 U. DET. MERCY L. REV. 315 (2012).

[79] *See* Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 152 n.6 (2016) (Noting that a few key crimmigration works include DANIEL KANSTROOM, AFTERMATH: DEPORTATION AND THE NEW AMERICAN DIASPORA (2012); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, (2014); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006)); *see also* SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR (Maria João Guia et al. eds., 2013) (multidisciplinary collection examining the convergence of immigration law and criminal law enforcement in the United States, Canada, and Europe)). Illegal entry scholarship forms only a small part of crimmigration.

[80] *See* Eagly, *supra* note 21, at 1359.

[81] *Id.* at 1288.

In order to justify crimmigration, the government unfairly portrays migrants as increasingly responsible for crime and terror within our borders.[82] The rhetoric used to justify programs like OSL painted migrants as the cause of crimes and as threats to the nation and community.[83] It is now a commonplace belief that the government removes noncitizens from the United States, especially Latinxs, because they are "dangerous criminals" who threaten national security and public safety.[84] In reality, most "criminal" aliens deported only have minor records. In 2008, for instance, North Carolina placed thousands of noncitizens in removal proceedings because of 287(g) agreements.[85] Fifty-eight percent of motorists in Alabama stopped by a specific police officer based upon 287(g) were Latinxs.[86] At the time, Latinxs made up two percent of the state's population.[87]

B. Drug Couriers

Scholarship on drug couriers has focused mainly on harsh punishment and its impact on children, family visitation, and loss of visas. Several authors have proposed ways to ameliorate this

[82] *See* Vázquez, *supra* note 71, at 661.
[83] *Id.*
[84] *Id.*
[85] 287(g) is a program that allows state and local agencies to act as immigration enforcement agents. Under 287(g), ICE forms an agreement with a state or local agency, most often a county sheriff that runs a local jail. This agreement delegates specific immigration enforcement authority to designated officers within the local agency. *See National Map of 287(g) Agreements*, IMMIGRANT LEGAL RES. CTR. (Nov. 27, 2019), https://www.ilrc.org/national-map-287g-agreements. Section 287(g) became law as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). Through the 287(g) program, state and local police officers collaborate with the federal government to enforce federal immigration laws. *See The 287(g) Program: An Overview*, AM. IMMIGRATION COUNCIL (Aug. 23, 2019), https://www.americanimmigrationcouncil.org/research/287g-program-immigration.
[86] *Id.*
[87] *Id.*

punishment. Lastly, a body of sociological and economic research described the market for couriers and how their prosecution in Arizona differs from other districts in the nation's interior in case selection and sentencing rationales.

1. Impact of Harsh Punishment

Low-level drug couriers as a whole are more likely to face imprisonment compared to those higher in the drug pyramid.[88] The sentencing guidelines and "tough on crime" laws passed during the 1980s and 1990s populated prisons with couriers and lower-level offenders, not kingpins.[89] This increased incarceration has had a discriminatory effect on low-level couriers because they face mandatory punishments that vastly exceed their culpability.[90] Higher-level drug dealers, on the other hand, are seldom arrested and remain largely untouched.[91] As most couriers are not fluent English speakers, incarceration is more difficult for them due to language barriers.[92]

Drug couriers' prolonged incarceration negatively influences their children. First, compared to children of parents untouched by the criminal justice system, children of incarcerated parents are five times more likely to end up incarcerated themselves.[93] As women represent a significant percentage of

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[88] *See* Adam B. Weber, *The Courier Conundrum: The High Costs of Prosecuting Low-Level Drug Couriers and What We Can Do About Them*, 87 FORDHAM L. REV. 1749, 1790 (2019).

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *See* Jessica M. Kelder et al., *Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR*, 14 INT'L CRIM. L. REV. 1177, 1190 (2014) ("[L]anguage barriers cause problems such as difficulties in understanding prison regulations, inability to participate in work or education programmes, or problems in communicating with other prisoners, prison staff or the outside world.").

[93] Weber, *supra* note 88, at 1772 n.195 (citing Stephanie Bush-Baskette, *The War on Drugs and the Incarceration of Mothers*, 30 J. DRUG ISSUES 919, 923

couriers, an increasing number of children go without their mothers' personal care.[94] The same applies for fathers. In all, the absence of a father or mother due to incarceration is detrimental for any child.

Visitation, a way to ameliorate some of the negative effects of parental incarceration on children, is difficult for families that live in the United States, but even more so for those that live in other countries.[95] Federal prisons are often located hundreds of miles from inmates' families.[96] Whereas a family has relatively easy access to a prison two or three hours by car from the United States-Mexico border, visiting a family member transferred to a non-border state makes visitation incredibly

(2000) ("discussing the negative impacts of parental incarceration on children . . . .").

[94] *See* Lynn M. Paltrow, *The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and the Effects*, 28 S.U. L. REV. 201, 241-42 (2001) (noting that women in prison leads to the separation of children from their mothers and bodes ill for the next generation).

[95] *See* Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 390-91 (2018) (describing the many obstacles children of incarcerated parents face both during and after their parent's period of incarceration). *See also* Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 135 (2008); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1284 (2004) (Children can experience antisocial behavior, future offending, drug abuse, school failure, and unemployment.).

[96] *See* Safia Fasah, *Pat-Downs but No Hugs: Why Prison Visitation Protocol Should Be Changed to Help Keep Familial Structures Intact*, 56 FAM. CT. REV. 135, 138 (2018) (citing Bureau of Justice Statistics Special Report, NJC 182335, Incarcerated Parents and their Children (2000)) (On average, they are imprisoned over 100 miles away from their homes and families). According to the Bureau of Prisons website, "The Bureau attempts to designate inmates to facilities commensurate with their security and program needs within 500 driving miles of their release residence. If an inmate is placed at an institution that is more than 500 driving miles from his/her release residence, generally, it is due to specific security, programming, or population concerns." *See Designations*, FED. BUREAU OF PRISONS (last visited Mar. 23, 2020), https://www.bop.gov/inmates/custody_and_care/designations.jsp.

difficult for those with little funds to afford travel. The Bureau of Prisons determines the facility in which an inmate serves her sentence.[97] The Bureau of Prisons may not provide certain information to the public.[98] Certain tourist visas also prohibit travel outside a certain mileage from the border.[99] In areas outside the border region, non-English speakers may face difficulties communicating with largely non-bilingual prison staff.[100] This makes visitation with family members even more difficult.

A federal drug conviction has consequences for the entire family. It not only suspends the visa of the drug courier, but also those of her immediate family. This prevents them from entering the country for any purpose. Under these circumstances, family visitation for those living abroad becomes impossible.

2. Proposals to Reduce Punishment

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[97] *See Designations*, FED. BUREAU OF PRISONS, *supra* note 96. ("Upon sentencing in Federal District Court, the Bureau of Prisons has the sole responsibility in determining where an offender will be designated for service of his/her sentence in accordance with Program Statement 5100.08, Inmate Security and Custody Classification manual.").

[98] *Id.* "Although general information regarding the designation or transfer process may be provided, specific information about a particular inmate is not public information and may not be released via the telephone or internet. This information may only be obtained by submitting a written request with an original authorization form signed by the inmate. Due to security requirements, certain information, such as an inmate's pending designation site and/or transfer date, will not be released to anyone even if an original authorization form is provided." *Id.*

[99] *See Travel to the USA*, NEW MEXICO BORDER AUTHORITY (last visited Mar. 23, 2020), http://www.nmborder.com/Travel_to_the_USA.aspx. "Mexican citizens who already have a visa and are planning to travel to the United States beyond the border area and/or for longer than 30 days, must obtain an I-94 permit at the port-of-entry from a Customs and Border Protection officer. In New Mexico, an I-94 is required for travel beyond 55 miles from the border. The fee for an I-94 permit is US$6." *Id.*

[100] *See* Lorena O'Neil, *The Rising Need for Bilingual Corrections Officers*, OZY (Feb. 7, 2014), https://www.ozy.com/acumen/the-rising-need-for-bilingual-corrections-officers/5996/.

In response to severe punishment, scholars have proposed modifications to the United States Sentencing Guidelines. The changes proposed by Adam Weber and Kevin Lerman go a long way toward improving sentencing for low-level drug couriers.[101]

To decrease lengthy sentences for low-level couriers, Adam Weber proposed the creation of a misdemeanor charge.[102] A person could qualify for a misdemeanor based on criteria common to low-level drug couriers. The criteria asks whether the defendant 1) received a small, flat fee payment versus a percentage of profits; 2) delivered drugs one way and did not deliver money in return; 3) received a prepackaged bag; 4) delivered the package to a previously unknown individual; 5) negotiated the terms of the sale; and 6) owned or financed the drugs involved.[103]

Kevin Lerman[104] proposed five amendments to the Sentencing Guidelines as a potential remedy. They are the following:

- The first amendment would add a provision to allow role-based mitigating reductions for couriers, mules, and even street-level dealers.[105] This amendment would be easier to address on appeal. It would clearly define "courier" and "mule."[106] If facts support a determination that a defendant is a courier, it is

[101] *See* Weber, *supra* note 88, at 1790; Kevin Lerman, Note, *Couriers, Not Kingpins: Toward A More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. IRVINE L. REV. 679, 682 (2017).
[102] Weber, *supra* note 88, at 1749.
[103] *Id.* at 1787.
[104] Lerman, *supra* note 101, at 694. Mr. Lerman openly endorses these amendments: "[t]he guidelines should be amended to address the kingpin-length sentences received by many low-level couriers and mules . . . ." *Id.*
[105] *Id.* at 682.
[106] *Id.*

more likely that a circuit court would reverse a district court's role-reduction denial.[107]

- A second amendment is to the role cap, or §2D1.1(a)(5). It would ensure its deployment for all "relatively low level trafficking functions, [who] have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., 'mules' or 'couriers' ...)".[108] This modification is best accomplished by extending § 2D1.1(a)(5) to all drug-trafficking defendants who do not qualify for an aggravating role.[109]
- The third amendment is to § 2D1.1(b)(5). Under this provision, if a drug-trafficking organization recruits a courier or mule defendant to transport methamphetamine and the court denies a mitigating role adjustment, the offense level increases by two levels.[110] The United States Sentencing Commission should amend this guideline such that defendants who receive an aggravating role adjustment only have an increase of two points if convicted of importation of methamphetamine.[111]
- Lerman's fourth proposal is to amend the Guidelines "to clarify that a lack of aberrancy should not foreclose mitigating role reductions."[112]

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[107] *Id.* at 705.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 708 (citing U.S. Sentencing Guidelines Manual § 2D1.1(b)(5) (U.S. Sentencing Comm'n 2016) [hereinafter U.S.S.G.]).
[111] *Id.*
[112] *Id.* at 711.

- The final amendment adds unequivocal language to the mitigating role guideline to "[d]isavow[i]ndispensability [d]eterminations."[113]

3. Sociological and Economic Studies of Drug Couriers Along the United States-Mexico Border

Social scientists have studied drug courier prosecutions along the United States-Mexico border. Caleb Mason and David Bjerk conducted the first empirical analysis of the economics of border smuggling into the United States.[114] Mona Lynch studied the discretionary process of drug case selection in Arizona and contrasted it with non-border districts.[115] Professor Lynch also studied the sentencing rationales of marijuana backpacking cases in Arizona.[116]

i. The Market for Couriers

Caleb Mason and David Bjerk conducted the first large-scale empirical analysis of the economics of border smuggling into the United States.[117] They documented every border drug arrest in California ports of entry between 2006 and 2010, noted the type of drug, weight, and how much the courier agreed to be paid (although this was not possible to accurately document in every case).[118]

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[113] *Id.* at 712.
[114] *See* David Bjerk & Caleb Mason, *The Market for Mules: Risk and Compensation of Cross-Border Drug Couriers*, 39 INT'L REV. L. & ECON. 58 (2014).
[115] *See* Mona Lynch, *Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court*, 35 JUST. Q. 1309, 1318 (2018).
[116] *See* Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High-Volume Court*, 57 BRIT. J. CRIMINOLOGY 112, 114 (2015).
[117] *See* Bjerk & Mason, *supra* note 114, at 58.
[118] *Id.* at 60.

The following are major conclusions of the study:

- Annually, federal agents arrest roughly 3,000 "while working as 'mules' smuggling drugs through the ports of entry along the United States-Mexico border in California, Arizona, New Mexico, and Texas." For every mule caught, many more get through.[119]
- Drug organizations pay mules "between one and two thousand dollars for a day's work—a daily wage in excess of the average wage rates on either side of the border."[120]
- Drug mules are "outside of the drug retail operation and not looking to 'work their way up' within the organization."[121]
- The illegal and unregulated labor market for drug couriers "behaves in a manner consistent with basic economic theory of competitive markets . . . [w]age differentials appear to arise for otherwise similar work that involves higher risk—in this case longer expected incarceration associated with being caught with the load carried."[122]
- "[T]he likelihood of detection at the border is [supposedly] roughly 7.5%."[123]
- Mules are generally knowledgeable about what they carry.[124]
- "[C]ompetitive forces lead to a compensating wage premium paid to those carrying higher risk loads."[125]

[119] *Id.* at 58.
[120] *Id.* at 70.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*

ii. Selection of Drug Cases for Prosecution

Mona Lynch studied how drug prosecutions in the District of Arizona differ from those in Northeastern, Southeastern, and Midwestern districts.[126] Arizona has one of the largest criminal caseloads in the nation.[127] The majority of cases involve immigration-related violations, but drug defendants constituted thirty-three percent of nearly 6,900 defendants charged in 2012.[128] The bulk of these drug cases resulted from border enforcement efforts.[129] This differed markedly from other districts, both in number of cases and enforcement efforts.[130]

In Arizona, law enforcement initiates fewer drug investigations.[131] Most drug cases arise from stops at ports of entry or marijuana backpackers arrested walking across the border.[132] In non-border districts, drug cases arise from proactive investigations.[133] These differences arise from the fact that most prosecutions in the Southwestern divisions result from border immigration enforcement as opposed to preplanned agent investigations.[134] Prosecutors in the Southwest, but in non-border districts, "select drug cases as a combined function of ideologies about crime and violence (including racialized ones) and the

