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The Criminalization of Immigration



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Crime and Immigration

New Forms of Exclusion and Discrimination

Government officials and academic researchers have long viewed crime and immigration through a racial lens. Instead, they should focus on how the use of legal exclusion from civil society is hurting millions of Americans.

In the United States today, two trends are intertwining in ways that affect both society and the research community. The first trend is the nationwide increase in the number of people incarcerated. This was the subject of a 2014 National Research Council (NRC) report titled, appropriately, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. The second trend is the increased inflow and integration of immigrants nationally. This was the subject of a 2015 NRC report titled, again appropriately, *The Integration of Immigrants into American Society*, (which I co-edited).

Despite the importance of these trends, however, most academics and policy makers have remained largely “siloe” in how they think about them. There are experts on incarceration, which is often understood in terms of its disparate impact on African Americans; and there are experts on immigrants, and the problem of undocumented immigration is often associated with Latino Americans. The two camps seldom meet. Yet I argue that they are intimately linked and it is imperative for stakeholders in all quarters to more fully examine how these issues are separating people across society—and how we can make things better.

Let’s start by thinking about African Americans and Latinos in terms of what has happened since the civil rights movement. Since the *de jure* end of discrimination in 1965, there has been a rapid growth of a black middle class, ushering in a lot of social mobility for African Americans and inclusion into the larger society. But since 1980, there has also been a rapid growth of mass incarceration of African Americans. Blacks are now 12% of the nation’s total population, but they represent 38% of the prison population. In 2010, Michelle Alexander wrote a very influential book, *The New Jim Crow*, in which she argued that the more things change, the more they stay the same, and that the incarceration of African Americans was a continuation of the kind of discrimination and racism that characterized Jim Crow in the South.

There is also a parallel debate about Latinos and race and Latinos and ethnic discrimination. A key question for scholars has been whether Latinos are making it in America or being racialized and excluded as



they're being incorporated? The situation of undocumented immigrants does disparately impact Latinos. An estimated 77% of undocumented people in the United States are from Mexico, Central America, or South America, although there are people who are undocumented from around the world.

What I want to argue is that social scientists have been using a racial lens when examining changes in mass incarceration and immigration. By lens I mean the variables that they—we—put front and center, the ways in which we argue about these topics, and the ways in which we think about them. Instead, I think we need to return to what was a prescient argument that sociologist William Julius Wilson made in 1978 when he talked about how we should think about race and class—and now we should add legal status—and how they intersect.

Today, it seems, legal exclusion is coming to replace racial exclusion as the major axis of differentiation in society. I think this legal exclusion is racially tinged, of course, but it is fundamentally class-based. It allows for the full inclusion of African Americans and Latinos in the upper reaches of society and it excludes vast numbers of people at the bottom level of society. So I think when we focus on race, we miss the growth of widespread legal discrimination.

This message was captured by Wilson when he wrote about economic changes in US society. He said, "A new set of obstacles has emerged from basic structural shifts in the economy. These obstacles are, therefore, impersonal but may prove to be even more formidable for certain segments of the black population. Specifically, whereas the previous barriers were usually designed to control and restrict the black population, the new barriers create hardships essentially for the black underclass; whereas the old barriers were based explicitly on racial motivations derived from intergroup contact, the new barriers have racial significance only in their consequences, not in their origins."

Prison outbreaks

When Wilson was writing about the growth of the underclass and the economic hardships they were facing, it was before the nation faced mass incarceration, which really took off in the 1980s, accelerated through the 1990s and 2000s, and continues still. Today, approximately 7 million people are under supervision in the United States—2.23 million in jail or prison, another 851,000 on parole, and almost 4 million on probation. That adds up to one in 33 adults.

In this regard, the United States is an outlier within the international community. The United States has 707 individuals per 100,000 in prison, compared with 148 in the United Kingdom, for example. This is true, in part, because the United States has so many African Americans in prison. There are 2,300 black prisoners per 100,000 African Americans. But even in looking at the incarceration rate for whites, the United States would still be an international outlier. The nation has 400 white prisoners per 100,000 whites in the population, which is still more than double the figure for leading European comparisons.

The other way to think about this is the risk of imprisonment. The risk is extraordinary for young, less-educated black men. For example, 68% of those born between 1975 and 1979 who are high school dropouts have been imprisoned or can expect to be imprisoned during their lifetimes. Since 1990, the disparity between blacks and whites in prison has started to decline, not because fewer blacks are being imprisoned, but because the white imprisonment rate has been rising faster than the black imprisonment rate.

