Commentary

Gendering Crimmigration:

*The Intersection of Gender, Immigration, and the Criminal Justice System*

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ABSTRACT

In the last decade, legal scholars have noted with alarm the increasing alignment between immigration enforcement and the goals and methods of the criminal justice system, terming this alignment "crimmigration." Although discussions of race and nativism have played a large part in this analysis, the same cannot be said for the connection between crimmigration and gender. This Commentary begins by introducing the reader to the rise of crimmigration, the intersection of gender with the criminal justice system, and the intersection of gender with immigration. Then, using examples of immigrant women's lived experiences, the author explores scholars' failure to consider a gendered analysis, demonstrating that a gender-blind approach ignores how most immigrant families interact with the state. The Commentary concludes by offering suggestions to decouple immigration and the criminal justice system in light of this gendered analysis, with the intent of encouraging scholars and policymakers to reconsider crimmigration's overly individualistic approach to a system that harms women and families disproportionately.

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Encarnación Bail Romero entered the United States without inspection in 2006. She gave birth to her son, Carlos, in Missouri later that year. Carlos and Ms. Romero slept on the floor of a friend’s apartment for the first few days of Carlos’s life. Eventually, a parent educator was able to find a crib for Carlos, but the mother and son’s living conditions remained poor and it was difficult for Ms. Romero to find sufficient food for Carlos. A few months later, the pair moved in with family, and Ms. Romero found work in a poultry processing plant in Barry County, Missouri. On May 22, 2007, Immigration and Customs Enforcement (“ICE”) officers raided the plant and arrested Ms. Romero. Because Ms. Romero was undocumented and had used false documents, including a false social security number, to obtain a job at the plant, the federal government charged her with aggravated identity theft. She pled guilty on October 11, 2007, and was sentenced to two years in prison with an order of removal following her release.

Although Carlos remained with Ms. Romero’s family for a time after she was taken into custody, each adult worked full-time and babysitting responsibilities eventually transferred to a local clergy couple. The parent educator visited Ms. Romero in jail in September 2007 and asked for her consent.

4. Adoption of C.M.B.R., 332 S.W. 3d at 801.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id. at 802. Ms. Romero was prosecuted under 18 U.S.C. § 1028A, which sentences someone to two years imprisonment for “knowingly transf[er],[ing], possess[ing], or us[ing], without lawful authority, a means of identification of another person.” However, the Supreme Court of the United States has since interpreted § 1028A to require that the government prove “that the defendant knew that the means of identification at issue belonged to another person.” Flores-Figueroa v. United States, 129 S. Ct. 1886, 1894 (2009). The Court held that, “in the classic case of identity theft, intent is generally not difficult to prove.” Id. at 1893. See also Peter R. Moyers, Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law, 32 SEATTLE U. L. REV. 651, 688-699 (arguing, pre-Flores-Figueroa, that § 1028A was intended to apply only to traditional identity-theft cases and has been misapplied to immigration cases where defendants were unaware that they were using the social security number of another person).
10. Adoption of C.M.B.R., 332 S.W. 3d at 802.
11. Id.
to Carlos’s adoption.12 Ms. Romero refused,13 requesting that Carlos be placed in foster care until she was able to take over his care.14 Soon after that, when Carlos’s uncle went to pick him up from the “babysitter,” he was told that marshals had taken Carlos away. When Ms. Romero learned Carlos was missing, she tried to contact the aide and the sitters, but they did not answer her calls. In the meantime, Carlos had been given to a couple who were interested in adopting him. They served adoption papers to Ms. Romero in English, which she could not read, and several days later were given temporary custody of Carlos by a Missouri judge.15

What followed next was a legally convoluted path that has “ensured that, whatever the ultimate outcome, hearts will be broken.”16 Although Ms. Romero soon sent the adoptive parents a letter requesting, “quiero que me veug a visitor todo el tiempo que este aqui en la carcel,”17 she was denied any contact with Carlos.18 She was also routinely denied due process rights, received ineffective assistance of trial counsel, and the case was routinely delayed.19 Although she does not speak English, she received information about her case in English with no translation services available.20 Most significantly, Carlos’s adoptive parents hired and paid for her lawyer, creating a conflict of interest.21 Finally, the trial court determined that Ms. Romero had abandoned her son, and it terminated her parental rights, allowing Carlos to be adopted.22 It took almost four years for the Supreme Court of Missouri to remand the case, finding that Ms. Romero’s rights had been violated.23

In December 2009, María Bolaños, an undocumented immigrant from El Salvador, called the Prince George’s County, Maryland, police station to report a

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12. Id.
13. Id.
17. Id. at 830 (Stith, J., concurring in part and dissenting in part). In English, this translates to, “I would like to have visitation with my son all the time that I am here in jail.” See id.
18. Adoption of C.M.B.R., 332 S.W. 3d at 830 (Stith, J., concurring in part and dissenting in part).
19. See generally id. (Justice Stith and Justice Wolff’s concurring and dissenting opinions, which would have returned custody to Ms. Romero immediately). For a detailed timeline of the case, see id. at 840-45 (Wolff, J., concurring in part and dissenting in part).
20. Brané, supra note 1.
21. Id.
22. Adoption of C.M.B.R., 332 S.W. 3d at 823.
23. Id. at 840. Both dissenting judges would have given custody to Ms. Romero without requiring remand. Id. at 825 (Stith, J., concurring in part and dissenting in part); Id. at 845 (Wolff, J., concurring in part and dissenting in part).
case of domestic violence. Instead of keeping her safe from an abusive husband, the police arrested Ms. Bolaños and charged her with illegally selling a $10 phone card. She was taken into police custody and fingerprinted; the police shared the prints with ICE, and ICE determined that Ms. Bolaños was undocumented. The criminal charges were dropped but Ms. Bolaños was shackled and held in a detention facility, even though she informed ICE that she was still breastfeeding her young daughter, a U.S. citizen. After a doctor insisted, she was fitted with an ankle bracelet and released pending her deportation hearing. Of the bracelet, she said, “I’m really ashamed to show it in public. . . . People see it and think I’m a murderer. I try to keep it covered at all times.”

Ms. Bolaños is fighting her deportation. In November 2010, she confronted an ICE official about her initial arrest. “I called the police after a fight with my partner. I thought they would help me. . . . But through this the police turned me over to ICE, and now I have a deportation order.” As of this writing, she has managed to remain in the country and care for her daughter. But Ms. Bolaños’s husband is also facing deportation and, because he is from Mexico and she is from El Salvador, their daughter will likely be forced to grow up without at least one of her parents. ICE claims that, in this case, its system “functioned exactly as it was designed to, allowing ICE to identify individuals booked into jail for a state crime and who were also present in the country unlawfully.” But immigrant rights groups and even Prince George’s County State’s Attorney Glenn F. Ivey feel differently. Ivey says, “We should target our limited state and federal law enforcement dollars on killers, rapists, child molesters, human traffickers and violent gang members. . . . This kind of defendant should not be a high priority.”

26. The process occurs automatically under Secure Communities, discussed in Part I infra.
27. Vedantam, supra note 25.
28. Id.
29. Id.
30. Id.
32. His deportation order does not stem from Ms. Bolaños’s call to the police but from a traffic violation. Vedantam, supra note 25.
33. Id.
34. Id.
35. Id.
36. Id.
Ms. Romero and Ms. Bolaños are not the only noncitizen women whose lives have been negatively impacted by the confluence of immigration and criminal laws. A woman in Rhode Island was convicted of felony criminal neglect of a child and deported after state officials determined that her husband abused their two children. Because the state also terminated her parental rights, she was not allowed to bring her children with her back to Mexico, and they were placed in foster care. Women who call the police to report abuse are often arrested as well, particularly in states with mandatory arrest laws or “where the couple doesn’t speak English and there is confusion about what happened,” and these arrests can have immigration consequences as well.