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[126] *See* Lynch, *Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court*, *supra* note 115, at 1309.
[127] *Id.* at 1316.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 1318.
[131] *Id.* at 1327.
[132] *Id.*
[133] *Id.* at 1331. Border bust cases constitute a load of drugs interdicted at a Port of Entry between the United States and Mexico. *See* Caleb Mason & David Bjerk, *Inter-Judge Sentencing Disparity on the Federal Bench: An Examination of Drug Smuggling Cases in Southern California*, 25 FED. SENT. R. 190, 190 (2013).
[134] *See id.* at 1330–31.

incentives that attend producing and prosecuting drug cases . . . ."[135] "[I]n Southwestern [districts], prosecutors were primarily case processors, with much less room to assert discretion in choosing to prosecute or not."[136] Although the racial composition of couriers in Arizona is polarized (almost nine out of every ten defendants are Latinx), there is less perceived racial bias in prosecutorial selection.[137]

iii. Sentencing rationales

In a 2017 journal article about sentencing, Lynch found that marijuana backpacker prosecutions in Arizona resemble criminal immigration cases.[138] This contradicts tenets of crimmigration suggesting the opposite.[139] "[T]he prevailing adjudicatory logic" at marijuana backpacker sentencing focuses on "defendants' status as unauthorized outsiders," as they are "barely distinguishable from immigration defendants" in how their sentences are calculated and rhetorically justified.[140]

In Arizona, the emphasis on excluding non-citizen marijuana backpackers arose from the process of moving these offenses to "flip-flop" status.[141] As flip-flops, defendants plead

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[135] *Id.* at 1333.
[136] *Id.*
[137] *Id.* at 1330.
[138] *See* Lynch, *supra* note 116. Lynch argues that the logic of immigration enforcement subsumes more traditional federal drug law enforcement—characteristics of drug cases more closely resemble immigration cases.
[139] *Id.* at 115-16. Crimmigration scholars argue that federal prosecutors and courts overcriminalize immigration practice. The opposite happens in Arizona, where the executive and the courts overcriminalize policy so that the immigrant status of drug defendants rather than criminal status drives the adjudicatory logic and practice.
[140] *Id.* at 113.
[141] *Id.* at 126. Flip-flops are cases selected for a rapid-resolution, or a mass processed mode. Prosecutors charge defendants charged with illegal entry, fraud, and marijuana with a "mixed complaint" that includes both a felony and a misdemeanor charge. Prosecutors offer defendants a misdemeanor conviction and a particular sentencing outcome, totaling less than 360 days of

guilty to simple possession of marijuana, not possession for distribution.[142] At flip-flop sentencings, judges do not focus on the crime of backpacking marijuana despite the fact that the government charged these individuals with drug crimes.[143] Instead, judges pay attention to the individual's immigration history, the number of apprehensions by border patrol, and removals from the United States.[144] The sentencing discourse emphasizes remaining in Mexico and past illegal entries.[145] Courts and prosecutors mainly attempt to resolve these cases by finding a way to keep backpackers "out of the country."[146]

In contrast, non-border districts punish undocumented drug defendants for dealing drugs as much as for entering the United States with illegal narcotics.[147] Judges and prosecutors base adjudicatory narratives in most regions on the drug offense as an act, whether it signified "individual weakness or inherent evil," extreme "poverty, gang and gun involvement or social failures."[148]

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incarceration in exchange for an immediate guilty plea prior to receiving discovery, a waiver of all rights and a waiver of the full-blown sentencing procedure. The decision as to whether prosecutors route a case to the flip-flop route or regular felony case depends on the drug courier's criminal history.

[142] *Id.* at 141. ("The remaining defendants, all men, were there to plead guilty to marijuana possession in exchange for dismissal of the possession with intent to distribute felony charge.")

[143] *Id.* at 128 ("[T]he flip-flop backpackers merely carried illicit drugs but were otherwise indistinguishable from the other men and women picked up in the same desert.").

[144] *Id.* at 113 ("In both sets of cases, how the case is adjudicated depends largely upon the past, primarily the defendant's prior documented history in the United States, and considers the future in devising strategies that foremost aim to keep the defendant out of the country.").

[145] *Id.* at 124 ("[S]entencing pronouncement[s] clearly reveal[] how this is not a case about drug dealing, but about illegal immigration.").

[146] *Id.* at 113.

[147] *Id.* at 117.

[148] *Id.*

III. ILLEGAL ENTRY AND DRUG COURIERS AS SITES FOR CRT ANALYSIS[149]

CRT is a diverse intellectual movement[150] that includes myriad analytical tools.[151] It rejects the tenet that race relations

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[149] CRT started in the mid-1970s, when scholars realized that the Civil Rights struggle of the 1960s had stalled and that government and courts began to roll back many of its gains. *See* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993). Scholars and activists believed that an understanding and coming to grips with the interplay of race, racism, and American law required new tactics and theories. They became frustrated with the liberal response that accepted the premise that race consciousness amounted to racism and that too often argued for race-conscious remediation as temporary, exceptional, and aberrational within an otherwise neutral legal frame. *See* Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1220 (2002).

[150] *See* Devon Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1607 (2011).

[151] *See id.* (interest convergence); Tanya Kateri Hernandez, *"Multiracial Discourse": Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 139 (1998) (critique of colorblindness); Delgado & Stefancic, *supra* note 149, at 462 (critique of liberalism and storytelling/counter storytelling); Richard Delgado & Jean Stefancic, *Part IV: Structural Determinism*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 213 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (structural determinism); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (intersectionality of race, sex, and class); CATHARINE A. MACKINNON, KEEPING IT REAL: ON ANTI-"ESSENTIALISM," *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 71, 74 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002) (essentialism and anti-essentialism); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in A Multicultural World*, 65 S. CAL. L. REV. 2129, 2228 (1992) (cultural nationalism or separatism); Daniel G. Solorzano & Tara J. Yosso, *Maintaining Social Justice Hopes Within Academic Realities: A Freirean Approach to Critical Race/LatCrit Pedagogy*, 78 DENV. U. L. REV. 595 (2001) (legal institutions, critical pedagogy, and minorities in the bar ("In this article, we merge the critical pedagogical work of Paulo Freire with the critical race and LatCrit frameworks . . . ."); Eden B. King et al., *Discrimination*

in the United States have a history of linear uplift and improvement.[152] CRT provides a counter-narrative to the dominant and ever-popular story about race and law that suggests that the struggle for racial justice, though long and incremental, is nevertheless forward-moving, progressive, and triumphant. Instead, it points out the stagnation of racial progress because of the continuity of underlying structures of White supremacist thought, operation, and social arrangements, accomplished through new and changing forces of rationalizations.[153]

In order to understand illegal entry, subsection A applies the history of subjugated groups, revisionist history of illegal entry laws, and post-colonial theory. To analyze drug couriers, subsection B applies intersectionality, revisionist history of federal drug laws, and the impact of harsh punishment on children. The section ends by arguing that these processes maintain racial stratification within the federal criminal justice system. The application of these CRT tools and analyses articulates new ways of understanding illegal entry and drug courier prosecutions.

A. CRT Perspectives of Illegal Entry

1. Mistreatment of Latinxs

The mid to late nineteenth century saw America expand its rule over land and peoples west of the Mississippi River.[154] White American expansionists encountered land already owned and occupied by Mexico, which had just become independent

in the 21st Century: Are Science and the Law Aligned?, 17 PSYCHOL. PUB. POL'Y & L. 54, 56 (2011) (study of microaggressions).

[152] *See* Carbado, *supra* note 150, at 1607.

[153] *See* Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U.L. REV. 329, 358–59 (2006).

[154] *See generally* Coy F. Cross, GO WEST YOUNG MAN: HORACE GREELEY'S VISION FOR AMERICA (1995).

from Spain.[155] In 1848, through the Treaty of Guadalupe Hidalgo, the United States gained parts of Mexico now known as California, Texas, New Mexico, Arizona, Utah, and Colorado.[156] In the 1890s, it won the war against Spain and claimed temporary control of Cuba and colonial authority over Guam, Puerto Rico, and the Philippine Islands.[157] In 1898, there was expansion into the Caribbean and the Pacific Ocean.[158] These new acquisitions meant America also gained control of many Latinx populations.[159]

During American expansionism through Manifest Destiny and worldwide colonialism, the "[b]elief in Anglo-Saxon superiority provided the 'logical' conclusion that Whites were destined to rule . . . the world."[160] These settler and expansionist perceptions came from rigid European constructions of racial hierarchy that viewed Latinxs and Native Americans in the Southwest as animalistic—less than fully human.[161] People described Mexicans as a "mongrel race."[162] They labeled them "lazy, ignorant,

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[155] *See Westward Expansion*, HISTORY (last visited Mar. 23, 2020), https://www.history.com/topics/westward-expansion.

[156] *See* OTIS A. SINGLETARY, THE MEXICAN WAR 160-62 (1960); *Treaty of Guadalupe Hidalgo*, HISTORY (Oct. 2, 2019), http://www.history.com/topics/treaty-of-guadalupe-hidalgo.

[157] *See* Singletary, *supra* note 156.

[158] *Id.*

[159] *See* Tom I. Romero, II, *The "Tri-Ethnic" Dilemma: Race, Equality, and the Fourteenth Amendment in the American West*, 13 TEMP. POL. & CIV. RTS. L. REV. 817, 827 (2004).

[160] *See* Vázquez, *supra* note 73, at 611 (citing Reginald Horsman, RACE AND MANIFEST DESTINY (1981) (discussing that the belief that Whites were superior to all other races was deeply held in the United States by 1800)).

[161] *See* Horsman, *supra* note 160, at 210. "While the Anglo-Saxons were depicted as the purest of the pure—the finest Caucasians—the Mexicans who stood in the way of southwestern expansion were depicted as a mongrel race, adulterated by extensive intermarriage with an inferior Indian race." *Id.*

[162] *Id.*

vicious, and dishonest."[163] Latinxs and their "mixed"[164] race took on a subordinated status, and society treated those with more indigenous or Black characteristics even harsher.[165] The discrimination was so ingrained that it persists to the present day in mainstream and even minority cultures.[166]

After the United States seized control of the west in the nineteenth century, Whites lynched Latinxs[167] because they saw them as a threat to the "American way of life."[168] They lynched Mexicans not only in border states like Texas, New Mexico, Arizona, and California, but as far away as Colorado, Nebraska, Oklahoma, Oregon, Kentucky, Louisiana, Montana, and

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[163] *See* Vázquez, *supra* note 73, at 613 (citing WADDY THOMPSON, RECOLLECTIONS OF MEXICO 6, 23, 187, 239 (1846)).

[164] *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710, 1712 (1993) (discussing racial identity and the right to claim "whiteness" through visual perceptions and assumptions by the dominant class, often called "passing").

[165] *See* Ian Haney Lopez, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 997 (2007) (the "mixing" of races resulted in racial degeneration of Whites); Ian Haney Lopez, *Race on the 2010 Census: Hispanics & the Shrinking White Majority*, DAEDALUS 42, 43-44 (2005) (discussing white perceptions of Latin Americans as "mongrels debased by their mixture of Spanish and Native American (and sometimes African and Asian) blood").

[166] *See* Vilma Ortiz and Edward Telles, *Racial Identity and Racial Treatment of Mexican Americans*, 4 RACE & SOC. PROBLEM 41 (2012) ("We found that darker Mexican Americans, therefore appearing more stereotypically Mexican, report more experiences of discrimination. Second, darker men report much more discrimination than lighter men do and then women overall. Third, more educated Mexican Americans experience more stereotyping and discrimination than their less-educated counterparts did, which is partly due to their greater contact with Whites. Lastly, having greater contact with Whites leads to experiencing more stereotyping and discrimination.").

[167] *See generally* RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION (1972).

[168] *See* Christy E. Lopez, *The Reasonable Latinx: A Response to Professor Henning's the Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 68 AM. U.L. REV. F. 55, 80 (2019).

Wyoming.[169] A conservative estimate of deaths from lynching is at least 597, most dating to the same period when anti-Black lynching was rampant during the Post-Reconstruction and Jim Crow eras.[170] The reasons for lynching included acting "uppity," "taking away jobs," making advances towards a White woman, cheating at cards, practicing "witchcraft," refusing to leave lands that Anglos coveted, acting "too Mexican," speaking Spanish too loudly, or reminding Anglos too defiantly of their "Mexicanness."[171] Whites lynched Mexican women often for sexual offenses, such as resisting an Anglo's advances too forcefully.[172]

The borderland lynching of ethnic Mexicans had similarities and differences to the Southern lynching of African Americans.[173] The comparison is useful to understand some of its motivations and nuances. Both types of lynchings were about citizenship, sovereignty, subordination, and control.[174] In contrast to African American families, however, a number of Mexican victim families had resources to investigate the crimes and thereby place the

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[169] *See* William Carrigan & Clive Webb, *When Americans Lynched Mexicans*, N.Y. TIMES (Feb. 20, 2015), https://www.nytimes.com/2015/02/20/opinion/when-americans-lynched-mexicans.html.

[170] *See* Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.C.L.L. REV. 297, 299 (2009) (citing William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 J. SOC. HIST. 411, 413 (2003) (citing this number and declaring it conservative)).

[171] *Id.* (citing Carrigan & Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, supra note 170, at 420-23).

[172] *Id.*

[173] The number of African Americans lynched during the period discussed here was higher, around 3,400 to 5000 but the Latinx group in the United States was much smaller then. *See* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996) (reprinted in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 155, 155-59 (Juan F. Perea et al. eds., 2d ed. 2007)).

[174] *See* CARTER A. WILSON, RACISM: FROM SLAVERY TO ADVANCED CAPITALISM 114 (1996).

incidents on an international stage.[175] Similar to African American lynchings, law enforcement often condoned the murder of Mexicans.[176] Sometimes law enforcement even committed lynchings themselves.[177] Stephen F. Austin, the founder of the Texas Rangers, wrote in the early nineteenth century that "the Anglo-American foundation, the nucleus of republicanism, is to be broken up, and its place supplied by a population of Indians, Mexicans and renegades, all mixed together, and all the natural enemies of White men and civilization."[178] Accounts from the time show that some rangers had "degenerated into common man-killers."[179] There was no penalty for killing, as no jury along the border would ever convict a White man for shooting a Mexican.[180] Historians William Carrigan and Clive Webb estimate that the number of Mexicans murdered by members of the Texas Rangers may run into the thousands.[181]

Police collaboration in attacks against Latinxs continued through the twentieth century. Historical accounts document law enforcement complicity in the West Coast "zoot suit" riots in

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[175] *See* NICHOLAS VILLANUEVA, JR., LYNCHINGS OF MEXICANS IN THE TEXAS BORDERLANDS (2017). Some Mexicans in the United States were able to alert the Mexican government, which in turn made the issue one of international importance.