There is another aspect of incarceration that greatly affects society: the growing number of individuals who leave prison as ex-felons and return to their communities. Collectively, they represent a significant portion of the nation's population. In fact, the total number of ex-felons is equal to the combined populations of Arkansas, Idaho, Nebraska, Nevada, New Mexico, Utah, and West Virginia. These people are in many ways legally excluded from many rights in US society.



David Harriman *Mariposa*

Photographer David Harriman's *Mariposa* series stems from *La Linea*, his 10-year project to document the landscape of the border between the US and Mexico. While photographing the landscape, he frequently encountered immigrants making the journey north, many of whom faced apprehension and deportation. He realized that he could not document the landscape without including the human aspect.

Since 2008, Harriman has made portraits of immigrants recently deported at the Mariposa port of entry in Nogales, Mexico. He writes, "The irony of the name of the crossing *Mariposa* (butterfly in Spanish) seemed to perfectly evoke the plight of those wishing to cross and seek a life elsewhere, only to be returned." In his makeshift studio on a patch of scrubland at the border, Harriman has captured images of more than one hundred immigrants—some of whom had crossed the border only hours earlier and others who have lived, undocumented, in the United States for several years. Ultimately, he says, "it's all about hope, but their hope's just run out at that point."

Harriman is a British photographer whose work has been exhibited at the National Portrait Gallery, London. He has had a lifelong fascination with the landscapes and cultural diversity of the United States. His other projects include *Truth & Kitty*, a series about a homeless couple in Las Vegas; *Meadows Edge*, a series about life on the periphery of Las Vegas; *Red State*, a look at the changing political map of the United States; and *Rust Belt*, a series about the declining industrial heartland of the United States. To learn more, visit his website: <http://www.davidharriman.com/>.

—Alana Quinn



DAVID HARRIMAN
All photos this page and opposite from the *Mariposa* series, 2008–2016.

As these developments were unfolding for African Americans, undocumented migration into the United States also grew very rapidly, especially during the 1990s, with the inflow hitting its peak right before the recession. The inflow has leveled off since 2008; there has basically been a net of zero in recent years, and the total number of undocumented immigrants has declined from its highest levels. There are now 11.3 million undocumented immigrants, the equivalent of the combined populations of Alaska, Delaware, the District of Columbia, Hawaii, Maine, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming.

In general, immigrants enter societies that have developed institutions and ideologies to accommodate past conflicts and demographic realities.



In the United States, this means immigrants encounter the legacies of the nation's past failures in dealing with race and successes in dealing with immigration. The usual story about immigration is that before 1965, the United States was successful in integrating waves of immigration from all over the world. But since then, the thinking goes, the legacies of racial discrimination remain, and non-white immigrants are believed to have a harder time integrating. Basically, scholars have been worried about the racialization of post-1965 immigrants and the ways in which discrimination might prevent their inclusion in society. We have tended to worry about immigrants since 1965 because of their race, not because of their immigrant status.

The recent NRC report on the integration of immigrants into American society examined this issue across many dimensions. We looked at socioeconomic, political, sociocultural integration, spatial integration, family, and health, among other variables. And on every measure, we found progress over time for the first generation, and progress between the first and the second generation in that the immigrants were becoming more integrated into society, more like the native-born. So, over time, the immigrants were seeing a lot of progress in terms of education, occupations, the neighborhoods they live in, and rates of inter-marriage. All of this is very much similar to how the nation has integrated immigrants in the past.

The one exception we found centers on undocumented immigrants and their children. We found, in essence, that the nation actually has what might be termed a non-integration policy directed toward them. It's also a failed policy, because the nation doesn't completely keep them from integrating, but it stops them from full integration. We have people who are living in the United States forming families, working, going to church, and sending their children to school, and yet they are prevented



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All photos this page and opposite from the *Mariposa* series, 2008–2016.

from integrating on very many dimensions, especially politically.

Right now, about one-third of immigrants are citizens, one-third can become citizens, and one-third are undocumented and have no path to citizenship under current law. Inequality between the undocumented and others has grown a great deal. Inequality between citizens and legal immigrants has also grown in a legal sense. So, there has essentially been a bright line between people with a green card and citizens.