These women’s stories all demonstrate a troubling trend. As the immigrant population in the United States grows, immigration policy has shifted “away from regulation and toward enforcement, punishment, and deterrence,” making immigration enforcement goals more aligned with those of the criminal justice system. Legal scholars have coined this confluence “crimmigration.” Crimmigration has a significant impact on the functioning of both immigration detention and the state and federal prison systems. Because the number of crimes the Immigration and Nationality Act (“INA”) deems deportable offenses has increased in recent years, crimmigration increases the number of immigrants who are deportable and held in immigration detention centers. The Supreme Court has upheld a law that requires mandatory detention until removal for any noncitizen who has been convicted of an aggravated felony and served his or her sentence, without requiring an individualized due process hearing showing that the detainee poses a “danger to society or a flight risk.” Simultaneously, because ICE does not have the capacity to seek out and detain all immigrants eligible for deportation, the criminal justice system often steps in to fill in the

37. A note on terminology: when I refer to noncitizens, I include undocumented immigrants, lawful permanent residents, and non-immigrants—excluding tourists—who are here on a temporary, but documented, basis. I have chosen to use the term “undocumented immigrant” instead of “illegal immigrant” or “illegal alien” because I believe those terms are divisive, incorrect, and dehumanizing. For a more in-depth discussion of terminology, see STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1140-41 (5th ed. 2009).
42. The first scholar to address this “crimmigration crisis” was Juliet Stumpf, who is now widely regarded as the preeminent expert on the topic. See Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 AM. U. L. REV. 367 (2006).
44. 8 U.S.C. §1226(c) (2006).
gaps, increasing the number of immigrants held in federal prisons.\textsuperscript{46}

As Teresa A. Miller succinctly describes, “[c]riminal aliens (deportable for their post-entry criminal conduct), illegal aliens (deportable for their surreptitious crossing of the U.S. border), and terrorists . . . are all deemed dangerous foreigners for whom criminally punitive treatment and removal are uniformly appropriate and urgently necessary.”\textsuperscript{47} Stephen Legomsky argues persuasively that the immigration enforcement system builds off the criminal justice system, with the “theories, methods, perceptions, and priorities” of the latter incorporated into the former.\textsuperscript{48} Jennifer Chacón builds on this theory to argue that “not only are we seeing what Stephen Legomsky has termed the asymmetric incorporation of criminal justice norms into civil removal proceedings, but we are also witnessing the importation of the relaxed procedural norms of civil immigration proceedings into the criminal realm.”\textsuperscript{49} This mutual reinforcement has a profound impact on noncitizens’ lives.

Although the past five years have seen a marked increase in scholarly interest in crimmigration issues, the same cannot be said for the intersection of crimmigration and gender. Scholars have not even begun to address the issue. Meanwhile, women’s detention in immigration centers, in pure numbers and as a percentage of the total population of the centers, has increased from 7 percent in 2001 to 10 percent in 2009.\textsuperscript{50} This growth is caused by a combination of factors, including “increased prosecution of immigration violations, workplace raids, and harsh sentencing for drug offenses.”\textsuperscript{51} In other words, this growth comes from both the immigration and criminal justice sides of crimmigration: ICE’s increased crackdown on workplaces where undocumented female immigrants are likely to be found, and women’s increased presence in the criminal justice system.

The stories of female immigrants clearly demonstrate the mutual reinforcement that Stephen Legomsky and Jennifer Chacón have identified, but thus far scholars have ignored women. Women are often invisible in criminal justice and immigration discussions, and the new focus on crimmigration is no different. As the stories of Ms. Romero and Ms. Bolaños illustrate, however,

\textsuperscript{46} See generally Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (2007) (arguing that immigration law has played a role in an increased focus on governing through crime); see also Teresa A. Miller, Citizenship & Severity: Recent Immigration Reforms and the New Penology, 17 GEO. IMMIGR. L.J. 611, 619 (noting “greater criminal punitiveness within a nominally civil system of immigration regulation”).

\textsuperscript{47} Teresa A. Miller, Blurring the Boundaries Between Immigration and Crime Control After September 11th, 25 B.C. THIRD WORLD L.J. 81, 113 (2005).


\textsuperscript{51} Id. at 702.
female immigrants’ experiences with crimmigration are uniquely impacted by their gender and familial status. Women and families have a distinctive relationship with the state that a gender-blind analysis misses entirely. I seek to insert women’s and families’ experiences into the field, ultimately arguing that as criminal law and immigration enforcement become more and more intertwined, our most vulnerable populations suffer the most.

In Part I, this Commentary provides background to crimmigration, discussing developments in immigration law that have made the confluence of immigration and criminal law especially critical and describing how criminal law interfaces with immigration law. In Part II, I examine the intersection of gender with the criminal justice system and then gender with immigration. Part III explores the failure of crimmigration scholars to analyze how gender interacts with the criminal justice system and immigration enforcement, ultimately concluding that a gender-blind look at crimmigration ignores the way most immigrant families interact with the state. In Part IV, I conclude by offering suggestions to make the gendered impact of crimmigration less harmful for women, men, and families.

I. THE RISE OF CRIMMIGRATION

Immigration and crime control have not always played such an intertwined role in the United States. Indeed, there was no mechanism for deportation at the federal level until the Immigration Act of 1891 created the Office of Immigration within the Treasury Department to deport people who entered the country without authorization. These new laws were motivated by racial animosity towards Chinese immigrants; the Supreme Court upheld laws with similar racial motives in two notorious cases. Even with the rise of administrative deportation, however, immigration and crime remained decoupled. The Immigration Service soon increased that number and

55. The very term “administrative deportation” indicates that the government did not aim its deportation efforts at criminal defendants.
56. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN
mostly located noncitizens in “asylums, hospitals, and jails,”57 perhaps indicating that immigration officials were beginning to link undesirable immigration with crime. Even so, the government did not begin to deport noncitizens for criminal convictions until 1917.58 Furthermore, a strict statute of limitations on deportation59 seems to mitigate this potential link between immigration enforcement and crime. “The statute of limitations on deportation was consistent with the general philosophy of the melting pot: it seemed unconscionable to expel immigrants after they had settled in the country and begun to assimilate.”60 In other words, although it may have been desirable to remove noncitizens who had become wards of the state shortly after their arrival, they were inoculated from removal after a period of time, no matter what crime they might commit.61 Additionally, entering the U.S. without inspection was not a grounds for removal, no matter how recent.62

All this began to change in the 1920s. In 1924, the Johnson-Reed Immigration Act established numerical limits on how many immigrants could enter the country each year, restricting immigration from some ethnic groups and countries much more than others.63 Perhaps just as important for the development of crimmigration, by 1929, the United States had criminalized illegal entry itself, “providing a means to criminally punish the growing class of [noncitizens] present without authorization.”64 Before the 1930s, immigrants were either “legitimate,” “illegitimate,” or “ineligible,”65 but “Congress’s criminalization of unauthorized migration created the ‘illegal alien.’”66 By the 1950s, “illegal” was the word of choice to describe undocumented immigrants.67

The combination of immigration and criminal law that began in the first decades of the twentieth century expanded in the century’s last decades, further linking the two areas of law and introducing harsher penalties for the violation of