[176] *See* LATINOS AND CRIMINAL JUSTICE: AN ENCYCLOPEDIA 49 (José Luis Morín ed., 2016).

[177] *Id.*

[178] *See* ALFREDO MIRANDE, GRINGO JUSTICE 173-74 (1987).

[179] *Id.* at 20.

[180] *See* Julia Jacobs, *Border Patrol Agent Who Shot Mexican Teenager Is Acquitted of Involuntary Manslaughter*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/border-patrol-acquitted-involuntary-manslaughter.html (an example of a border patrol acquittal).

[181] *See* William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928, supra* note 170, at 417 (noting that the organization's enthusiasm for punishing Mexicans ran so high that they even crossed the United States-Mexico border to arrest one, who was then returned to the United States where he was "strung up to the cross beams of the gate in the court house yard until he was dead" (quoting El Paso Times (Tex.), Apr. 8, 1881)).

1943, when sailors on leave in California attacked young Latinx "zoot-suiters," having been encouraged by local police.[182] The riots ended when military authorities declared Los Angeles off-limits for enlisted personnel and the Los Angeles City council prohibited "zoot suits," the clothing favored by many young Mexican Americans at the time.[183]

Distaste for Latinxs in the 1930s is evident in the government's disassociation of Europeans and Canadians from the real and imagined category of illegal alien,[184] while Mexicans emerged as "iconic illegal aliens."[185] Mainstream society easily assimilated Europeans and Canadians as White American citizens.[186] In contrast, "[i]llegal status became constitutive of a racialized Mexican identity and of their exclusion from the national community and polity."[187]

Customs officials treated Mexicans less favorably compared to other immigrants at the United States-Mexico border.[188] Beginning in the 1920s, inspection at the border "involved a degrading procedure of bathing, delousing, medical line inspection, and interrogation."[189] Officials inspected them while naked, sheared their hair, and fumigated their baggage and clothing.[190] "Medical line inspection, modeled after the practice at Ellis Island, required migrants to walk in single file past a medical officer."[191] Even though this practice ended in 1924 at Ellis

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[182] *See* Camilo M. Ortiz, *Latinos Nowhere in Sight: Erased by Racism, Nativism, the Black-White Binary, and Authoritarianism*, 13 RUTGERS RACE & L. REV. 29, 46 (2012).
[183] *See* Lopez, *supra* note 168, at 81.
[184] *See* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 72 (2003).
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.* at 80.
[189] *Id.* at 85.
[190] *Id.*
[191] *Id.*

Island, the government continued to use it at the El Paso Port of Entry for more years.[192] Customs officers at this port "exempted all Europeans and Mexicans arriving by first class rail from medical line inspection, the baths, and the literacy test."[193] Mexican migrants allowed to commute regularly for work were required to report to the immigration station once a week for bathing.[194]

Mexicans in the southwest continued to see other types of mistreatment, such as Border Patrol interrogations of Mexican laborers on roads and in towns.[195] "[I]t was not uncommon for 'sweeps' to apprehend several hundred immigrants at a time."[196] By the early 1930s, the service apprehended nearly five times as many suspected illegal aliens in the Mexican border region as it did in the Canadian border area. The Los Angeles newspaper *La Opinión* believed the aggressive deportation policy would result in a "de-Mexicanization of southern California."[197]

2. Revisionist History of Illegal Entry

The Passport Act of 1918 gave the President the power to restrict the comings and goings of foreign citizens during wartime.[198] It was one of the first attempts to criminalize entry without inspection.[199] Up to that point, there were either no limits

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[192] *Id.* at 86-87.
[193] *Id.* at 86.
[194] *Id.* at 88.
[195] *Id.*
[196] *Id.*
[197] *See id.* at 88 (citing CLIFFORD PERKINS, BORDER PATROL: WITH THE U.S. IMMIGRATION SERVICE ON THE MEXICAN BOUNDARY, 1910-1954, at 116 (El Paso: Texas Western Press, 1978)); *La Opinion*, Jan. 29, 1929, 1 (trans. from Spanish); Commissioner General of Immigration to the Secretary of Labor, *Annual Report*, fiscal year ending June 30, 1932, p. 44).
[198] *See* Act of May 22, 1918, Pub. L. No. 65-154, ch. 81, 40 Stat. 559.
[199] *See* Jeffrey Kahn, *The Extraordinary Mrs. Shipley: How the United States Controlled International Travel Before the Age of Terrorism*, 43 CONN. L. REV. 819, 833 (2011).

or blanket bans for groups, such as the Chinese Exclusion Act.[200] Immigrants were free to enter provided they were not "lunatics, polygamists, prostitutes," or suffered from a "loathsome or a dangerous contagious disease."[201] As a result, millions of immigrants from Eastern Europe entered the United States between 1901 and 1910.[202] The Passport Act contained criminal provisions imposing a maximum of twenty years in prison for violations of entering the country when the United States was at war.[203] Prosecutors at the time used this authority to prosecute illegal entrants in an attempt to deter immigration.[204]

After a federal appeals court ruled the practice of indicting migrants under the Passport Act unlawful outside of wartime, two lawmakers, James Davis and Coleman Livingston Blease, urged Congress to pass laws criminalizing entry.[205] James Davis supported the eugenics movement and believed Americans "learned to discern between bad stock and good stock, weak blood and strong blood, sound heredity and sickly human stuff."[206] Coleman Livingston Blease was pro-lynching and against Black people receiving education.[207] Both men spearheaded the effort to create the "Undesirable Aliens Act of 1929,"[208] which Herbert Hoover

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[200] *See The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 L. & SOC. INQUIRY 1, 2 (2000) (The Chinese Exclusion Act was the first law to bar the immigration of a particular nationality.).

[201] *See* Ngai, *supra* note 184, at 73.

[202] *See* ALAN KRAUT, THE HUDDLED MASSES: THE IMMIGRANT IN AMERICAN SOCIETY, 1880-1921, at 20-21 (1982).

[203] *See* Keller, *supra* note 78, at 73.

[204] *See* Ian MacDougall, *Behind the Criminal Immigration Law: Eugenics and White Supremacy*, PROPUBLICA (June 19, 2018), https://www.propublica.org/article/behind-the-criminal-immigration-law-eugenics-and-white-supremacy.

[205] *Id.*

[206] *See* HANS P. VOUGHT, THE BULLY PULPIT AND THE MELTING POT: AMERICAN PRESIDENTS AND THE IMMIGRANT, 1897-1933, at 176 (2004).

[207] *See* Simon, Bryant, *The Appeal of Cole Blease of South Carolina: Race, Class, and Sex in the New South*, 62 J. S. HIST. 57, 60, 86 (1996).

[208] *See* MacDougall, *supra* note 204.

signed into law.[209] Consequently, between 1929 and 1936, federal, state, and local governments deported between 400,000 and 2,000,0000 Mexican immigrants and their United States citizen children.[210] People colloquially came to know this as the "Mexican Repatriation" efforts.[211]

In 1952, Congress enacted 8 U.S.C § 1325, but prosecutions under it were rare for most of the twentieth century.[212] Although the government created this law to apply to all immigrants, the intent was to restrict immigration from Mexico.[213] In the first ten years after § 1325 passed, the United States prosecuted approximately 44,000 immigrations, a small number compared to the hundreds of thousands, if not millions, of immigrants rounded up and deported in the Great Depression's "repatriation drives."[214] The United States based the drive on the "belief that Mexicans were a drain on the economy."[215] "During World War II, prosecutions under Section 1325 decreased as the United States sought more labor for the war effort."[216] The Bracero program, which started in 1942 and continued until 1964, brought

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[209] *Id.*

[210] *See* Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 584 (2019).

[211] *See* Alex Wagner, *American's Forgotten History of Illegal Deportations*, THE ATLANTIC (Mar. 7, 2017) citing, https://www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/ (citing FRANCISCO BALDERRAMA, A DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (2006)).

[212] *See* Dara Ling, *Why Julian Castro started a Democratic debate fight over repealing "Section 1325"*, VOX (June 26, 2019), https://www.vox.com/2019/6/26/18760665/1325-immigration-castro-democratic-debate.

[213] *See* Becky Little, *How Border-Crossing Became a Crime in the United States*, HISTORY (July 1, 2019), https://www.history.com/news/illegal-border-crossing-usa-mexico-section-1325.

[214] *Id.*

[215] *Id.*

[216] *Id.*

"more than 300,000 Mexican guest workers for short-term agricultural projects."[217]

The United States did not make prosecuting immigrants a priority.[218] Presidents generally decided it was not worth it to spend time, money, and resources prosecuting migrants.[219] The low number of immigration prosecutions at this time was because of time, money, and resources.[220] Presidential administrations sought instead to deport millions of Mexicans without going through the criminal process.[221]

Things changed during the George W. Bush administration.[222] In 2005, the Bush Administration and the Department of Homeland Security (DHS) created OSL.[223] The program was principally responsible for a 500% increase in illegal entry prosecutions: from 15,392 cases in Fiscal Year 1997 to 90,067 in 2013.[224] Between 1997 and 2013, federal courts handled more than a million such cases.[225]

The total number of people apprehended for illegally crossing the Southern United States border has been steadily falling since the year 2000;[226] however, sub-groups of people

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[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *See* Katharine Brink, *Neglecting Due Process Rights of Immigrants in the Southwest United States: A Critique of Operation Streamline*, 89 U. DET. MERCY L. REV. 315 (2012).
[224] *See The Immigration Prosecution Factory*, KINO BORDER INITIATIVE (Nov. 14, 2017), https://www.kinoborderinitiative.org/immigration-prosecution-factory/.
[225] *See Criminal Immigration Prosecutions Down 14% in FY 2017*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, (Dec. 6, 2017), https://trac.syr.edu/tracreports/crim/494/.
[226] *See* Rebecca Hersher, *3 Charts That Show What's Actually Happening Along The Southern Border*, NPR (June 22, 2018), https://www.npr.org /2018/06/22/622246815/unauthorized-immigration-in-three-graphs.

have consistently crossed in greater numbers in recent years.[227] The largest groups are Central Americans seeking asylum because of violence in their home countries.[228] Mexican migration, much of which relates to family and friendship linkages between the two countries, decreased after the 2008 recession.[229] Although there has been a decrease in illegal prosecutions since 2013, numbers continue to dwarf pre-2005 levels.[230]

Compared to the Obama administration, President Trump's deportations have not been as high in terms of numbers, but there is a sense that United States officials are "looking for everyone."[231] This has "created a society of fear and terror" in immigrant communities.[232] This fear resulted in part from former Attorney General Jeff Sessions' instructions to federal prosecutors to make entry-level prosecutions a high priority nationwide,[233] leading to the reenactment of Zero Tolerance in 2018.[234] In the announcement of the policy, Jeff Sessions said that federal prosecutors will "take on as many of those cases as humanly possible until we get to 100 percent."[235] To carry out the new

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[227] *Id.*

[228] *Id.*

[229] *See* David Bier, *Why Unemployment is Lower When Immigration is Higher*, CATO INST. (July 26, 2016), https://www.cato.org/blog/why-unemployment-lower-when-immigration-higher.

[230] *See Criminal Immigration Prosecutions Down 14% in FY 2017*, *supra* note 225.

[231] *See* Lindsey Bever & Deanna Paul, *Deportations under Trump are on the rise but still lower than Obama's, ICE report shows*, WASH. POST (Dec. 14, 2018), https://www.washingtonpost.com/nation/2018/12/14/deportations-under-trump-are-rise-still-lower-than-obamas-ice-report-shows/.

[232] *Id.*

[233] *See Renewed Commitment to Criminal Immigration Enforcement*, U.S. DEP'T OF JUST., OFF. ATT'Y GEN. (Apr. 11, 2017), https://www.justice.gov/opa/press-release/file/956841/download.

[234] *See* 2018 95 No. 19 Interpreter Releases Art. 11.

[235] *See* Sari Horwitz & Maria Sacchetti, *Sessions vows to prosecute all illegal border crossers and separate children from their parents*, WASH. POST (May 7, 2018), https://www.washingtonpost.com/world/national-security/sessions-

enforcement, Jeff Sessions sent 35 prosecutors to the southwest and 18 immigration judges to the border to handle asylum claims.[236] Fifteen of the new AUSA positions were allocated to United States Attorney's Offices in Texas, eight to California, six to Arizona, and six to New Mexico.[237] The administration assigned immigration judges to hear cases in Arizona (Eloy and Florence), California (Adelanto, Imperial, and Otay Mesa), New Mexico (Otero), and Texas (El Palo, Harlingen, Pearsall, and Port Isabel).[238]

3. Post-colonialism

The term "post-colonial" refers "to physical settings in which formal colonization has ended or is ending but in which the effects and structures of colonialism remain."[239] Post-colonial theory includes writing by mainly Asian and African scholars, but now includes some Latin Americans.[240] These writers aim to understand the colonial condition by exploring themes such as resistance, collaboration, and language rights. Some address the psychology of the oppressed and the role of intermediaries and

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says-justice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c917dab596e8252_story.html.

[236] *Id.*

[237] *See Justice Department Announces Additional Prosecutors and Immigration Judges for Southwest Border Crisis*, DEP'T OF JUST. (May 2, 2018), https://www.justice.gov/opa/pr/justice-department-announces-additional-prosecutors-and-immigration-judges-southwest-border.

[238] *Id.*

[239] *See* Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33, 56 n.141 (1995).