The Obama administration has deported almost 2 million people, more than any other administration, and the numbers being detained for possible deportation have been growing rapidly. But as work by Douglas S. Massey, a professor of sociology and public



affairs at Princeton University and co-director of the Mexican Migration Project, makes clear, these efforts have not really reduced the rate of initial migration. What pouring money into border enforcement did accomplish is that it reduced the rate of return migration, changing a circular migration pattern into a permanent migration pattern. Migrants also began to cross at different parts of the border where they had never crossed before, especially in the deserts of Arizona, making it much more dangerous and leading to a national distribution of undocumented immigrants. So, a population that used to be concentrated in places such as Texas and California is now in all 50 states.

Another development as the government cracked down on immigration is that people who have successfully made their way to the United States have not gone back to Mexico or to other South American countries, which has resulted in a growth in settled immigration. People who might want to come to the United States only for temporary or seasonal work now stay permanently because it is so difficult to leave and return. Sixty-one percent of immigrants now have been in the United States for 10 years or more, and only 16% have been here less than five years. So the undocumented population is changing in that it's becoming more and more settled, people with families who are here in this kind of liminal status of non-integration.

There are 5.2 million children who have an undocumented parent; 4.5 million of those are citizens. Children with undocumented parents make up one-third of all immigrant-origin children in the United States, about 8% of all US-born children and about 7% of all kids in the K-12 system. This is a large number of children in a very uncomfortable predicament.

Much of the data on immigration has come from a wave of new research that is focusing on what the mass incarceration literature has called the collateral consequences—the effects that reverberate

out from imprisonment. Researchers have found many collateral consequences that resonate from parents' undocumented status onto their families. For instance, children of the undocumented have lower levels of cognitive development in early and middle childhood, as well as greater mental health issues in adolescence. Frank D. Bean, a professor of sociology and director of the Center for Research on International Migration at the University of California, Irvine, and his colleagues found that adult children of the undocumented are less likely to finish high school, and overall they achieve 1.25 years of schooling less than comparable children with parents who have achieved legal status. In sum, this research is revealing that growing numbers of families of the undocumented are experiencing negative consequences of the lack of integration.

Legal penalties expand

There are also rising legal penalties and increased involvement of the legal system in dealing with the undocumented. Overstaying a visa is a civil violation, not a criminal act. People in this category comprise about one-half of the people who are undocumented. Entering without inspection—that is, sneaking over the border—is a misdemeanor. Since 1996, if one is caught, sent back, and then re-enters and is caught again, that is a felony. The government has significantly increased the consequences for being undocumented.

Also since 1996, the government has mandated automatic deportation for anyone convicted of an “aggravated felony.” This includes anyone who is a noncitizen, even people with a green card who have been in the United States for a long time. It's retroactive, and there is no recourse for false convictions. So, if you're convicted of any one of 50 different crimes—which are decided by Congress, and Congress adds to them over time—you will be deported. This is despite the fact that these need not be actual felonies; the list includes minor transgres-



sions such as filing false tax returns, simple battery, and failing to appear in court.

Or consider this case: prior to 1996, someone caught trying to sneak across the border would simply be returned to the other side. The process was called voluntary departure and there was no criminal charge. If one was caught inside the country, judges had discretion about what to do. The chances of being caught in the country were very low, and in 1990 there were only about 30,000 deportations.

After 1996, the government introduced a series

in Federal Bureau of Prison facilities for all other federal crimes. The Border Patrol and ICE together refer more cases for prosecution than all Department of Justice law enforcement agencies combined. The Border Patrol alone refers more cases for prosecution than the FBI. Immigration is now over half of the federal criminal workload, and immigration laws empower criminal prosecutions without constitutional protections.

Someone detained for an immigration violation is not entitled to the same criminal protection that a citizen who is arrested would have. For example, ICE puts a hold on any undocumented person arrested and that means the person is not eligible for bond and is therefore detained until trial. Moreover, one can be arrested without probable cause of crime because the government can make an accusation of immigration violations, and one can be sentenced without hope of probation because ICE automatically considers undocumented persons to be a flight risk. Someone convicted of a crime would have to serve the full sentence and then be deported.

ICE now has a mandated quota of 34,000 beds per day. This means that they are obligated by law to have *at least* 34,000 people in detention every day of the year. In 2013, the United States detained—not imprisoned, but detained—441,000 people in private detention facilities and in local jails, state prisons, and federal facilities. The federal government pays state and local prisons a set amount per night for every person detained. Even as the nation is supposedly trying to reduce mass incarceration and reduce the number of people in state and local prisons, the federal government is filling those beds. States such as Louisiana regularly take in large numbers of immigration detainees from across the country to help cover the cost of maintaining their prisons. This is an attractive option for states that are releasing prisoners to save money; they receive money from the federal government for every immigrant detained in their state and local prisons.