57. Id.
59. There was a one-year statute of limitations on initiating deportation proceedings before 1917. Chacón, Unsecured Borders, supra note 53, at 1836.
60. NGAI, supra note 56, at 59.
61. See id.
62. Id. For a compelling argument that border crossings alone should not constitute a crime modernly, see generally Victor C. Romero, Decriminalizing Border Crossings, 38 FORDHAM URB. L.J. 273 (2010). Professor Romero notes that the criminal justice system treats traffic violations, for example, as a civil, administrative penalty and treats drug possession, for example, as a criminal offense. Id. at 279. “In the immigration context, however, this distinction [between the two systems] disappears, for Congress has seen it fit to establish both civil, administrative penalties . . . as well as criminal consequences . . . for the same conduct—entry without inspection.” Id.
63. NGAI, supra note 56, at 3.
64. Chacón, Unsecured Borders, supra note 53, at 1837.
67. Id.
either. There are two main criminal offenses that have immigration removal consequences today: crimes of moral turpitude and aggravated felonies. U.S. law does not clearly define crimes of moral turpitude, even though the term first appeared in an immigration statute in 1891. Legal dictionaries and courts have both attempted to define the term, and courts routinely find certain crimes to inherently contain moral turpitude, including “fraud, larceny, or intent to harm persons or things.” The consequences for conviction of a crime of moral turpitude have increased in the twentieth century. For example, current law provides that a lawful permanent resident is deportable if, within ten years after the date of admission, he or she commits one crime of moral turpitude “for which a sentence of one year or longer may be imposed” or if he or she commits more than one such crime at any time after admission. For undocumented immigrants, conviction of the crime of moral turpitude is not necessary; merely “admit[ting] committing acts which constitute the essential elements of . . . a crime involving moral turpitude” is sufficient to make that immigrant inadmissible.

68. 8 U.S.C.A. § 1227(a)(2)(A)(i)-(iii) (West 2011). The INA lists other criminal grounds for removal, including high speed flight from an immigration checkpoint; failure to register as a sex offender; conviction of controlled substance and certain firearms offenses; miscellaneous crimes; domestic violence, stalking, and child abuse crimes; failure to register and falsification of documents, including document fraud and falsely claiming citizenship; and national security grounds. See §1227(a)(2)-(4). However, most of these crimes are also considered either aggravated felonies or crimes of moral turpitude, and ones that are not have much broader avenues for relief from removal. See 8 U.S.C.A. § 1229b (West 2011) (describing mechanisms for canceling removal or adjusting status).

69. See generally Derrick Moore, “Crimes Involving Moral Turpitude”: Why the Void-For-Vagueness Argument is Still Available and Meritorious, 41 CORNELL INT’L L.J. 813 (2008) (arguing that the term is so unclearly defined that the U.S. Supreme Court should find moral turpitude to be unconstitutionally vague).

70. Id. at 821.

71. See, e.g., BLACK’S LAW DICTIONARY 1008-09 (6th ed. 1990) (“Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others.”).

72. See, e.g., Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996) (adopting a definition of moral turpitude as “conduct that shocks the public conscience” or conduct that is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general”).

73. Moore, supra note 69, at 824. It is important to note, of course, that these crimes also overlap with aggravated felonies. See 8 U.S.C.A. § 1101(a)(43) (West 2011).


75. 8 U.S.C.A. § 1182(a)(2)(A) (West 2011). This harsher penalty—with even fewer due process requirements—originated with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627. IIRIRA made “admission” to the United States “determine whether a noncitizen will be subject to the admissibility grounds” or the removal grounds. LEGOMSKY & RODRIGUEZ, supra note 37, at 522. This means that undocumented immigrants, who were never “admitted” to the country for the purpose of the INA, are considered under admission grounds, while lawful permanent residents, who were admitted to the country, are considered under removal grounds. There are two benefits to the admission grounds under § 1182(a)(2)(A), however, that do not apply to immigrants under 8 U.S.C. § 1227(a)(2): the former contains an exception for minors and
Aggravated felonies are perhaps an even more contentious ground for deportation, in part because the term today encompasses an enormously broad range of crimes\textsuperscript{76} and in part because avenues for relief from removal are nonexistent.\textsuperscript{77} “Notably, it was the Anti-Drug Abuse Act of 1988, a crime-control bill intended to combat narcotics trafficking, rather than an immigration bill that expanded the categories of removal by creating an ‘aggravated felony’ ground,”\textsuperscript{78} a development with profound implications for immigrants convicted of crimes. Although the 1988 bill included crimes that could truly be considered “aggravated,” including murder or trafficking in drugs or weapons,\textsuperscript{79} Congress began to expand the definition in 1990.\textsuperscript{80} In 1996, Congress passed both the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”)\textsuperscript{81} and the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”),\textsuperscript{82} making gambling, bribery, minor drug offenses, thefts, and burglaries removable aggravated felonies\textsuperscript{83}—even when the crimes are neither aggravated nor felonies according to criminal statutes. During the AEDPA floor debate, representatives touted the link between noncitizens, criminals, and terrorists, with one representative calling for the removal of “those who abuse both our immigration and criminal laws. S. 735 ensures that the forgotten Americans—the citizens who obey the law, pay their taxes, and seek to raise their children in safety—will be protected from the criminals and terrorists who want to prey on them.”\textsuperscript{84}

Following the September 11, 2001 terrorist attacks, the criminalization of immigration law escalated further. The USA PATRIOT Act, the National Security Entry-Exit Registration System, and the Secure Fence Act have all “conflated crime, national security, and immigration.”\textsuperscript{85} Just as importantly, recent years have seen the rise of state and local enforcement of crimmigration.


\textsuperscript{76} 8 U.S.C.A. § 1101(a)(43) (West 2011).

\textsuperscript{77} For both permanent residents and undocumented immigrants, relief from removal is within the discretion of the Attorney General unless the individual has “been convicted of any aggravated felony.” 8 U.S.C.A. § 1229b(a)(3) (West 2011).

\textsuperscript{78} Aarti Kohli, Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens, 2 CALIF. L. REV. CIRCUIT 1, 5-6 (2011). The Act was widely known as the Drug Kingpin Act. Id. at 6.


\textsuperscript{80} The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (adding money laundering and any crime of violence for which at least a five-year sentence is imposed to the list of aggravated felonies).


\textsuperscript{82} Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401, 110 St. 1214, 1277-78. AEDPA was passed in the wake of the Oklahoma City bombing and was frequently cited as a means to prevent such acts of terrorism, even though none of the conspirators were immigrants. See, e.g., 142 CONG. REC. H3606 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde).

\textsuperscript{83} Kohli, supra note 78, at 6-7.


The most notorious example has been Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act of 2010, known as S.B. 1070. The Obama administration successfully obtained a preliminary injunction based on federalism grounds against sections of the law that “called for police officers to check a person’s immigration status while enforcing other laws and required immigrants to prove that they were authorized to be in the country or risk state charges.” However, in many other respects the executive branch has been all too happy to use state and local resources to enforce immigration laws. ICE’s 287(g) program, for example, “allows a state and local law enforcement entity to enter into a partnership with ICE, under a joint Memorandum of Agreement (MOA), in order to receive delegated authority for immigration enforcement within their jurisdictions.” The MOAs allow state and local law enforcement officers to act as ICE or border patrol officers in enforcing immigration laws.

In 2008, Homeland Security instituted Secure Communities with four strategic goals: (1) “[i]dentify and process all criminal aliens amenable for removal” currently in custody; (2) increase detention space and alternatives to detention to “ensure no removable alien is released into the community;” (3) shorten the time between initial detention and removal; and (4) deter unlawful immigration and decrease recidivism. To do so, ICE uses technology that links “local law enforcement agencies to both FBI and DHS biometric databases,” so that fingerprints are automatically checked with immigration history.