[240] *See* Richard Delgado, *Rodrigo's Corridor: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691, 1696 (2007) (citing Florencia E. Mallon, *The Promise and Dilemma of Subaltern Studies: Perspectives from Latin American History*, 99 AM. HIST. REV. 1491, 1491-92 (1994) (describing new theoretical constructs among Latin American scholars)); Latin American Subaltern Study Group, Founding Statement, 20 BOUNDARY 110, 110 (1993) (describing the Subaltern Studies Group of South Asian scholars as inspiration for Latin American scholars).

educated elites who collaborate with overlords. Others write about how occupying powers use literature and their invading force as bearers of civilization and light. Post-colonial scholarship[241] "ha[s] exposed how the identity of the West and the European has been constructed in opposition to another."[242]

Subaltern studies, "a subset of postcolonial scholarship,"[243] examines the exclusion of the Other, whether based on gender, sexual status, race, ethnicity, or religion. Society constructs exclusions based on what people perceive to be "real differences."[244] The law produces the binaries of "us and them," "here and there," and "civilized and uncivilized." Society achieves this by representing the migrant subject as distinct and different.[245] These distinctions become key factors for determining who to include and exclude when formulating legal responses to those who cross borders.[246] Through this analysis, subaltern studies helps unravel the true status of illegal entrants. "Illegal aliens" occupy the lowest rung on a community membership ladder that culminates in citizenship.[247] "Lawful permanent residents and others who

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[241] Examples of postcolonial scholarship includes Franz Fanon's THE WRETCHED OF THE EARTH (1961) (describing mental illnesses in a colonized population and offering independence as a solution) and Edward Said's ORIENTALISM (1978) (from its position of imperialistic dominance the United States defined an "Orient" in a binary way as "the other" in order to solidify itself as superior).

[242] *See* Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 HARV. HUM. RTS. J. 107, 110 (2005).

[243] *See* Delgado, *Rodrigo's Corridor: Race, Postcolonial Theory, and U.S. Civil Rights*, *supra* note 240, at 1697 n.17 (citing David Ludden, *Introduction: A Brief History of Subalternity*, *in* READING SUBALTERN STUDIES: CRITICAL HISTORY, CONTESTED MEANING AND THE GLOBALIZATION OF SOUTH ASIA 1, 5-9 (David Ludden ed., 2002) (describing history of "subaltern studies," a subset of postcolonial scholarship)).

[244] *See* Kapur, *supra* note 242, at 110.

[245] *Id.*

[246] *Id.*

[247] *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 276-79 (1996-97).

entered through lawful channels are 'good aliens' who receive more favorable treatment by the courts than undocumented noncitizens, 'bad aliens,' who are 'uninvited guests, intruders, trespassers, law breakers.'"[248]

American mainstream culture, discourse, and law subject Latinxs to a post-colonial subjugation.[249] The prevalence of lynching and vigilante justice by conquering Anglos on Latinxs in the Southwest was a key component of this subjugation.[250] A second component is American acceptance of undocumented White European immigrants in spite of the routine banishment of Latinxs. Beginning in the 1930s, the government legalized many White illegal immigrants from Poland, Italy, and other European countries through the power of administrative discretion.[251] This formal recognition of their inclusion into the nation contributed to a broader reformation of racial identity, a process that reconstructed the "lower races of Europe" into White ethnic Americans.[252] By contrast, Mexican entry by illegally crossing the border was an act that could not be undone, a fact that, "combined with the constructions of Mexicans as migratory agricultural laborers (both legal and illegal) in the 1940s and

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[248] *Id.* at 276 (quoting T. Alexander Aleinikoff, *Good Aliens, Bad Aliens and the Supreme Court*, *in* IN DEFENSE OF THE ALIEN 46, 47 (Lydio F. Tomasi ed., 1987)).

[249] *See generally* ACUÑA, *supra* note 167 (describing the Chicano liberation movement); RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS vii-ix (2d ed. 1981) (explaining author's use of the internal-colony analogy); ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA (1972) (explaining theory of domestic colonialism). Historian Rodolfo Acuña writes that Latinxs living in the United States form an internal colony. ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS, *supra* note 249, at [insert pincite].

[250] *See* Delgado, *The Law of the Noose: A History of Latino Lynching*, *supra* note 170, at 312.

[251] *See* Ngai, *supra* note 184, at 108. "[A] rough estimation suggests that between 1925 and 1965 some 200,000 illegal European immigrants, constructed as deserving, successfully legalized their status under the Registry Act, through pre-examination, or by suspension of deportation." *Id.* at 107.

[252] Ngai, *supra* note 184, at 108.

1950s gave powerful sway to the notion that Mexicans had no rightful presence on United States territory, no rightful claim of belonging."[253]

American engagement with Latin American countries embodies neo-colonial and post-colonial dynamics.[254] Central American nations are as dependent on the United States as they were during most of the twentieth century.[255] Although the United States never formally colonized these nations or parts of Mexico, American economic hegemony depended on extracting resources and labor from these countries.[256] This extraction contributed to economic underdevelopment in those regions.[257] Underdevelopment led immigrants to flee their homelands on a daily basis directly because of unemployment or low wages that resulted from distorted economic relations.[258] The United States created satellite relationships with Central America and Mexico.[259] Once migrants arrived, the government deported them back to

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[253] *Id.*

[254] *See* David Sheinin, *Colonial and Post-colonial Latin America*, 7 AFR. STUD. Q. 219, 222 (2003) (noting that scholars such as "Andre Gunder Frank, Fernando Henrique Cardoso, and other '"dependentistas' conceived of a new imperialism that was primarily American and that held up Latin American countries as colonies.").

[255] *See* Steven Schmidt, *Latin American Dependency Theory*, GLOBAL SOUTH STUDIES (Jan. 21, 2018), https://globalsouthstudies.as.virginia.edu/key-thinkers/latin-american-dependency-theory.

[256] *Id.*

[257] *Id.*

[258] *See* Julian Borger, *Fleeing a hell the US helped create: why Central Americans journey north*, THE GUARDIAN (Dec. 19, 2018), https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy.

[259] *See generally* FERNANDO ENRIQUE CARDOSO & ENZO FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA (1979); ANDRE GUNDER FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1967); Edward Goldsmith, *Development as Colonialism*, *in* THE CASE AGAINST THE GLOBAL ECONOMY 253 (1996); WALTER RODNEY, HOW EUROPE UNDER-DEVELOPED AFRICA (1981).

their home countries. The story then repeated itself as many tried to return and were at risk of deportation again.[260]

American action that incites violence in Central America is another type of post-colonial oppression.[261] For example, Nicaragua was an American battlefront in the Cold War.[262] After the left-leaning Sandinistas took control, President Reagan, acting through executive order, intervened to attempt to restore President Somoza to power.[263] This military intervention triggered violence and led to waves of people who fled to enter the United States.[264] The United States also funded and trained military regimes battling guerilla groups in El Salvador and Guatemala.[265] This claimed the lives of thousands of people,[266] generated a refugee flow of nearly 1,000,000, and contributed to political and economic instability that continues today.[267] Many of the families that experienced these hardships fled north, where the justice system criminally prosecuted them with illegal entry and deported them.

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[260] *See* Amy F. Kimpel, *Coordinating Community Reintegration Services for "Deportable Alien" Defendants: A Moral and Financial Imperative*, 70 FLA. L. REV. 1019 (2018) (noting that recidivism rates for individuals who are convicted of illegal entry and re-entry (U.S.C. §§ 1325 and 1326) are quite high despite post-sentencing deportations).

[261] *See* Deirdre Salsich, *International Workers' Rights Enforced Through Free Trade Agreements: DR-CAFTA and the DOL's Case Against Guatemala*, 25 N.Y. INT'L L. REV. 19, 27 (2012).

[262] *See* Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 757 (2016) (citing James M. Scott, *Interbranch Rivalry and the Reagan Doctrine in Nicaragua,* 112 POL. SCI. Q. 237, 243 (1997)).

[263] *Id.*

[264] *Id.*

[265] *Id.* (citing Kevin Sullivan & Mary Jordan, *In Central America, Reagan Remains a Polarizing Figure,* WASH. POST (June 10, 2004), http://washingtonpost.com/ wp-dyn/articles/A29546-2004Jun9.html).

[266] *Id.*

[267] *Id.* at 759 (citing Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era,* MIGRATION POL'Y INST. (Apr. 1, 2006), http://migrationpolicy.org/ article/central-americans-and-asylum-policy-reagan-era).

American trade agreements with Latin American nations have also pressured migrants to come north without papers.[268] During the 1990s, Mexico and other developing nations began to accept structural adjustment programs that resulted in privatization, subsidies, price controls, trade liberalization, and reduced worker protections.[269] One example is the North American Free Trade Agreement (NAFTA), a devastating economic policy that led to migration more than any other time in recent history.[270] The government prosecuted and deported many who came north under § 1325, but they returned.[271]

Ironically, as much as the United States deports Latinxs, as a global capitalist giant, it requires poor migrants for a supply of cheap labor to fill jobs Americans find "beneath them"[272]—an issue as true today as it was 100 years ago.[273] During the first two decades of the twentieth century, for instance, "[i]mmigration inspectors ignored Mexicans coming into the southwestern United States . . . to work in railroad construction, mining, and agriculture."[274] "The Immigration Bureau did not seriously consider Mexican immigration within its purview, but rather as something that was 'regulated by labor market demands in [the southwestern] border states.' The Bureau also described the

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[268] *See* DAVID BACON, ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS 60 (2008).
[269] *Id.*
[270] *Id.* at 51.
[271] *See* Kimpel, *supra* note 260.
[272] *See* Isabella Bakker & Stephen Gill, *Global Political Economy and Social Reproduction, in* POWER, PRODUCTION AND SOCIAL REPRODUCTION 3, 5 (Isabella Bakker & Stephen Gill eds., 2003) (discussing how current global governance facilitates transnational corporations). *See also* Aristide R. Zolberg, *The Next Waves: Migration Theory for a Changing World,* 23 INT'L MIGRATION REV. 403, 404-05 (1989) (proposing a migratory theory grounded in the fact of inequality).
[273] *See* Ngai, *supra* note 184, at 83 ("After 1924, when European immigration to the United States declined, American sugar beet growers resorted not to Canadian labor but to Mexican and, secondarily, to Filipino labor.").
[274] *Id.*

Southwest as the 'natural habitat' of Mexicans, acknowledging, albeit strangely, Mexicans' claims of belonging in an area since that had once been part of Mexico."[275]

B. Prosecution of Drug Couriers Through a CRT Lens

1. Intersectionality

Intersectionality is useful for a discussion in this Article because it helps one see the myriad dimensions of a person from his or her point or view based on varied life experiences. Intersectionality[276] is the belief that individuals and classes often have shared overlapping interests or traits.[277] It examines race, sex, class, national origin, and sexual orientation to study how their combination plays out in various settings.[278] Intersectionality also dictates that socioeconomic lines, each of which generates intersectional individuals, divide many races.[279] Perspectivism, an aspect of intersectionality, is the insistence on examining how things look from the perspective of individual actors. It helps understand the predicament of intersectional individuals[280] and enables us to avoid oversimplifying human experience.[281]

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[275] *Id.* at 82.

[276] *See* Crenshaw, *supra* note 151. Professor Kimberlé Crenshaw introduced intersectionality theory as a challenge to the "uncritical and disturbing acceptance of dominant ways of thinking about discrimination." *Id.* at 150. The Oxford online dictionary defines it as "[t]he interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage." LEXICO, (last visited Mar. 23, 2020), https://www.lexico.com/en/definition/intersectionality.

[277] *See* Richard Delgado & Jean Stefancic, CRITICAL RACE THEORY: AN INTRODUCTION 165 (2d ed. 2012) (discussing Critical Race Theory as being fundamentally based on antisubordination).

[278] *Id.* at 51.

[279] *Id.* at 54.

[280] *Id.* at 55.

[281] *Id.*

Intersectionality is evident in the experiences of Latina drug couriers, whom drug traffickers routinely recruit in order to send drugs into the United States, sometimes by means of threats.[282] If law enforcement arrests them, and the United States Attorney decides to pursue charges, these couriers experience implicit bias as people of color in the courtroom.[283] Second, they face bias as undocumented Latinxs.[284] Third, if their defense

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[282] *See* Tracy Huling, *Women Drug Couriers: Sentencing Reform Needed for Prisoners of War*, 9 CRIM. JUST. 15, 15 (1995) ("[W]omen drug couriers should be a population of particular concern to policy experts examining the effects of the global war on drugs."). *See also* Shimica Gaskins, *Women of Circumstance—the Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1533 (2004) ("These 'women of circumstance' find themselves incarcerated and subject to draconian sentences because the men in their lives persuade, force, or trick them into carrying drugs."); Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER RACE & JUST. 277, 280 (2002) (Women have been caught in the crossfire of the drug war through heterosexual relationships with men engaged in drug activity.").

[283] Implicit bias helps "explain not only the continued subordination of historically subordinated groups but also the legal system's complicity in that subordination." Eric K. Yamamoto & Michele Park Sonen, *Reparations Law: Redress Bias?*, *in* IMPLICIT BIAS ACROSS THE LAW 2, 6 (Justin D. Levinson & Robert J. Smith, eds., 2012) (calling for intersectional race-gender sensitive redress to account for implicit redress bias). For an in-depth treatment of implicit bias in the law, *see* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Justin D. Levinson, Huajian Cai & Danielle Young, *Guilt by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

[284] Courts sentence Latinx more harshly than Whites. *See* Darrell Steffensmeier and Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?*, 65 AM. SOC. REV. 705 (2000). Undocumented immigrants are far more likely to be incarcerated and sentenced for longer periods than are U.S. citizens. Light et. al,, *supra* note 65. The magnitude of the citizenship penalty is over four times stronger than nearly all of the extra-legal variables that factor prominently in prior research. *Id.* If a court sentences the average offender to 78 months in prison, the average non-citizen receives a sentence of just over 81 months. *Id.*

attorney appears Mexican or has "Hispanic appearance," they are likely to face even more discrimination.[285]

Patriarchal relationships are another type of intersectional layer that Latina couriers face.[286] Patriarchy, a product of male dominance in cultures, is "a structure that constrains agency and determines behavior."[287] Scholars use it to explain the universal devaluation of women in society. The concept asserts that the patriarchal social structure survives because men restrain women from advancing socially.[288] Thus, male-dominated societies and institutions subject third-world women accused of drug trafficking to this additional weight of oppression through insistence on mandatory minimum punishments and disparities in bail hearings that negatively affect foreigners.[289] Drug traffickers recruit young third-world women as couriers because they

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[285] *See* Cynthia Willis-Esqueda & Russ Espinoza, *Defendant and Defense Attorney Characteristics and Their Effects on Juror Decision Making and Prejudice Against Mexican Americans*, 14 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL., 364-71 (2008). This study found that bias against Mexican American defendants occurred most when the Mexican American defendant was of low socio-economic status and represented by a Mexican American defense attorney. *Id.* In addition, study participants perceived attorneys representing low-SES Mexican American defendants as less competent and rated lower on a number of trait measures. *Id.*

[286] *See generally* Holly Jeanine Boux & Courtenay W. Daum, *Stuck Between A Rock and A Meth Cooking Husband: What Breaking Bad's Skyler White Teaches Us About How the War on Drugs and Public Antipathy Constrain Women of Circumstance's Choices*, 45 N.M. L. REV. 567, 569, 573 (2015).