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of laws that effectively integrated the local criminal justice system with immigration enforcement. Now what happens is that whenever local police make an arrest—or for some other reason collect someone's fingerprints or name or ID—that information is sent to the interstate identification index maintained by the Federal Bureau of Investigation (FBI). If the person is found to be undocumented, Immigration Customs Enforcement (ICE) will issue a two-day hold and then commence deportation proceedings.

Scholars have dubbed this intersection between crime and immigration as "cimmigration." Since 1986, the United States has spent \$187 billion on immigration enforcement. In 2012 alone, the nation spent \$18 billion on immigration enforcement. The total is approximately 24% higher than the combined spending for all other federal enforcement, including for the FBI, the Secret Service, the Marshal Service, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and various other functions related to drug enforcement.

More people are detained each year in the immigration detention system than are serving sentences



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All photos this page and opposite from the *Mariposa* series, 2008–2016.



who hasn't lived there for years, roust people from bed to demand papers and take away in handcuffs anyone who cannot produce the right documents. In the aftermath of such raids, relatives, employers, even lawyers have to struggle to find out where those being detained are being held."

The threat of deportation also extends to children in indirect ways. Researchers have conducted a number of studies on the prevalence and effect of stress in childhood from growing up in a poor neighborhood exposed to extensive violence and uncertainty. The studies have demonstrated that there are many lifelong consequences from growing up under those conditions, and even inter-generational epigenetic changes in children who have lived with this. I think that there is going to be a wave of research showing some of these same effects on kids growing up with the uncertainty of having undocumented parents.

The undocumented young people, largely Mexican Americans, who organized for the Dream Act adopted the model of the civil rights movement, demanding civil rights for themselves and their families. But I think that using this racial lens to understand things obscures the way in which race can be a resource rather than an impediment for legal immigrants and citizens of Mexican origin, and it can lead to more pessimistic predictions about their future. In addition, taking this view obscures the shifting line of repression in US society from racial phenotype to legal exclusion.

Legal aid

US citizens who are not white do have actual legal protection through the Justice Department's Civil Rights Division, even though some of that has been undermined in recent years. The nation still has strong norms against racial hate speech—recent political activity to be excluded. There are still affirmative action and diversity programs and there still is—although it is being watered down—the Voting

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The total removals (which is the legal term for deportation) has skyrocketed under the Obama administration. In 2013, more than 400,000 people were deported. The risk of deportation is felt widely in many communities, especially those with large Latino populations. As reported in the *New York Times*: "It can be risky, for example, simply to live in an immigrant neighborhood in a house or apartment where a previous tenant may have had an old deportation order. Immigration agents may show up at the door with a photograph of someone



Rights Act to assure representation.

These protections have been resources for immigrants as well. The illegality of racial profiling puts limits on some of the most draconian state anti-immigrant laws. And the Supreme Court, when it heard the issue of Arizona's latest immigration laws, made clear that racial profiling is the line that could not be crossed. This is partly why when one reads anti-immigrant rhetoric, it very much tries to avoid charges of racism. But anyone who listens to the evening news knows that it is no holds barred when it comes to demonizing undocumented people. There have been cases where the Department of Justice's Civil Rights Division has investigated anti-immigrant actions by local governments. One example occurred when Somalis in Maine called for the Justice Department to come in, not because they were being mistreated as refugees or immigrants, but because they were black (for example, when the mayor of Lewiston told them publically to leave). Justice came through. This may be a limited resource, but in some ways, being non-white allows the tapping into racial laws that protect against discrimination.

Let's now return to the issue of ex-felons and people who have experienced incarceration. When some politicians or laypeople discuss immigration, they often say: "What part of illegal don't you understand? These people broke the law; they're responsible for what happened to them, and we should be very strict with them." The same ideas often swirl around the experience of mass incarceration, where legal distinctions are key to life chances and access to mainstream society. Just like the undocumented, ex-felons have no mobility across the legal divide. They still carry a prison record; they still carry the prohibitions that are built into many laws. Thus, both ex-felons and undocumented immigrants are defined out of civil society. They are defined as not eligible for the same rights as everyone else.