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86. Randal C. Archibold, Arizona Enacts Stringent Law on Immigration, N.Y. TIMES, April 23, 2010, http://www.nytimes.com/2010/04/24/us/politics/24immig.html. It is important to note that Arizona Governor Jan Brewer, when she signed the bill into law, touted the bill as a crime-reducing measure:

I firmly believe it represents what’s best for Arizona. Border-related violence and crime due to illegal immigration are critically important issues to the people of our state, to my Administration and to me, as your Governor and as a citizen. There is no higher priority than protecting the citizens of Arizona. We cannot sacrifice our safety to the murderous greed of drug cartels. We cannot stand idly by as drop houses, kidnappings and violence compromise our quality of life. We cannot delay while the destruction happening south of our international border creeps its way north.


88. The name comes from INA § 287(g), which was added to the INA by IIRIRA in 1996 but not utilized by any state or local government until Alabama signed the first Memorandum of Agreement in 2003. ICE, Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Nov. 16, 2011). §287(g) is codified at 8 U.S.C. § 1357 (2006).

89. ICE, Fact Sheet: Delegation of Immigration Authority, supra note 88.


92. Id. at 5.
claims that it “allocate[s] appropriate resources” based on crimes that “pose the greatest risk to the public” and that it exercises its discretion in choosing whom to detain and remove. Jennifer Chacón points out, however, that Secure Communities screens arrestees “without regard for the reason for the arrest or whether the person is guilty or innocent of a crime,” putting the accuracy and sincerity of ICE’s claims into question.

Statistics and anecdotes further emphasize that ICE does not focus its police power on high-level offenders. Monthly statistics through November 2010 indicate that over one-half of the people removed through the Secure Communities program are low-level offenders and an additional one-quarter are non-criminals. Ms. Bolaños’s story illustrates a key problem with these programs. Local police departments need the cooperation of residents to investigate reported crimes. Few would blame Ms. Bolaños for refusing to cooperate with police in the future when calling them for help with a dangerous situation previously put her ability to remain in the country in danger. The International Association of Chiefs of Police has questioned the benefits of using local agencies to enforce immigration violations: “[w]ithout assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants with critical information would not come forward, even when heinous crimes are committed against them or their families.” Similarly, the Major Cities Chiefs Association writes,

without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear. Such a divide between the local police and immigrant groups would result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.

María Bolaños’s charged crime, selling a $10 phone card, certainly posed almost no risk to the public, and thus far ICE has refused to use its discretion to allow her to remain in the country. Although ICE has taken steps under the Obama administration to prevent arrest for minor offenses like Ms. Bolaños’s as a “guise to initiate removal proceedings,” it is unclear how much impact these

93. Id. at 2.
94. Chacón, A Diversion of Attention?, supra note 90, at 1596-97.
95. Id. at 1596.
97. IMMIGRATION POL’Y CTR., LOCAL ENFORCEMENT OF IMMIGRATION LAWS THROUGH THE 287(G) PROGRAM: TIME, MONEY, AND RESOURCES DON’T ADD UP TO COMMUNITY SAFETY 3 (Apr. 2, 2010).
98. Id.
99. Press Release, Dep’t Homeland Sec., Secretary Napolitano Announces New Agreement for
directives will have on ICE practices. Some evidence suggests that ICE may even be moving in the wrong direction since the implementation of Secure Communities.\textsuperscript{100}

This link between immigration and crime has had a profound impact on how Americans view immigrants. In 2000, when “[a]sked whether ‘more immigrants cause higher crime rates,’ 25 percent [of adults] said [this was] ‘very likely’ and an additional 48 percent said [this was] ‘somewhat likely’—that is, about three-fourths (73 percent) believed that immigration was causally related to more crime.”\textsuperscript{101} Homeland Security now labels any noncitizen with a criminal conviction a “criminal alien,” recently publicizing its success in removing 195,000 such criminal aliens in 2010.\textsuperscript{102} However, empirical data clearly suggest that immigrants\textsuperscript{103} are less likely to commit crimes than U.S.-born citizens.\textsuperscript{104} According to the Homeland Security Office of Immigration Statistics, although


100. A recent ICE directive itself seems to indicate this. A 2008 fact sheet laying out the program, supra note 91, at 2, described ICE’s risk-based approach as follows:

\begin{itemize}
  \item Level 1 – Individuals who have been convicted of major drug offenses and violent offenses such as murder, manslaughter, rape, robbery, and kidnapping;
  \item Level 2 – Individuals who have been convicted of minor drug offenses and mainly property offenses such as burglary, larceny, fraud, and money laundering; and
  \item Level 3 – Individuals who have been convicted of other offenses.
\end{itemize}

However, a 2011 memorandum to all ICE employees replaces “the existing Secure Communities levels of offenses:”

\begin{itemize}
  \item Level 1 offenders: aliens convicted of “aggravated felonies,” as defined in § 101(a)(43) of the Immigration and Nationality Act, or two or more crimes each punishable by more than one year, commonly referred to as “felonies”;
  \item Level 2 offenders: aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as “misdemeanors”; and
  \item Level 3 offenders: aliens convicted of crimes punishable by less than one year.
\end{itemize}

Memorandum from John Morton, Director, ICE, to All ICE Employees regarding Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens 2 (Mar. 2, 2011), available at http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf. This change seems to reflect a change from a sensible sliding scale based on the severity of the crime and the likelihood that the immigrant actually poses a risk to security to a sliding scale based on the INA’s definition of aggravated felonies and other removable crimes, which can include crimes that are neither aggravated nor felonies. This re-definition of the scope of the risk-based approach can only harm noncitizens.


103. These statistics include undocumented immigrants, lawful permanent residents, and naturalized citizens.

104. Chacón, Unsecured Borders, supra note 53, at 1879-80; BARRY KRISBERG & VERONICA SMITH, BERKELEY CTR. FOR CRIMINAL JUSTICE, WHERE IS THE FIRE? IMMIGRANTS AND CRIME IN CALIFORNIA 3-4 (2010) (noting that between 1991 and 2008 there has been a “dramatic decline in California in crimes reported to the police,” despite over 3.5 million new foreign-born immigrants in the state).
almost 30 percent of “[c]riminal [a]liens” were removed for “[d]angerous [d]rugs” in fiscal year 2009, just as many immigrants were removed for simple traffic offenses or immigration violations. Over the last 100 years, there has been an ever-increasing confluence of immigration and criminal laws, to the point where the government is no longer focused on removing noncitizens who pose a risk to the security of the United States but rather on the blanket removal of any immigrant who comes into contact with the criminal justice system. Although women are often ignored when we talk about either crime or immigration, the impact of escalating crimmigration practices on women could not be more dramatic and heartbreaking.

II. WOMEN, CRIME, AND IMMIGRATION

Immigration and crime are both often examined as male issues, despite clear evidence that women’s imprisonment “has increased dramatically and disproportionally in recent decades” and “nearly half of the foreign-born population in the United States is female.” This section will first examine women’s increasing interactions with the criminal justice system and then look at women’s experiences with immigration.

A. Women and the Criminal Justice System

The “tough on crime” policies that began in the United States in the 1980s have greatly increased the total number of incarcerated people in the United States. The war on drugs and “changes in the economy, social services, education, and employment opportunities” have also contributed to this dramatic increase. Although these policies may appear to be gender-neutral, “[w]omen are particularly vulnerable to policy changes because they are more likely than men to be incarcerated for drug-related or petty, nonviolent property crimes,” crimes specifically targeted by this recent legislation. For example, according to

107. Wolf, Bloom & Krisberg, supra note 106, at 140.
108. SREEHARSHA, supra note 106, at 4.
110. Id. at 140.
111. Id. at 140-41.
the U.S. Department of Justice, men in jail are more likely to be incarcerated for a violent offense than any other type of offense, while women are less likely to be incarcerated for a violent offense than any other crime. Women are most likely to be accused or convicted of property offenses, drug offenses, or public order offenses.