[287] *See* Jessica A. Platt, *Female Circumcision: Religious Practice v. Human Rights Violation*, 3 RUTGERS J.L. & RELIGION 5 (2001) (citing L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997).

[288] *Id.*

[289] *See* Cheryl B. Preston, *Women in Traditional Religions: Refusing to Let Patriarchy (or Feminism) Separate Us from the Source of Our Liberation*, 22 MISS. C.L. REV. 185, 194 (2003) (It is also the case that Western feminists fail to see how imperialism subjects third world women to additional layers of oppression.).

perceive them as weak, gullible, and less likely to face questioning by Customs and Border Protection Officers compared to men.[290] Traffickers believe they can also more easily threaten and assault them if uncompliant in response to requests to transport drugs.[291]

2. Revisionist History of Federal Drug Laws

CRT calls for the study of the history of laws and legal practices from the perspective of subjugated groups.[292] Only by studying history from the bottom up can one understand the interplay of race and contemporary federal drug courier prosecutions. To this end, this section traces the evolution of federal drug laws to highlight how prosecutors have disproportionately targeted Latinxs.

Drugs first surfaced in the United States when opium and cocaine became popular after the American Civil War in the 1880s.[293] People used coca, the plant from which we derive cocaine, in health drinks and remedies.[294] Medical providers used morphine, discovered in 1906, for medicinal purposes. During

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[290] *See The Rise of Femicide and Women in Drug Trafficking*, COUNCIL ON HEMISPHERIC AFF. (Oct. 28, 2011), http://www.coha.org/the-rise-of-femicide-and-women-in-drug-trafficking/.

[291] It is the experience of this author that many female clients are asked to transport drugs within their body cavities.

[292] *See* Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 891 (2000). The study of history is a practical exercise, a means of facilitating and furthering the reconstructive project of Critical Race Theory, Lat-Crit, or Third World Approaches to International Law. *Id.* It offers one means of understanding why people of color continue to be the most disadvantaged and marginalized. *Id.*

[293] *See* Stephen R. Kandall, *Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women*, 43 HASTINGS L.J. 615, 617, 619 (1992).

[294] *See* John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine: Not All It's Cracked Up to Be*, SCHAFFER LIBRARY OF DRUG POLICY, (1997) http://www.druglibrary.org/schaffer/cocaine/crack.htm.

this time, people also used heroin to treat respiratory illnesses.[295] The turn of the century saw awareness that psychotropic drugs can cause drug addiction as opium and cocaine abuse reached epidemic proportions.[296]

Local governments began prohibiting opium dens and opium importation,[297] which prompted the 1914 Harrison Narcotics Act, the first federal drug policy.[298] It restricted the manufacture and sale of marijuana, cocaine, heroin, and morphine.[299] It limited the discretion of physicians to treat addicts with maintenance doses of narcotics.[300] Pursuant to the Act, the government criminally prosecuted doctors and some pharmacists.[301]

Criminal drug enforcement became part of Jim Crow in the early twentieth century.[302] "[T]he criminalization of drugs such as marijuana started much earlier, around 1920, when policy-makers noticed that Mexicans living in the southwest used it recreationally and that its use was catching on with black

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[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *See* Harrison Narcotics Act of 1914, Pub. L. No. 63-223, 38 Stat. 785, repealed by Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971 (2006).
[299] *Id.*
[300] *See* Webb v. United States, 249 U.S. 96, 99-100 (1919); United States v. Doremus, 249 U.S. 86, 94 (1919); United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916).
[301] *See* Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261, 351 (2010) (citing Rufus G. King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 YALE L.J. 736, 737-48 (1953) (discussing "the furious blitzkrieg" involved with enforcing the Harrison Act and the judiciary's contribution to the campaign)).
[302] *See* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 271 (2002).

musicians."[303] Anti-Latinx bias[304] in marijuana prohibition prevailed because enforcement took place in regions of the United States most heavily populated by Mexican and Central American immigrants.[305] People perceived that newly arrived Mexicans used the drug.[306] Longstanding stereotypes of Mexicans as "criminal and treacherous" made it easy for law-and-order politicians and voters to scapegoat them for the drug trade.[307]

As early as 1931, a study under President Hoover that analyzed arrest and conviction data showed racial bias in the creation and enforcement of drug laws.[308] It concluded that Mexicans were overrepresented in marijuana arrest and convictions.[309] The Christian Science Monitor relied on the study for an article published just before the enactment of the first federal marijuana prohibition, the 1937 Marijuana Tax Act. [310] The Monitor's reliance on the study is an example of how people perceived "Mexicans were criminally inclined,' . . . responsible for using and selling marijuana and engaging in other criminal acts, and influencing Whites to do the same."[311]

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[303] *See* Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1540 (2016) (citing Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T. L. REV. 359, 361-62 (2013)).

[304] *See* Carrie Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens*, 9 DEPAUL J. SOC. JUST. 1, 16 (2016).

[305] *Id.* (citing Carl Olsen, *The Early State Marijuana Laws*, SCHAFFER LIBR. OF DRUG POL'Y (last visited Mar. 23, 2020), http://www.druglibrary.org/olsen/dpf/whitebread05.html.

[306] *Id.*

[307] *Id.* (citing STEVEN W. BENDER, RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.-MEXICO BORDER CROSSINGS 164-65 (Ediberto Román, ed., 2012)).

[308] *See* Rosenbaum, *supra* note 304, at 16.

[309] *Id.* at 17 (citing RICHARD J. BONNIE & CHARLES H. WHITEBREAD, THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES 76 (1st ed., 1974)).

[310] *Id.* (citing Bonnie & Whitebread, *supra* note 309, at 76-77).

[311] *Id.*

During its history, mainstream American culture did not always attach immorality to narcotic drug use.[312] The moral reappraisal of narcotics addiction did not occur until patterns of use shifted from the middle and upper classes to those in the working classes and the poor in the early twentieth century.[313] As a substantial number of minorities at the time were poor, they became associated with stigmatized drug use.[314]

The mid-twentieth century saw increased drug regulation and enforcement, culminating with the War on Drugs.[315] The 1951 passage of the Narcotics Drugs and Import and Export Act introduced severe mandatory minimum prison sentences for drug offenders.[316] With the ramping-up of federal agencies and bureaucracy devoted to drug control, drug use in the United States became more salient in public consciousness and more closely associated with challenges to established authorities.[317] These trends drove President Richard Nixon to declare the problem of drug use as "public enemy number one."[318] Nixon declared a

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[312] *See* Boldt, *supra* note 301, at 351 (citing TROY DUSTER, THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT 19–10, 22–23 (1970)).
[313] *Id.*
[314] See Rex Greene, M.D., *Towards A Policy of Mercy: Addiction in the 1990s*, 3 STAN. L. & POL'Y REV. 227, 230 (1991).
[315] The War on Drugs comprises a series of actions tending toward prohibition of illegal drug trade, adopted by the U.S. government along with foreign military aid and assistance of participating countries to define and to end the import, manufacture, sale, and use of illegal drugs. *See War on Drugs Law and Legal Definition*, U.S. LEGAL (last visited Mar. 23, 2020), https://definitions.uslegal.com/w/war-on-drugs/. The War on Drugs was largely responsible for the imprisonment of mostly low-level drug offenders, including couriers. *See* Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 456 (1999) (The War on Drugs has contributed to the massive influx of poor non-Whites into the criminal justice system.).
[316] *See* Boldt, *supra* note 301, at 285-86.
[317] *Id.* at 286 (citing *Effective Drug Control: Toward a New Legal Framework*, KING CNTY. BAR ASS'N, DRUG POL'Y PROJECT 25 (2005), http://www.kcba.org /druglaw/pdf/effectivedrugcontrol.pdf).
[318] *Id.*

"War on Drugs," which matured under President Reagan.[319] To justify the War on Drugs, the Reagan administration portrayed African Americans, Latinxs, and other people of color as the enemy.[320] "Reagan's rhetorical declaration of a [W]ar on [D]rugs had a deliberate political effect."[321] It allowed the president to appear as a strong leader, tough on crime, and concerned about domestic issues. It was strategically advantageous to portray urban minorities as responsible for problems related to the drug war and for resolving such problems.[322]

Supporters of the War on Drugs did not see race discrimination because they did not believe drug law enforcement harmed minorities.[323] They saw it as protecting communities of color "from addiction, harassment, and violence."[324] "[W]ithout realizing it, they have accepted the same definition of discrimination that the courts use in constitutional equal protection cases—absent ill-intent, there is no discrimination."[325]

The War on Drugs permitted Congress to enact three overly punitive sets of drug laws during the 1980s. The first was the Comprehensive Crime Control Act of 1984, which increased federal penalties for cultivation, possession, or transfer of marijuana and allowed the government to seize property associated with drug offenses.[326] The second was the Anti-Drug

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[319] *Id.* (citing Diane E. Hoffmann, *Treating Pain v. Reducing Drug Diversion and Abuse: Recalibrating the Balance in Our Drug Control Laws and Policies*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 231, 263-64 (2008)).

[320] *See* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was A "War on Blacks"*, 6 J. GENDER RACE & JUST. 381, 390 (2002).

[321] *Id.*

[322] *Id.* (citing WILLIAM N. ELWOOD, RHETORIC IN THE WAR ON DRUGS: THE TRIUMPHS AND TRAGEDIES OF PUBLIC RELATIONS 11 (1994)).

[323] *See* Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257 (2009).

[324] *Id.*

[325] *Id.*

[326] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

Abuse Act of 1986, which contained harsh new penalties, including new mandatory minimum sentences.[327] The federal law supporting charges against drug couriers, 21 U.S.C. § 841, was codified as part of this law.[328] The third was the Anti-Drug Abuse Act of 1988, which set criminal penalties even higher.[329] To justify these laws, the "administration embraced a supply-reduction strategy focusing on interdiction, seizure and criminal prosecution, rather than a demand-reduction strategy that focused on public education and drug treatment designed to reduce demand for illegal drugs."[330]

These legislative policies led to high numbers of arrests and harsh punishment of Latinxs along the border.[331] Another factor that contributed to more arrests included the shift in drug trafficking from oceanic transportation to land travel.[332] In 1994, for example, low-level couriers comprised forty-two percent of federal drug offenders.[333] On average, courts sentenced them to

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[327] *See* Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 408 (1995).

[328] *See* Edward J. Tafe, *Sentencing Drug Offenders in Federal Courts: Disparity and Disharmony*, 28 U.S.F. L. REV. 369, 377 (1994).

[329] *See* Sheldon Whitehouse, *Foreword*, 11 HARV. L. & POL'Y REV. 359, 362 (2017) (citing Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6371, 102 Stat 4181, 4370 (repealed by Fair Sentencing Act of 2010)).

[330] *See* Nunn, *supra* note 320, at 388.

[331] *See* E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, U.S. DEP'T OF JUST. (Dec. 2016), https://www.bjs.gov/content/pub/pdf/p15.pdf (Latinxs make up 18% of the United States population but comprise 38% of people incarcerated in federal prisons for drug offenses.).

[332] *See* Shannon K. O'Neil, *The Real War in Mexico: How Democracy Can Defeat the Drug Cartels*, FOREIGN AFF. (Aug. 2009), http://www.foreignaffairs.com/articles/65175/shannon-k-oneil/the-realwarin-mexico (During the 1980s, the United States installed stricter policies pertaining to drug transit through sea, resulting in increases in drug-trafficking across the U.S.-Mexico border and increasing drug cartel activity in Mexico.).

[333] *See* Shimica Gaskins, *"Women of Circumstance" - the Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1543 (2004) (citing *Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, U.S. DEP'T OF JUST. 3 (1994)).

thirty-nine months in prison, but considerable numbers served mandatory minimum sentences.[334]

The problem is not government prosecution of drug couriers, but the amount of time they face because of increasingly harsh policies by the United States Attorney General,[335] coupled with the focus of federal drug prosecutions mainly on couriers, not kingpins.[336] For instance, during the entire history of the mandatory minimum laws (1986 to the present day), there was only a four-year period during the Obama administration when couriers did not face mandatory minimum charging.[337] On the

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[334] *See* Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1618 n.32 (2017) (citing 161 Cong. Rec. S955-02, S963) (describing Senator Chuck Grassley's statements opposing legislation that would have reduced mandatory minimum sentences, in part because prosecutors were not seeking those penalties in all cases).

[335] *See* Weber, *supra* note 88, at 1759 (for succinct explanation of federal mandatory minimum drug sentences).

[336] Jacob Sullum, *Federal Prosecutors Say They Never See Low-Level Drug Offenders*, REASON (May 30, 2017), https://reason.com/2017/05/30/federal-prosecutors-say-they-never-see-l/.

[337] In 2013, U.S. Attorney General Eric Holder issued a memo that required federal prosecutors to avoid mandatory minimum sentences in certain low-level, non-violent drug cases, citing the "unduly harsh sentences" and rising prison costs. Memorandum from Attorney General Eric Holder to the United States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf (issuing new policy against prosecutorial charging decisions triggering mandatory-minimum sentences if certain criteria are satisfied, such as a nonviolent offense, no serious criminal history, and no major connection with organized crime). U.S. Attorney General Jeff Sessions rescinded the memo on May 12, 2017. Mr. Sessions directed all federal prosecutors to pursue the most severe penalties possible, including mandatory minimum sentences. Sari Horwitz, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html ("Attorney General Jeff Sessions said Friday that he has directed his federal prosecutors to pursue the most severe penalties

other hand, not all couriers are Safety Valve eligible, which means that there is no way for some couriers to avoid harsh mandatory minimum sentences.[338] It has only been recent policies, such as the First Step Act, that have expanded the Safety Valve provision for some offenders.[339]

3. Impact of Harsh Drug Courier Punishment

possible, including mandatory minimum sentences, in his first step toward a return to the war on drugs of the 1980s and 1990s that resulted in long sentences for many minority defendants and packed U.S. prisons.").