There are 19 million people who have been convicted of a felony. That is 6.5% of the adult

population and includes approximately 25% of the African American male adult population. Through a mix of federal and state laws, ex-felons can legally be denied a variety of privileges and opportunities. Disenfranchisement from voting is probably the most well-known consequence. There are 5.8 million people who are denied the right to vote. Of these, only 25% are in prison; the rest are on probation, parole, or permanently disenfranchised. There are only two states—Maine and Vermont—that have no restrictions on voting for people who have been convicted of a crime. Other states place varying limits on voting, ranging up to lifelong prohibition.

Among other consequences, ex-felons may be barred from federal jury service for life, ineligible for a security clearance, not allowed to own firearms, not eligible to enlist in the military, prohibited from adoption or foster parenting, and excluded from public housing. For drug violations, ex-felons are excluded from receiving aid through Temporary Aid for Needy Families (TANF), most federal health care (although the situation under the Affordable Care Act remains difficult to understand), federal education aid, and 750 listed benefits that include any grant, contract, loan, or professional license provided by a federal agency. In the private sector, ex-felons are not eligible to work for the airlines.

Moreover, as states are trying to reduce the number of people in prison, there has been a growth of civil and other policies that are intended to control people who have run afoul of the law, but stop short of putting them in prison. One new area is what's called spatial exclusions in addition to or in lieu of arrest. One can be issued a stay-out-of-drug-area order—called a SODA—or a stay-out-of-area of prostitution order. One can be excluded from public parks. Many parties involved in public or private housing now use trespass laws to keep anyone who has been convicted of a drug crime from being allowed on the premises. The number of people affected by such restrictions is significant. One study



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found that 30% of felony drug offenders now have SODA orders. For instance, in Seattle, almost the entire downtown area is defined as a drug area, so someone who has received a SODA is banned from entering most of the city's downtown.

If one compares ethnographies of people who have been in trouble with the law, are ex-felons, or are on the run from the law with ethnographies of people who are undocumented, some striking similarities emerge, such as a reluctance to interact with mainstream institutions. This can mean avoiding going to the hospital, avoiding conventional employment, or avoiding going to any place where one might encounter agents of the police or become visible to government officials. These all stem from the constant threat of apprehension, which is part of what drives many undocumented immigrants and ex-felons into casual day labor jobs and the underground economy.

Shifting currents

So let's now step back and do a thought experiment. Let's substitute race for either ex-felon or undocumented status and then list all of the consequences that people live with for the rest of their lives—consequences that are written in laws and legally enforced, such as the various forms of legal discrimination. It begins to look like legal apartheid, but an apartheid based not on race, but on legal status. If these laws used race to define people, the laws would be unconstitutional discrimination. But, in fact, society does have these punishing laws based in legal status but with large racial disparities in their effects. That is in large measure because the people suffering this exclusion are seen as responsible, morally responsible, for their own fate. The rationale is that they broke the law—some law—and must pay the price.

What I would like to propose is that the nation may be moving from a system based on phenotype to a system based on legal status. The end result would be a way to continue to exclude brown- and black-

skinned people and to exploit them in many ways, but with a legal system to enforce the new conditions and no obvious way to challenge them, all the while allowing diversity and access to the mainstream for many non-whites. And importantly, it does not lead to the complaint of racial discrimination because the people being excluded are seen as morally responsible for their own fate.

Deportation and post-entry social control is a legal form of oppression that has far-reaching consequences that are not widely recognized. These populations are predominantly non-white, but they are being excluded not formally because of race. Nevertheless, the negative effects fall primarily on certain racial groups, just as William Julius Wilson described the effects of economic changes in the 1970s.

My bottom line is that we need clear thinking about the ways in which laws at many levels in the United States do not reflect our basic values. In turn, we need a model of a social movement that is not based in civil rights, because we have defined millions of people living in this country as being outside of civil society. We need to think about whether that is something we want our laws to do, whether that's something that is consistent with our moral values, and whether there might be a better way of thinking about the human rights of people and the right to social inclusion in society. In short, we need a different way of thinking about these very critical issues that have remained misunderstood and insufficiently explored for too long.

Mary C. Waters is the M.E. Zukerman Professor of Sociology at Harvard University. This article is derived from her presentation of the annual Henry and Bryna David Lecture at the National Academy of Sciences on May 3, 2016. A more complete discussion of this topic will be found in the forthcoming book she is co-authoring with Philip Kasinitz, The New American Dilemma: Legal Exclusion in Post-Civil Rights America.