As a result, the number of female prisoners is rising more quickly than the number of male prisoners, and there are now almost 200,000 female inmates in local jails and state or federal prisons across the country. Between 1995 and 2000, the number of women incarcerated in state, federal, and private facilities increased by 37.9 percent, while the number of men incarcerated increased by 26.8 percent. In 1990, jail inmates were 9.2 percent female; by 2009, the number had risen to 12.2 percent.

Female offenders face unique circumstances as a result of their gender. They are “disproportionately women of color, low-income, uneducated, and unskilled, with sporadic employment histories.” These women have often faced sexual abuse, assault, and domestic violence. They are also more likely than not to be the primary caregiver of minor children and to be

113. 26.5 percent of offenses. Id.
114. 17.1 percent of offenses. Id. When violent crimes are broken down by crime, women are also more likely to be incarcerated for less serious violent crimes like assault. Id. Furthermore, approximately 62 percent of these women had a prior relationship with the victim. BARBARA BLOOM, BARBARA OWEN, STEPHANIE COVINGTON & MYRNA RAEDER, NAT’L INST. OF CORRECTIONS, GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 13-14 (2002), available at http://www.nicic.org/pubs/2003/018017.pdf. This raises the possibility that the women were acting in self-defense against an abusive partner.
115. 32.4 percent of offenses. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, supra note 112.
116. 29.2 percent of offenses. Id.
117. 20.8 percent of offenses. Id.
121. BLOOM, OWEN, COVINGTON & RAEDER, supra note 114, at 10.
122. Id.
123. Id.; M. ANNE POWELL & CLARE NOLAN, CALIFORNIA STATE PRISONERS WITH CHILDREN: FINDINGS FROM THE 1997 SURVEY OF INMATES IN STATE AND FEDERAL CORRECTIONAL FACILITIES 1 (2003) (“Care taking arrangements for the children of those children of incarcerated fathers. While most fathers (85 percent) reported that at least one of their children were being cared for by the child’s other parent or step-parent, only 29 percent of incarcerated mothers reported their children in parental care. Mothers were much more likely than fathers to report that a grandparent was caring for their children (49 percent as compared to 14 percent). In addition, the children of incarcerated women were more likely than the children of incarcerated fathers to be in the care of a foster home, agency or institution (nine percent as compared to two percent).”); LITTLE HOOVER COMM’N, BREAKING THE BARRIERS FOR WOMEN ON PAROLE 7 (2004).
unemployed.\textsuperscript{124} They are often “[f]rom fragmented families that include other family members who also have been involved with the criminal justice system” and have significant health, mental health, or substance use histories.\textsuperscript{125} Despite these circumstances, the U.S. prison system has been remarkably slow to develop gender-responsive probation, incarceration, or parole systems.\textsuperscript{126} This failure has ramifications outside the criminal justice system—namely, for female immigrants and crimmigration in general.

\textbf{B. Women and Immigration}

As with women and the criminal justice system, female immigrants receive much less scholarly, political, and popular attention than male immigrants—a fact that is even more dramatic considering that women are almost half the foreign-born population in this country. Lawful permanent residents are disproportionately female, making up almost 55 percent of the total and outnumbering male permanent residents in every age group except ages five to nineteen.\textsuperscript{127} Undocumented immigrants under the age of forty-four are more likely to be male, while those forty-five and older are more likely to be female.\textsuperscript{128}

Despite these numbers, female immigrants are often especially vulnerable—and often in ways that mirror the inequalities women in the criminal justice system face. Immigrant women, like women in the justice system, are likely to be primary caregivers,\textsuperscript{129} so women like Encarnación Romero risk termination of their parental rights when they are taken into ICE custody or removed from the country. Even if their detentions do not result in removal, the detention of domestic violence survivors often entails leaving a child in the

\begin{thebibliography}{99}
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\bibitem{124} Bloom, Owen, Covington & Raeder, supra note 114, at 11 tbl.2.
\bibitem{125} Id. at 18.
\bibitem{126} For discussion of this problem and recommendations for rectifying it, see generally \textit{id.}; see also Wolf, Bloom & Krisberg, supra note 106, at 154-69. For specific critiques of the federal criminal justice system’s failure to develop policies addressing gender’s intersection with family ties, see, e.g., Jack B. Weinstein, \textit{The Effect of Sentencing on Women, Men, the Family, and the Community}, 5 COLUM. J. GENDER & L. 169, 178 (1996) (“In certain cases, in view of the necessity of maintaining family stability in environments where father role models are few and far between, downward departures from the [Sentencing] Guidelines and a search for alternatives to incarceration are a necessity for male defendants.”); Jody L. King, \textit{Avoiding Gender Bias in Downward Departures for Family Responsibilities Under the Federal Sentencing Guidelines}, 1996 ANN. SURV. AM. L. 273, 301 (recommending that “the decision to grant a downward departure for family responsibilities turn[] on the need of the defendant’s dependents”).
\bibitem{127} Homeland Sec., Office of Immigration Statistics, 2009 Yearbook of Immigration Statistics 25 tbl.8 (2010). Women are slightly less likely than men to be admitted on nonimmigrant grounds (which include tourism and business travel, study, temporary work and diplomacy). \textit{id.} at 80 tbl.29.
\bibitem{129} Sreeharsha, supra note 106, at 7.
\end{thebibliography}
custody of the abuser. Women often come to the U.S. to reunite their families or keep them together, but criminal and immigration laws often prevent them from succeeding.

Lack of access to education, both in their countries of origin and in the U.S., often means that immigrant women have fewer job opportunities. Immigrant men are much more likely to find professional or white-collar employment, while immigrant women are more likely to be homemakers or unemployed. Immigrant women’s median income in 2008 was $21,182—$3,259 less than U.S.-born women and $8,351 less than immigrant men.

A less obvious effect of this lack of education and job opportunities is reflected in the way that lawful permanent residents gain access to the U.S. While men are the majority of immigrants under employment-based preferences, which prioritize jobs requiring high levels of education and skill, women vastly outnumber men under family-sponsored preferences and as immediate relatives of U.S. citizens. This means that female immigrants who are able to enter the U.S. as lawful permanent residents are more likely to depend on men for their immigrant visas than vice versa. It also means that, because “the family immigration system has been fraught with backlogs and burdens that sometimes separate families for more than 20 years,” women must choose between remaining in their country of origin, often “as the sole providers in countries where women may lack the same economic and employment opportunities as men,” or entering the U.S. without documents.