[338] Drug couriers with a prior conviction that resulted in a prison term of more than one year and one month are not eligible for the Safety Valve. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(a) (U.S. SENTENCING COMM'N 2020). The Safety Valve is a way for drug couriers facing mandatory minimum of 5 or 10 years punishment to qualify for lesser periods of incarceration. Thus, a low-level offender sentenced in any jurisdiction for a minor crime to more than a year and one month is not eligible. The only way for a drug courier in this position to receive less time is to provide "substantial assistance" to the government. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2020). Most kingpins or higher-level drug workers do not tell couriers details about drug trafficking. *See* John S. Austin, *Prosecutorial Discretion and Substantial Assistance: The Power and Authority of Judicial Review*—United States v. Wade, 15 CAMPBELL L. REV. 263, 274 (1993) (noting that drug couriers have little knowledge of operations). Thus, these couriers are unable to supply "substantial assistance" and must serve mandatory minimum sentences if convicted.

[339] President Trump signed the First Step Act into law on December 21, 2018. It expanded the safety valve to 4 points, so long as no conviction resulted in 3 points or were for violent crimes. Jonathan Feniak, *The First Step Act: Criminal Justice Reform at A Bipartisan Tipping Point*, 96 DENV. L. REV. ONLINE 166, 169 (2019) (citing Brandon Sample, *First Step Act: A Comprehensive Analysis*, Dec. 19, 2018, https://sentencing.net/legislation/first-step-act).

Despite a 2018 poll[340] that showed a majority of Latinxs favor rehabilitation over punitive responses to crime,[341] couriers face an average of thirty-nine months in prison.[342] Rehabilitation means providing services outside of the prison or jail context. The criminal justice system continues to use harsh punishment, even though research proves that prolonged periods of incarceration increase the rate of suicidal ideation and suicide attempts among children of prisoners.[343] For example, a recent study of Latinx in California assessed the association between familial incarceration and suicide behaviors, and examined ethnic identity as a potential factor in reducing suicide attempts.[344] The study found that the use of positive racial identity among Latinx children and their families mitigates the problem.[345]

The criminal justice system doubly punishes low-level drug couriers with family in the United States who have obtained green cards or visas. One former client, who pled guilty, will never be able to enter to visit his mother in Nogales, Arizona because authorities suspended his border-crossing card. Another client who pled guilty lost her green card because of the drug conviction. Her entire family lives in the United States. The client learned she was pregnant after her arrest and returned to

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[340] Latino Decisions, *Latinx CJR Survey* (2018), https://docs.google.com/spreadsheets/u/1/d/e/2PACX-1vQgVVqx16OX5OHPdkY62CJyNBQq30BDgxkeB-ReNmzUKiN6FWNeg_uP4zeu233aODIy-I1Z9Sz9PTIf/pubhtml.

[341] *National Poll Shows Latinos are Concerned about Police Violence, Feel Less Safe Under Trump but insist on Increased Rehabilitation Instead of More Funding for Prisons or Police,* LATINOJUSTICE PRLDEF (Jan. 10, 2017), https://www.latinojustice.org/es/news/national-poll-shows-latinos-are-concerned-about-police-violence-feel-less-safe-under-trump.

[342] Gold et al., *supra* note 334, at 1618 n.32 (citing 161 Cong. Rec. S955-02, *supra* note 334, at S963).

[343] Myriam Forster et al., *The Role of Familial Incarceration and Ethnic Identity in Suicidal Ideation and Suicide Attempt: Findings from a Longitudinal Study of Latinx Young Adults in California*, 64 AM. J. CMTY. PSYCHOL. 191, 192 (2019).

[344] *Id.* at 195–97.

[345] *Id.*

Mexico as a single mother with no family to help rear the baby after she served her sentence (her mother, father, and siblings reside in the Phoenix area). This client planned to move to Tijuana, Baja California, as one of her aunts lives there. A third client, who possessed a visa had it revoked because of a plea to drug importation. Although his common-law wife and children reside in Mexico, one of his sisters lives in the United States. After the Bureau of Prison releases these convicted couriers, all must endure banishment from the United States for the rest of their lives.

4. Drug Courier Prosecutions Maintain Racial Stratification

Historical processes racially stratify American society, [346] with sharp disparities in criminal justice.[347] One in every thirty-one adults in the United States is in prison, on parole, or on probation.[348] Broken down by race, this constitutes "one in every eleven African Americans, one in twenty-seven Latinxs, and one in forty-five Whites."[349] Significantly, "[r]acial differences in the penal context dramatically exceed those in every other social domain: 'Whereas racial disparities in unemployment and infant mortality stand at roughly two to one, and the disparity in unwed childbearing is three to one, the differential with respect to

[346] Natsu Saito Jenga, *Finding Our Voices, Teaching Our Truth: Reflections on Legal Pedagogy and Asian American Identity*, 3 ASIAN PAC. AM. L.J. 81, 82 (1995) ("[C]ontemporary American society is in its essence racially stratified; i.e., that racial divisions are a fundamental, structural element of American social and economic institutions, not simply an unfortunate remnant of our past.").
[347] Ian F. Haney López, *Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1025 (2010).
[348] *Id.* at 1023, 1028.
[349] *Id.* at 1028.

imprisonment is eight to one."[350] The Federal Judicial Center reports, "African-Americans and Latinx were more likely than Whites to be sentenced to at least the minimum sentence" in cases with mandatory minimums.[351]

The federal system perpetuates racial imbalances, even though it incarcerates only twelve percent of prisoners in the United States.[352] For instance, in 2007, Latinxs constituted forty percent of newly sentenced offenders in federal prisons and accounted for nearly one in three of all federal inmates.[353] The federal criminal justice system convicted nearly half of all Latinxs sentenced in federal court in 2007 of immigration offenses.[354] By 2011, Latinxs constituted the majority of people sentenced to prison for federal felonies.[355]

By imprisoning mainly minority defendants, drug courier prosecutions perpetuate the phenomenon of mass incarceration, the extreme rate of imprisonment of young minority men "living in neighborhoods of concentrated disadvantage."[356] Mass incarceration includes the "larger web of laws, rules, policies, and customs that

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[350] *Id.* (citing DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 99 (2007); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 16 (2006)).

[351] Testimony of Charles Ogletree: Discriminatory Impact of Mandatory Minimum Sentences in the United States, 18 Fed. Sent. R. 273, 275, 2006 WL 2433755 (Vera Inst. Just.).

[352] *See* Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html. Out of 2,300,000 people incarcerated in the United States, the federal system houses 226,000. *Id.*; *id.* at Slideshow 1.

[353] *A Rising Share: Hispanics and Federal Crime*, PEW RES. CTR. (Feb. 18, 2009), https://www.pewresearch.org/hispanic/2009/02/18/a-rising-share-hispanics - and-federal-crime/.

[354] *Id.*

[355] *Hispanics New Majority Sentenced to Federal Prison*, CBS8 (Sept. 6, 2011, 12:28 p.m.), https://www.cbs8.com/article/news/hispanics-new-majority-sentenced-to-us-prisons/509-56287f59-d793-4a1b-b4a0-9b1b2066706a.

[356] Christopher Wildeman, *Mass Incarceration*, OXFORD BIBLIOGRAPHIES, (last visited Aug. 6, 2019), https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0033.xml.

control those labeled criminals both in and out of prison."[357] Former couriers, Anglos, Latinxs, and African-Americans, leave prison each year to "enter a hidden underworld of legalized discrimination and permanent social exclusion."[358]

Felon disenfranchisement forms part of a large machine of American marginalization that disadvantages Latinxs by relegating them, like African Americans, to inferior schools, jobs, and even the loss of voting rights.[359] Consequently, Latinxs have "low average family income, school completion rates, and access to health care."[360] An inability to vote, rent, own adequate housing, or find well-paying work results from this system of subjugation.[361] Mass incarceration succeeds in segregating Black people from the American mainstream, while imprisonment and subsequent banishment accomplishes the same result for legal permanent resident and visa-carrying couriers.[362] Imprisonment and banishment, therefore, determine the fate of two large groups of near-equal size,

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[357] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 15 (2010).

[358] *Id.* at 13.

[359] Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1458–61 (2005). *See also* Lauren Handelsman, *Giving the Barking Dog A Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875, 1879 (2005) (noting that in the United States a felony conviction carries not only criminal repercussions, but also civil ones such as the loss of the right to hold public office, the loss of the right to serve as a juror, and the loss of the right to vote).

[360] Delgado & Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, *supra* note 303, at 1537-38 (citing Anna Brown & Eileen Patten, *Statistical Portrait of Hispanics in the United States, 2012*, PEW RES. CTR. (Apr. 29, 2014), http://www.pewhispanic.org/2014/04/29/statistical-portrait-of-hispanics-in-the-united-states-2012 [https://perma.cc/MCN4-57DJ]).

[361] Kelly Lyn Mitchell, *Reining in Collateral Consequences by Restoring the Effect of Judicial Discretion in Sentencing*, 27 HAMLINE J. PUB. L. & POL'Y 1, 23–26 (2005).

[362] This is because legal permanent residents lose their green card because of the criminal drug trafficking conviction. 8 U.S.C. § 1182(a)(2)(C).

demonstrating how society uses imprisonment and deportations to impose racial stratification and control.[363]

Racial segregation and mass incarceration both embody racialized systems of control that foster a racial caste system.[364] Mass incarceration differs from the old Jim Crow in that it does not rely on overt racial classifications. The overall impact of America's criminal justice system on Black and Latinx felons bears striking similarities to the impact that segregation had on African Americans in the pre-Brown South, including disfranchisement, exclusion from juries, racial segregation, and the perpetuation of racial stigma. A racial caste system locks stigmatized racial groups into inferior positions by law and custom, regardless of whether those laws and customs derive from direct racial animus or indifference.[365] The increase in incarceration over the last thirty to forty years shows that race and ethnicity are core mechanisms by which we order society.

IV. A CRT-BASED APPROACH TO LAWYERING CAN REDUCE THE NEGATIVE INFLUENCE OF IMPLICIT BIAS FOR CRIMINAL DEFENDANTS

The historic and contemporary experiences of people charged with illegal entry and drug trafficking described in earlier sections of this Article reflect explicit and implicit racial animus. We see explicit animus in the lynching of Mexicans in the South-west and the targeting of Latinxs for drug prosecution in the early nineteenth century. Likewise, mass deportations of Mexicans, while excusing the illegal status of undocumented Europeans, reflects

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[363] *Id.*

[364] Alexander, *supra* note 357, at 12.

[365] *Id.* ("I use the term racial caste in this book the way it is used in common parlance to denote a stigmatized racial group locked into an inferior position by law and custom.").

explicit racial animus. Today, however, implicit biases reign supreme, as explicit racism is socially unacceptable.[366]

Society preserves biases over long periods through generations.[367] Media plays an important role in teaching children about biases.[368] Adults also teach children, as the entire cultural system perpetuates lessons and ideas about what is favorable or desirable versus undesirable.[369] Fortunately, psychologists created the Implicit Association Test (IAT) to measure biases on sexuality, race, ethnicity, gender, weight, age, skin-tone, religion, disability, and career.[370] These biases are rampant in all phases of the criminal justice process.[371] They impact people charged with illegal entry and drug trafficking through interactions with criminal justice professionals.[372]

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[366] *See* Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 76 (2015) ("Implicit biases are actually an unconscious mirror of our ubiquitous societal biases.") (citing Eric Mandelbaum, *Attitude, Inference, Association: On the Propositional Structure of Implicit Bias*, 50 NOUS 629, 629 (2015)).

[367] *See Implicit Bias Module Series*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY (last visited Mar. 21, 2020), http://kirwaninstitute.osu.edu/implicit-bias-training/ (explaining the far-reaching societal impact of implicit bias in education, the criminal justice system, and aspects of our everyday lives).

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *See* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 657 n.19 (2015) ("Ample evidence suggests that implicit bias is rampant. For instance, [IATs], which measure the strength of association between categories such as Black/White and Good/Bad by testing the reaction times of participants, have consistently shown that participants prefer White people and attributes.").

[372] *Id.* Trial courts can treat illegal entrants harshly. For example, a district court in Arizona sentenced an immigrant to forty-eight months in prison for illegal entry after deportation. A court had previously convicted the defendant, Ernesto Garcia-Barragan, of theft. United States v. Garcia-Barragan, 19 Fed. Appx. 527, 528 (9th Cir. 2001) ("Garcia-Barragan appeals his 48-month sentence imposed following a guilty plea to illegal reentry of a previously

A practice method sensitive of CRT mitigates bias by educating prosecutors, judges, and jurors.[373] The following section discusses what a CRT practitioner[374] should do at initial appearance, bail hearings, preliminary hearings, disclosure review, voir dire, opening statement, and closing argument. The examples provided come from illegal entry and drug courier prosecutions, but defense lawyers can apply them to any charge involving a minority client.

It will be difficult for some lawyers to begin to change their viewpoints and perspectives about race as their minds have cemented traditional ways of processing thoughts over decades. It is not easy to change thinking on issues of racism and implicit bias. Any lawyer employing these strategies will also encounter judges unwilling to respond, or that may resist some or all of the ideas presented. One the other hand, these are important reasons for lawyers to begin a process of change through awareness, acceptance, and action. Without a slow process of alteration, nothing in the system will improve. When a lawyer continues to bring arguments and information to judges and prosecutors about an important topic such as race, the hope is that change will happen, even at a slow pace.

Part II has shown that persons charged with illegal entry and drug trafficking have been, in large part, the target of historical oppression and structural racism. The following sections on

deported alien, in violation of 8 U.S.C. § 1326"). A district court in Georgia sentenced another immigrant to thirty-seven months in prison followed by three years of supervised release. His criminal background included resisting arrest and illegal entry. United States v. Castrillon-Gonzalez, 77 F.3d 403, 404 (11th Cir. 1996).

[373] Awareness of implicit biases is a first but very important step in mitigating its negative impact. *See* Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142–43, 1159 (1996) (mitigating the effects of implicit bias on behavior must involve awareness of implicit biases and motivation to behave in a non-prejudiced manner).

[374] I also call these lawyers race-conscious lawyers, or critical race practitioners. The terms are interchangeable.

individual bias training and strategies to combat implicit bias in the courtroom, compared to such deep historical processes, may seem a bit small as a solution. One the other hand, this Article is not about how to revolutionize society, but how individual defense lawyers begin to make change in the courtroom, client by client.