When women do enter the U.S. without documents, they face unique risks and pressures. If they find work, it is often at factories that provide both low wages and a high likelihood for workplace raids by ICE agents. Because women make up an ever-growing share of the workforce in such factories, they are increasingly likely to come into contact with ICE and face deportation consequences. Women may also find work as domestic workers, where they are unable to organize and where their undocumented status allows employers to gain substantial control over their employees, underpaying them and perhaps threatening to report them to ICE if the women complain about workplace

130. Id. at 11.
131. Id. at 5.
133. SREEHARSHA, supra note 106, at 4.
134. 2009 YEARBOOK OF IMMIGRATION STATISTICS, supra note 127, at 26 tbl.9. Under the INA, “the term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.” 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 2011). These immigrants are “not subject to direct numerical limitations.” § 1151(b). Family-sponsored immigrants who do not qualify as immediate relatives, § 1151(c), and employment-based immigrants, § 1151(d), are subject to numerical restrictions. Preference for employment-based visas is only given to certain priority workers. 8 U.S.C. § 1153(b) (2006).
135. SREEHARSHA, supra note 106, at 4.
136. Rabin, supra note 50, at 702.
137. Id.
conditions or hours.138

Women may also be survivors of sexual assault and domestic violence, both related and unrelated to their immigration status. Such a large percentage of women are sexually assaulted when they cross the border from Mexico that advocates advise them to take birth control pills on their journeys.139 The assaults may come from the coyotes who help them cross the border, so-called “border bandits” who wait for them on the U.S. side of the Rio Grande, or even Border Patrol agents.140 “On a single tree outside Tucson, Arizona, an orange pair, a blue pair, and a white pair [of underwear] hang like grotesque ornaments among the desert’s thorny brush. Border activists and women’s advocacy groups call them ‘rape trees.’ Each pair of underwear, they say, represents a victim of sexual abuse.”141 Women with immigrant visas may have less dangerous journeys to the U.S., but they are also often survivors of domestic violence. As mentioned above, they may be dependent on their spouse for their lawful status,142 making them especially reticent to report domestic violence.143

Undocumented survivors like María Bolaños are often even less likely to report being crime victims for fear of coming to the attention of ICE.

In sum, gender plays parallel roles in immigration and in the criminal justice system. Female immigrants and women in the criminal justice system face employment, race, and class inequities. Their status as primary caregivers shapes their daily lives and their interactions with immigration and criminal laws. Finally, they are frequently survivors of sexual assault and domestic violence. Understanding the impact of gender on both immigration and the criminal justice system and the merger of criminal and immigration laws into “crimmigration,” however, does not explain why this merger occurred. Part III will begin by examining scholars’ attempts to understand this union. It will then argue that these attempts, by ignoring gender and family, have failed to comprehend the entire picture.

138. EVELYN NAKANO GLENN, FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA 180 (2010).
140. Id.
141. Id.
142. They may also be on a nonimmigrant visa that does not allow them to work, making them economically dependent as well. SREEHARSHA, supra note 106, at 8.
143. Although the Violence Against Women Act has attempted to correct this troublesome issue by allowing survivors to self-petition for lawful status, this option is only available to women whose spouses are citizens or permanent residents. Furthermore, there is a severe backlog that makes this option difficult for many women to take advantage of. Id. at 8-9.
III. BEYOND THE INDIVIDUAL AND THE STATE: INSERTING GENDER AND THE FAMILY INTO CRIMMIGRATION

Crimmigration scholars have shed light on an increasingly important legal issue that impacts real people’s lives. However, by failing to analyze how gender interacts with the criminal justice system and immigration enforcement, scholars have ignored an entire group of immigrants and their experiences. Just as crucially, scholars’ gender-blind examination of crimmigration overlooks immigrant families’ lived experiences by creating an individualistic framework that does not reflect how immigrants and their loved ones interact with the state. This Part examines the theoretical basis for the rise of crimmigration and then inserts the issue of gender to demonstrate how previous scholarship has failed to consider the full picture.

Before 2006, many scholars had noted the growing links between immigration and criminal law but had not discussed the analytical underpinnings that had driven the shift. Professor Stumpf, in a groundbreaking article, coined the term crimmigration and sought to “illuminate how and why these two areas of law have converged.” She observed that “criminal law seems a distant cousin to immigration law”: while the former is aimed at harm deterrence and punishment, the latter is ostensibly about “who may cross the border and reside here, and who must leave.” However, she further noted that the two areas of law are more similar and interconnected than they appear. Instead of regulating inter-personal relationships or relationships between businesses and individuals, both criminal law and immigration law “primarily regulate the relationship between the state and the individual.” Furthermore, both use “physical exclusion” and “lesser levels of citizenship” to isolate individuals regulated by criminal or immigration law from the broader society.

Membership theory indicates that both immigration law and criminal

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145. See generally Stumpf, The Crimmigration Crisis, supra note 42.

146. Id. at 377.

147. Id. at 379.

148. Id. at 379-80.

149. Id. at 381.

150. According to Stumpf, “[m]embership theory is based in the idea that positive rights rise from a social contract between the government and the people. Those who are not parties to that agreement and yet are subject to government action have no claim to such positive rights, or rights equivalent to those held by members.” Id. at 397. It “depend[s] on the decisionmaker’s vision of who belongs.” Id. “Immigration law defines membership in this society explicitly,
law entail making choices about who we want in the national community, making the merger of these two institutions into crimmigration a natural progression in a nation obsessed with crime prevention, punishment, and eliminating unauthorized immigration. Stumpf writes, “[t]he result of the application of membership theory has been to create a population, often identifiable by race and class, that is excluded physically, politically, and socially from the mainstream community.” Immigration enforcement explicitly factors in class by refusing to admit would-be immigrants who lack financial resources and allows consideration of race and ethnicity through racially-related traffic stops and programs that require registration for men from Muslim and Arab countries. Although “criminal law’s disparate treatment of members of certain minorities and income levels is not [as] explicit” as it may be in immigration law, there is certainly a disparate impact on minority and indigent communities.

At the same time, however, crimmigration theory and membership theory together have ignored gender as a unit of analysis, thus failing to examine gender as a crucial intersection with race and class. Perhaps scholars assume that immigration law is gender-neutral, or that women are not convicted of crimes in sufficient numbers to warrant study, or both. Of course, these assumptions are wrong. Women are a growing presence in the criminal justice system, both in raw numbers and as a percentage of the total. Less obviously, the ramifications of immigration law are not gender-neutral. Although the INA is facially neutral, its impact is often not. Laws like the 1986 Immigration

by establishing a ladder of accession to permanent residence and then formal U.S. citizenship,” while the term “[c]riminal defines membership implicitly, by stripping critical elements of citizenship from individuals who commit relatively serious offenses,” like the freedom of association, the right to vote, and access to the social safety net. Id. at 398-99.

151. Stumpf, The Crimmigration Crisis, supra note 42, at 413.
155. Stumpf, The Crimmigration Crisis, supra note 42, at 417 (noting that “the rules of the criminal justice system are neutral on their face, but their effect on racial and ethnic minorities is notoriously disproportionate to the number in the general population” and citing numerous articles and studies in support of this proposition).
156. See, e.g., id. at 377-78 (failing to mention gender as a component of membership theory when discussing crimmigration); T. Alexander Aleinkoff & Rubin G. Rumbaut, Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?, 13 GEO. IMMIGR. L.J. 1, 3-4, 4 n.7 (discussing race-based membership policies but relegating citizenship laws discriminating on the basis of gender to a footnote and discussing them only in a historical context).
157. See supra Part II.A.
158. The obvious and controversial exception to the INA’s facial neutrality is 8 U.S.C. §§ 1401(g), 1409(c), which impose a five-year residence requirement on citizen fathers—but not citizen mothers—before they may transmit their citizenship to a child born abroad, outside marriage, where the other parent is a non-citizen. The Supreme Court has upheld these statutes. See generally Flores-Villar v. U.S., 131 S. Ct. 2312 (2011) (affirming, in a
Reform and Control Act (IRCA) legalized the status of many more male than female undocumented immigrants. The INA also denies admission to anyone who, “in the opinion of the consular officer . . . or . . . the Attorney General,” “is likely at any time to become a public charge.” Under a totality of the circumstances test, the officer considers age, health, family status, assets, education, and skills. Although gender is not one of the factors listed in the test, it has historically been a significant deciding factor, and the government continues to deem “receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense” a relevant factor. Although men sometimes receive public assistance as well, women and children are the primary beneficiaries, indicating that women and children are more likely to be prevented from documented entry into the country. Finally, because immigrant women are less likely to have jobs and work experiences that qualify them for employment-based visas, they have fewer opportunities to come to the United States legally. These factors add up to create an immigration law with disparate impact on women and their children.