A. Initial Appearance

The lawyer should do everything he or she can to interview the client in order to obtain and verify information before the initial appearance.[375] The lawyer should review the complaint and PreTrial Services report with the client, listen carefully, and take copious notes.[376] She should be mindful that sometimes clients change stories based on fear, the mental impact of withdrawal from the influence of drugs or alcohol, or mistrust of the public defender or court-appointed lawyer.[377] Therefore, it is imperative to try to bond with the new client at the initial appearance so she can more easily gain trust early in the representation.[378]

During this early stage of the case, the lawyer should note what to follow up on through investigation, because witnesses'

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[375] *See* Douglas L. Colbert, *When the Cheering (for Gideon) Stops: The Defense Bar and Representation at Initial Bail Hearings*, 36 CHAMPION 10, 12 (2012) ("Without access [to clients before the initial appearance], defenders do not stand much of a chance of influencing a judicial officer's ruling.").

[376] Michigan Indigent Defense Commission, *Initial Interview*, 1–12 (Spring 2017).

[377] *See* Gary S. Gildin, *Testing Trial Advocacy: A Law Professor's Brief Life As A Public Defender*, 44 J. LEGAL EDUC. 199 (1994) (attempting to categorize types of clients the criminal defense lawyer is likely to encounter, including clients who may change stories for no reason or some who are perpetual liars).

[378] *See* Marcus T. Boccaccini et al., *Development and Effects of Client Trust in Criminal Defense Attorneys: Preliminary Examination of the Congruence Model of Trust Development*, 22 BEHAV. SCI. & L. 197 (2004) (underscoring the important ways that communication between people facing charges and their lawyers affects the charged individuals' level of satisfaction with the relationship and the process, as well as their perceptions of system fairness and legitimacy).

memories quickly fade and helpful physical evidence may be lost or destroyed.[379] The lawyer should interview witnesses who have insights regarding potential claims involving race, Fourth Amendment violations, evidence planting, or cross-racial identifications.[380]

B. Detention Hearing

Of all factors in the Bail Reform Act, courts must give the least weight to the evidence against the person.[381] Courts must pay more attention to community ties, risk of flight, and, in some cases, dangerousness.[382] The lawyer should be mindful of these requirements, and obtain details about the client's living situation, employment, drug and alcohol abuse, and history of appearing for court. When necessary, the lawyer should attempt to determine whether criminal history contacts are minor and explain discrepancies to the court,[383] the reasons why the client did not appear for a

[379] *See* Ryan Walters, *Worth the Toll? The Dormant Commerce Clause's Effect on Statutory Tolling Based on a Defendant's Absence from the State in Texas and Other States*, 62 BAYLOR L. REV. 628, 631 (2010) ("When the discovery process begins early, the evidence obtained tends to be more reliable and easier to obtain because the witnesses' memories are fresh and physical evidence is less likely to have been misplaced or have lost its evidentiary value.").

[380] *See* Michigan Indigent Defense Commission, *supra* note 376, at 4–5.

[381] United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985) (holding that evidence against the person is the least important factor because court cannot make pretrial determination of guilt).

[382] Federal Bail Reform Act, 18 U.S.C.A. §§ 3142(g)(1), (3)–(4).

[383] *See* MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 82 (1995) ("On both ethical and policy grounds, because of its implications for black Americans, the War on Drugs should never have been launched." Because many lower level criminal history contacts and convictions are the result of police attention in poor neighborhoods, this is fertile for investigation. If the judge does not understand that simple drug possession arrests and/or other misdemeanors or lower level felony convictions are the result of police misconduct or selective law enforcement conduct, these contacts will make it more difficult for courts to release clients. *See also* United States v. Leviner, 31 F.Supp.2d 23, 32–33 (D.Mass. 1998) (holding that Criminal History Category V over-represented defendant's criminal record

hearing, and difficulties with transportation to court if there is a substance abuse problem that prevented her from attending court or other legitimate reasons.

To combat the influence of racial stereotypes, the lawyer should obtain as many details as possible to present a counter-narrative.[384] Judges are not used to this approach because most lawyers do not practice this way.[385] The counter-narrative should focus on how the client is a reliable employee, good father, husband, or talented in a particular trade or hobby. This may require interviewing family members and calling witnesses at bail hearings.[386] Calling witnesses at bail hearings humanizes the client and makes it easier to create a narrative.[387] It is not advisable to put the client on the stand at a bail hearing because the lawyer does not know her well at this point and may be unfamiliar with all the facts. Putting the client on the stand could result in different statements by the client that the government could use against her at trial and lead to a potential perjury charge.[388]

The Bail Reform Act states that the court, among other factors, shall consider the defendant's "length of residence in the community [and] community ties."[389] The lawyer should gather as much information as possible about the social circumstances of

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because defendant's driving convictions were the result of pre-textual traffic stops or racial profiling).

[384] Walter I. Gonçalves, *Narrative, Culture and Individuation: A Defender's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 17 SEATTLE J. FOR SOC. JUST. (forthcoming 2019) (manuscript at 3–4).

[385] Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2089 (2005).

[386] United States v. Torres, 929 F.2d 291 (7th Cir. 1991) (holding that courts shall allow witnesses to testify at bail hearings if the defense calls them).

[387] *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412–15 (1989) (maintaining that narratives and counter narratives provide a means for understanding differing pictures of events, especially those concerning disenfranchised minorities).

[388] Major Timothy C. MacDonnell, *The Miranda Paradox, and Recent Developments in the Law of Self-Incrimination*, ARMY LAW 37, 51 (May 2001).

[389] Federal Bail Reform Act, 18 U.S.C.A. § 3142(g)(3)(A).

the neighborhood where the client grew up or lived.[390] For example, if the government charges the client with drug trafficking and the client committed the crime because of duress, it may be worthwhile to investigate whether drug cartels recently committed acts of violence in the neighborhood or community where the client lived.

Lastly, the lawyer should educate judges and prosecutors whenever possible about racial disparities at bail hearings.[391] When representing a minority defendant, the lawyer should file a written motion for release and supplement it with studies explaining racial disparities at these proceedings.[392]

C. Preliminary Hearing

The CRT approach asks lawyers to formulate a three-dimensional view of the client to understand her from not only a legal perspective, but also a cultural, ethnic, racial, psychological, and socioeconomic viewpoint.[393] The lawyer should attempt to uncover these layers during the preliminary hearing.[394] The lawyer should

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[390] *Four Pillars of Holistic Defense*, BRONX DEFENDERS, (Nov. 15, 2010), https://www.bronxdefenders.org/the-four-pillars-of-holistic-defense/.

[391] *See* Rapping, *supra* note 7, at 1023 ("defense lawyers should be vigilant about identifying opportunities during the course of litigation to educate others about IRB [implicit racial bias].").

[392] Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1246 (2006). One example of such a study is Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994).

[393] Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons from Two Young Lives in Indian Country*, 73 FORDHAM L. REV. 2133, 2143 (2005) ("Knowledge of critical race theory brings awareness that in the context of power, race, color, and culture impact the legal situations of clients. There is always more to a client's legal situation than the technical legal matter.").

[394] *See* Rodney J. Uphoff, *Criminal Discovery in Oklahoma: A Call for Legislative Action*, 46 OKLA. L. REV. 381, 392–93 ("A preliminary hearing gives defense counsel a significant preview of the State's case") (citing Beard v. Ramey, 456 P.2d 587, 589 (Okla. Crim. App. 1969) (recognizing discovery as a legitimate goal of a preliminary hearing and affirming the right of a defendant to discover evidence at the hearing)).

question government witnesses openly at this stage because there is no jury that will decide guilt or innocence.[395] Certain questions and answers might help the prosecutor and judge gain a better understanding of the client.

At the preliminary hearing, the lawyer should pay attention to race issues that could relate to the theory of defense. For example, the defense attorney should observe whether there are any indications from government witnesses that law enforcement focused on the client due to her race, ethnicity, nationality, or neighborhood. The lawyer should also ask whether there are Fourth Amendment issues that arise for the first time at a preliminary hearing. The preliminary hearing is also a good place to investigate whether any witnesses, including police, were susceptible to cross-racial identifications, weapon focus, or any other factor that could influence a witness's memory or identity of a suspect of color.[396]

When cross-examining officers, the lawyer should pay attention to the social history of the specific client.[397] It is unlikely that agents will volunteer mitigating information on direct, but the

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[395] J. Jervis Wise, *Preparing a Defense: Understanding Drug Crimes and Law Enforcement*, *in* DEFENSE STRATEGIES FOR DRUG CRIMES, 2014 WL 5465767, at *9 (Aspatore 2015) ("[I]n jurisdictions in which preliminary hearings are conducted at the outset of cases, the questioning of law enforcement officers through more open-ended questions and less adversarial means can be an invaluable method for learning the facts of the case . . . .").

[396] *See* Martinis M. Jackson, *Timely Death of the Show-Up Procedure: Why the Supreme Court Should Adopt A Per Se Exclusionary Rule*, 56 HOW. L.J. 329, 348 (2012) ("Memory malleability, race-bias, and weapon focus are three of many estimator variables that can affect the reliability of witness identifications; however, a defendant is not entitled to a preliminary hearing addressing these factors without some level of suggestiveness.") (citing State v. Henderson, 208 N.J. 208, 261 (2011), *holding modified by* State v. Chen, 208 N.J. 307 (2011), *holding modified by* State v. Anthony, 237 N.J. 213 (2019)).

[397] *But see* NEIL P. COHEN, LAW OF PROBATION & PAROLE § 26:18 (2d) (stating that at least in the context of probation violations, the preliminary hearing is not traditionally a venue for discovering or presenting mitigating information; however defense counsel may ask questions and, if the court permits it, gain valuable information.)

defense lawyer should consider asking the following questions: Was there any indication that the client was intoxicated or under the influence of any substance during any encounter? Did the client seem unstable? Did she say anything that did not make sense?

It is also a good idea to ask the client before the preliminary hearing if the lawyer should pursue a specific line of questioning, and if so, to what extent.[398] It is also advisable to ask the client if she is comfortable with questions relating to her race to support a defense theory, Fourth Amendment violations, or cross-racial identifications.[399]

Similar to detention hearings, it is not advisable to put the client on the stand.[400] The judge does not have to hear from the client at the hearing and may decline to consider any evidence by the defense if the prosecution meets its burden to prove charges by a preponderance of the evidence.[401]

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[398] *See* Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2264 (2014) ("it will 'frequently be the case' that the client's individual goals and criminal defense counsel's systemic goals will be aligned.") (citing Rapping, *supra* note 7, at 1019).

[399] *Id.*

[400] Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 459 (2004) ("One lawyer explained that he is reluctant to put his clients on the stand at a bond or preliminary hearing because the client might say something that may later be deemed false or failure to accept responsibility."). In some jurisdictions, it may be malpractice to put defendants on the stand. United States v. Frappier, 615 F. Supp. 51, 52 (D. Mass. 1985); United States v. Ingraham, 832 F.2d 229, 237 (1st Cir. 1987) (statements by defendant at detention hearing admissible at trial). *See* United States v. Parker, 848 F.2d 61, 62 (5th Cir. 1988) (no Fifth Amendment problem with the Bail Reform Act). *But see* United States v. Perry, 788 F.2d 100, 116 (3rd Cir. 1986) (court should give defendant use immunity to protect Fifth Amendment right).

[401] FED. R. CRIM. P. 5.1(e). "At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed

D. Disclosure Review

The lawyer should review all disclosure with skepticism, keeping in mind officer bias against the accused when writing reports.[402] The defense lawyer should translate this skepticism into a presumption of innocence of the client when reviewing disclosure, and follow up with disclosure requests, such as audio or video-recorded interviews, not received but referenced in initial reports, or any missing items of evidence within the government's control relevant to the defense investigation.[403] Because all actors within the criminal justice system perceive clients of color differently, believing the case will go to trial during disclosure review assures minorities receive the same level of scrutiny as a wealthy White male criminal defendant.[404]

E. Voir Dire

Voir dire can be the most difficult part of trial because jurors are unpredictable.[405] Lawyers do not know what jurors will say, so thinking on one's feet in response to juror answers is common. For this reason, coming up with follow-up questions can be a challenge.

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and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings." *Id.*

[402] *See* Joseph Citron & Lawrence E. Wines, *Medical Conditions and Diseases that can Impact the DUI Investigation*, *in* UNDERSTANDING DUI SCIENTIFIC EVIDENCE, 2012 WL 4964557, at 1 (Aspatore 2012) ("standard police reports are generally biased, calling for only bad evidence against the accused driver").

[403] For example, when reviewing potential Fourth Amendment claims, the defense lawyer should consider requesting statistics for traffic stops made by the Border Patrol if a drug seizure took place along a road at or near the border. The defense lawyer should determine whether someone of a different race made a pre-trial identification, including the law enforcement officer.

[404] *See* Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 685 (2017).

[405] Lori G. Cohen, et al., *Make or Break? Using Voir Dire Effectively*, 58 No. 6 DRI FOR DEF. 38 (2016).

The goal of voir dire for the defense is to learn as much damaging information as possible about jurors' experiences on issues pertinent to the defense's theory.[406] With this information, the lawyer should decide whether to seek exclusion of particular jurors for cause and exercise peremptory strikes.[407] Research shows that raising race during voir dire and other phases of trial decreases the negative impact of implicit biases.[408] For this reason, the lawyer should make jurors aware of race, even in a run-of-the-mill case.[409] For jurors who have taken the IAT, the attorney should say that they do not have to share test results publicly. The lawyer can use peremptory strikes or attempt to excuse for cause individuals not considered reliable, or people believed to carry negative implicit associations about minority groups.

The majority of criminal cases charging a minority defendant do not involve a defense where race is at the forefront of the theory. The government occasionally accuses a client of color of victimizing a White person, or in which police officers planted evidence to arrest a person of color, but those are a minority. In these cases, judges have an easier time permitting voir dire on race issues. The more important question is how to prepare voir dire for a typical drug case.

The lawyer should seek attorney voir dire and ask permission to inquire jurors about implicit bias.[410] In support of

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[406] *Id.*

[407] *Id.*

[408] *See* Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026–27 (2003) (making race salient in jury voir dire can reverse the effects of implicit bias and influence the jurors' perceptions of the trial and their decisions).

[409] *See* Chris Mooney, *Across America, Whites are Biased and They Don't Even Know It*, WASH. POST (Dec. 8, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/ [https://perma.cc/3CQU-EPRH] (noting that as of 2014, two million people had taken the IAT).

[410] *See* Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR

a motion for attorney voir dire, the lawyer can cite studies showing that jurors are more willing to share information if the lawyer asks questions.[411] She should seek permission to read a definition of implicit bias from an encyclopedia or well-known journal article defining the concept.[412] Once jurors hear a definition of implicit bias, she can ask whether anyone has heard of implicit bias and taken the IAT. If no one has heard of implicit bias, the attorney or the judge should explain the main findings of implicit bias. These findings conclude that clients of color are perceived and judged differently, albeit implicitly. By recognizing this reality and becoming aware of the science, jurors decrease the negative impact of implicit bias in their decision-making as finders of fact.[413]

The lawyer can do several things to convince the judge to permit voir dire on race.[414] She should mention that Senior Judge

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SOC. JUST. 139, 166 (2010) ("[T]he American judiciary does not appear ready to listen to arguments that use implicit bias, despite the fact that these arguments are consistent with the stated and revered goals of voir dire.").

[411] *See* Susan E. Jones, *Judge-Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & HUM. BEHAV. 131, 145 (1987) ("[J]urors often distort their replies to questions posed during the voir dire."). Subjects in this study "changed their answers almost twice as much when questioned by a judge as when interviewed by an attorney." *Id.* at 131. The study also found that a "judge's presence evokes considerable pressure toward conformity to a set of perceived judicial standards among jurors." *Id.* Attorney conducted voir dire minimizes this pressure. *Id.*

[412] American Bar Association, *What Is Implicit or Unconscious Bias?* (Apr. 15, 2019), https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/what-is-implicit-bias/ (offering two definitions that a court may read).

[413] *See* Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009) (Particular types of reflective voir dire, which required individuals to answer an open-ended question about the possibility of racial bias, appeared successful at removing juror racial bias in assessments of guilt.).

[414] Denials for voir dire on race may be common. On the other hand, even if unsuccessful, at least the lawyer made the judge and prosecutor aware of

Mark Bennett, a pioneer in the field of courtroom bias, gave a PowerPoint presentation on implicit bias to jurors at the outset of the case.[415] The lawyer should also mention that the Western District of Washington spent over $50,000 in a video shown to all jurors in all civil and criminal cases.[416] Citing social science literature on the impact of race on voir dire in criminal cases is another strategy. The lawyer should bring these facts to the attention of the trial judge in support of voir dire on race, since no case law, outside of the death penalty context, *requires* courts to permit questions on race.[417]

F. Opening Statement

Defense lawyers should find a way to interweave race during opening, as making it salient during trial reduces jurors' implicit biases.[418] This can be difficult in a drug courier case unless

important courtroom issues involving race. Secondly, there is now a record for appeal.

[415] *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 169 (2010) (discussing the use of a slide about implicit bias in a PowerPoint presentation shown by the author before voir dire).

[416] U.S. Dist. Ct., W. Dist. Wash., *Unconscious Bias Juror Video* (2017), http://www.wawd.uscourts.gov/jury/unconscious-bias [https://perma.cc/K365-QZY4]. Jeffery Robinson, director of the ACLU Trone Center for Justice and Equality, said during a CLE training where I was present that the video cost $56,000.00 to produce. He is one of the lawyers in the video.

[417] Turner v. Murray, 476 U.S. 28, 36–37 (1986) (announcing a due process right to voir dire on race, but only in interracial crime cases, and only where the death penalty is at stake).

[418] *See* Donald Bucolo, Race Salience in Defense Attorney Opening and Closing Statements: The Effects of Ambiguity and Juror Attitudes (May 2007) (unpublished M.A. thesis, University of New Hampshire). This study showed that emphasizing a defendant's race during opening statements influences White jurors. In a case where the evidence is strong, when the defense lawyer made race salient, a jury is more likely to find the Black defendant not guilty than a White defendant. The research also suggests that when lawyers do not

there is a nexus to race as part of the defense's theory. In a typical drug case, where there is no nexus, the defense attorney can briefly allude to the nationality and ethnic makeup of the client. The attorney can say that the client is a Latinx man, born in Mexico, and use race as a way to discuss why a drug cartel targeted the client to transport drugs. The attorney can argue that drug traffickers believe the defendant conforms to profiles of people crossing the border at a particular time.

In an illegal entry case,[419] the defense lawyer can refer to the foreign nationality, race, or ethnicity of the defendant during opening by indicating where she is from, and emphasize her motivations for entering the United States. This is generally not objectionable unless the defense attorney emphasizes it more than once or makes it into a larger part of the opening.[420] In these situations, the prosecutor or the judge will interrupt and object on grounds of relevance or improperly playing to the sympathies and emotions of jurors.[421]

G. Closing Argument

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make race salient more racist jurors will more likely find a Black defendant guilty. Other studies include Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Racial Prejudice against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001).

[419] Illegal entry or re-entry cases are difficult to defend at trial. Common defenses for illegal entry prosecutions include duress or that the government cannot prove the element that the government actually deported or removed the person from the United States. *See* Robert J. McWhirter & Jon M. Sands, *A Primer for Defending A Criminal Immigration Case*, 8 GEO. IMMIGR. L.J. 23, 33–39 (1994).

[420] FED. R. EVID. 401.

[421] *Id.*

During closing argument, the lawyer analyzes the facts and law for the jury in a digestible format.[422] A CRT approach to closing requires the lawyer to incorporate race. The same points about race salience that apply in opening apply to closing.[423] The difference is that by closing, jurors have heard all evidence and filtered it with a careful eye. Jurors may have also heard the evidence in a more race-conscious way because of voir dire on implicit bias.

A defense lawyer can incorporate race into a closing in a drug courier case by first repeating what the lawyer said in opening about the client's background. This conjures issues discussed during voir dire. The lawyer should emphasize constitutional principles of equality and fairness based on social science research.[424] This research concludes that emphasis on principles such as presumption of innocence, the government's burden of proof, and equality for all reduce implicit bias during deliberations.[425]

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[422] Walter I. Gonçalves Jr., *Tips and Strategies for Excellent Closing Arguments*, CRIM. JUST. 48 (2018).

[423] *See* Evelyn M. Maeder et al., *Race Salience in Canada: Testing Multiple Manipulations and Target Races*, 21 PSYCHOL. PUB. POL'Y & L. 442, 449 (2015) (part of the study included race salience in closing arguments finding that "among those who indicated that racial issues featured prominently in the trial (regardless of experimental manipulation), there were more not guilty verdicts.").

[424] *See* Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 362 (2012) ("There are no simple answers, but, when crafting opening and closing arguments, counsel should carefully consider (1) how to prime themes based on fairness and equality, (2) how to incorporate counter-stereotypical exemplars in the narrative, and (3) what kinds of schemas might 'fit' a client while supplanting jurors' unconscious racial schemas.").

[425] *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1503 (2005) ("[R]acial schemas are 'chronically accessible' and can be triggered by the target's mere appearance, since we as observers are especially sensitive to visual and physical cues."). Actors can neutralize racial schemas through counter-schemas that are presented during closing arguments. *See also* Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and*

The defense attorney's closing will come after the prosecutor's argument, but it must stand on its own and not be a response to the prosecutor.[426] The defense attorney should not only object if the prosecutor invokes jurors' biases by mentioning subtle or obvious racial stereotypes, but also respond with a discussion of the dangers of implicit bias in her closing.[427] During the defense closing, the lawyer should also let jurors know that the defense only gets one argument, whereas the prosecutor has an opportunity for rebuttal.[428] This discussion should include an explanation of what proper and improper rebuttal is. This educates jurors about objections the defense may make.

The closing is also an opportunity to go over jury instructions related to race. These instructions may include an implicit bias instruction similar or identical to the one used by Senior District Court Judge Mark Bennett in Northern Iowa. The lawyer should also ask for a race-switching instruction.[429] The instruction asks jurors to imagine the same scenario as the current case, but with

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Disliked Individuals, 81 J. PERSONALITY & SOC. PSYCH. 800, 807 (2001) (implicit attitudes could be changed without conscious effort simply by exposing people to particular types of content).

[426] Gonçalves, *Tips and Strategies for Excellent Closing Arguments*, *supra* note 422, at 50.

[427] *See* Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3094 (2018) (When prosecutors' summations involve subtle references to race or racial stereotypes because of their own implicit biases, in an attempt to appeal to jurors' implicit biases, or both, courts rarely detect and often dismiss the potential of prejudice influencing a decision.).

[428] Gonçalves, *Tips and Strategies for Excellent Closing Arguments*, *supra* note 422.

[429] *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 482 (1996) (The race-switching instruction involves having the jurors imagine "the same events, the same circumstances, the same people, but switching the races of the parties" of the case.). *See also* Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407, 443 (2014) ("[R]ole-reversals could be presented in opening statements and closing arguments, or given as a jury instruction.").

the race or ethnicity of the actors switched, and to self-monitor whether they perceive the situation differently.[430]

H. Sentencing

Ninety-seven percent of all federal cases result in a guilty plea in lieu of trial.[431] The rate is even higher for illegal entry cases, where ninety-nine percent of clients plead guilty.[432] This means that most courtroom work in federal criminal cases is in sentencing advocacy.[433]

The lawyer should develop a client's biography to include not only mitigating factors, such as sexual abuse, domestic violence, mental health problems, and addictions, but also larger forces that shaped motivations for the person to become involved

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[430] James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, CHAMPION 24 (1999) (Judge Milton Souter, in Alaska, agreed to give jurors an instruction on "race-switching" before finalizing a verdict. Judge Souter noted that he "personally engaged in a race-switching exercise whenever he was called on to impose a sentence on a member of a minority race to ensure that he was not being influenced by racial stereotypes.").

[431] Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 203 (2014) ("Federal court guilty pleas as a portion of all convictions rose from 86% in 1970 to 97% in 2009. In the 1990s, the federal government instituted 'fast-track' plea bargaining policies designed to reduce the time required to resolve cases by guilty pleas. For the category of cases in which they did so first and most consistently—immigration-related crimes—plea rates rose to 99.4% by 2010") (citing Mark Motivans, Federal Justice Statistics 2009 - Statistical Tables at 18 tbl.4.2, BUREAU OF JUST. STAT. (Dec. 2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09st.pdf (96.7% of convictions resulted from guilty pleas in 2009)). .

[432] *Id.*

[433] Plea acceptance rates are ninety-seven percent and ninety-four percent in federal and state cases, respectively. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html.

in crime.[434] For instance, in the case of illegal entry, this may include an explanation of specific economic conditions of the area the person lived and recent economic trends. If the person lost a job at a factory, the lawyer should research how American economic policies contributed to the closing of factories. Although this research is not always easily accessible, it may be available through public economic reports, newspaper accounts, or interviews with local officials. The defense attorney can also conduct this analysis for drug couriers. Most drug couriers agree to commit the crime for financial reasons.[435] A critical race practice advises the lawyer to delve into economic, social, and personal factors that influenced her client's decision-making.

In the sentencing memorandum, the lawyer may wish to include a section at the end that explains implicit bias and provides the judge and prosecutor with online resources to learn more. I include this section in all sentencing memoranda involving minority clients.

The sentencing presentation should highlight factors that neutralize reasons to impose a harsh sentence, an explanation of mitigating factors and why they justify a reduced sentence, and narratives that provide a counter-schema to mainstream viewpoints of the person. For example, in a drug sentencing involving a Latinx person, a common perspective of the judge and prosecutor is that the person is a "Latinx drug dealer," "dangerous," and "violent."[436] To combat these negative perspectives, the defense

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[434] *See Restructuring the Plea Bargain*, 82 YALE L.J. 286, 289 (1972) ("Individualized sentencing looks for sentencing criteria to the totality of the defendant's circumstances—to the detailed facts of his crime and to his criminal and personal biography.").

[435] Weber, *supra* note 88, at 1773.

[436] *See* L. Song Richardson & Phillip Atiba Goff, *Self Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 310 (2012) ("Latinos (or those appearing to be) are stereotyped as drug dealers, gang members, and undocumented immigrants . . . ."); *See also* ELLEN PAO, RESET: MY FIGHT FOR INCLUSION AND LASTING CHANGE, 86–87 (2017) (describing frequent jokes

lawyer should narrate a mitigating story of the client as a worker, father, coach, husband, or any other positive role.[437] The defense attorney should accomplish this not only by interviewing the client, but also by obtaining character letters and even photographs showing the positive role of the person in her community.[438] This individualizing information will go a long way in reducing negative implicit bias.[439]

V. CONCLUSION

Beginning in the early twentieth century, when the federal government first created illegal entry and drug laws, the criminal justice system slowly began to overcriminalize the actions of couriers. At that time, the immigration system treated Latinx immigrants differently than newly arrived Europeans. Overcriminalization of offenses committed by low-level couriers escalated in the 1980s with the War on Drugs. Banishment climaxed in the early part of the twenty-first century with crimmigration, the merging of the criminal and immigration systems. All of this took place despite couriers' and illegal entrants' low level of criminal threat and responsibility.

The experience of couriers and illegal entrants, as seen through the lens of CRT, shows that American society not only selected them for prosecution, harsh sentencing, and deportation, but also, at an earlier time, lynched them. Couriers and migrants also experience multiple levels of prejudice as seen through intersectionality. These historical exploitations have made it easy for mainstream American culture to transmit implicit biases through several past generations to the present day. These processes led to

about how all Black and Latinx people were drug dealers and all Indians wore turbans, and comments conflating Asian names).

[437] Wilkins, *supra* note 424, at 332–33.

[438] *See* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 801 (2018) (noting the importance of character letters for reducing racial priming at sentencing).

[439] *See* Doug Passon, *Using Moving Pictures to Build the Bridge of Empathy at Sentencing*, CHAMPION 14 n.2 (2014) ("[I]ncluding *still photos* in a sentencing memorandum can add layers of emotional depth to a sentencing story.").

contemporary stereotypes, which criminal justice professionals are unequipped to mitigate.

As there are presently no CRT studies of illegal entrants and drug couriers, and few sets of tools for defense lawyers to mitigate implicit bias, this Article begins a conversation to encourage scholars to pay more attention to biases against Latinxs in federal criminal defense as a whole. A CRT approach can begin a larger process of change within the criminal courts, starting with criminal defense lawyers, the only voice providing legal representation for migrants and low-level couriers.