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159. See Syd Lindsley, The Gendered Assault on Immigrants, in Policing the National Body: Sex, Race, and Criminalization 175, 177-78 (Jael Silliman & Anannya Bhattacharjee eds., 2002) (“This gender bias was a result of several factors. First of all, men predominately filled the types of agricultural work upon which amnesty was contingent. Cannery and packing, in which women held the majority of jobs, were specifically excluded from the amnesty provision. Also, the documentation required for amnesty, such as driver’s licenses, pay stubs, and rent receipts was much more likely to be held by men than women.”).


162. See, e.g., MARTHA MARIE GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965 91 (2005) (noting that pregnant women were often deemed inadmissible because they were thought likely to become public charges); EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 5 (2002) (claiming that unmarried pregnant women were automatically presumed to be public charges).

163. U.S.C.I.S., Public Charge (Sept. 3, 2009), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a75436d1a/?vgnextoid=829b0a5659083210VgnVCM100000082ca60aRCRD&vgnextchannel=829b0a5659083210VgnVCM100000082ca60aRCRD.

164. See, e.g., Lindsley, supra note 159, at 177 (noting that welfare recipients are primarily women).


167. Because gender plays an obviously important role in both employment and welfare law, it seems natural that immigration scholars would analyze gender’s role when discussing the intersection of crimmigration and welfare or employment. Unfortunately, this is not the case. Another Juliet Stumpf article builds on membership theory. Stumpf, States of Confusion, supra note 85, at 1583-86. Immigration law’s transition “from a border-focused foreign policy matter to a more internal focus began with employment law” through IRCA, which “was the first expansion of federal immigration enforcement into employment, an area of traditional state concern.” Id. at 1583. However, instead of standing for an increasing federal presence over immigration control, IRCA represents a move away from immigration as foreign policy—and thus subject to federal control—and toward immigration as a domestic...
Furthermore, immigrant women—and, especially, immigrant women of color—are clearly defined as “other” by membership theory. They have the unique ability to reproduce more non-members, making them especially threatening. For Mexican women, for example, “their sexuality as well as their culture and language have been suspect and considered alien.” David Morales describes the “paradigmatic vision of ‘illegal’ immigration” as

a Mexican woman, brown-skinned and mestiza, nine-months pregnant, crossing the Rio Grande under cover of night. Such an image captures the full scope of the terror bound up with “illegal” immigration: the sneaking nocturnal setting lends the tableaus the requisite feeling of legal breach (of trespass onto sovereign property) while also emphasizing the defenselessness of the border, which is barely a “border” at all, just a river, like any other, that happens to mark a boundary. . . . That the immigrant herself is gendered as the “weaker sex” reinforces our sense that immigrants are dependent on us. That the woman is also literally burdened with a growing child represents the perpetual burden that We the People will bear once she and her pre-citizen fetus take residence in the United States. Her brown skin reflects our long-standing fear of cultural and genetic miscegenation.

Syd Lindsley suggests that we should see this conceptualization as an attack “on immigrant women’s ability to reproduce and maintain their families” and “an attempt to regulate and control immigrant women’s mothering.” With this conceptualization in mind, any membership theory analysis that looks at race and class but fails to consider gender will necessarily fail to understand the immigrant experience and its popular conception as a whole.

Just as important is current scholarship’s missed opportunity to discuss the way that gender changes immigrants’ relationship to the state. Although Juliet Stumpf argues that criminal law and immigration law both “primarily regulate the relationship between the state and the individual,” her conception of this issue. Id. Likewise, the Personal Responsibility and Work Opportunity Act (“PRWORA”) of 1996 “devolved federal power to the states to deny benefits to immigrants” and required that states receiving grants under PRWORA report anyone they knew to be undocumented. Id. at 1586. It “connected the state welfare laws with the condition under which noncitizens are admitted” by mandating that immigrants prove they have sufficient resources not to become a public charge. Id. at 1585.

168. For an intriguing and horrifying example of this, see Mary Romero, “Go After the Women”: Mothers Against Illegal Aliens’ Campaign Against Mexican Immigrant Women and Their Children, 83 IND. L.J. 1355, 1374-75 (2008) (looking at Mothers Against Illegal Aliens’ (“MAIA”) “dehumanizing construction of immigrant women as unworthy mothers”). MAIA claims that immigrant women are “crossing our border to ‘steal’ the American Dream by giving birth” and “are producing and utilizing children as hostages until demands for citizenship are met.” Id.

169. Id. at 1365.


171. Lindsley, supra note 159, at 185.

“individual” is gendered male. If we add gender and family into the crimmigration equation, it becomes clear that the scope of the impact of immigration law and the criminal justice system extends beyond the individual directly involved, whether that individual is male or female. When male immigrants are taken into ICE custody or deported, their children and partners are left behind to fend for themselves and are ignored by academic scholarship and popular opinion. When female immigrants are taken into ICE custody or deported, however, the media and popular opinion correctly recognizes that their status as primary caregiver—and thus their relationships with their family—is compromised. If a partner remains in the U.S. and is involved in the family, he often takes over primary caregiving responsibilities leaving the mother to survive in custody or in her home country without her family. But if the partner is also deported or is out of the picture, a woman with children may lose her parental rights involuntarily—as Ms. Romero did—or make a heartbreaking choice between leaving a citizen child in the U.S. and taking the child with her when she is deported.¹⁷³ When we analyze gender in conjunction with crimmigration, it is clear we are not simply talking about the relationship between individuals and the state but rather between families and the state.

Scholars’ failure to include women and gender in their examination of crimmigration represents more than simply ignoring a substantial portion of the individuals affected by crimmigration. Overlooking gender has led to an overly individualistic analysis of the relationship between noncitizens and the state, making it appear that only the individual who comes into direct contact with the crimmigration apparatus is affected. Inserting gender into the equation demonstrates that this individualistic approach harms men, women, children, and families and makes it clear that current scholarship does not represent the lived experiences of all immigrants.

IV. PROPOSALS FOR THE DECLINE OF CRIMMIGRATION IN WOMEN’S LIVES

Thus far, academia has failed immigrant women. This Part attempts to begin rectifying that failure by proposing specific laws and policies that could limit crimmigration’s impact on noncitizens in general and women in particular.

Crime and immigration have not always been linked, and only over the last several decades have the two become so interdependent. The law must halt—and hopefully reverse—the ever-increasing number of crimes identified as aggravated felonies discussed in Part I. The Immigration and Nationality Act should limit deportable crimes to those that are truly both aggravated and felonies, as the Anti-Drug Abuse Act did.¹⁷⁴ Not only would this limit deportation to punishment for those crimes that truly impact public safety, but it would also limit the number of crimes for which relief from deportation is not

¹⁷³ There are many reasons why she might not want to take her child with her, including poverty, social stigma, lack of education, and lack of medical care in her country of origin.

¹⁷⁴ Kohli, supra note 78, at 5-6.
available. Additionally, the INA should return to the era of statutes of limitations for removal, a time when “it seemed unconscionable to expel immigrants after they had settled in the country and begun to assimilate.” These two simple reforms—once taken for granted—would do much to decouple crime and immigration.

We should also aim to limit the detrimental impact that newer laws and policies have on immigrant populations. Secure Communities could become less damaging to noncitizens in several ways without implicating its overall mission. It could base removal on whether the noncitizen is actually convicted of, or at least charged with, a crime. It could also restrict automatic reporting to cases where the noncitizen is arrested for a high-level offense that in fact poses a danger to the community. We should also demand that our counties opt out of Secure Communities and 287(g) altogether. Local and state police collaborating with ICE makes our communities less safe by making noncitizens reticent to work with the police for fear of being arrested themselves and turned over to Immigration. This non-collaboration strategy has been working. Illinois Governor Pat Quinn ended his state’s involvement in Secure Communities. According to his administration, “Illinois signed up to help I.C.E. remove criminals convicted of serious crimes, but based on the statistics from I.C.E., that’s not what was happening.” The California legislature has been considering whether to allow counties to opt out of the program after San Francisco Sheriff Michael Hennessey “argued that engaging local police in immigration enforcement would erode hard-earned trust with Latino and other immigrant communities.” The Providence City Council recently expressed concern with the program and directed the public safety commissioner to review it. Continuing education about the damage Secure Communities actually does will hopefully lead to more actions like these.

This approach will help both male and female noncitizens escape the devastating impact of crimmigration, but there are specific actions that can shield women and families in particular. Perhaps most simply, educating police officers about domestic violence and other ways that women come into contact with the criminal justice system could have prevented Ms. Bolaños’s arrest in the first place. With Secure Communities in place, the initial arrest and fingerprint scan is currently the point of no return, regardless of whether a prosecutor ultimately decides to institute charges. If police officers are trained to be more careful in their approach to situations of domestic violence and other abuse, they could avoid involving ICE at all by not making hasty arrests in the first place.

175. NGAI, supra note 56, at 59.
177. Id.
Other actions must focus on women’s disproportionate role as primary caregivers\textsuperscript{179} for children. The INA currently allows for cancellation of removal for two categories of noncitizens: permanent residents who have lived in the U.S. for seven continuous years, five of which were under permanent resident status, and have “not been convicted of any aggravated felony”;\textsuperscript{180} and any noncitizen who has lived in the U.S. for ten continuous years, “has been a person of good moral character,” has not been convicted of a crime that would make her inadmissible or removable,\textsuperscript{181} and “establishes that removal would result in exceptional and extremely unusual hardship” to a citizen or permanent resident parent, child or spouse.\textsuperscript{182} Where a noncitizen is the primary caregiver of a U.S. citizen or permanent resident child, we should expand avenues for relief under either section. For example, because the continuous residence requirement is meant to stand as a proxy for connections to the U.S., being a primary caregiver to a citizen or resident child could be another such proxy. Such caregivers could be given relief with fewer years of residence. Furthermore, almost anyone implicated by the crimmigration crisis will be ineligible for relief under either section. To that end, we should redefine aggravated felonies and other crimes that make a prospective immigrant inadmissible or removable, as discussed above, or we should not make these crimes an absolute bar to relief. Additionally, in the case of undocumented immigrants, primary caregiving of a citizen or permanent resident child should automatically qualify as sufficient hardship to bar removal.\textsuperscript{183} All of these actions would benefit women and families caught up in the crimmigration system.

Finally, we must address the potential for termination of parental rights while primary caregivers are in ICE custody to ensure that what happened to Ms. Romero does not happen again. Unlike avenues for relief from deportation, these guidelines should apply regardless of whether the child is a citizen, a permanent resident, or undocumented. Beyond ensuring that the court upholds a parent’s procedural due process rights while in custody, ICE should release primary caregivers until their deportation hearings unless, after an individualized hearing, an immigration judge finds the noncitizen would pose an immediate threat to the community. In cases where release is not possible, immigrants’ rights groups should rethink their opposition to holding children with their parents in


\textsuperscript{180} 8 U.S.C.A. § 1229b(a)(1)-(3) (West 2011).

\textsuperscript{181} This includes aggravated felonies, crimes of moral turpitude, and national security grounds, as discussed in Part I, supra.

\textsuperscript{182} § 1229b(b)(1)(D). There is a limited exception for a “battered spouse or child” that decreases the amount of time that noncitizen must have resided in the U.S. to three years. § 1229b(b)(2).

\textsuperscript{183} Of course, all of these proposals will be strongly opposed by conservative politicians and advocates who decry so-called “anchor babies,” whose parents allegedly enter the United States to give birth to American citizens and then use their children to “anchor” themselves to the country. See generally Hartry, supra note 3.
detention.\textsuperscript{184} Mother-child prison facilities have shown potential for success,\textsuperscript{185} and similar programs run by ICE or community groups could help primary caregivers maintain contact with their children and limit opportunities for termination of parental rights. As discussed in Part III in a different context, current opposition to mother-child immigration detention facilities possibly stems from an overly individualistic view of crimmigration that focuses only on the noncitizen caught in the crimmigration net and ignores its impact on the immigrant’s family. If we examine the holistic best interest of a child, given the option of foster care outside detention or remaining with his or her family inside detention, the latter may win. It is not sufficient to examine the relationship between the child and the state; instead, advocates and courts must look at the relationships between the family and the state and between family members. Doing so may allow us to keep families together during a very difficult time.

The above proposals are not exclusive, nor will they dismantle the crimmigration crisis sufficiently. For real change, we need comprehensive reform of both our immigration policy\textsuperscript{186} and our criminal justice system.\textsuperscript{187} But

\textsuperscript{184} For example, a private immigration detention center in Texas sparked an ACLU lawsuit for housing women with their children in violation of a “1997 court settlement that established minimum standards and conditions for the housing and release of all minors in federal immigration custody.” Press Release, ACLU, ACLU Challenges Prison-Like Conditions at Hutto Detention Center (Mar. 6, 2007), available at http://www.aclu.org/immigrants-rights-racial-justice/aclu-challenges-prison-conditions-hutto-detention-center.

\textsuperscript{185} See generally, e.g., KAREN SHAIN, CAROL STRICKMAN & ROBIN REDERFORD, LEGAL SERVS. FOR PRISONERS WITH CHILDREN, CALIFORNIA’S MOTHER-INFANT PRISON PROGRAMS: AN INVESTIGATION (2010).


any proposals that attempt to impact the lives of women caught in this dual system of oppression are a step in the right direction.

CONCLUSION

This Commentary argues that academic treatment of the intersection of the criminal justice system and immigration law has thus far ignored the experiences of immigrant women and families. I have examined the ways in which crimmigration is uniquely gendered in an attempt to put women and families at the forefront of our nationwide debate over the future of criminal justice and immigration reform. In doing so, I hope to encourage other scholars to reexamine crimmigration’s overly individualistic approach to the relationship between noncitizens and the state and situate scholarly analysis in noncitizens’ lived experiences. Finally, I aim to help women like Encarnación Bail Romero and María Bolaños avoid deportation and the loss of their children by showing that society’s overzealous approach to crimmigration harms women and families disproportionately.

“is based on values that promote repairing harm, healing, and rebuilding relations among victims, the offenders, and the communities,” and community justice, which “views crime as a social problem that affects life in communities and suggests that prevention is an essential part of all criminal justice agencies’ work.”); Marc Mauer, Sentencing Reform: Amid Mass Incarcerations—Guarded Optimism, 26 CRIM. JUST. 27, 27, 28, 30, 31 (2011) (noting that “the high cost of imprisonment, particularly at the state level, has caused policy makers to consider a host of reform strategies designed to stabilize or reduce the number of people in prison,” and advocating reentry programs, “smart on crime” policies, and improvement of prison conditions). This is just a small sampling of some proposals; the rich treatment this topic deserves is outside the scope of this Commentary.